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CURRENT ENVIRONMENTAL ISSUES AFFECTING THE READINESS OF THE DEPARTMENT OF DEFENSE

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

AND THE

SUBCOMMITTEE ON
ENERGY AND AIR QUALITY

OF THE

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CURRENT ENVIRONMENTAL ISSUES AFFECTING THE READINESS OF THE DEPARTMENT OF DEFENSE

WEDNESDAY, APRIL 21, 2004

HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS, JOINT WITH THE SUBCOMMITTEE ON ENERGY AND AIR QUALITY,

Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. , in room 2123, Rayburn House Office Building, Hon. Ralph M. Hall (chairman) presiding.

Members present from the Subcommittee on Environment and Hazardous Materials: Representatives Gillmor, Hall, Issa, Otter, Sullivan, Barton (ex officio), Solis, Pallone, Wynn, Capps, Allen, Schakowsky, Gonzalez, Rush, Stupak, Green, and Dingell (ex officio).

Members present from the Subcommittee on Energy and Air Quality: Representatives Hall, Cox, Burr, Whitfield, Shimkus, Shadegg, Pickering, Walden, Issa, Otter, Sullivan, Boucher, Barton (ex officio), Allen, Waxman, Markey, Pallone, Brown, Wynn, Green, McCarthy, Capps, and Dingell (ex officio).

Staff present: Mark Menezes, majority counsel; Robert Meyers, majority counsel; Jerry Couri, policy coordinator; Bob Rainey, fellow; Thomas Hasenbloeher, majority counsel; Richard Frandsen, minority counsel; Michael Goo, minority counsel; and Jeff Donofrio, minority staff assistant.

Mr. HALL. The subcommittees will come to order. I will start out with an opening statement and then we will hear from Chairman Gillmor from Ohio of the Subcommittee on Environment and Hazardous Materials. Others can make an opening statement if they want to but I think it would take from the time that our guests have. We run a pretty lose operation for people to ask the questions they want and extract the answers. We thank each of you because we know what you have gone through and the time it is taken and ability to be prepared to come here before this committee. We thank all of you for it.

I will just get underway here and I want to, of course, welcome all the witnesses to today's hearing on current environmental issues that are affecting the readiness of the Department of Defense. As President Bush has indicated the other night during his press conference, the simple fact of the matter is we are at war. We are at war in Iraq and Afghanistan and more broadly in our

continuing effort to combat terrorism following the attacks in New York and Washington on 9/11.

We ought to be ever vigilant. We have an enemy that has no capitol we can bomb, no navy we can sink. We have to be very supportive of our commander and chief and the men and women that are on the desert over there two oceans away and young men and women who are training and give them leadership.

I think the simple fact is that our military forces need to be as ready and prepared as possible. The men and women who serve this country deserve the best from our citizens. If we ask them to go in harm's way and defend our freedom, they deserve the best training and the best preparation that we can provide.

The Department of Defense has put forward several proposals addressing the readiness of our armed forces. It is indicated that these proposals are needed to advance the proficiency and capabilities of our military and to give them the realistic training exercises that they require. I think that is very reasonable.

Increasingly, according to DOD, the sophistication of our weapon system demands a high level of technical proficiency. Large scale maneuvers and advanced weapon systems require a broad geographic area in which to conduct live firing exercises. We can't train our troops in a video arcade. They need dirt under their boots and they need to experience a more realistic training scenario as we can create for them.

So I make no apology for giving the Department of Defense the benefit of the doubt. When a the Department indicates it needs further legal authority from this Congress, it is certainly our duty to critically examine the proposal and review their impact on environmental law under our jurisdiction in the local communities that we represent. We will do this today in a measured and deliberate fashion. But I believe we should always keep in mind why such training is vitally necessary and why it carries with it an implicit duty to Congress to those who wear our Nation's uniform.

On the second panel we will receive testimony that is critical of various legislative proposals made by the DOD very briefly. It appears that most witnesses on the second panel believe that the proposals are either not needed, are overly broad, and that they would do damage to the environmental laws of our country.

It is argued that in many cases existing exemptions contained in the Clean Air Act, CERCLA, RCRA are sufficient and the rights of citizens and local communities may be adversely affected if the proposals are enacted without revision.

Listen closely to these concerns as we all will. I doubt no one's sincerity in the opinions they express or the expertise that they bring to the table but recognize that the one thing a former carrier pilot for the Navy knows is the value of realistic training. I regret that the department was unable to get us its testimony earlier this morning.

Under Rule 4B, Subsection 1 of the rules of the committee the Chair has the authority to waive the requirements for written testimony. The Chair will do this in this case with some reluctance but not with great reluctance. This hearing is a long time in coming.

They could have had it in, should have had it in but I don't have any reason not to allow that testimony now with the trouble and the problem and the time that they put into it. You are here and we are having it as a result of the Defense Department's request to us. We had to wait for the testimony but we are going to go forward with the witnesses and with the hearing.

Without objection the Chair proceeds pursuant to Committee Rule 4E and recognize members for 3 minutes for opening statements. If they defer, this time will be added to their opening round of questions.

Mr. GILLMOR. Mr. Chairman.

Mr. HALL. The Chair recognizes the gentleman from Ohio.

Mr. GILLMOR. Thank you, Mr. Chairman. Today's meeting will delve into a long anticipated survey of proposed changes to several environmental statutes over which our full committee has jurisdiction. I think it is right appropriate today we are having a joint hearing, Mr. Hall of the Energy and Air Quality Subcommittee and my subcommittee, the Subcommittee on Environment and Hazardous Materials.

The Defense Department's legislative proposals cuts across the jurisdiction of both our subcommittees and I am pleased that we are able to have a hearing that will comprehensively allow all of our members a chance to understand these issues.

As an Air Force veteran I can comfortably say that military readiness is vital to our freedom as Americans and we should do everything in our power and in our capacity as legislators to ensure that the men and women who defend our liberties have the best preparation they can to protect our way of life. We owe them, their families, and all U.S. tax payers these assurances.

We also, though, have an obligation to protect the air we breathe, the water we drink from contamination and the soil on which our children play from toxic exposure. Twelve years ago this committee played a major role in enacting the Federal Facilities Compliance Act, a law which granted national security exemptions but also clearly required Federal entities to pay Federal and State environmental laws in the manner that was expected of everyone else.

My own experience with DOD responses to handling UXO and that made a challenge in offering settings has been marred by years of frustrations and long efforts to get the Army to clear unexploded ordinance lodged in the channels of Lake Erie, Ohio's coast. They want every training activity conducted at Camp Peary there has made our military a more capable fighting force. I support training exercises like these across our country. I also want to be sure that as our soldiers leave their military uniforms for civilian life, that what is left behind does not threaten the quality of life they fought to protect.

As our witnesses provide us their perspectives on these proposals, I will go over three threshold questions we need to address today. Most Federal environmental laws provide statutory compliance exemptions if the President determines the exemptions are crucial to preserving national security. In addition, the U.S. EPA has negotiated a set of processes for administrative exemptions for Defense Department readiness activities. We need to know why in

the real world in the practical application that these exemptions have been inadequate.

Second, when Congress provided statutory exemptions from the Marine Mammal Protection Act, the Endangered Species Act, and the Migratory Bird Tready Act, the Defense Department had specific examples of places where readiness training had been compromised. I think as we examine how execution of the requirements under Superfund and Clean Air and Safe Drinking Water Act or RCRA have interfered with readiness training, specific examples in these areas would, I think, also be very helpful to the committee.

Third, the Defense Department states their proposals only refer to active ranges and other missions. The question is how does the Defense Department define the universe of places where the proposals will apply and what kind of response does DOD plan in the way of maintenance and remediation of those facilities and that those ranges and bases which will have the way to environmental cleanup under the bill.

I think those questions are an essential starting point toward discussion but by no means the only ones. I look forward to the work of our panel and I thank our witnesses for their help in dealing with this problem.

I yield back.

Mr. HALL. Thank you, Chairman Gillmor. At this time the Chair recognizes Congressman Dingell, ranking on Commerce, long-time Chairman of Energy and Commerce.

Mr. DINGELL. Mr. Chairman, thank you. Thank you for holding this hearing. For 3 years the Department of Defense has been trying to circumvent the laws that affect protection of the public and the public interest from environmental degradation at the hands of the Defense Department and other polluters.

This is clearly not in the public interest. The administration's proposal to exempt the Defense Department from important environmental laws will imperil drinking water supplies, eliminate vital State and Federal authorities necessary to protect the public health and the environment. Nowhere has a single set of legislative proposals had so much audacity and so little merit. I would note that the Defense Department is supposed to defend the Nation, not to defile it.

Some of the facts are here to be found to be unquestioned. First, the Clean Act and the two hazardous waste laws have never resulted in actual adverse impacts upon military readiness but the Defense Department like an old maid rushes around looking under the bed to find about what they may complain or what might threaten them. I could understand this from somebody else but I expect our Defense Department to be made of sterner stuff.

EPA Administrator Whitman testified as such and the DOD officials have not cited a single instance in which any of these three laws has adversely affected readiness. Our witnesses from the Defense Department should be ready to address this with me.

Second, each of these laws already contain provisions that allow the President in his discretion to exempt any base or training facility from their requirements if it is in the paramount interest or the

national security interest of the United States. We will address this matter this morning.

Under the Defense Department proposals, ground water sacrifice zones would be created. The contamination from perchlorate, demolition explosives, or other munitions constituents would be allowed to migrate through thousands of acres of an aquifer until it has reached outside of the base and until it affects the broader public interest and the public health. It would go on until it has migrated offsite to public drinking water wells or otherwise poses an imminent threat.

Only then would State and Federal officials regain authority under the Solid Waste Disposal Act to investigate and to address the contamination. This would be after the horse was out of the barn.

Even at that point the State regulatories would not be able to require cleanup of the source on an operational range. Operational ranges, I would note, are the size of many States in the United States. EPA and State sampling and inspection authorities currently available to investigate ground water contamination under operational ranges will be eliminated.

Furthermore, Section 7002 of the Solid Waste Disposal Act is the only Federal authority that drinking water utilities, States, or private citizens have available at this time with contamination from perchlorate or Royal Demolition Explosives (RDX) that may be creating an imminent and substantial engagement to the public health.

The DOD proposals eliminate this critical public health authority. Removing perchlorate and other munitions constituents from the definition of release under Superfund DOD would rob the Agency for Toxic Substances and Disease Registry of its authority to determine health effects from exposure.

We know from the tragic experience of Marine families who were poisoned at Camp Lejeune, North Carolina, how important these authorities are and we will try and instruct the Defense Department on its duty to protect not only its own personnel but the citizenry generally from this kind of misbehavior.

DOD tries to minimize the impact of these proposals by saying they only apply to operational ranges. That is, I would note, 24 million acres. The land mass is six U.S. States. For example, the General Accounting Office reports that DOD is claiming 152,000 acres as operational ranges at Camp Lejeune. I would note that is approximately equal to the entire acreage of that installation. Moreover, not a single example has been cited by the Defense Department where these laws have affected military readiness and we will address that today.

We have, however, countless examples where DOD's lethal legacy of toxic waste has contaminated surface and ground water and forced the closure of private and public drinking water wells and threatened the health of American citizens, including military personnel.

At the Iowa Army Ammo Plant the creek running off the base was so polluted with Royal Demolition Explosive and TNT that it ran red in color and the locals reported seeing pink raccoons. Imag-

ine that. Over 100 private drinking water wells had to be shut down.

Finally, DOD seeks a blanket exemption from the Clean Air Act which would give the DOD the right to emit air pollution on an ongoing basis regardless of the ultimate affect on public health. No constraints could be imposed on DOD for any matter related with this particular situation.

DOD would have us ignore all air pollution from military readiness activities at a time when all other sources of air pollution are subject to strict controls that impose substantial economic burdens. There is no basis for such a blanket exemption and American citizens and businesses will pay the price if DOD is given a free pass under the law to admit unlimited amounts of ozone precursors, sulfur oxides, carbon monoxides, and other toxic emissions.

In conclusion, these defects in the DOD proposal demonstrate once again why this committee's expertise and understanding are vital and should not be ignored. They also tell us that somebody is needed to defend the United States from its own Defense Department when the Defense Department decides it is going to run wild. These DOD exemptions are unnecessary, unjustified, unwise, and must be rejected. I thank you, Mr. Chairman.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, thank you for holding this hearing. For three years the Department of Defense (DOD) has been trying to circumvent the Committee on Energy and Commerce. That would not be in the public interest. This Committee has the expertise and exclusive jurisdiction over the Clean Air Act and the Solid Waste Disposal Act and primary jurisdiction over the Superfund statute.

The administration's proposal to exempt the Defense Department from these important environmental laws will imperil drinking water supplies and eliminate vital state and federal authorities necessary to protect public health and the environment. Never has a set of legislative proposals had so much audacity and so little merit.

Several facts are unquestioned. First, the Clean Air Act and the two hazardous waste laws have never resulted in actual adverse impacts on military readiness. Former EPA Administrator Whitman testified as such and DOD officials have not cited any instances in which any of these three laws has adversely affected readiness. Second, each of these laws already contains provisions that allow the President, in his discretion, to exempt any base or training facility from their requirements if it is in the paramount interest or national security interest of the United States. Currently President Bush is using this authority to exempt Groom Lake Air Force Base in Nevada from certain requirements of the Solid Waste Disposal Act.

Under the Defense Department proposals groundwater sacrifice zones would be created. The contamination from perchlorate, Royal Demolition Explosive, or other munitions constituents would be allowed to migrate through thousands of acres of an aquifer until it migrated off-site to public drinking water wells or otherwise posed an imminent threat. Only then would state and federal officials regain authority under the Solid Waste Disposal Act to investigate and address the contamination. Even at that point state regulators would not be able to require cleanup of the source on an "operational range."

These proposals, if adopted, will result in huge additional costs to the American taxpayer to clean up contamination that has been allowed to spread throughout large aquifers. EPA and state sampling and inspection authorities currently available to investigate groundwater contamination under "operational ranges" will be eliminated.

It defies logic to wait until we have public health impacts before state and federal regulators have authority to act. Further, Section 7002 of the Solid Waste Disposal Act is the only federal authority that drinking water utilities, states, or private citizens have available if contamination from perchlorate or Royal Demolition Explo-

sives may be creating an imminent and substantial endangerment to human health. The DOD proposals eliminate this critical public health authority.

And by eliminating perchlorate and other munitions constituents from the definition of "release" under Superfund we are robbing the Agency for Toxic Substances and Disease Registry of its authority to conduct health assessments or perform epidemiologic studies to determine health affects from exposure. We know from the tragic experience of Marine families who were poisoned at Camp Lejeune, North Carolina, how important these authorities are.

DOD tries to minimize the impact of its proposals by saying they only apply to "operational ranges." The General Accounting Office, however, reports that DOD is claiming 152,000 acres as "operational ranges" at Camp Lejeune. The size of the entire installation is 153,000 acres. Thus, exemptions would apply to more than 99 percent of Camp Lejeune. It also appears that DOD is claiming that the entirety of Eglin Air Force Base in Florida, 463,000 acres, is an "operational range" and 86 percent of Aberdeen Proving Ground in Maryland is an "operational range."

Nationwide, DOD claims that more than 24 million acres are "operational ranges"—a land area the size of the states of Massachusetts, New Jersey, Connecticut, Delaware, New Hampshire, and Hawaii. We also know some of the "operational ranges" are on land owned by the states and leased to DOD. DOD has refused to identify which ones at the same time they are seeking to pre-empt state authorities.

According to DOD's definition, an "operational range" could have been last used 20 years ago, 40 years ago, or even 100 years ago. The DOD definition also includes buffer zones where the public is allowed to hunt, fish, or engage in other recreational activities.

Moreover, not a single example has been cited by the Defense Department where these laws have affected military readiness. We have, however, countless examples where DOD's lethal legacy of toxic waste has contaminated surface and groundwater and forced closure of private and public drinking water wells. At the Iowa Army Ammo Plant, the creek running off the base was so polluted with Royal Demolition Explosive and TNT that it ran red in color and the locals reported seeing pink raccoons. Imagine that. Over one hundred private drinking water wells had to be shut down.

We also know that at least forty DOD facilities have known perchlorate contamination of surface or groundwater. Yet very little testing has occurred of the groundwater under the vast acreage of "operational ranges" that would be exempted by these proposals. The reason we have these state, federal, and citizen suit authorities is because Congress has said that we will not trust the agency who caused the pollution to be the one charged with protecting public health and the environment.

Finally, DOD seeks a blanket exemption from the Clean Air Act, which would give DOD the right to emit air pollution on an ongoing basis, regardless of the ultimate effect on public health. DOD would have us ignore all air pollution from "military readiness" activities, at a time when virtually all other sources of air pollution are subject to strict controls that impose substantial economic burdens. There is no basis for such a blanket exemption and American citizens and businesses will pay the price, if DOD is given a free pass under the law to emit unlimited amounts of ozone precursors, sulfur oxides, and carbon monoxide.

Under DOD's proposal, citizens will be told that their air meets Clean Air Act requirements. The DOD proposal would amount to environmental "doublespeak"—by indicating that the air is clean—even when it is not. There is ample flexibility in the Clean Air Act and its implementing regulations to accommodate DOD's needs and DOD has provided no example of a situation in which the Clean Air Act has hindered military readiness. DOD's exemptions are unjustified and would jeopardize the legitimate efforts of all other sectors to achieve actual clean air.

In conclusion, these defects in the DOD proposal demonstrate, once again, why this Committee's expertise and understanding are vital and should not be ignored. The DOD exemptions are unnecessary, unjustified, and unwise.

Mr. HALL. Thank you, Mr. Dingell.

At this time the Chair should recognize Ms. Solis whose ranking on the Environment and Hazardous Materials Subcommittee. We note the presence of the chairman of the Commerce Committee, Mr. Barton, a gentleman from Texas. We both agreed to have Mr. Barton for the time he consumes.

Chairman BARTON. Thank you, Chairman Hall and Chairman Gillmor, for holding this joint hearing on this very important issue.

I listened with interest to my good friend from Michigan's opening statement and I must respectfully disagree with conclusions that he came to in that opening statement.

I don't think that there is anything more important in our Nation's military preparedness than we totally support our own forces, both those on active duty and those that are training in the instant that they need to be on active duty to defend our Nation.

It is a possibility, if not a fact, that some of the environmental laws that this committee has helped to craft over the years on a bipartisan basis are now being used, or could be used, in a way that can constrain those forces from the defense of our Nation.

That is the purpose of the hearing today, take a look at these proposals that the Department of Defense have come forward with and determine that if there is a legislative tweak that needs to be made whether we can do that. I am going to listen to the witnesses with an open mind that I hope, like all our members on both sides of aisle of this committee, or these two subcommittees, that at the end of the day whatever it takes to maintain preparedness in the defense structure of our armed forces we agree to do that.

I want to thank our witnesses on the first panel for coming today. We don't hear from our folks in the armed services too often so we are glad to have you all here. I want to especially thank General Weber who at one point in time was a fellow in my office in his younger days and is one of the fine military leaders who last year led our troops to liberate Iraq and Baghdad. He was in the division that I believe was the point of the sphere and headed that up. I want to commend you for your service to our country.

Today's hearing is to discuss whether the existing environmental laws and the regulations that come from those laws are infringing upon our Nation's military to effectively and efficiently train our young men and women to defend our freedom and standard of living.

The Pentagon has determined that the changes are necessary to the Clean Air Act Superfund and the Resource Conservation Recovery Act. That is the purpose of the hearing to see if their decision is something that we agree with.

On our second panel today we are going to hear from, I believe, seven witnesses who believe that somewhat differently than the first panel and that is the purpose of having an open and balanced hearing. I am very interested in the proposal put forth by the Defense Department regarding the Clean Air Act.

Last week the Environmental Protection Agency changed the rules for standards of attainment or ozone. They eliminated the 1-hour standard which was set at 120 parts per billion and replaced it with an 8-hour standard at 80 parts per billion.

That change in the standard, which EPA has the right to do under the Clean Air Act is going to put half of our Nation's citizens in nonattainment for ozone in terms of the military infrastructure an additional 32 bases that were not in nonattainment areas before last week are now in nonattainment.

If, in fact, lowering the ozone standard from 120 parts per billion on a 1-hour basis to 80 parts per billion on an 8-hour average makes it difficult to do the training mission, that is something that we need to know about and that is something that we need to look

at very carefully. When you are looking at parts per billion it doesn't take much to effect that standard.

We must have our military at the height of preparedness if, in fact, we are going to call on them to defend our country. We must ensure that our defense funds are utilized in the most efficient and effective manner possible so we need to check these regulations and see if they do hamper our ability to train our troops.

I am also concerns that as we approach another round of base realignment and closure that those facilities that have existing capacity to take on new missions will be overlooked due to Clean Air Act restrictions. One such installation is not in my congressional district but very near it, the Joint Reserve Naval Air Station Base in Fort Worth, Texas, that we commonly refer to as Carswell.

I am very interested in how these new standards in the Clean Air Act might affect the BRAC Commission. I want to thank both my subcommittee chairmen for calling this hearing. I think it is very important. I am glad to see that we have so many members in attendance because it shows this is a serious issue and it needs to be addressed seriously.

I want to end by stating that it would be ironic if because our military forces are constrained even unintentionally in the defense of our country because of environmental restrictions there well could come a day when there might not be a government to administer those same departmental laws we are so concerned about.

With that, Mr. Chairman, I yield back the balance of my time.

Mr. HALL. Thank you, Mr. Chairman, and I join you in being pleased to give this committee an opportunity to say the effect of the regulations you operate under and why you operate under them as you do. Not just that something might occur or afford the basis for allegations to a court but how you are actually affected by them. That is the thing that we are going to give you plenty of time to answer today.

Now, it is my pleasure to recognize Congresswoman Solis who is ranking on the Environment and Hazardous Materials Subcommittee. Thank you.

Ms. SOLIS. Thank you, Mr. Chairman, and thank you for holding this hearing and thank you to the witnesses that are here. Also my good friend Ron Gastelum who is here who will be on the second panel representing the Southern California water district. I am very appreciative of him being here.

I appreciate the opportunity to discuss today the request for exemptions from three very critical public health and environmental statutes in this committee. My heart goes out to the soldiers in Iraq and elsewhere and their families who wait for them to come home. Increasingly we know that there are issues there that we need to address and I fully understand and appreciate that we need to be militarily ready. I hope that we can work with the Department of Defense to see that we can continue to secure and provide the necessary security for our troops.

However, at this time I am extremely disappointed that for the third time the Pentagon is requesting that we choose between public health, the environment, and military readiness. Activities I don't believe in this context are mutually exclusive and these extensions, in my opinion, are dangerous.

They would endanger, in my opinion, the public health and welfare of military families and our surrounding communities, endanger our drinking water supply for many in the Nation and undermine the legal ability of States and citizens to protect themselves from these threats.

In fact, back in April 2000 I recalled then Governor Bush knew these sites were problems when he said, and I quote, "The Federal Government is considered the Nation's worst polluter." Pentagon representatives have repeatedly tried to justify these exemptions by fighting concern about growing interest and contamination and cleanup. The military is preparing for a train wreck, they say. I believe the train wreck is the collision between contamination caused by the military where it governs itself and public health. It spoke of existing military contamination is astounding. The full extent of contamination at closed sites nationwide may not even be known until 2012.

At least 300 ground water wells in Southern California in the district I represent have been shut down due to contamination. In the city of Baldwin Park we have one of the first cleanup operable units there to treat for chloric treatment. That is one of the first in the Nation. Other water facilities in my district are following suit. My community faces over the next 15 years at least the cost of $200 million as the result of cleanup of perchlorate contamination.

This devastation is largely the result of the Department of Defense related activity so it is no surprise that I have heard from both the Metropolitan Water District who will be speaking to us and the San Diego Valley Water Association who make up about 60 water agencies in California. These agencies are concerned that acting only after the damage has been done could result in unnecessary public health risks and unacceptable losses of water and resources.

The cost of these exemptions could be overwhelming both monetarily and to the public health. Thirty-three percent of military families live in military housing on installations. Would we be putting those people at risk if we do nothing?

I can't support legislative proposals that we would put at risk my district's water supply, the public health, and the environment because the military fears that there is a train wreck coming. I have yet to see where the existing flexibility fails the military but I do see where these exemptions would put our military families and their children at risk.

I truly believe that the worst train wreck we could be facing is if we allow the military to both contaminate our water, our air, and our land, and determine on their own when to decide to lean up. Military families who sacrifice so much for this country deserve better.

Thank you and I yield back my time.

Mr. HALL. Thank you. May I recognize the gentleman from Maine, Mr. Allen. Two republicans in a row spoke when Chairman Gillmor and I spoke initially. I think fairness calls on you to have two in a row. We recognize you for 3 minutes.

Mr. ALLEN. Mr. Chairman, I thank you for that kindness and also for holding this hearing. I thank the witnesses, all of you, for

being here today. For the third time in 3 years the Department of Defense has asked Congress for blanket exemptions from public health laws.

In my 6 years on the Armed Services Committee I never saw any evidence that our environmental laws had degraded readiness. The Department of Defense to my knowledge has not offered a single example of how these laws impede military readiness. The United States armed forces are the best trained, best prepared fighting force in the world.

Our military defends American citizens from deadly threats but so does the Clean Air Act. The bedrock principle of the Clean Air Act is that all Americans deserve to breathe air requisite to protect public health. According to the act, it does not matter whether the nitrogen oxide that causes asthma comes from an FA-18 or a Boeing 737.

In Maine because of imported dirty air we have the highest rate of adult asthma in the country. The State has regulated every major source it could find, yet our coastline still is violating the 8-hour ozone rule. This year we are regulating emissions from portable gas cans.

In fact, DOD tells us that complying with public health laws is too difficult. They asked Congress to order States to ignore DOD's pollution when they measure whether air is safe to breathe. In the words of DOD's proposal EPA "shall approve" State plans that do not actually meet national ambient air quality standards when pollution making people sick is produced by "military readiness activities."

DOD's proposal would mean that the air citizens breathe could continue to cause high rates of asthma, emphysema, and even premature death as long as the deadly pollutants are from military instead of civilian sources.

The Clean Air Act already includes provisions allowing the president to exempt DOD from complying with clean air requirements but he hasn't used those. When the military argues it needs to move or replace aircraft more rapidly than the Clean Air Act allows, DOD is really saying it needs to increase deadly emissions more rapidly than the Clean Air Act allows.

Has the Clean Air Act hindered our soldiers in Iraq, has RCRA reduced the effectiveness of our mission in Afghanistan? Our armed forces must be combat ready but air quality and drinking water protection do not have to be compromised. We need balanced laws that protect both our national security and the health of our citizens. We have done both since World War II and I know that we can maintain that balance.

Thank you. I yield back.

Mr. HALL. Thank you. The Chair recognizes Mr. Cox, chairman of the Select Committee on Homeland Security for 3 minutes.

Mr. COX. Thank you, Chairman. I am not here in the subcommittee devoted to issues such as energy and air quality or on the Energy and Commerce Committee. I am over at the Homeland Security Committee where we are asking different questions. I am concerned that it is all too easy to beat up on the Department of Defense for doing its job.

I am distressed that not a single word has been spoken this morning about winning the war on terror or about protecting Americans from deliberate attacks that would kill millions of our fellow citizens and, incidentally, destroy our environment perhaps for centuries if, for example, a dirty bomb were to spread microscopic plutonian through our air.

The question has been asked what is the problem. Is there really a hit to readiness from the application of our environmental laws designed for the civilian economy to war fighting. It should serve as a prima facie response to that question that, of course, there is a tradeoff with readiness when billions of dollars from our defense budget are devoted to mitigation of the environmental effects of war fighting, and when military trainers are required to apply to the President of the United States or the Secretary of Defense every time for a temporary exemption when they want to conduct a specific exercise.

The Department of Defense has asked Congress only to make clarifications to environmental law in order to provide flexibility for specific training activities that are necessary to maintain the Nation's armed forces. This proposal, the Readiness and Range Preservation Initiative, was partially enacted by Congress when it passed the 2004 DOD authorization bill and today we are considering only those outstanding provisions affecting four areas of interest to our committee: RCRA, CERCLA, also known as Superfund, the Safe Drinking Water Act, and the Clean Air Act.

The training and testing fundamental to our military's readiness requires far more flexibility than is currently provided. Technology today allows some of the soldiers battle field training to be conducted in computer simulators but there is no substitute for the kind of experience that can only be gained from realistic battlefield training. There is no substitute for training with weapons and equipment under battlefield conditions.

Military training and testing activities aren't only necessary, but frequent and regular. Military trainers should not have to apply to the President or the Secretary of Defense for individual temporary exemptions for every single exercise, particularly if the inevitable result is that the President would want to grant the exemptions in the interest of national security.

Manufacturing red tape only so that we can cut it does not come cheaply. It cost lives in the field whenever our soldiers are not fully and properly trained. Today's bureaucratic red tape is an obstacle to regularized military training and it does impede our military's effectiveness.

There can be no doubt that today's Department of Defense takes environmental protection seriously, Mr. Chairman. Mr. DuBois and Mr. Cohen have worked closely with the Congress and with EPA, as Horinko will testify, to comply with existing laws. Both the Department of Defense and the EPA have shown a keen interest at minimizing environmental problems and they are investing more and more money each year in cleanup and in research and development of new technologies to prevent pollution.

I will simply say in closing, Mr. Chairman, that one instance of which I am particularly aware, the Department of Defense has worked closely with a company in Orange County, California,

which I represent, Liquid Metal Technologies, to develop an alternative weapon, an alternative to depleted uranium emissions that have proven toxic, if not severely toxic.

Because of the possibility of environmental impact, we are actually developing different weapons, in this case a weapon made from a tungsten composite alloy to lessen the impact on the environment. These are very, very significant investments that the taxpayer is making. I hope today's hearing will help dispel some myths both about the specific reforms that the Department of Defense is requesting and about the need for them. Thank you, Mr. Chairman.

Mr. HALL. Thank you, Chairman. I recognize Ms. Capps, gentlelady from California, for 3 minutes.

Ms. CAPPS. Thank you, Mr. Chairman, for holding this committee meeting and this hearing. I ask that my full statement be made a part of the record. I have the distinct honor of representing two military bases in my congressional district, Vandenberg Air Force Base and Naval Base Ventura County.

I visit these places often and know first hand that they are important elements in our national security system, key players in the local economy, and very good neighbors. Their exemplary standards in upholding environmental regulations makes them the pride of the community and desirable neighbors to have. Their military accomplishments are notable as well. We all support the need for first class training and readiness for U.S. troops but as a public health nurse I find the Pentagon's proposal for sweeping exemptions from public health laws extremely troubling.

For decades these laws have kept our children and our community safe from hazardous waste and air pollution. Unfortunately, the blanket exemption saw by the Pentagon will have the most serious consequences for the very people living on and near military installations. For example, the proposal we can see only State and Federal programs designed to address ground water contamination. No one should have to worry about what comes out of their faucet or what their children drink. Regrettably that is not the case at many of our military bases.

For more than 50 years the Pentagon has used perchlorate in rocket fuel without regard to its impact on the environment and on water supply. Nationwide there are at least 40 DOD facilities with known perchlorate contamination of ground water or surface water including Vandenberg Air Force Base and Naval Base Ventura County.

Perchlorate poses serious health risks, particularly for newborn children, pregnant women. Among other illnesses, perchlorate exposure has been linked to physical and mental retardation and thyroid cancer. It has seeped into the ground in at least 22 States including Colorado, Massachusetts, and Maryland and the situation is particularly serious, as my colleague Hilda Solis has mentioned, in California.

It has been detected in 58 California public water systems that serve almost 7 million people. While the Pentagon bears significant responsibility to identify and clean up contaminated drinking water, it does not want to take responsibility for its action.

First, the Pentagon's proposal may impair the ability of local government's water utilities, developers and others to paying reimbursements from DOD for their cost in cleaning up the Pentagon from emissions related contamination. Second, the Pentagon's proposal is inadequate to protect human health and the environment.

Under legislation contamination must move beyond the lateral boundary of the range before it is considered off range and can be addressed. Preventing and controlling contamination of the source is the only sure way to protect water supplies. This proposal prevents EPA and States from getting to the source. They must retain authority to investigate and address the contamination.

Waiting for contamination to move offsite before taking remediation action will have catastrophic results. Finally, Pentagon's proposal would block EPA and States from requiring the Pentagon to identify or address an on-range source of contamination. They would be completely powerless to require any action under RCRA or CERCLA.

Mr. Chairman, we shouldn't make it easier for the Pentagon to pollute and harder for them to clean it up. Our military families should not be made to suffer from pollution. The military has not made a compelling case that these exemptions are needed. Statutory exemptions already exist that allow waivers for these laws in the interest of national security on a case-by-case basis. We don't have to sacrifice our Nation's public health to have strong national security.

I yield back and thank you.

Mr. HALL. Thank you, gentlelady. The Chair recognizes Congressman Issa from California.

Mr. ISSA. Thank you, Mr. Chairman, and I ask permission to revise and expand and include extraneous materials.

Mr. HALL. Without objection.

Mr. ISSA. Thank you. It is no accident that this subcommittee is heavily weighted with Californians. California is the major home to many of our military personnel. It used to be the home to even a greater amount of military personnel before several rounds of BRAC. Camp Pendleton is in the heart of my district so I am acutely aware of some of the challenges faced by the U.S. Marines when they are not in Iraq where almost all of them are today.

Our training capability is severely restricted in an attempt to comply with California law. As most of you know, California today is not an attractive place for heavy industry, manufacturing, or anything else that does anything other than perhaps sits in an office. That is something that California has to deal with.

But as I look today at the men and women in uniform in front of us, I realize that we don't have that same choice. It is not an open supply and demand. People cannot simply move to other States or other countries if the rules are not allowing them to train and train properly.

I don't know that any of us can determine what is the best balance between military readiness and the environment. What I will say, though, is that as late as last year former Governor Gray Davis was continuing to allow MTBE, a known carcinogen to be poured into the ground water of California. When given a mandate with a waiver, he waived the MTBE in favor of another oxygenate.

Why did he do this? He named it as cost. He felt that it was prohibitive for California to switch to ethanol which would be more costly so he delayed getting rid of a ground water contaminate. I am not here to say anything in the way of how that decision was made beyond his own statement but it is very clear that every day decisions have to be made between the best interest of people of the State and absolute clean air and clean water. In our own State our own Governor made that decision.

When I see the need for military readiness, something that cannot be weighed in dollars and sense and can only be weighed in human lives in either winning a war or ceasing to be the country that we are, I have to say here today that if it is a close call the military has to be given that opportunity to make it is case and make it in a simple enough way to not slow up military training.

Last but not least, Mr. Chairman, I believe that the United States military has consistently improved it is standards on air quality and water quality and its utilization. We no longer see fuel dumped on the ground the way we did 20 years ago. We no longer see a lot of things that in the past have led to pollution. I would certainly hope that all of my colleagues from California particularly would recognize that speaking of the sins of the past and the cost of cleanup does not really deal with the modern military today and the limited exemptions they ask for.

With that I yield back.

Mr. HALL. I want to thank the gentleman. At this time I would recognize Mr. Brown of Ohio for 3 minutes.

Mr. BROWN. Thank you, Mr. Chairman. Thanks to our witnesses for appearing today. The Bush Administration's plan to exempt Defense Department facilities and activities from America's environment protection laws is a solution in search of a problem. Superfund law, solid waste disposal law, the Clean Air Act already include national security exemptions. That the Pentagon has used these authorities sparingly, if at all, makes it clear that this, in fact, is an illusory program.

President Bush's first EPA administrator Christine Todd Whitman 1 year ago told the Senate Environment Committee, "I don't believe there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulations."

There is no reason to believe that assessment is any less true today. DOD has polluted 140 Superfund sites. Look at in my State, Wright Patterson Air Force Base located near Dayton, Ohio, just 10 miles from the city of Dayton. The Department of Defense has dumped benzine, which causes cancer in humans. It has dumped perchloroethylene which causes liver and kidney damage in people. It has dumped ethyl benzine which causes birth defects. These hurt our soldiers. They hurt our soldier's families. They hurt our communities.

It just makes me wonder about the priorities of this administration. I heard last night on the floor of the House of Representatives Mitch Schakowsky talk about the Department of Defense and the Bush Administration's inattention to providing body armor.

We have all heard those stories at home, providing body armor to our troops month after month after month after month even

though it is clear as more hearings are held around this capital that we knew we were going to war far in advance of the actual attack on Iraq. I am amazed that this administration doesn't seem that interested in providing the kind of armor for the Humvees to outfit the Humvees to make them safer.

We all know what this administration has done once these service men and women come home un terms of their treatment of veterans in cutting education and healthcare benefits. To ignore this the environmental part and accept the Bush Administration's proposal would be a foolish mistake that could have great consequences for public health.

The Bush plan also sends a terrible message. It tells the American people the Federal Government is serious about cracking down on your pollution as citizens, as private businesses, but not on our own. The Federal Government should be leading by example on environmental protection, not looking for loopholes.

All this begs the question is this really about readiness, this proposal, or is it really another excuse for more environmental rollbacks from the Bush Administration. America's Governors, attorneys general, State and local government officials and leading environmental protection and public health organizations all oppose unanimously this misguided proposal. We should oppose it, too.

Thank you, Mr. Chairman.

Mr. HALL. The Chair recognizes Mr. Burr of North Carolina. Senator, you have 3 minutes.

Mr. BURR. I thank the Chair and would say to the Chair how welcome we are to have him in the Chair, I think, for his first subcommittee as chairman of the Energy Subcommittee.

Mr. Chairman, we are all sensitive to the needs of the military and the needs of our national security. There is no doubt that our environmental laws affect the training of our troops across this country and the decision of our military leaders.

We are being asked to provide a blanket exemption for military readiness. I for one have found it a little bit difficult to distinguish the terms, the technical difference between military readiness and routine operation. Clearly this is important. I hope today to try to get some clarification of that term.

Today we will hear also about a ground water contamination problem at Camp Lejeune, North Carolina, the health effects of the continued consumption by military men and women and their children. I don't believe this should affect the exemption sought today by DOD. I would say that is supported by the Secretary of Health and Natural Resources in a recent letter that he has sent the Secretary of North Carolina.

I would ask the members, Republican and Democrat, on the two subcommittees to focus on the need for accountability and the need for answers as to how this contamination of our ground water happened and why it took so long for the military to respond and why there is no a comprehensive effort to understand the full effects of that contamination to not just children but to the adults who served and were exposed.

Mr. Chairman, trust is absolutely essential when one asks for the exemption that I understand DOD is asking for. I would also

have to ask the OD to think about that as they continue to pursue this request and when they continue to think about the deficiencies and their stewardship of the basis and the lives that are affected by that deficiency.

I will assure you, Mr. Chairman, I have more questions of today's panelists than I will have time to ask. Therefore, I would ask the Chair might now unanimous consent that all members be allowed to submit written questions and to receive answers.

Mr. HALL. I thank you. Without objection it is done.

Mr. BURR. I thank the Chair for that consideration and I would yield back.

Mr. HALL. I thank the gentleman. The Chair notes the return of Congressman Green, the gentleman from Texas, recognized for 3 minutes.

Mr. GREEN. Thank you, Mr. Chairman. Like my colleagues, I will only read a brief part of my statement put I would like the full statement placed in the record.

Mr. HALL. Without objection.

Mr. GREEN. I want to thank you and Chairman Barton and our ranking members for holding the hearing today to assert the committee's proper jurisdiction over the Clean Air Act Superfund and resource conservation recovery act. We rarely have military hearings in this committee so I want to take the opportunity to note that this is the 167th anniversary of the Battle of San Jacinto where Texans and Tehanos defeated the military dictator Santa Anna and won their independence.

The site is now in my new congressional district that I visited many times growing up in Houston. To my knowledge there is no need for an environmental cleanup work on a battle ground. Reading the Department of Defense proposal and today's testimony, I am very concerned with our ability to maintain the public health in and around current military facilities should these proposals become law.

Every Member of Congress I know appreciates and will fight hard in Congress for military installations in our areas. Many communities are centered around and anchored by military bases. For the Houston area we have nationally important gasoline refining capacity and the sky patrol is by the Texas Air National Guard F-16s based out of Ellington Field, which have brought necessary levels of security of comfort to me and my constituents.

It may not attract national notice but the chemical refining areas in my district in Houston's east side have been under repeated high alert for terrorist activity in recent months. Those F-16 patrols are critical for the homeland defense mission. Ellington's operations are currently budgeted for our area's Clean Air Act plan, as they should be, so there is no conceivable problem in our backyard.

But there are other less desirable environmental impacts that the military may have like destruction of napalm and other hazardous munitions. These activities have definite environmental consequences. The Houston area is a good case study because we are facing a lot of challenges in our healthy clean air standards.

Many industries have been asked to make a great deal of sacrifices to reach these goals. I don't know if it would be fair to ask our private sector industries that make the Nation's gasoline and

the military's jet fuel to make costly pollution control upgrades while we allow the Department of Defense and Congress to exempt ourselves from the Clean Air Act.

I don't want to blame the military. I don't want to blame the ones who are here—that is our job. If there needs to be something done, then we ought to provide the funding and be able to do it because, again, if you are going to be good neighbors whether it be the private sector of the public sector we ought to do that.

Mr. Chairman, again, I will ask for my full statement to be in the record and I will yield back my time.

Mr. HALL. Without objection. The Chair would remind the gentleman from Texas that San Jacinto may not still be in your district because the legislature is meeting down there.

The Chair recognizes Butch Otter, the whip of the Energy Subcommittee, No. 1 whip.

Mr. OTTER. Mr. Chairman, in the interest of time, I am going to waive my statement and ask that it be printed in the permanent record.

Mr. HALL. I appreciate that.

[The prepared statement of Hon. C.L. "Butch" Otter follows:]

PREPARED STATEMENT OF HON. C.L. "BUTCH" OTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Thank you, Mr. Chairman, for providing us with the opportunity to discuss what is one of our government's most important responsibilities: preparing our armed forces for success as they defend and protect our nation.

It seems obvious that any defense authorization should enable our military to meet our nation's environmental standards without jeopardizing the training and protection of our troops. And yet in this country some of the greatest obstacles to preparing our troops for battle are burdensome environmental regulations that, while well intended, have far reaching implications. I agree that clean air and clean water are important. But when our stifling over regulation prevents business and government from doing their jobs—like preparing our soldiers for battle—I question whether or not those regulations are doing what they were intended to do. Laws and regulations that were never created to interfere with the day-to-day operations of our military ranges and training grounds now force government and private industry alike to prepare for an all-out attack by litigation and fines.

For the past few years, I have continually voted to free the Defense Department from problems caused by our environmental laws, enabling the military to prepare members of our armed forces to defend our freedoms across the globe. I will continue to do so. But I can't help but wonder if the government realizes that these same environmental laws and regulations that bind down our military also burden the businesses and industries across our country. Yet while the U.S. government can regularly come to Congress or the President for exemptions and waivers that allow them to go about their business, the American businessman cannot and is forced to wade through the mire of restrictions, fines, and limitations. How can we say that these regulations are too burdensome for our government while continuing to impose them on our businesses and private industries? I support the changes we will discuss today, as I have supported those in the past. I simply ask why these same changes should not apply to the rest of Americans as well.

Mr. HALL. The Chair recognizes the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman. Thanks for calling this hearing. Welcome to all our witnesses. I particularly look forward to hearing from Mr. Ensminger's testimony who, as someone who resided at Camp Lejeune, North Carolina during the 1980's, unfortunately knows all too well the devastation these contaminants can cause to people who are exposed to them. I know it can't be easy

for him to appear before us today but I commend him for sharing his personal story with us.

The Department of Defense has asked Congress to exempt the military from a number of major environmental laws including the Resource Conservation and Recovery Act, the Clean Air Act, and the Comprehensive Environmental Response Compensation and Liability Act.

DOD wants us to exempt from these laws 24 million acres. That is roughly the size of six different States, Delaware, Connecticut, Hawaii, New Jersey, Massachusetts, and New Hampshire. Why should Congress exempt the Nation's largest polluter?

In my district, for example, there is a National Guard training center that is comprised of over 147,000 acres of what the DOD considers operational ranges. Included in these operational ranges are recreational facilities such as lighted softball diamonds and picnic areas used by service mean and women and their families which would also be exempt from clean up of harmful toxins.

DOD has failed to identify any instances in which there has been a negative impact on military readiness due to these laws. In a memo to the military secretaries written by Deputy Secretary of Defense Wolfowitz, he stated that DOD has demonstrated that they have been able to comply with environmental requirements and also conduct necessary military training and testing.

Former EP Administrator Whitman also testified before Senate committee last year that there is not a training mission anywhere in the country that has been delayed due to environmental protection regulation. So what is the problem? The law already allows national security exemptions for any DOD facility if necessary for military readiness.

Why is it necessary for Congress to provide DOD with a sweeping exemption? What I find particularly disconcerting about these proposed exemptions is that the DOD would be allowing toxic substances to remain exposed anywhere on a military range where they could reach into ground water, surface water, or the air outside of these ranges weakening the ability of States and EP to protect communities from exposure to toxins if DOD could also delay Superfund cleanup of these toxins until they have spread beyond boundary range.

It is like saying we are the military and we shouldn't have to play with the same rules.

Mr. Chairman, I have three former military bases in my district, KI Sawyer, Kinslow and Wurtsmith. While these bases have been closed for more than a decade, we are still cleaning up the environmental messes left behind by DOD when they left town. We can't ill afford to exempt DOD from environmental standards at the expense of our constituent's health.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. HALL. All right. The Chair recognizes Mr. Shimkus, the gentleman from Illinois, vice chairman, Energy and Air Quality Subcommittee, for 3 minutes.

Ms. SHIMKUS. Thank you, Mr. Chairman. I will try to be brief. I want to welcome General Weber. General Weber used to command a brigade, I believe. We talked before. The brigade he com-

manded was taken over by my classmate, Dave Perkins, who was well known for leading the assault in Baghdad.

The point I want to make is this. Is military trained to be prepared for the crisis? So the rules and regulations here are being debated based upon a crisis that could occur on training and readiness. That is what they do. That is what we train them. That is what we pay them for. This is a good debate that we are having. I have three concerns that I will talk about quickly.

We are going through a round of BRAC. I have colleagues here from the State of Illinois. Many you know of our concerns at Scott Air Force Base. What these provisions may allow if unchanged, BRAC could be significantly affected for people who want to in the realignment of forces an inability to bring new planes to the air field because, one, it is under a State SIP or, two, if it is, then you may have to go to the county for other rules and regulations and changes. What this change would say is give a 3-year phase in to meet the Clean Air Act SIP for that State. I think that is reasonable and especially with BRAC I think it is important.

Second thing is I am also from Illinois. It is known as a very litigious State. We are involved in a medical malpractice crisis where doctors are leaving the State, 70 in my home county. We don't like law that is written in the courts as legislators. My fear to my friends who are law enforcement, hunters, and the like is is the camel's nose under the tent when law gets enacted by lawsuits filed throughout this country. I am referring to the Alaska case right now and how that might affect sport shooting ranges, how it may affect hunting, local police ranges and the like.

The third thing, I do want to say some things positive that the military is doing, the positive steps that have been taken to improve the environment. Many people know that I promote renewable fuels here, ethanol and bio-diesel. The Department of Defense has been the No. 1 user of bio-diesel. Scott Air Force Base uses 75,000 gallons. Camp Lejeune, 147,000 gallons. An 80-20 mix cleans up the diesel exhaust by 50 percent. I think those are good things, positive moves that the Department of Defense has done to clean up the air quality. Actually commercial fleets are moving in that direction, too, and I want to applaud that.

I want to thank you, Mr. Chairman and yield back my time.

Mr. HALL. Thank you, gentleman. The Chair recognizes the gentleman from New Jersey, Mr. Pallone, 3 minutes.

Mr. PALLONE. Thank you, Mr. Chairman. I appreciate the opportunity this morning to examine DOD's proposed exemptions from long-standing environmental laws in the name of military readiness. But I have to say I am greatly concerned that while the proposed exemptions are presented as being narrow in scope, the actual implications to public health and environmental health would be sweeping.

I am mostly concerned that much of the exemption language lacks clarity and I have found little documentation that substantiates the military's need to make such gross changes to our Nation's environmental statutes.

I know two of my Democratic colleagues have already mentioned that both the Christine Todd Whitman and Paul Wolfowitz have already testified that there was little to no difficulty in maintaining

military readiness while complying with existing environmental laws and the current exemptions afforded by the DOD.

In reviewing the exemptions proposed for RCRA and CERCLA, I am troubled by terminology and definitions that I find ambiguous. I am worried about the implication that such lack of clarity would have in my State of New Jersey that has some of the worst contaminated active, inactive, and formerly used military sites.

For instance, how would the proposed exemptions from CERCLA or RCRA impact the former Raritan Arsenal in my district where both soil and water contamination threaten people who currently work on the site and residents nearby. Migration of onsite contaminated water is now reaching the Raritan River that could pose a threat to both people and the environment.

The exemptions proposed under RCRA would allow the toxic materials at many sites across the country to remain exposed and allow further contamination of ground water. Additionally, I would point out that the exemptions from CERCLA that DOD is proposing would delay clean up of sites such as Raritan until the contamination migrated well beyond the base boundaries at which time the problems could be ten times as dangerous and exorbitantly more expensive.

I would also like to note that I find the DOD request to be exempt from the Clean Air Act provisions ironic, given EPA's report last week that 474 cities in this country are out of compliance with ozone standards. While millions of Americans are exposed to unhealthy air and elevated ozone levels, the administration seeks not only to roll back mercury emission standards, but proposes to exempt a significant contributor to air quality nationwide.

While the administration places more burdens on the States to comply with Clean Air Act provisions and ozone standards, it is doing little and, in fact, undermining the State's ability to improve its air quality.

The Bush Administration's attempt to undermine current environmental law under the guise of military readiness not only damages the environment that this body has worked so hard to protect, but it also puts Americans, military families, military personnel, and civilians at risk of adverse health impacts from the known or suspected contamination of over 15 million acres of operational, closed, or formerly used military installations. The Federal Government has a responsibility to abide by the very laws it creates. If not, how can we expect others to abide by them? Thank you, Mr. Chairman.

Mr. HALL. Thank you, gentleman. The Chair now recognizes the vice chairman of the Commerce, Trade, and Consumer Protection Subcommittee, Mr. Shadegg of Arizona.

Mr. SHADEGG. Thank you Chairman Hall and Chairman Gillmor, for holding today's hearing on the impact of environmental laws on the ability of our armed forces to maintain their readiness.

Regardless of one's stance on the specific proposal before us today, I hope we can all agree that it is imperative for our men and women in uniform to be given the best, most realistic training possible before being deployed. Vigorous training by our armed services saves lives, increases unit effectiveness, and wins wars.

Especially with our current military commitments around the world, we cannot afford to let readiness slip. We cannot sit idly by while red tape and bureaucratic nonsense threaten our military's ability to meet its obligations. We simply cannot risk such failures where national security is concerned.

At the same time, our military bases and ranges across the country that once were removed from major metropolitan areas are now threatened by encroachment and by an influx of regulations that could block future activities essential for military readiness—such as the rollout of new technologies or the simple relocation of equipment.

In Arizona, which I represent, Luke Air Force Base and the Barry Goldwater Range are prime examples of this trend. Both must overcome significant encroachment and environmental issues for operations to continue, despite providing the only active duty F-16 training in the world.

At the same time, this is a very challenging issue. For example, the question of perchlorate, which is being discussed here today, is a serious issue in my congressional district and for my State. We must be sure that issues such as perchlorate and other issues which affect our environment are handled in an appropriate and correct fashion in order not to further damage our economy.

It seems to me that we must strike the appropriate balance here, and I look forward to hearing the witnesses' testimony on precisely what that balance is and how the proposal before us today would affect both our environmental obligations and our readiness obligations.

With that, Mr. Chairman, I yield back.

Mr. HALL. Thank the gentleman for giving us back a minute. The Chair recognizes Mr. Gonzalez, a gentleman from Texas, 3 minutes.

Mr. GONZALEZ. Thank you, sir. First of all, I welcome this opportunity and I thank the Chair for holding this important joint hearing. Thank you to all the witnesses, especially those that wear our Nation's uniform. Thank you for so much that you do that we are able to meet here today and enjoy the wonderful freedoms of a democracy.

I am going to echo some words that I think were spoken by my colleague on the other side, Congressman Burr, and that is really making a distinction in order to establish the necessity of maybe relaxing certain rules and regulations when they apply to readiness as opposed to everyday training and how we make that distinction, who makes that distinction. Who can question that distinction is going to be really important.

This Nation has always recognized that in times of war the law many times is silent and that extends all the way up to our civil liberties as shocking as that may sound. What we seek here today is a particular law, a particular regulation that is not just going to be silent. It is not going to really exist and will not be applied at anytime that a certain determination is made.

The reason that we recognize these type of emergency situations is because in the past wars have been definite in nature. They have been against other sovereign nations. they have certain geo-

graphical limitations. they almost started at a certain date and you could see when they were going to end.

The war on terrorism is entirely different so whatever we enact here in Congress that would excuse any entity or any department from compliance that could affect welfare of our communities must be weighed very carefully. I hope that we will remain focused and really see the pressing need to make certain laws that are absolutely necessary. When we regulate our environment for the safety of our communities that we will look the other way and relax enforcement.

In the final analysis every community will welcome a military installation and San Antonio is one of those proud communities. I am sure you have visited and maybe even were stationed at Fort Sam Houston. Every installation really is a citizen and a neighbor of our community. It would never wish to do anything to harm that community so it is a partnership.

With that spirit, I hope that we will proceed today. Thank you.

Mr. HALL. Thank you, gentleman. The Chair recognizes the gentleman from Oregon, Mr. Walden, 3 minutes.

Mr. WALDEN. Mr. Chair, I am going to give you all 3 back and hold my statement and comments for questions.

Mr. HALL. The Chair reluctantly recognizes Mr. Markey from Massachusetts.

Mr. MARKEY. And you will soon find out why.

Mr. HALL. I knew I would pay for that.

Mr. MARKEY. More people die each year from diseases in the United States than have died in all the wars that have ever been fought in the history of the United States combined—more children, more adults. So while we honor what you do, and each one of us respects what you do, we also have to be cognizant of what poses the greatest risk on a daily basis to the health and well being of every American.

A woman in the United States is six times more likely to contract breast cancer as a woman in Japan. There is something in our air. There is something in our food. There is something in our water. There is something in our environment which is causing this six times greater contraction of breast cancer amongst women.

The same thing is true for asthma. The same thing is true for prostate cancer. It is in our society. It is in our environment. It is poisoning and killing Americans at a much higher rate than other people around the country. For an asthmatic child in the United States they don't know the difference between military pollution and civilian pollution. All they know is that they need an aid to help them breathe. That is not right.

The Department of Defense stands for something that is really very important in protecting our country but DOD should not stand for Department of Dumping or the Department of Disease. Pollution is pollution. It kills people. It causes cancer. It causes asthma. It causes lung disease. It causes problems which have tremendous adverse affects on our country.

If we exempt the Department of Defense on the basis that they produce patriotic pollution but we ignore the consequences for the health of millions of people. There are right now 130 Department of Defense Superfund sites in the United States. One is in Massa-

chusetts, the Massachusetts Military Reservation where because of that site the drinking water for 250,000 people has been contaminated.

What are the long-term consequences of that? The President has the ability to exempt any military project on a case-by-case basis if he makes that case to the American people. He should retain that ability but there should be no blanket exemption which is given to the Department of Defense. The consequences for the health of our country are that many, many, many, many more people will die if we give that exemption to the military than will ever be saved by allowing them to pollute in the name of national security.

Thank you, Mr. Chairman.

Mr. HALL. I thank the gentleman. The gentleman knows I was joking with him. We have had a feud for 24 years but I don't have a better friend in Congress.

I recognize at this time Mr. Wynn, a gentleman from Maryland. Three minutes.

Mr. WYNN. Thank you, Mr. Chairman. I will defer at this time.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. JANICE SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Thank you, Mr. Chairman, for holding this hearing today. The most important job of the federal government is to protect the health and safety of the public. We do that in a number of ways, including through the protection of our environment. Today, we are being asked to examine the Department of Defense's effort to secure ongoing and expanded exemptions from core U.S. environmental laws.

The government's role in carrying out both national security and environmental protection are of paramount importance. Protecting the environment and public health and guaranteeing our security needs are all goals that can and must be met. The Department of Defense wants us to believe we must exempt it from environmental regulations if we want to be safe. But if we grant the Department of Defense exemptions from our most fundamental environmental laws, the environment and public health would be undermined.

The Department of Defense is making the case that we have an either-or choice to make. The Department's argument is that either we uphold our environmental laws or we guarantee our security. I do not agree with the Department's reasoning. The Department of Defense is one of the nation's worst polluters and we have every right to demand better environmental performance while enjoying the same level of security for America.

DOD officials themselves have repeatedly insisted that the military is a good environmental steward. Shortly after Iraq invaded Kuwait, then-Secretary of Defense Dick Cheney told an assembly of military planners and environmentalists:

> Defense and the environment is not an either-or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense.

The Department of Defense does not need the exemptions it is requesting. The Department has yet to identify a single instance when the environmental protection laws in this proposal have impaired military readiness activities. Each of these laws already grants the President the authority to exempt the Department of Defense from compliance in the case of a national emergency, such as a terrorist attack.

Implementation of DOD's request could cause a train wreck for our environment and for the health of the American public. Recently, 39 State Attorneys General, including Illinois Attorney General Lisa Madigan, agreed, on a bi-partisan basis, that the Department of Defense's proposal would, "significantly impair [their] ability to protect the health of [their] citizens and their environment." (April 19, 2004 letter to Senate Committee on Armed Services, Senate Committee on Environment and Public Works, House Committee on Armed Services and House Committee on Energy and Commerce)

Granting the Department's request now would be unwise and unnecessary. Existing and possible sources of drinking water would be destroyed and the air quality would continue to suffer.

Again, Mr. Chairman, thank you for holding this hearing today. I look forward to hearing the testimony from our witnesses on this important issue.

Mr. HALL. All right. Finally, we are ready for the folks that are the main attraction here to be recognized at this time. At this time I recognize Mr. DuBois who is Deputy Under Secretary for Installations and Environment. I recognize you for 5 minutes but I am not holding the clock on you.

Thank you for your patience, all of you. You know how we feel and now we want to find out what the hard actual facts are. Thank you for appearing and thank you for the opportunity for us to ask you about the effect of the regulations we have, the actual effect and not the supposed or the guessed effect, how you are affected and what it has to do with your ability to defend this country. Thank you.

STATEMENTS OF RAYMOND F. DuBOIS, DEPUTY UNDER SECRETARY FOR INSTALLATIONS AND ENVIRONMENT, DEPARTMENT OF DEFENSE, ACCOMPANIED BY BEN COHEN, DEPUTY GENERAL COUNSEL FOR ENVIRONMENT AND INSTALLATIONS; BRIG. GEN. LOUIS W. WEBER, DIRECTOR OF TRAINING, DEPARTMENT OF THE ARMY, ACCOMPANIED BY COL. RICHARD A. HOEFTERT, DIRECTOR, ARMY ENVIRONMENTAL PROGRAMS; HON. MARIANNE LAMONT HORINKO, ASSISTANT ADMINISTRATOR FOR SOLID WASTE AND EMERGENCY RESPONSE, ACCOMPANIED BY HON. JEFFREY R. HOLMSTEAD, ASSISTANT ADMINISTRATOR FOR AIR AND RADIATION, ENVIRONMENTAL PROTECTION AGENCY; AND DOUGLAS H. BENEVENTO, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Mr. DUBOIS. Thank you, Mr. Chairman, Chairman Hall and Chairman Gillmor, Chairman Barton and, of course, Representative Solis and Representative Dingell, members of this subcommittee, the two subcommittees. This opportunity to testify today is extremely timely. The issues you have heard carry with them emotion and passion, as they should. We hope that our testimony today and answers to your questions will clarify some of the issues that seem to have been occasionally mischaracterized.

I am joined today by an distinguished panel of our Federal Government as well as Mr. Doug Benevento, the head of the Colorado Department of Public Health and Environment who is on the closed circuit television.

On my left, your right, let me introduce the Honorable Jeff Holmstead, the Assistant Administrator of EPA for Air, the Honorable Marianne Horinko who is the Assistant Administrator of EPA for Solid Waste.

Then we have with us, as has been mentioned by a number of the members, Brigadier General Bill Weber, the Director of Army Training and, most recently, Third Infantry Division in Iraq; Colonel Richard Hoeftert, Director of Army Environmental Programs. On my immediate left my very close colleague, especially on this issue, Mr. Ben Cohen, the DOD Deputy General Counsel for Environment and Installations.

Now, preparing America's military forces for battle, preparing them and their equipment for fighting men on the first day of battle is critical. No one would argue with that. We at the Department have said many times before that we need to train as we fight.

But the reality, of course, is that we end up fighting as we have trained. Our collective task as it has been articulated by a number of you this morning is to find the necessary, find the appropriate balance between the use of military lands for their unique readiness purpose and the protection of our Nation's environmental heritage.

There are approximately 650 million acres of public land in the United States. It is nearly one-quarter of the land mass of this country. Congress has set aside a little less 30 million of those acres for defense purposes. I might note here that it is less than 1.2 percent of the entire land area of the United States. These lands have been entrusted by the Congress to the Department and we must use them efficiently and we must care for them properly. In executing these responsibilities we are committed to more than just complying with the applicable laws and regulations.

We are committed to protecting, preserving, and, when required, restoring and enhancing the quality of these lands. We need various types of topography, various types of land configuration in order to train because we know not where are young men and women in uniform will be deployed.

It is the Department's goal to manage and operate our military testing and training ranges to support their long-term viability on meeting our commitment to protect human health and the environment. DOD has implemented, and continues to refine, a comprehensive operational range sustainment program.

There are a number of elements to that program which we will no doubt get into today. We have also assembled a comprehensive inventory, an inventory that is very important of our operational ranges that we continue to refine and update annually as Congress has asked. In addition, the Defense Planning Guidance for fiscal year 2004 requires the military departments to "assess potential hazards from off-range migration of munitions constituents" and to begin remediation no later than fiscal year 2008.

In fact, already the military departments are actively executing that policy guidance and ensuring that our ranges are assessed and remediation where necessary is under way. Our budget documents require funding to be put into place for these tasks so we have in place today both elements of a successful program.

Two years ago, as has been mentioned, the administration submitted to Congress an eight-provision legislative package, the Readiness and Range Preservation Initiative (RRPI). Congress enacted three of those provisions as part of the National Defense Authorization Act for fiscal year 2003 and two more in 2004. We are grateful to Congress for its adoption of those provisions. We have resubmitted this year for the National Defense Authorization Act our authorization act, the three provisions which we are going to address today.

Why? Why did we resubmit them? There are evolving and unprecedented legal challenges and interpretation which continue to raise concerns for us. That is to say, the proper use and manage-

ment of our training and test ranges will be constrained should the Congress not act. Military training activities are increasingly being scrutinized under industrial pollution laws designed to further constrict. The extension of those laws and regulations we believe were never intended for application for military readiness activities.

I think it is important in the few minutes remaining to define what is and what is not in our legislative package. Recently press accounts suggest that DOD is seeking blanket or sweeping exemptions of environmental law and that, I read this this morning, we are, "playing on national security fears."

I would remind our critics that we seek no such relief for our closed ranges, nor for our contractors, nor for our nonreadiness activities, nor for existing cleanup obligations concerning chemicals like perchlorate. I would also remind our critics that they have conveniently forgotten that what we have proposed is in large measure what the Clinton defense department sought.

Our provisions are narrowly focused on only military readiness activities and operational ranges. We have worked closely with many of our stakeholders, particularly the States and members and staff of the Congress to clarify the language of these provisions and have revised our proposal to clearly state that it has no affect on closed ranges or on our existing cleanup activities.

Working with EPA we have developed further language clarifying that it has no affect on our contractors as I have indicated. In fact, these proposals largely codify existing bipartisan policies that have served both readiness and the environment very well.

In conclusion, Mr. Chairman, this issue, these proposals carry strong emotion for both sides. We have heard in compelling fashion today some of the concerns and arguments. I can only conclude that there is no substitute for live fire, realistic combat training. My experience as a young soldier in Vietnam many, many years ago teaches me that it is one of my strongest obligations as a Defense Department official to provide that to the sons and daughters of our country who we send into harm's way.

But we also recognize that protecting our environment is important to all Americans. We believe that neither should be sacrificed. Thank you, Mr. Chairman, for, as I said, this timely opportunity to address these very important issues.

[The prepared statement of Raymond F. DuBois follows:]

PREPARED STATEMENT OF RAYMOND F. DUBOIS, DEPUTY UNDER SECRETARY OF DEFENSE FOR INSTALLATIONS AND ENVIRONMENT AND BENEDICT S. COHEN, DEPUTY GENERAL COUNSEL (ENVIRONMENT AND INSTALLATIONS) U.S. DEPARTMENT OF DEFENSE

INTRODUCTION

Mr. Chairman and distinguished members of this Committee, we appreciate the opportunity to discuss with you the very important issue of sustaining our test, training and military readiness capabilities, and the legislative proposals within the jurisdiction of this committee that the Administration has put forward in support of that objective. In these remarks we would like particularly to address some of the comments and criticisms offered concerning these legislative proposals

Encroachment

Over the past several years, the Department has become increasingly aware of the broad array of encroachment pressures at our operational ranges and installations that are increasingly constraining our ability to conduct testing and training, modernization, and force realignments. These activities are essential to maintaining the

technological superiority, efficiency, and combat readiness of our military forces. Given world events today, we know that our forces and our weaponry must be more diverse and flexible than ever before. Unfortunately, this comes at the same time that our ranges and installations are under escalating pressure from myriad sources, such as encroaching development and private litigation that seeks to interpret environmental laws in ways unimagined by Congress.

This current predicament has come about as a cumulative result of a slow but steady process involving many factors. Because external pressures are increasing, the adverse impacts to readiness are growing. Yet future testing, training, and force structure requirements will only further exacerbate these issues as the speed and range of our weaponry increase, the number of training scenarios expand in response to real-world situations, and our forces are realigned to modernize and increase efficiency. We must therefore address these issues in a much more comprehensive and systematic fashion and understand that they will not be resolved overnight, but will require a sustained effort.

Environmental Stewardship

Before we address our specific proposals, let us first emphasize our position concerning environmental stewardship. There are approximately 650 million acres of public land in the United States. Congress has set aside about 30 million acres of this land—some 1.1% of the total land area in the United States—for defense purposes. These lands were entrusted to the Department of Defense (DoD) to use efficiently **and** to care for properly. In executing these responsibilities we are committed to more than just compliance with the applicable laws and regulations. We are committed to protecting, preserving, and, when required, restoring, and enhancing the quality of the environment.

- We are investing in pollution prevention technologies to minimize or reduce pollution in the first place. Cleanup is far more costly than prevention.
- We are managing endangered and threatened species, and all of our natural resources, through integrated natural resource planning.
- We are cleaning up contamination from past practices on our installations and are building a whole new program to address unexploded ordnance on our closed, transferring, and transferred ranges.

Balance

The American people have entrusted these 30 million acres to our care. Yet, in many cases, these lands that were once "in the middle of nowhere" are now surrounded by homes, industrial parks, retail malls, and interstate highways.

On a daily basis our installation and range managers are confronted with myriad challenges—urban sprawl, noise, air quality, air space, frequency spectrum, endangered species, marine mammals, and unexploded ordnance. Incompatible development outside our fence-lines is changing military flight paths for approaches and take-offs to patterns that are not militarily realistic—results that lead to negative training and potential harm to our pilots. With over 300 threatened and endangered species on DoD lands, nearly every major military installation and range has one or more endangered species, and for many species, these DoD lands are often the last refuge. Finally, private litigants are attempting to use environmental laws as tools to halt critical readiness activities, such as live fire training.

Much too often these many encroachment challenges bring about unintended consequences to our readiness mission. This issue of encroachment is not going away. Nor is our responsibility to "train as we fight."

2004 READINESS AND RANGE PRESERVATION INITIATIVE (RRPI)

Overview

In 2002, the Administration submitted to Congress an eight-provision legislative package, the Readiness and Range Preservation Initiative (RRPI). Congress enacted three of those provisions as part of the National Defense Authorization Act for Fiscal Year 2003. Two of the enacted provisions allow us to cooperate more effectively with local and State governments, as well as private entities, to plan for growth surrounding our training ranges by allowing us to work toward preserving habitat for imperiled species and assuring development and land uses that are compatible with our training and testing activities on our installations.

Under the third provision, Congress provided the Department a regulatory exemption under the Migratory Bird Treaty Act for the incidental taking of migratory birds during military readiness activities. This was essential to address the serious readiness concerns raised by recent judicial expansion of prohibitions under the Migratory Bird Treaty Act.

Last year, Congress enacted two additional provisions of our Readiness and Range Preservation Initiative. The first of these authorizes the Secretary of the Interior to certify the use of an approved Integrated Natural Resource Management Plan as a substitute for critical habitat designation on military lands. This provision shields from private litigation a policy decision on the management of endangered species that was first crafted in the previous administration. It will allow the DoD to work in partnership with the Department of the Interior to manage endangered species on military lands in a more holistic manner than is accomplished by simple designation of critical habitat. The second provision reformed obsolete and unscientific elements of the Marine Mammal Protection Act by, for example, amending the definition of "harassment" under that Act. It also added a national security exemption to the statute, making it consistent with most other environmental protection laws.

We are grateful to Congress for these provisions. We have already begun to use these provisions both to enhance our ability to maintain military readiness and to satisfy our environmental stewardship obligations. In fact, the conservation authority Congress granted under section 2811 of the National Defense Authorization Act for Fiscal Year 2003 has already been put to good use to forestall encroachment around Camp Blanding in Florida. About 8,500 acres of Florida black bear habitat will be added to Camp Blanding in southwestern Clay County. The acquisition stems from an agreement between the Florida Department of Environmental Protection and the Army National Guard to protect a 3-mile buffer adjacent to Camp Blanding. The 8,500-acre buffer was targeted for preservation through the Northeast Florida Timberlands Florida Forever project, which spans more than 157,000 acres and protects a belt of green space connecting the Ocala and Osceola national forests. The project safeguards 60 rare species, including the bald eagle, red-cockaded woodpecker, wood stork and Florida black bear.

Also in Florida, Governor Bush, DoD, and the Nature Conservancy have established a partnership to craft a Northwest Florida Greenway corridor—an effort that will benefit our soldiers, sailors, airmen, and marines while at the same time preserving some of our country's most unique natural areas. The Northwest Florida Greenway collaboration represents the most ambitious use to date of the congressional authority provided under section 2811. The project will preserve 100 miles of open space stretching from the Apalachicola National Forest and waters of the Gulf of Mexico to Eglin Air Force Base. This greenway will sustain military training and necessary access to Northwest Florida's unique air, land, and water resources for generations to come, while at the same time preserving Northwest Florida's rich and diverse natural environment. Building on these successes, the Department is working with additional States and non-governmental organizations to develop similar partnerships in additional areas throughout the country. In fact, to assist the Services in implementing these authorities at the state and local level, the President's FY 2005 Budget request includes a new initiative of $20 million targeted to our new authority—to help in developing new policies, partnerships, and tools to assist communities and other interested stakeholders in executing compatible land use partnerships around our test and training ranges and installations. The new request is intended to build upon on-going efforts—innovative win/win partnerships with our neighbors to enhance conservation and compatible land use on a local and regional basis.

The remaining three proposals address military readiness activities on military lands. They remain essential to military readiness and range sustainment and are as important this year as they were last year—maybe more so. These three provisions would modestly extend the allowable time for military readiness activities, like bed-down of new weapons systems, to comply with Clean Air Act, and limit regulation of munitions testing and training on operational ranges under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA), if and only if those munitions and their associated constituents do not have the potential to migrate off of an operational range.

Before discussing the specific elements of our proposals, I would like to address some overarching issues. A consistent theme in criticisms of our RRPI proposal is that it would bestow a sweeping or blanket exemption for the Defense Department from the Nation's environmental laws. This assertion is wholly inaccurate.

First, our initiative would apply only to military readiness activities, **not** to closed ranges or ranges that close in the future, and **not** to "the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage, schools, housing, motor pools . . . nor the operation of industrial activities, or the construction or demolition

of such facilities."[1] It **does** address only uniquely military activities—what DoD does that is unlike any other governmental or private activity. 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. We seek alternative forms of regulation only for the things we do that have no private-sector analogue: military readiness activities.

Nor does our initiative "exempt" even our readiness activities from the environmental laws. Rather, our RCRA and CERCLA proposals clarify and confirm existing regulatory policies that recognize the unique nature of our activities; the RCRA proposal codifies and extends EPA's existing Military Munitions Rule, and the RCRA and CERCLA elements ratify longstanding state and federal policy concerning regulation under RCRA and CERCLA of our operational ranges. The Clean Air Act provision does not exempt our readiness activities from Clean Air Act requirements, but simply gives states and DoD temporary flexibility under the Clean Air Act to allow important readiness activities to proceed in conjunction with planning for State Implementation Plan (SIP) compliance.

Ironically, the alternative proposed by many of our critics—invocation of existing statutory emergency authority—would fully exempt DoD from the waived statutory requirements for however long the exemption lasted, a more far-reaching solution than the alternative forms of regulation we propose.

Accordingly, our proposals are neither sweeping nor exemptive; to the contrary, it is our critics who urge us to rely on wholesale, repeated use of emergency exemptions for routine, ongoing readiness activities that could easily be accommodated by minor clarifications and changes to existing law.

Existing Emergency Authorities

As noted above, many of our critics state that existing exemptions in the environmental laws and the consultative process in 10 U.S.C. 2014 render the Defense Department's initiative unnecessary. Although existing exemptions are a valuable hedge against unexpected future emergencies, they cannot provide the legal basis for the Nation's everyday military readiness activities.

• 10 U.S.C. 2014, which allows a delay of at most five days in regulatory actions significantly affecting military readiness, is a valuable insurance policy for certain circumstances, but allows insufficient time to resolve disputes of any complexity. More to the point, Section 2014 merely codifies the inherent ability of cabinet members to consult with each other and appeal to the President. Since it does not address the underlying statutes giving rise to the dispute, it does nothing for readiness in circumstances where the underlying statute itself—not an agency's exercise of discretion—is the source of the readiness problem. This is particularly relevant to our RRPI proposal because none of the amendments we propose have been occasioned by the actions of state or federal regulators. Our proposed RCRA and CERCLA amendments were occasioned by private litigants seeking to overturn federal regulatory policy and compel federal regulators to impose crippling restrictions on our readiness activities. Our 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. Section 2014, therefore, although useful in some circumstances, would be of no use in addressing the critical readiness issues that our RRPI initiatives address.

• Most environmental statutes with emergency exemptions clearly envisage that they will be used in rare circumstances, as a last resort, and only for brief periods.

• Under the Clean Air Act, RCRA and CERCLA, the decision to grant an exemption is vested in the President. In the case of the Clean Air Act and RCRA, an exemption is available only under the highest possible standard: "the paramount interest of the United States," a standard understood to involve exceptionally grave threats to national survival.[2] Although a discrete activity (e.g., a particular weapon system realignment or munitions testing activity) might only rarely rise to the ex-

[1] *See* Pub. L. 107-314, § 315, 116 Stat. 2509 (Dec. 2, 2002) for the definition of "military readiness activity."

[2] Although the Department of Defense believes that a determination of "paramount interest" is committed to the President's discretion and is unreviewable, there is judicial language that indicates that such a determination may be subject to judicial challenge in a citizen suit. In *Kasza v. Browner,* the 9th Circuit, in comparing the scope of the state secrets privilege to that of the Presidential exemption under RCRA said "if a facility has been exempted [under RCRA], for example, a citizen's suit could question whether the exemption was in the paramount interest of the United States, to which the exemption itself would not apply . . ." 133 F.3d 1159, 1168 (9th Cir. 1998). So even if an exemption were granted by the President it is not clear that his decision would be immune from challenge.

traordinary level of a "paramount national interest," it is clearly intolerable to allow all activities that do not individually rise to that level to be compromised or halted by inflexible regulations or private litigation.

• The exemptions are limited to renewable periods of a year (or in some cases under the Clean Air Act for as much as three years for certain categories of property).

• Under CERCLA, exemptions may be granted regarding "any specified site or facility" and under RCRA, exemptions may be given to "any solid waste management facility." If RCRA and CERCLA are applied to operational ranges, these provisions suggest that the President might have to provide an individual exemption annually for each operational range. Maintaining military readiness through use of emergency exemptions would therefore involve issuing and renewing scores or even hundreds of Presidential certifications annually.[3]

The Defense Department believes that it is unacceptable as a matter of public policy for indispensable readiness activities to require repeated invocation of emergency authority—particularly when narrow clarifications of the underlying regulatory statutes would enable both essential readiness activities and the protection of the environment to continue.

Specific Proposals

RCRA and CERCLA

The legislation would codify and confirm the longstanding regulatory policy of EPA and every state concerning regulation of munitions use on operational ranges under RCRA and CERCLA. It would confirm that military munitions are subject to EPA's 1997 Military Munitions Rule while on range, and that cleanup of operational ranges is not required so long as there is no potential for migration and the range remains operational. If such material moves off range, it still must be addressed promptly under existing environmental laws. Moreover, if munitions constituents cause an imminent and substantial endangerment *on range,* EPA will retain its current authority to address it on range under CERCLA section 106. Our legislation explicitly reaffirms EPA's section 106 authority. The legislation similarly does not modify the overlapping protections of the Safe Drinking Water Act, the National Environmental Policy Act, and the Endangered Species Act against environmentally harmful activities at operational military ranges. The legislation has no effect whatsoever on DoD's cleanup obligations under RCRA or CERCLA at Formerly Used Defense Sites, closed ranges, ranges that close in the future, or waste management practices involving munitions even on operational ranges.

The main concern addressed by our RCRA and CERCLA proposal is to protect against litigation the longstanding, uniform regulatory policy that (1) use of munitions for testing and training on an operational range is *not* a waste management activity or the trigger for cleanup requirements, and (2) that the appropriate trigger for DoD to address the environmental consequences of such routine test and training uses involving discharge of munitions is (a) when the range closes, (b) when munitions or their elements migrate or threaten to migrate off-range, or (c) when munitions or their elements create an imminent and substantial endangerment on or off the range. The legislation clarifies and confirms the applicability of EPA's CERCLA section 106 authority to on-range threats to health or the environment, and likewise clarifies and confirms the applicability of both RCRA and CERCLA to migration of munitions constituents off-range.

This legislation is needed because of RCRA's broad definition of "solid waste," and because states possess broad authority to adopt more stringent RCRA regulations than EPA (enforceable both by the states and by environmental plaintiffs). EPA

[3] Further, the authority of the President to issue an exemption under RCRA has been interpreted to be limited in scope. RCRA provides that "[t]he President may exempt any *solid waste management facility*" from requirements "respecting the control and abatement of solid waste or hazardous waste disposal and management . . ." In the one case to consider this issue, the court determined—after almost a year-long process—that "there is a distinction between 'solid waste management facility or disposal site' which the President can exempt, and an 'activity resulting, or which may result, in the disposal of solid waste or hazardous waste,' which the President has no authority to exempt." *Puerto Rico v. Muskie,* 507 F. Supp 1035, 1048 (1981), *vacated on other grounds, Marquez-Colon v. Reagan,* 668 F.2d 611 (1st Cir. 1981). This holding, if followed by other courts, may allow the President to exempt an operational range from RCRA's requirements applicable to a waste treatment, storage or disposal facility, however, the one-year exemptions might not be broad enough to protect the military training activity itself from regulation. However, there would first be a substantial question to be answered about whether an operational range or a portion thereof should or could be considered a "solid waste management facility" before the exemption could be considered for application.

therefore has quite limited ability to afford DoD regulatory relief under RCRA. Similarly, the broad statutory definition of "release" under CERCLA may also limit EPA's ability to afford DoD regulatory relief. And the President's site-specific, annually renewable waiver (under a paramount national interest standard in RCRA and a national security standard in CERCLA) is inapt for the reasons discussed above.

Although its environmental impacts are negligible, the effect of this proposal on readiness could be profound. Environmental plaintiffs filed suit at Fort Richardson, Alaska, alleging violations of CERCLA and an Alaska anti-pollution law they argued was applicable under RCRA.[4] If successful, plaintiffs could potentially force remediation of the Eagle River Flats impact area and preclude live-fire training at the only mortar and artillery impact area at Fort Richardson, dramatically degrading readiness of the 172nd Infantry Brigade, the largest infantry brigade in the Army. Most important is that, successful, the Fort Richardson litigation could set a precedent fundamentally affecting military training and testing at virtually every test and training range in the U.S.

Some critics of the RRPI have argued that such citizen suits are not a sufficient justification to go forward with the RCRA and CERCLA provisions. We believe, however, that the risks inherent in these lawsuits provide ample justification for the RRPI proposals. This is particularly true because the proposals merely clarify longstanding regulatory practice and understanding of the Department, the Environmental Protection Agency, and the States. Together, the provisions simply confirm that military munitions are subject to EPA's 1997 Military Munitions Rule while on range, and that cleanup of operational ranges is not required so long as the material stays on range.

As to the magnitude of the risk presented by litigation, the Department strongly believes it is ill-advised to wait until a critical readiness resource is actually adversely impacted, and then, and only then, seek relief through legislation. The Department has prior experience with such an approach. In *Center for Biological Diversity (CBD) v. Pirie*[5] CBD filed suit to prevent the use by the United States military of live fire training exercises on the island of Farallon de Medinilla (FDM) because, CBD alleged, such exercises harmed migratory birds and the U.S. Navy did not have a permit. The plaintiffs alleged this was a violation of the Migratory Bird Treaty Act (MBTA).[6] This was a novel theory, and prior to this suit, neither the U.S. Fish and Wildlife Service nor the Department of Defense believed that the MBTA required such permits for the limited number of migratory birds that might be inadvertently harmed from the use of munitions in testing and training. Nevertheless, on March 13, 2002, the Court granted summary judgment in favor of plaintiffs, holding that the Navy's activities on FDM violated the MBTA, and on May 1, 2002, the court halted all military training exercises at FDM that could potentially wound or kill migratory birds. Although in the FDM case the order was stayed by the appellate court, allowing Congress to respond legislatively before training was curtailed, it seems more reasonable to clarify recognized ambiguities in the law before an injunction is issued that requires a hurried legislative response.

Stakeholder Concerns.

The Department has actively reached out to stakeholders, listened to their concerns regarding our proposals, and addressed those concerns by modifying and clarifying our RCRA and CERCLA proposals. The result has been an evolution in our proposals that we believe provides essential protections for munitions related readiness activities on our operational ranges and ensures protection of health and the environment. Over the past three years, we have worked with EPA to make it absolutely clear that nothing in our proposal alters EPA's existing protective authority

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[4] In their original complaint, the Plaintiffs alleged that an Alaska anti-pollution statute was made operative against the federal government because of the broad waiver of federal sovereign immunity found in RCRA. The RCRA waiver subjects Federal agencies to "all" state or local laws and regulations "respecting the control and abatement of solid waste or hazardous waste disposal and management." 42 U.S.C. 6961(a). The RCRA count in the case was voluntarily dismissed on August 28, 2003. However, counts alleging CERCLA and Clean Water Act violations are pending a ruling on Plaintiff's motion for summary judgment. *Alaska Community Action on Toxics v. Army,* Complaint for Declaratory and Injunctive Relief, No. A02-0083CV (D. Alaska, 2002). In addition to the claims regarding Fort Richardson, the United States has been repeatedly sued regarding Navy operations at the range on the island of Vieques, Puerto Rico. Plaintiffs claimed that use of ordnance on an active range was an activity regulated by RCRA. While no suit has to date shut down range operations, it seems unnecessary and unwise to wait for or risk an adverse ruling when minor adjustments to RCRA and CERCLA will clarify that it was not Congress' intent to subject the use of munitions for their intended purpose on operational ranges to those laws.

[5] 201 F. Supp. 2d 113 (D. D.C. 2002).

[6] 16 U.S.C. § 703 *et seq.*

in section 106 of the Superfund law. In our proposal, EPA retains the authority to take any action necessary to prevent endangerment of public health or the environment in the event such a risk arose as a result of use of munitions on an operational range. Further, the proposed amendments were modified to clarify that they do not affect our cleanup obligations on ranges that cease to be operational. This was in response to the misapprehension by some that the proposal could apply to closed ranges. To make this latter point even clearer, after submitting last year's proposal to Congress, EPA and DoD continued to refine the RCRA and CERCLA elements of the RRPI. This collaboration produced a further revision designed to underscore that our proposals have no effect whatsoever on our legal obligations with respect to the cleanup of closed bases or ranges or on bases or ranges that close in the future.

In the summer and fall of 2003, we presented the language we had developed in cooperation with EPA to a broad range of stakeholders for their consideration. In this regard, the Department consulted with State environmental regulators and working in consultation, we developed the language of the Department's current RCRA and CERCLA proposals. We have used this language in discussions with individual state representatives and at meetings of associations of state officials, such as the Environmental Council of the States, the National Governors' Association, the National Association of Attorneys General, and the Conference of Western Attorneys General. We believe this language is a very clear expression of the Department's very narrow intent to protect only readiness activities on our operational ranges, leaving intact state and federal authorities to protect health and the environment. This language expressly provides that its provisions do not apply to munitions that have been deposited on an operational range that subsequently ceases to be operational. Therefore, the provision provides no protection to munitions on closed, transferred, or transferring ranges and Formerly Used Defense Sites (FUDS). Further, it also eliminates the "CERCLA preference" which had been included in previous versions. Earlier drafts of the RCRA provision provided that munitions or constituents that migrate off range are considered a waste, but only if they are not addressed under CERCLA. In response to the criticism that this provision went beyond DoD's intent to protect our readiness activities on ranges, the Department deleted it from the current discussion draft.

The Department of Defense's goal is to manage and operate ranges to support their long-term viability and utility to meet the National defense mission while protecting human health and the environment. DoD has implemented, and continues to refine, a comprehensive operational range sustainment program. To make sure that this program is viable, the Department has established a suite of policies and directives that require installations to assess the environmental impacts of munitions use on ranges, including the potential off-range migration of munitions constituents, and begin any necessary remediation by 2008. The overarching policy, DoD Directive 3200.15, Sustainment of Ranges and Operating Areas, signed in January of 2003, requires the consideration of all aspects of a range's lifecycle (development, use and closure) when developing a new range. It requires multi-tiered (e.g., national, regional and local) coordination and outreach programs that promote sustainment of ranges, The directive ensures that inventories of training ranges are completed, updated every five years, and maintained in a Geographical Information System readily accessible by installation and range decision-makers.

We have assembled, in response to section 366 of the FY 2003 National Defense Authorization Act, a comprehensive inventory of operational ranges. The inventory will be refined and updated annually in accordance with section 366. In addition, the FY 2004 Defense Planning Guidance requires the military departments to "assess potential hazards from off-range migration of munitions constituents" and to begin remediation by FY 2008. This reinforces the January 4, 2002, letter from the Deputy Under Secretary of Defense (Installations and Environment) that directed the Military Departments to develop "a strategy to assess the environmental impacts of munitions use on operational ranges." Further, DoD Directive 4715.11 "Environmental and Explosives Safety Management on Department of Defense Active and Inactive Ranges Within the United States," August 19, 1999, states that it is DoD policy to "minimize both potential explosives hazards and harmful environmental impacts" and requires the Military Departments and other DoD components to "respond to a release of munitions constituents to off-range areas, when such a release poses an imminent and substantial threat to human health and the environment."

The Department has not only developed the necessary policies to assess and respond to environmental issues on operational ranges, but the Military Departments are actively executing the policy guidance to ensure our ranges are assessed and remediation, where necessary, is initiated. In FY 2003, the Navy began active Range

Condition Assessments (RCAs) at its SOCAL (California), Fallon (Nevada), and VACAPES (Naval Air Station (NAS) Oceana and Dam Neck in Virginia, and Dare County in North Carolina) ranges. It will start RCAs in FY 2004 for NAS Jacksonville (Florida) and its Whidbey Complex (Washington, Oregon, California). The Air Force is conducting investigation and sampling, initially focusing on test and training ranges, where the majority of military munitions uses occur. It will spend $1 million in FY 2004 to sample at Warren Grove range, New Jersey; Eglin Air Force Base range, Florida; Poinsette range, South Carolina; and Goldwater range, Arizona. It also has an additional $1 million programmed for follow-on assessments in FY 2004. The Army has completed Regional Range Studies at Camp Shelby, Mississippi, and Jefferson Proving Ground, Indiana. It has completed fieldwork at Fort Bliss, Texas, and Fort Polk, Louisiana, and will complete fieldwork at Aberdeen Proving Ground, Maryland, by Spring of 2004. In Fall of 2004 through early 2005, the Army will begin assessments at Ft Sill, Oklahoma; Fort Drum, New York; and Fort Riley, Kansas. Finally, the Army has conducted range characterization activities regarding the potential for contamination from munitions residues at 17 ranges throughout the United States, assessing the different types of ranges used by the Army. These assessment activities, covering a broad cross-section of ranges, will give DoD the data it needs to focus on locations where remedial efforts may be necessary.

Lastly, DoD is actively engaged in a comprehensive research, development, test, and evaluation program through the Strategic Environmental Research and Development Program (SERDP) and Environmental Security Technology Certification Program (ESTCP) to address constituents that may contaminate groundwater. The development of remediation technologies within SERDP/ESTCP began many years ago but was focused on TNT contamination at ammunition plants. This work has been expanded in scope to include other constituents and range-specific conditions. The bulk of the work has been focused on remediating groundwater aquifers, but new work concerning the wellhead treatment of perchlorate in drinking water is planned for FY 2005.

The Department now has two essential matching elements in place—policy and budgeting guidance. Both elements have the same requirements—inventories, management plans, assessment/mitigations (where appropriate) of off-range migrations of munitions constituents, and outreach to stakeholders to promote transparency in our range management efforts.

Contractor and Off-Range Liability.

As we have mentioned, the Military Munitions Rule adopted by EPA under the prior Administration already provides that munitions used for training military personnel or explosives and munitions emergency response specialists, or for research, development, test, and evaluation (RDT&E) of military munitions, are not solid waste for purposes of RCRA. However, in the existing Military Munitions Rule, these exclusions are not limited to munitions training or RDT&E activities that occur on operational ranges; in fact, they apply to such activities anywhere they occur, on or off such ranges.[7] Nevertheless, our Readiness and Range Preservation Initiative is not intended to codify all the circumstances in which munitions use is properly excluded from RCRA regulation. Rather, it is intended to address one emerging threat to our operational ranges. Accordingly, the current administration provision makes it clear that only DoD's readiness activities on DoD operational ranges are covered by the proposals. The activities of DoD contractors, taking place at non-operational ranges, while they may be covered by the Military Munitions Rule, will not be covered by the RRPI's RCRA or CERCLA provisions.

First, this year's provisions exclude from the definition of "solid waste" only military munitions that are used and remain on an operational range, thereby clarifying

[7] Sec. 266.202 of the Military Munitions Rule provides as follows:

(a) A military munition is not a solid waste when:

(1) Used for its intended purpose, including:

(i) Use in training military personnel or explosives and munitions emergency response specialists (including training in proper destruction of unused propellant or other munitions); or

(ii) Use in research, development, testing, and evaluation of military munitions, weapons, or weapon systems; or

(iii) Recovery, collection, and on-range destruction of unexploded ordnance and munitions fragments during range clearance activities at active or inactive ranges. However, "use for intended purpose" does not include the on-range disposal or burial of unexploded ordnance and contaminants when the burial is not a result of product use.

(2) An unused munition, or component thereof, is being repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subjected to materials recovery activities, unless such activities involve use constituting disposal as defined in 40 CFR 261.2(c)(1), or burning for energy recovery as defined in 40 CFR 261.2(c)(2).

that these provisions, unlike their analogues in the Military Munitions Rule, do not apply to such activities outside operational ranges. Second, as part of the National Defense Authorization Act for FY 2004, Congress enacted a definition of "operational range."[8] This definition, explicitly states that operational ranges must be under the jurisdiction, custody, or control of the Department. This requirement applies whether the operational range is active or inactive. This definition addresses any possible concern that the Department's RCRA/CERCLA RRPI provision might be read to apply to ranges controlled by our contractors. Third, the RCRA and CERCLA provisions of the RRPI apply not to all activities on operational ranges, but only to the use of "military munitions." In order to clarify that this is not a "wholesale exemption for explosives and munitions" from the hazardous waste requirements of RCRA, as has been suggested by some critics of earlier versions of the proposal,[9] we also proposed a definition of "military munitions," which was enacted in the FY 2004 Defense Authorization Act. This definition provides that military munitions include only "ammunition products produced for or used by the armed forces for national defense and security . . ."[10] Therefore, before the protections of our RRPI provisions are triggered by DoD activities on a range, the range must first be an operational range, which would not include contractor controlled facilities, and the activity must involve military munitions, which would exclude wastes or byproducts of any contractor activity that does not involve a munition or explosive that is being produced specifically for the armed forces.

Perchlorate and RRPI.

We would also like to take the opportunity to address some other concerns about these provisions that in DoD's view do not accurately characterize the effects of the legislation. First, some observers have expressed concern that our RRPI legislation could intentionally or unintentionally affect our financial liability or cleanup responsibilities with respect to perchlorate. Nothing in either RRPI or our defense authorization as a whole would affect our financial, cleanup, or operational obligations with respect to perchlorate.

- As discussed above, nothing in our legislative program alters the financial, cleanup, or operational responsibilities of our contractors, or of DoD with respect to our contractors, either regarding perchlorate or any other chemical.
- Nothing in our legislative program alters our financial, cleanup, or operational responsibilities with respect to our closed ranges, Formerly Used Defense Sites, or ranges that may close in the future, either regarding perchlorate or any other chemical.
- Nothing in our legislative program affects the Safe Drinking Water Act, which provides that EPA "upon receipt of information that a contaminant which is present *or is likely* to enter a public water system or an underground source of drinking water may present an imminent and substantial endangerment to the health of persons . . . may take such actions as [EPA] may deem necessary to protect the health of such persons," enforceable by civil penalties of up to $15,000 a day. Because this Safe Drinking Water Act authority is not limited to CERCLA "releases" or off-range migration, it clearly empowers EPA to issue orders to address endangerment either on-range or off-range, and to address possible contamination before it migrates off-range. EPA used this Safe Drinking Water order authority to impose a cease-fire on the Massachusetts Military Reservation to address groundwater contamination from perchlorate, and nothing in our proposal would alter the events that have played out there
- DoD is also committed to being proactive in addressing perchlorate. On November 13, 2002 DoD issued a perchlorate assessment policy authorizing assessment "if there is a reasonable basis to suspect both a potential presence of perchlorate and a pathway on [ ] installation[s] where it could threaten public health." That policy was superseded on September 29, 2003. The new "Interim Policy on Perchlorate Sampling" charges DoD components to continue their efforts to consolidate existing perchlorate occurrence data at active or closed installations, nonoperational ranges, and FUDs, and to program resources to sample for per-

[8] Subsection 1042(a) of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 (Nov. 24, 2003), added several general definitions to section 101(e) of title 10, United States Code. "Operational range" is defined as "a range that is under the jurisdiction, custody, or control of the Secretary of Defense and (A) that is used for range activities, or (B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

[9] *Impact of Military Training on the Environment: Hearing Before the Committee on Environment and Public Works,* 108th Cong. (Apr. 2, 2003) (written testimony of Mr. Daniel S. Miller, First Assistant Attorney General, Colorado Department of Law).

[10] Pub. L. 108-136, § 1042(a) (2003).

chlorate at previously unexamined sites where there is a reasonable likelihood that perchlorate may have been released by DoD activities and a complete pathway for human exposure. Further, for operational ranges, the policy "requires the Military Departments to include perchlorate in future range assessments," and to assess for the potential for off-range migration.

Delayed Response to Spreading Contamination.

Some commentators have expressed concern that our RRPI proposal would create a legal regime that barred regulators from addressing contamination until it reached the fence lines of our ranges, or that it at least reflects a DoD policy to defer any action until that point. As the above discussion makes clear, EPA's continuing authority under the Safe Drinking Water Act to prevent *likely* contamination clearly empowers the Agency to act before contamination leaves DoD ranges. In addition, nothing in our legislative program affects EPA's authority under Section 106 of CERCLA to "issu[e] such orders as may be necessary to protect public health and welfare and the environment" whenever it "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual *or threatened* release of a hazardous substance from a facility." Such orders are judicially enforceable. Because EPA's sweeping section 106 authority covers not only actual but "threatened release," our proposal would therefore clearly enable EPA to address groundwater contamination *before* the contamination leaves DoD land—which is also the objective of DoD's existing management policies. Section 106 would also clearly cover on-range threats. Finally, States and citizens exercising RCRA authority under our RRPI RCRA provision addressing off-range migration could potentially use that authority to enforce on-range measures necessary to redress the migration where appropriate. Under RRPI, our range fence lines would not become walls excluding regulatory action either before or after off-range migration occurred.

Finally, it is most definitely not DoD policy to defer action on groundwater contamination until it reaches the fence lines of our operational ranges, when it will be far more difficult and expensive to address. In this regard, we believe it is extremely important to emphasize that DoD has developed its range sustainment policies based on the assumption that new ranges are not likely to be acquired and that we must, therefore, actively sustain the operational range resources we have. As such, DoD is aggressively executing the suite of policies mentioned earlier to assess and address potential contamination from military munitions use on operational ranges. DoD is taking affirmative steps to ensure that contamination does not present a risk to groundwater resources and to initiate response actions before contamination migrates from the range.

Active vs. Inactive Ranges.

Some commentators have criticized the application of our RCRA and CERCLA provisions to both the active and the inactive categories of operational ranges, suggesting that it will motivate DoD to retain ranges that are never used and should be closed as nominally "inactive" ranges to defer cleanup costs. This policy question was first addressed in EPA's 1997 Military Munitions Rule (40 CFR § 266.201), which established a three-part test designed to prevent such manipulation: "inactive ranges" must be "still under military control and considered by the military to be potential range area, and . . . [must] not [have] been put to a new use that is incompatible with range activities." This test was enacted into statutory law by subsection 1042(e) of the National Defense Authorization Act for Fiscal Year 2004. [11]

We believe the statutory definition provides appropriate guidance and limitations to DoD in characterizing ranges as "inactive" but still "operational." Our range sustainment policy initiative is based on the recognition that DoD will not easily acquire new range lands in the future, even though modern precision munitions and weapons systems, with their longer ranges, require more training areas. Existing range lands must, therefore, be appropriately but not excessively husbanded for future needs. DoD believes that the policy embodied in the Military Munitions Rule and the new statutory definition strikes the correct balance.

Further, in response to the requirements of Section 366 of the FY 2003 National Defense Authorization Act, DoD has developed an inventory of operational ranges. This inventory has been transmitted to Congress. The inventory will be refined and updated annually in accordance with section 366 for fiscal years 2005 through 2008. In addition, Department of Defense Directive 3200.15, "Sustainment of Ranges and Operating Areas (OPAREAs)," 10 January 2003, requires the Department to "identify current and future operational air, ground, sea and/or undersea, space, and fre-

[11] Pub. L. 108-136 (2003), *supra* note 14.

quency spectrum range and OPAREA requirements necessary to meet test and training needs" and ensure that range inventories are updated every five years. This review will ensure that even after the Department's obligation for reporting on operational ranges under section 366 expires, the Department will continue to verify the necessity of retaining operational range areas.

DoD is also taking action to inventory ranges that are no longer operational. In response to requirements in Section 311 of the Fiscal Year 2002 National Defense Authorization Act, DoD has assembled and made publicly available an inventory of former ranges and other areas which may require a munitions response (i.e., cleanup). This inventory was contained in the Department's Environmental Restoration Program Annual Report to Congress. We are now working with EPA, other Federal Land Managers, the States, and affected Indian tribes and Alaska native entities to ensure this list is as comprehensive as possible. This list includes Formerly Used Defense Sites, BRAC installations, and former operational ranges on active installations. The inventory will be updated annually and submitted with the Annual Report to Congress. Together, the Section 311 and Section 366 inventories of former and operational ranges will account for all areas for which concerns have been expressed.

Clean Air Act General Conformity Amendment

Our Clean Air Act amendment is unchanged from last year. The legislation would provide more flexibility for the Defense Department to ensure that emissions from its military training and testing are consistent with State Implementation Plans under the Clean Air Act by allowing DoD and the states a slightly longer period to accommodate or offset emissions from military readiness activities.

The Clean Air Act's "general conformity" requirement, applicable only to federal agencies, has repeatedly threatened deployment of new weapons systems and base closure/realignment despite the fact that relatively minor levels of emissions were involved.

- The planned realignment of F-14s from NAS Miramar to NAS Lemoore in California would only have been possible because of the fortuity that neighboring Castle Air Force Base in the same airshed had closed, thereby creating offsets.
- The same fortuity enabled the homebasing of new F/A-18 E/Fs at NAS Lemoore.
- The realignment of F/A-18 C/Ds from Cecil Field, Florida, to NAS Oceana in Virginia was made possible only by the fortuity that Virginia was in the midst of revising its Implementation Plan and was able to accommodate the new emissions. The Hampton Roads area in which Oceana is located will likely impose more stringent limits on ozone in the future, thus reducing the state's flexibility.

As these near-misses demonstrate, under the existing requirement there is limited flexibility to accommodate readiness needs, and DoD is barred from even beginning to take readiness actions until the requirement is satisfied.

Our proposal does not exempt DoD from conforming to applicable requirements; it merely allows DoD more time—a three-year period—to find offsetting reductions. And this period does not apply to "any activities," but rather to the narrow category of military readiness activities, which characteristically generate relatively small amounts of emissions—typically less than 0.5% of total emissions in air regions.

The Clean Air Act permits the President to issue renewable one-year waivers for individual federal sources upon a paramount national interest finding, or to issue renewable three-year regulations waiving the Act's requirements for weaponry, aircraft, vehicles, or other uniquely military equipment upon a paramount national interest finding. Use of such time-limited authorities in the context of activities that are (a) ongoing indefinitely, and (b) largely cumulative in effect would be difficult under a paramount interest standard, and would require needless revisiting of the issue annually or triennially.

This provision is vitally needed to protect readiness. The more efficient and powerful engines that are being designed and built for virtually all new weapons systems will burn hotter and therefore emit more NOx than the legacy systems they are replacing, even though they will also typically emit lower levels of VOCs and CO.

Conclusion

In closing Mr. Chairman, let us emphasize that modern warfare is a "come as you are" affair. There is no time to get ready. We must be prepared to defend our country wherever and whenever necessary. While we want to train as we fight, in reality

our soldiers, sailors, airmen and Marines fight as they train. The consequences for them, and therefore for all of us, could not be more momentous.

DoD is committed to sustaining U.S. test and training capabilities in a manner that fully satisfies that military readiness mission while also continuing to provide exemplary stewardship of the lands and natural resources in our trust.

Mr. Chairman, we sincerely appreciate your support on these important readiness issues. We look forward to working with you and this Committee on our Readiness and Range Preservation legislation.

Thank you.

Mr. HALL. Mr. DuBois, we thank you and thank you for your service to this country. It is my understanding this is your second tour of duty under Secretary Rumsfeld. We thank you for this presentation and for the time you have spent and for the time you will spend.

At this time the Chair would recognize Ben Cohen who is Chief Deputy General Counsel for DOD. He was for a long time the Chief of Staff for Congressman Cox on the Policy Committee and no stranger to this committee and to this Congress. We thank you for your presence here.

Also, I will recognize Colonel Hoeftert who is also here in a position of support. He is the Director of Army Environmental Programs, the Department of the Army. At this time for testimony I recognize General Louis Weber who is Director of Training and we recognize you at this time for 5 minutes and we won't be pressing about holding you to 5 minutes. Thank you.

STATEMENT OF LOUIS W. WEBER

Mr. WEBER. Thank you, Mr. Chairman, Chairman Hall and Chairman Gillmor, members of the subcommittee. Thank you for the opportunity to speak to you today about training and readiness for the Army and some of the important training challenges that we face.

The Army, as we all know, is heavily engaged today on a global basis in the war on terrorism and also the deterrent force elsewhere. We are currently transforming toward a more joint and expeditionary force. In the future we will be better able to respond more quickly to the defense needs of the Nation.

Active, Army Reserve and National Guard soldiers are deployed around the world as you all well know. We have a continued commitment to peacekeeping operations in the Balkans and Haiti. We have a continued deterrent presence in South Korea. Solders in all these locations and others throughout the world face real threats on a daily basis.

Other units and soldiers are "resetting." After reploying from current operations they are beginning transforming new organizations and preparing for future combat operations potentially. Their readiness is dependent on training.

The exceptional challenges currently faced by our soldiers in Iraq clearly indicate the uncompromising nature of combat and the absolute need to provide the best possible training for our solders. The best way to achieve the required level of individual and collective competency is through repetitive, challenging, and as realistic training as we can provide. We conduct live-fire training focused on weapons firing under realistic combat conditions to the greatest extent possible.

Conditions in Iraq have led us to change many live-fire tasks and events, and to increase the amount of live-fire training not only for our combat arms soldiers, but more importantly for our soldiers in our combat support and combat service support units.

Maneuver training involves practicing combat skills as a team. Because of the ever increasing effective range of our weapons, we must practice maneuver over large land areas where we employ battalions as well as brigade training techniques. Other key maneuver skills essential today include conducting operations in an urban situation requiring very specialized training techniques and facilities.

To support our live-fire and maneuver training requirements, we manage an extensive range infrastructure that allows firing the full array of our weapons systems impact areas into which these firing ranges are oriented, maneuver space, and specialized training ranges such as an extensive array of military operations on urban terrain or MOUT facilities, as we call them, that in the aggregated laws to train in various conditions to enhance our unit readiness.

The Army's transformation that we are currently undergoing involves the creation of even more combat units, higher levels of tactical skills for all soldiers, and the appointment of joint and Army weapon systems that will generate a larger operational training footprint.

There is a great demand on our existing ranges and training land. The Department of Defense in fiscal year 2005 Readiness and Range Preservation Initiative (RRPI) directly addresses the Army's training requirements.

The RCRA and the CERCLA proposals will continue to ensure that all of our soldiers will be able to continue to carry out required live-fire training and using weapons in ways needed to maintain the training of the Army, as well as properly prepared units for deployment.

These proposals clarify that certain provisions of these laws cannot be used to shut down live-fire training on operational ranges. Without these provisions, the Army continues to be vulnerable to misapplication of certain environmental laws and citizen suits that could potentially disrupt or shut down our training. These prospects threaten training and, therefore, the readiness of our men and women in uniform.

The Clean Air Act provision will allow us to train units without restricting live fire or maneuver training. This provision allows us, as well as the States, a slightly longer time to offset emissions for military readiness activities. We believe without these provisions training of Army units could be diminished.

We are committed to providing the best training for our soldiers, and to intensively managing our ranges and training land through the Sustainable Range Program that I direct in cooperation with the Army Assistant Chief of Staff for Installation Management. This range management program ensures that our ranges are capable of supporting our training mission, that they are sustainable for the long-term, and are environmentally safe.

My investment in training land management is over $50 million per year in a program called Integrated Training Area Manage-

ment (ITAM). ITAM involves the effective integration of stewardship principles for training with conservation management practices to ensure that the Army's training lands remain viable to support future training mission requirements. This is in addition to the Army's overall environmental stewardship investment of $1.5 billion annually that covers Pollution Prevention, Restoration, Conservation, Compliance, and Technology.

The Army invests both energy and effort in the environmental management and sustainability of its training land assets. We are committed to environmental leadership and stewardship and our soldiers, as citizens, are concerned about their environment, our personal concerns but also for our families.

In closing, I would ask you to consider a few basic facts: We have just over 1 million soldiers in uniform in the Active Army, Army Reserve and Army National Guard who are committed to protecting and defending the national interests of the United States. We must train those soldiers to protect and defend our Nation and to prepared them for the uncompromising conditions of combat. Today, unfortunately, combat is a certainty for most of them.

We constantly strive to balance our training requirements against protecting our environment in order to generate and train the finest Army in the world. Thank you, Mr. Chairman, for the opportunity to be here and your support, as well as the committee's support to America's Army. I look forward to answering your questions.

[The prepared statement of Louis W. Weber follows:]

PREPARED STATEMENT OF BRIGADIER GENERAL LOUIS W. WEBER, DIRECTOR OF ARMY TRAINING (G3)

Chairman Gillmor, Chairman Hall, Congressman Pallone, Congressman Boucher, and distinguished members of the Committees, thank you for this opportunity to testify before you on this important issue.

Military Training

The Army is heavily engaged on a global basis in the war on terrorism as a deterrent to war. We are also transforming toward a more joint and expeditionary force that will be better able to respond to the defense needs of the Nation. Active, Army Reserve and Army National Guard soldiers are deployed around the world. We have a continued commitment to peacekeeping in the Balkans and Haiti. We have a continued deterrent presence in South Korea. Soldiers in all these locations face real threats on a daily basis. Other units and soldiers are "resetting" from current operations, are transforming, and are preparing for future operations. All of this is dependent on training.

The exceptional challenges currently faced by our Soldiers in Iraq clearly indicate the uncompromising nature of combat and the absolute need to provide the best possible training for our soldiers.

The best way to achieve the required level of individual and collective competency is through repetitive, challenging, and as realistic training as we can provide. We conduct live-fire training focused on weapons firing under realistic combat conditions. Conditions in Iraq are requiring us to change many live fire tasks and events, and to increase the amount of live fire training for not only our combat arms soldiers, but also for soldiers in our combat support and combat service support units. Maneuver training involves practicing combat skills as a team. Because of the effective range of our weapons systems, we must practice maneuver over large land areas where we employ battalion as well as brigade force-on-force training techniques. Another key maneuver skill essential today is conducting operations in an urban situation requiring very specialized training techniques and facilities.

To support our live-fire and maneuver training requirements, we manage an extensive range infrastructure consisting of approximately 10,000 operational ranges on over 500 installations and sites. These cover some 16 million acres of land in all the states and territories. These training areas provide fixed-firing ranges for the

full array of weapons systems, impact areas onto which firing ranges are oriented, maneuver space, and specialized training ranges, such as our extensive array of Military Operations on Urban Terrain, or MOUT, training facilities.

The Army's Transformation involves increasingly greater numbers of combat units, higher levels of tactical skills for all Soldiers, and new weapon systems that will generate a larger operational and training footprint than currently available. Driven largely by increased mobility and the range of new weapon systems, Transformation will place greater demand on our existing ranges and training land. Coupled with a requirement for proficiency across a broader range of the spectrum of military capabilities, the demand for ranges and training land is straining our available assets and training capacities. DoD, the Administration, and Congress must improve the processes by which we integrate the realistic training needs required to maintain readiness and the preservation of the land and resources America entrusts to us.

We are committed to providing the best training for our Soldiers, and to intensively managing our ranges and training land through the Sustainable Range Program that I direct in cooperation with the Army Assistant Chief of Staff for Installation Management. This range management program ensures that our ranges are capable of supporting our training mission, that they are sustainable for the long-term, and that they pose no danger to our fellow citizens.

My investment in training land management is over $50M per year in a program called Integrated Training Area Management (ITAM). ITAM involves the effective integration of stewardship principles with conservation management practices applicable to lands used for training.

This is in addition to the Army's overall environmental stewardship investment of $1.5 Billion annually that covers Pollution Prevention, Restoration, Conservation, Compliance, and Technology.

As an example, this year the Army invested $16.4 Million in mitigation efforts to recover the desert tortoise at the National Training Center at Fort Irwin California. The Army's total investment in desert tortoise recovery will be approximately $70 Million, with a per capita investment of between $36,000 and $80,000 per tortoise.

The Army invests both energy and effort in the environmental management and sustainability of its training land assets. The Army is committed to environmental stewardship and our Soldiers, as citizens, are concerned about their environment. We recognize the importance of stewardship responsibilities in sustaining the lands and resources entrusted to us.

Legislative Proposals

The Administration's Readiness and Range Preservation Initiative (RRPI) proposals affecting the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are requests to Congress for common sense clarifications to ensure that these laws are applied as intended and that we preserve military training vital to national defense and the flexibility to swiftly adapt to our changing doctrinal training requirements. A proposed amendment to the Clean Air Act (CAA) would provide the Army with the flexibility needed to base and operate military weapons systems and structure forces, while ensuring that compliance, and not an exemption from compliance, is achieved.

RCRA and CERCLA

The RCRA and CERCLA proposals clarify that certain provisions of these laws cannot be used to shut down training on operational ranges. These proposals reflect existing policies of the Environmental Protection Agency and state environmental regulatory agencies with regard to our operational range activities and remove ambiguity currently in the law. These clarifications will help protect the armed forces from the present threat of lawsuits that seek to extend and, in our view, misapply the requirements of these laws to military live-fire training, with adverse impacts on national defense.

Simply put, the RRPI proposals seek to confirm that the normal and expected use or presence of military munitions on operational ranges does not, alone, create RCRA statutory "solid waste" or a CERCLA "release." These provisions will not apply to private or contractor sites, because, by the proposals terms, they apply only to areas under the jurisdiction, custody and control of the Department of Defense. Further, the provisions ensure we cannot avoid our legal duties and responsibilities by simply labeling an area as an "operational range." Our operational ranges, and thus our legal responsibilities, are defined by the activities conducted on those ranges. In order for an area to qualify as an operational range, it must be used for range activities (research, development, testing, and evaluation of military muni-

tions, other ordnance, and weapons systems; or the training of military personnel in the use and handling of military munitions, other ordnance, and weapons systems). If the range is not currently being used for such activities, it may still be considered an "operational range" but only if it has not been converted to a use incompatible with range activities. By definition, therefore, lands that were once used as ranges, even if they are still under the control of the military, are no longer operational ranges if put to an incompatible use and consequently would not enjoy any protection under the RRPI's provisions. Any former ranges that have passed into private ownership would not be covered by the RRPI's provisions. Once a range ceases to be an "operational range," it would lose the protections of the RRPI.

Under our proposal, our responsibility to address munitions that land off our operational ranges is unchanged from current law. Additionally, state and federal regulatory agencies retain authority to address an imminent and substantial endangerment to the public health or welfare or the environment, whether the threat is on or off an operational range. Neither of DoD's proposals affect DoD's responsibilities on former ranges or other defense sites. These provisions do not seek to avoid the military's responsibilities to cleanup formerly used defense sites or to protect the environment from potentially harmful impacts. Rather, they seek to clarify and affirm existing policies and ensure that operational ranges, set aside to allow live-fire training, remain available to the forces that need to train for combat.

Under the current statutory language, those seeking to halt military training can—and have—argued that CERCLA and RCRA require the cessation of live-fire on operational ranges pending investigation and potential cleanup of munitions and munitions-constituents. Obviously, if they were successful, this would make it nearly impossible for the Army to fulfill our national defense mission.

Some have characterized the administration's request to clarify the intent of Congress with regard to the application of certain environmental laws to military training operations as a "roll back" of environmental laws. Such characterizations are entirely unfounded. We comply with, and we will continue to comply with, all applicable environmental laws and regulations to the extent required by law. The RCRA and CERCLA proposals we support today are narrowly tailored to address specific concerns—they are not wholesale exemptions. Indeed, they clarify and confirm regulatory practices and policies that have been in place for years, but are now being challenged in the courts. Historically, environmental regulatory agencies have recognized that RCRA and CERCLA were not intended to apply to live-fire training and testing activities on operational ranges. In fact, these operational ranges were set aside precisely for these types of activities, activities that are essential to national defense. The RRPI provisions seek to enact this regulatory practice and prevent expanded application of these laws beyond Congress' original intent. We seek a clarification of Congressional intent that will provide certainty to regulators and the courts. Such clarification will allow the military to maintain required levels of training and readiness proficiencies while properly managing the resources entrusted to us by our Nation.

While it is possible under some of the environmental statutes to seek national security exemptions—most often at the Presidential level—such exemptions are narrowly tailored to a specific site, regarding a specific issue, and for a limited time (e.g., RCRA provides for a 1 year Presidential exemption, renewable thereafter). The readiness activities we are concerned with are not "one-time" events. They are part of the day-to-day training regimens of our servicemen and women, and it is simply unrealistic to expect the military to repeatedly request exemptions for training that must occur on a regular basis —a practice that would be inefficient and ineffective over time. Use of these exemptions is, in fact, the opposite of what we seek. We believe our use of operational ranges is consistent with current law and therefore needs no exemption. We seek only clarification of current law and policy to ensure they are not extended in an unwarranted fashion in the courts. The use of existing statutory exemptions for range activities would imply we are unable or unwilling to comply with the law, which is most certainly not the case.

In our view, a clarification of the statutory framework applicable to military testing and training operations is the appropriate manner in which to address this issue. Although, as we've noted, existing regulatory policies are consistent with our RCRA and CERCLA proposal, the Department of Defense, as well as the regulatory agencies themselves, are vulnerable to citizen suits seeking to impose an inflexible interpretation of these and other environmental laws to military munitions and munitions constituents on operational ranges.

The Army at Fort Richardson, AK, is currently engaged in such a lawsuit in which the private party plaintiffs alleged violations of CERCLA and RCRA associated with firing munitions at Eagle River Flats (ERF) range. The court challenge implies that CERCLA should be applied to the act of firing munitions onto an oper-

ational range and that the continued presence of those munitions on the range constitutes a release of hazardous substances requiring reporting, investigation, characterization, and remediation. If the court agrees with the plaintiff, then live-fire training and testing operations at ERF, and potentially every other operational range (more than 500 sites), could be subject to CERCLA response requirements. Live-fire training during the remediation would likely be impossible, and the only mortar and artillery impact area at Fort Richardson would be unavailable for training.

The RCRA allegation in the Fort Richardson case was that munitions fired into ERF—an operational range—were subject to state pollution abatement requirements. In their original complaint, the plaintiffs alleged that an Alaska anti-pollution statute was made operative against the federal government because of the broad waiver of federal sovereign immunity found in RCRA. In the Fort Richardson case, the RCRA count has since been voluntarily dismissed; however, the United States has also been sued under RCRA regarding the range on the island of Vieques, Puerto Rico, where, in an effort to shut range operations down, plaintiffs claimed that use of ordnance on an active range was an activity regulated by RCRA. If munitions used for their intended purpose are considered statutory solid waste under RCRA, the Armed Forces could be forced to cease firing activities on operational ranges and seek operating permits and perform corrective action or remediation of ranges while they are still operational.

While no suit has to date shut down range operations, we believe it is unwise to risk an adverse ruling that could have tremendously significant adverse consequences to an activity that is critical to military readiness. An adverse ruling in the Fort Richardson or Vieques cases, along with the potential for further lawsuits, could compel EPA and state regulators throughout the U.S. to enforce the same standards on other operational ranges. Live-fire training would be severely constrained throughout the Department of Defense and military readiness would be critically threatened.

Clean Air Act Amendment

The Readiness and Range Preservation Initiative (RRPI) also proposes a commonsense amendment to the Clean Air Act (CAA). The Services need the flexibility of limited time extensions to comply with General Conformity rules of the CAA so they can plan moves of missions and weapons systems to installations based on operational needs and still ensure that they can meet clean air requirements. Currently, when new actions such as replacing weapon systems are taken in non-attainment or maintenance areas, the CAA conformity requirement prohibits initiating replacement without first demonstrating that the future action conforms to the State Implementation Plan (SIP) requirements in place today. While this "conformity" requirement has not yet prevented military readiness actions, it has the potential to significantly disrupt readiness activities whenever we seek to replace or realign forces and equipment to improve military efficiency and effectiveness, to modernize, or to meet the requirements of legally mandated realignments and closures.

Both existing and new military readiness activities, and hence, warfare readiness capabilities, could be adversely impacted by the existing CAA General Conformity provision.

RRPI does not propose to exempt DoD from CAA conformity requirements; it merely requests that DoD be allowed a three-year period to find mutually beneficial solutions to offset emissions and avoid disrupting military readiness activities. Further, this extension does not apply to just "any activities," but rather to the narrow category of military readiness activities, which characteristically generate relatively small amounts of emissions—often less than 0.5% of total emissions in air regions.

Examples of Sustainable Management at Live Fire Training and Testing Areas

Although the Army is very concerned with the impact that environmental encroachment has on training, we are also mindful of public concern for the potential impact that training and testing may have on the environment. To address public concern, the Army implemented local community outreach programs and environmental studies to better understand and manage the implications associated with live-fire training.

For example, the Army is conducting Regional Range Studies designed to gather credible data on the true environmental impact of live fire training and weapons testing. We are studying conditions and effects at ranges at different installations representing a wide variety of climatic, geologic and ecological settings. The program includes the development of field assessment protocols, field studies, and a les-

sons-learned report that will include a tool to prioritize future range assessments. Soil, surface water, sediments, groundwater, and vegetation are sampled and analyzed for explosives and metals related to live-fire. Small mammals are also studied to determine ecological impacts. Field protocols are being developed and will be continually refined over the course of the Regional Range Study.

The Army is studying the behavior of military-specific chemical compounds and the potential effects they may have on human health and the environment. The major objective of this project is to identify available data for modeling of chemicals typically associated with munitions and their respective emissions and to compile toxicity benchmarks for these chemicals. The findings will help develop strategies for the removal or destruction of harmful byproducts, or to design processes and products that minimize environmental impact.

Operational ranges produce scrap metals as byproducts of live-fire training. The Army regularly removes this scrap from the range as part of maintenance operations. Much of the range scrap contains valuable metals that can be recycled, and some of this scrap may contain hazardous residues that are handled in compliance with state and Federal requirements. In response to issues associated with the removal of range residue, the Army is chemically characterizing this material and developing best management practices for managing spent munitions at Army troop training ranges. All such scrap is subject to RCRA and would continue to be under the RRPI.

The Army is also investing in Research and Development to eliminate potentially harmful compounds from munitions throughout their lifecycle. The most notable of these efforts is the Army's "Green Bullet." The Army has developed a substitute material (tungsten/tin or tungsten/nylon) for the lead core bullet of our 5.56mm (M-16) round. The Army has authorized the procurement of approximately 5 million rounds this year and expects to complete the transition to the "Green Bullet" by fiscal year 2005. A similar effort is underway for other small arms rounds including 7.62mm and 9mm rounds. The Army also recognized the need to eliminate potentially harmful dyes from two smoke grenades and developed alternative materials for these smoke grenades.

CONCLUSION

In closing, I would ask you to consider a few basic facts:

We have just over 1 million soldiers in uniform in the Active Army, Army Reserve and Army National Guard who are committed to protecting and defending the national interests of the United States. We must train those soldiers for the fight. We must prepare them for the uncompromising conditions of combat—and today, combat is a certainty for most of them.

Our most effective training is "live"—live fire and maneuver with real weapons over real distances, in realistic settings, including urban areas—making our ranges and training land indispensable our readiness. The Army's total range and land holdings of 16 million acres represents less than one half of one percent of the nation's landmass. A small investment in training considering the risk faced by our soldiers.

We are committed to being good stewards of the Nations's resources entrusted to our care and its environment

The RRPI initiatives that DoD proposes are small measures to ensure that our ranges on that land provide for the realistic training of American soldiers.

Mr. HALL. General, thank you very much, sir.

We now recognize the Honorable Marianne Lamont Horinko who is Assistant Administrator for Solid Waste and Emergency Response. We have also at the table and we are honored to have Jeffrey Holmstead who is the Assistant Administrator for Air and Radiation with EPA. The Chair recognizes you, Mrs. Horinko. Thank you.

STATEMENT OF HON. MARIANNE LAMONT HORINKO

Ms. HORINKO. Thank you, Mr. Chairman and members of the subcommittees. We are pleased to be here today to discuss the administration's proposed National Defense Authorization Act of Fiscal Year 2005 and the provisions that affect our environmental pro-

tection statutes. I do ask that my following statement be placed in the record.

The administration's proposal appropriately addresses two equally compelling national priorities: military readiness and environmental protection. EPA and the Department of Defense share an important mission: the protection of both our national and environmental security.

I would like to highlight some of the proposed statutory changes that both agencies have developed to facilitate our missions. First, EPA recognizes that military readiness depends on DOD's ability to move assets and materiel around the Nation. These movements of people and equipment may have impacts on State Implementation Plans (or SIPs) for air quality.

Accordingly, EPA and DOD developed proposed changes to the Clean Air Act to allow the armed forces to conduct these activities while working toward ensuring that its actions are consistent with a SIP's air quality standards. Under the proposed bill, the armed forces would still be obliged to quantify and report air quality impacts prior to starting its readiness activities but they would be given 3 years to comply.

Second, the bill contains a change to the Resource Conservation and Recovery Act, or RCRA, the Nation's solid and hazardous waste law. The provisions would change the definition of "solid waste" to provide flexibility for DOD regarding the firing of munitions on operational ranges. EPA, the States, and citizens will retain the right to take actions if munitions pose a threat off-range or after a range ceases operations.

Third, the bill contains analogous changes to Comprehensive Environmental Response Compensation and Liability Act, or CERCLA, also known as the Superfund law. Explosives and munitions deposited during normal use on an operational range would be exempt from the definition of release. However, EPA would retain the authority to take action to abate an imminent and substantial endangerment to public health and the environment. Again, the exemptions do not apply if contamination migrates off-range or after a range ceases operations.

Mr. Chairman, we believe that the administration's proposed bill meets the needs of the armed forces, of EPA, and of the public. The bill's provisions will ensure that we can protect both our national and our environmental security.

That concludes my prepared remarks, Mr. Chairman. Mr. Holmstead and I would be pleased to answer any questions that the committee may have.

[The prepared statement of Hon. Marianne Lamont Horinko follows:]

PREPARED STATEMENT OF MARIANNE LAMONT HORINKO, ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to speak with you today on behalf of the Environmental Protection Agency about the Administration's proposed National Defense Authorization Act of Fiscal Year 2005. EPA and the Administration believe the proposed bill appropriately addresses two equally compelling national priorities: military readiness and the protection of human health and the environment. These priorities are not at odds, and EPA has worked with the Defense Department to develop the proposals before you today.

Both EPA and the Department of Defense (DoD) agree that environmental protection is essential to readiness—from preserving military training grounds and developing more efficient weapons systems to safeguarding our servicemen and women. After all, EPA and DoD share an important mission: the protection of both our national and environmental security. One holds little value without the other, and we believe neither mission should be sacrificed at the expense of the other. Toward that end, EPA and DoD have for years worked cooperatively toward achieving these goals, with tangible benefits to both the military and the public alike.

The Administration feels that the proposed statutory changes before this Subcommittee can allow the services to continue to "train the way they fight," while protecting the health of our citizens and safeguarding our natural resources. The bill satisfies DoD's readiness concerns by providing that EPA, States or a citizen may not take an action under the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at operational ranges. However, EPA, States, and the public retain RCRA and CERCLA authorities for off-range migrations of munitions and their constituents. Further, the bill does not amend federal, state, or private authorities under the Safe Drinking Water Act. I would like to highlight for the Subcommittees several of the proposed statutory changes that the Administration proposes to facilitate our twin missions, both vital to the health and security of the nation, as well as how we understand DoD plans to assume these responsibilities.

Proposed Changes to the Clean Air Act

EPA recognizes that military readiness depends on DoD's ability to move assets and materiel around the nation—perhaps on short notice. Such large-scale movements of people and machines may have impacts on State Implementation Plans (or SIPs) for air quality.

Accordingly, the Administration has developed proposed changes to the Clean Air Act's SIP provisions to allow the military to engage in such activities while working toward ensuring that its actions are consistent with a SIP's air quality standards. Under the proposed bill, the military would still be obliged to quantify and report its effects on air quality, but would be given three years to ensure that its actions are consistent with a given state's SIP. The Administration believes this provision effectively addresses the military's readiness concerns, while ensuring timely compliance with air quality standards.

Proposed Changes to RCRA

The Administration's bill also proposes to amend RCRA, the nation's solid and hazardous waste law. First, the bill contains language that would change the statutory definition of "solid waste" under RCRA to provide flexibility for DoD regarding the firing of munitions on operational ranges, while clarifying that the definitional exemptions are not applicable once the range ceases to be operational. This change comports with EPA practice and the Military Munitions Rule that have defined EPA's oversight of fired munitions at operations ranges since 1997. The Administration's bill specifically maintains the authority of EPA, the States and citizens to take actions against the military or its contractors in the event that munitions or their constituents migrate off-range and may pose an imminent and substantial endangerment to human health or the environment. The ability of EPA, the States, and citizens to use this authority will be facilitated by the availability of on-range assessment and sampling information that is conducted by DoD under its authorities.

Secondly, the Administration's proposal reflects a statutory definition of "operational range" developed by EPA and DoD. Under the proposed revised definitions of "solid waste" and "range," the military will have statutory assurance that EPA, the States, and citizens will not be able use RCRA to intervene in training activities, weapons development, or other related munitions activities on operational ranges. EPA, the States and citizens still retain the authority to take action under RCRA if such activities pose a threat outside the operational range or after a range is declared by DoD to be no longer operational.

The history of interaction between EPA and DoD demonstrates that the two agencies can work together to achieve their respective missions, and EPA will continue to work with DoD to ensure that both missions are successfully carried out under the proposed legislation. We note, for the record, that in its history, EPA has in only one instance taken an enforcement action that resulted in the cessation of live fire training at a military base—namely, at the Massachusetts Military Reservation (MMR) on Cape Cod, Massachusetts. There, EPA's Regional Office took action after consultation with Headquarters and used the Safe Drinking Water Act—which remains unaffected under these proposed changes. EPA acted in this single instance

only after determining that the groundwater aquifer underlying MMR, the sole source of drinking water for hundreds of thousands of Cape Cod residents, was threatened with contamination by munitions constituents, and only after efforts to support voluntary action failed to stop the spread of contamination. Today at MMR, EPA is overseeing cleanup work to ensure that Cape Cod residents have a supply of drinking water that meets relevant standards now and in the future. The Defense Department shifted some of its training to another facility and has continued to conduct training at the Massachusetts Military Reservation using small arms, as well as other training without using explosives, propellants and pyrotechnics.

Proposed Changes to CERCLA

The Administration's bill proposes analogous changes to CERCLA, also known as the Superfund law. The changes would exempt from the definition of "release" under CERCLA explosives and munitions and related constituents deposited during normal use while they remain on an operational range. EPA would retain CERCLA Section 106 authority to take action to abate an imminent and substantial endangerment to public health and the environment due to the deposit or presence of explosives and munitions on an operational range. Again, this proposed change to CERCLA regarding the statutory definition of "release" is meant to provide an exemption only while the range is operational and does not impinge on EPA or state authority to take action to address contamination migrating off an operation range. As with the RCRA changes, EPA and State authorities would not be affected on non-operational ranges.

Conclusion

In conclusion, EPA and the Administration believe that the bill appropriately takes account of the interests of the American people in military readiness and in environmental and public health protection. EPA will continue working with DoD, the States, Tribes, federal land managers and the public within the framework of the proposed law to ensure that DoD can carry its national security mission while the Agency is able, at the same time, to carry out its mission of protecting human health and the environment.

Mr. HALL. Thank you very much.

Now at this time we will hear from Douglas Benevento, Executive Director of Colorado Department of Public Health and Environment. I think if we have the cooperation of those who are managing the screen, if you want to turn I think you can see it from each side there. At this time, I guess, the Chairman will recognize the Executive Director for as much time as he consumes.

STATEMENT OF DOUGLAS BENEVENTO

Mr. BENEVENTO. Good morning. My name is Doug Benevento and I am the Executive Director of the Colorado Department of Public Health and Environment. In that capacity I am responsible for the safe environmental programs, as well as a majority of the State's health programs.

Further, I am the former chair of ECOS' DOD forum as well as I serve on the executive committee of ECOS so today I am speaking for the State of Colorado and not ECOS.

I would like to go through briefly how Colorado evaluated the proposal from the Department of Defense. We did so using a couple of principles. First, no change to the environmental laws pose a threat to human health or the environment. In this case no temporary waiver could result in any offsite release. We also felt that it needed to be maintained on operational ranges.

Second, full liability needed to rest with the Department of Defense for cleanup activities once a site is no longer an operational range. I believe both of those principles have been met. It is important to note that the DOD proposal is very narrow. It applies to munitions on operational ranges.

It does not apply, in Colorado at least, to facilities such as the Rocky Mountain Arsenal or the Pueblo Chemical Depo or the former Lowry Bombing Range or the former Lowry Air Force Base. It only applies to those operational ranges that they are maintaining and still can use or are using.

I would briefly like to walk through the RCRA provision and discuss some of the changes that the Department of Defense has made that I think make a good proposal. First, I think it is important to note that at this point I don't know of any State, Colorado certainly doesn't, and I don't know of any State that attempts to regulate military training on operational ranges.

Colorado has worked well with DOD on training activities on their sites in our State. The proposed legislation merely seeks to codify a generally good relationship with Colorado and other States on these issues.

I have had numerous conversations with DOD and I feel comfortable representing their intent behind this proposal. What DOD is seeking are protections for their training activities on a range. They are not seeking an exemption from offsite impacts caused by their activities.

For example, this legislation would not exempt DOD from a permitting requirement for open burning or open detonation (OB/OD) when used as a disposal activity. Colorado currently permits such activities and with or without this legislation we will continue to permit such activities. However, under this law an OB/OD activity that is a necessary part of training would be exempt. That is a legitimate exemption and currently the practice in Colorado and, I believe, all other States.

Nevertheless, I testified on this issue last year and I understood DOD's intent but I was concerned that there could be some unintended difficulties with their RCRA proposals. The first was definitional. The operational range definition was not in statute and I thought this could create an ambiguity.

However, I think that has been resolved through the inclusion of a definition in the 1904 NDAA which has defined an operational range as, under the jurisdiction, custody, or control of the Secretary of Defense and that is used for range activities, or although not currently being used for range activities, that is still considered to be used for range activities. I think this provides clarity and I think it should provide some comfort to States.

Second, I was concerned that DOD was not clear with respect to their intent. I think that was just part of the problem but that was just that there was a lot of language and complex language. I think they significantly simplified this year's language by stating the scope of the exemption up front. It only applies to exempt from the definition of solid waste, military munitions and their constituents that meet a 3 prong test; 1. the munitions must be deposited incident to their normal and expected use; 2. they must be deposited on an operational range, and; 3. the munitions and the constituents must remain on the range. If any of these criteria are not met, they are not included in the exemption.

Third, last year I expressed concern that that definition of operational range included ranges that were not currently in use. From an environmental regulators point of view, I think that should not

be a concern so long as those ranges are not open to the public and there are no offsite releases and they are not being used for some different incompatible purpose. I don't believe inclusion of these ranges would pose any threat.

Further, it is my understanding that DOD needs to retain these ranges because they potentially could be useful and the ability to acquire new ranges is very limited. I think DOD has done an excellent job of simplifying the language so it is clear what is being exempted and what is not being exempted. The language, I think, can always be tweaked. I believe this year's language sufficiently spells out the region's scope of the exemption.

Fifth, an issue that was of some concern to me last year was how to detect and verify that there are no offsite releases. In conversations that DOD has had with me and that DOD has had with other States as well as State's attorney generals, I think they have worked out a system to evaluate the impact that their current ranges are having or could be having on the environment. I am comfortable that this information (1) will be sufficient and (2) will be publicly available.

Sixth, DOD has language in this year's legislation which clearly states that once a range is no longer operational they are responsible for cleanup. The inclusion of this language is merely a clear statement of DOD's original intent and should obviate any criticism that they were attempting to avoid their environmental responsibilities on their property.

Finally, with respect to RCRA, they have removed language from last year's legislation which would have created a CERCLA preference for cleanup. In other words, CERCLA would have applied and States would have been prohibited from using their RCRA authority. That has been removed and I think it is a very significant concession and we thank DOD for that.

I am equally persuaded that the language of DOD's current CERCLA provision is sufficiently narrow to preserve the common sense proposition that use of munitions for testing and training on an operational range should not be considered a release of a hazardous substance triggering the requirements of CERCLA.

I expressed concern last year that it is more difficult, I think, to control offsite releases under the Clean Air Act and we continue to have some concerns but based upon the relationship that we have developed with the Department of Defense over the past year, I think that those issues can be worked out. I am comfortable that with Mr. Holmstead's help that we can work that issue out so that we can ensure the environment is protected.

I believe the RCRA and CERCLA provisions of the Range Readiness and Preservation Initiative are appropriate and would not pose any risk in Colorado. The changes being sought merely allow for additional flexibility for DOD in carrying out training for their core mission.

It is appropriate for environmental regulators to help provide that flexibility so long as we can ensure that we can fulfill our core mission. DOD should be commended for immense amount of time they have spent working with Colorado and other States to address our concerns in a positive problem solving fashion.

Thank you, Mr. Chairman.

[The prepared statement of Douglas Benevento follows:]

PREPARED STATEMENT OF DOUGLAS BENEVENTO, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Good morning, my name is Doug Benevento and I am the executive director of the Colorado Department of Public Health and Environment. In that position I am responsible for the oversight of the State of Colorado's air, water, solid waste and hazardous waste programs as well as the bulk of the state's health programs. The majority of the programs that I am responsible for on the environmental side are programs that are delegated to the state through the Clean Air Act, the Clean Water Act, or the Resource Conservation and Recovery Act. I am a member of the Environmental Council of States and serve on that body's executive committee. Also, I am the former co-chair of ECOS' DoD forum, which is designed to open communications with DoD for the purpose of working through issues like this one. I do want to make clear though that today I am speaking for the state of Colorado and not ECOS or the DoD forum.

I'm here today to testify on the excellent progress that has been made on DoD's proposal over the past 2 years. Through open communication and give and take I believe a product has been developed that should be mostly acceptable to both the DoD and the states.

There is an interesting dynamic between state regulators and the Department of Defense. State regulators tend to automatically react with skepticism on any perceived infringment on our authority to regulate DoD activities. We are very good at pointing out every shortfall in any environmental proposal sought by DoD but are not very good at providing mutually acceptable solutions. A review of the testimony of state official on this topic is illustrative of this point. On the other hand DoD has in the past not done a good job of reaching out to state officials when developing their proposals and we have at times only found out about them after a final position has been adopted.

I think both sides have done an excellent job of trying to remedy those past shortcomings. From a state's perspective I have read DoD's proposed changes critically, but with a problem solving perspective, and have tried to make suggestions that are helpful to their goals while ensuring no threat would arise to the public from any change. On DoD's part they have done an excellent job of reaching out to states. They have held numerous working meetings with state officials at our national organization, the Environmental Council of States (ECOS), and with other state organizations. Also, they have met with the Attorney Generals to try and ameliorate concerns and make changes to their proposal.

I would also like to point out for the committee that I have not been hesitant in the past to use Colorado's regulatory authority when I believed it was appropriate. For example, when the Army found Sarin nerve gas bomblets at the Rocky Mountain Arsenal, a superfund site in the Denver Metropolitan Area, and proposed open detonating them as a remedy the state delivered a RCRA order to them at my directing prohibiting them from that course of action. Also, when asbestos was found in the soil at Buckley Air Force base the state mandated a stricter cleanup plan than the Air Force would have preferred. We are also currently engaged in an action against the Air Force also dealing with cleanup of asbestos in soils at the former Lowry Air Force base. I can provide more examples of enforcement actions the state has taken if only to demonstrate that I don't come to this issue as someone who has always agreed with DoD on the application of environmental laws.

When I evaluated the DoD proposal I evaluated it using 2 principles. First, no change should pose a threat to human health or the environment; in this case no temporary waiver could result in any offsite release. Second, full liability needed to rest with the DoD for cleanup activities once a site is no longer an operational range. I believe both of those principles have been met.

The DoD proposal is very narrowly tailored. They are seeking a temporary waiver from the Resource Conservation and Recovery Act (RCRA), the Clean Air Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. The temporary waiver would only apply to operational ranges, which is defined as those ranges that are used, or are anticipated for use, for military training activities. This proposal would not apply to those sites, such as the Rocky Mountain Arsenal or the former Lowry bombing range or the Pueblo Chemical Depot or the former Lowry Air Force base all of which are excluded through a plain reading of the language DoD has put forward. As the person in Colorado who is responsible for running the programs I can say with certainty sites such as these will not be affected. Further, any site which has been put to a use incompatible with military training is not covered by this proposal. Finally, when a site is no longer in use as an operational range

all authorities would snap back and the states or EPA would have full authority to act appropriately. These are the facts and I think they're little room to dispute them.

The provisions of the Clean Air Act are also narrow. It would allow DoD and the states a 3-year period to accommodate emissions from new military readiness activities into state implementation plans. This provision would apply to only new military readiness activities or construction related to the new activity.

RESOURCE CONSERVATION AND RECOVERY ACT AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

Working with the states DoD has made changes to their proposal which I believe address state concerns and ensure that human health and the environment are protected while meeting their goal.

When I testified last year in the Senate on this issue I offered several suggestions to DoD's proposal. I would like to outline how these suggestions have been addressed by DoD in the remainder of my testimony.

I would like to begin with how the DoD proposal would impact RCRA and the authority of states under RCRA. I want to state at the outset that I don't know of any state that issues RCRA permits or attempts to regulate normal training activities of the military. Colorado has worked well with DoD on training activities on their sites in out state. The proposed legislation merely seeks to codify a generally good relationship with Colorado and other states on these issues.

I have had numerous conversations with DoD and I feel comfortable representing their intent behind this proposal. What DoD is seeking are protections for their training activities on a range. They are not seeking an exemption from offsite impacts caused by their activities.

For example, this legislation would not exempt DoD from a permitting requirement for open burning or open detonation (OB/OD) when used as a disposal activity. Colorado currently permits such activities and with or without this legislation we will continue to permit such activities. However, under this law an OB/OD activity that is a necessary part of training would be exempt. That is a legitimate exemption and currently the practice in Colorado and other states.

Nevertheless, even though DoD was clear about their intent I was concerned that it could pose some unintended difficulties. The first was definitional. The proposal last year exempted munitions on an operational range. However, this posed an ambiguity since operational range did not have a statutory definition. This ambiguity has been resolved through the "04 NDAA which has defined an operational range as, under the jurisdiction, custody, or control of the Secretary of Defense and;

1. that is used for range activities, or
2. although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

In my opinion, this definition provides sufficient clarity to ensure the exemption sought by DoD is limited to those areas under DoD control for necessary munitions related testing and training. This language should not apply to private ranges or to defense related contractor facilities.

Second, I was concerned that last year's exemption language could be interpreted to apply offsite. DoD was very clear that was not their intent and this year's language has changed to clarify that point. DoD has significantly simplified this year's language by stating the scope of the exemption up front, it only applies to exempt from the definition of solid waste, military munitions and their constituents that meet a 3 prong test;

1. the munitions must be deposited incident to their normal and expected use;
2. they must be deposited on an operational range, and;
3. the munitions and the constituents must remain on the range.

If any of these criteria are not met, they are not included in the exemption.

Third, last year I expressed concern that that definition of operational range included ranges that were not currently in use. This is a difficult issue, but after numerous conversations with DoD I am comfortable with the inclusion of having ranges that are not currently being used for training sharing in the exemption. From an environmental regulators point of view so long as those ranges are not open to the public and there are not offsite releases and they are not being used for some different incompatible purpose, I don't believe inclusion of these ranges would pose any threat. Further, it is my understanding that DoD needs to retain these ranges because they potentially could be useful and the ability to acquire new ranges is very limited.

However, I believed from a state perspective it would be useful if the military went through a review process of these inactive ranges to determine whether they should remain inactive, go to active status, or move to cleanup if necessary. Since my testimony of last year, DoD has completed an inventory of their operational ranges which has been provided to Congress. I understand this inventory was mandated by law in 2003 and will be updated annually until 2008. In addition, I am aware that a 2003 directive issued by DoD requires that range inventories be updated at least every 5 years to verify that they are still necessary. I think these inventories will assure that ranges which are not currently active will be evaluated and blunts any criticism that DoD will merely hold inactive ranges to avoid cleanup.

Fourth, DoD has done an excellent job of simplifying the language so it is clear what is being exempted and what is not being exempted. While the language can always be tweaked, I believe this year's language sufficiently spells out the reach and scope of the exemption.

Fifth, an issue that was of some concern to me last year was how to detect and verify that there are no offsite releases. In conversations with DoD I understand that they have already established policies to evaluate the impact of their ranges and to make that information public. By law, the results of all DoD on-range assessments or monitoring are available to EPA, and through FOIA to states and citizens as well; beyond that DoD has advised me that they are finalizing a policy formally requiring proactive sharing of such information with state and federal regulators and the public. Further, should constituents from military munitions migrate from an operational range, it would trigger a number of requirements under CERCLA section 103 respecting the release of hazardous substances, and response requirements under CERCLA section 104 and 10 U.S.C., section 2701. The combination of these authorities and binding policies will ensure that Congress, state, and federal regulators, as well as the public will soon have access to far more information about the environmental effects of DoD's on range activities than we ever possessed before.

Sixth, DoD has language in this year's legislation which clearly states that once a range is no longer operational they are responsible for cleanup. The inclusion of this language is merely a clear statement of DoD's original intent and should obviate any criticism that they were attempting to avoid their environmental responsibilities on their property.

Finally, they have removed language from last year's legislation which would have created a CERCLA preference for cleanup. What that would have done is preempt state hazardous waste laws and in favor of CERCLA. The elimination of this language was important to Colorado and we appreciate greatly their acknowledgement of our concerns.

As with the redraft of the RCRA provision, I am equally persuaded that the language of DoD's current CERCLA provision is sufficiently narrow to preserve the commonsense proposition that use of munitions for testing and training on an operational range should not be considered a release of a hazardous substance triggering the requirements of CERCLA. As written, the exemption from the definition of release would apply to "military munitions, including unexploded ordnance, and the constituents thereof" that are deposited on the range incident to their normal and expected use in military test and training activities. As with RCRA my concerns about the scope of last year's proposal have been addressed.

THE CLEAN AIR ACT

I expressed concern last year about revisions to the Clean Air Act that are sought with this proposal. While I do believe that flexibility from the conformity provisions of the Clean Air Act can be appropriate, crafting that flexibility is a challenge.

My concerns are based on the simple fact that the potential for offsite impacts are much greater in this media. As I mentioned in the beginning of my testimony a basic principle I have is no change should result in an offsite impact. However, I have been very impressed with the diligence of DoD staff in working through issues on their proposal. Further, I am convinced and have been assured by DoD staff that they will continue to the collaborative effort with states that began over a year ago. Colorado will continue to work with them on this issue in hopes of finding a mutually solution that all of us feel comfortable supporting.

CONCLUSION

I believe the RCRA and CERCLA provisions of the Range Readiness and Preservation Initiative are appropriate and would not pose any risk in Colorado. The changes being sought merely allow for additional flexibility for DoD in carrying out training for their core mission. It is appropriate for environmental regulators to help

provide that flexibility so long as we can ensure that we can fulfill our core mission. DoD should be commended for immense amount of time they have spent working with Colorado and other states to address our concerns in a positive problem solving fashion.

Mr. HALL. All right. Thank you very much. We will be allowed to make inquiries of the Executive Director. We have two-way communications.

At this time we will begin our questioning of those who have testified. I will start with Mr. DuBois.

In your testimony, you state that your critics urge you to, and I am quoting here, "rely on wholesale repeated use of emergency exemptions for a routine ongoing readiness activity that could easily be accommodated by minor clarifications and changes to existing law." How does this currently happen and for what reasons have the exemptions been issued?

Mr. DUBOIS. Mr. Chairman, as we have discussed today, these are very complex issues of a legal nature. I would defer if I might with your permission.

Mr. HALL. Without objection, Mr. Cohen, we ask you to give your oral testimony. Your name is in the record and we appreciate your presence.

Mr. COHEN. Thank you, sir. Your question goes to whether it is possible for DOD to manage its ranges through the use of Presidential exemptions. The experience that the executive branch has had for those exemptions suggest that it is not. The exemptions have not often been used by any department, including the Department of Defense. On the only occasions in which they have been used they have proven unsatisfactory.

In 1980 the most notable use of those exemptions, or attempt to use those exemptions occurred when President Carter attempted to exempt the construction of a refugee camp in Puerto Rico, Camp Al, for refugees that leave from Cuba from a host of environmental provisions. I believe he made exemption findings under four or five different environmental statutes and in numerous cases finding that it was in the paramount interest of the United States that the camp be created for these refugees.

The construction activity of the camp was enjoined the day the president issued the emergency proclamation. No work was ever done pursuant to this emergency proclamation because of litigation. His proclamation was renewed by President Reagan again under the same 4 or 5 or 6 environmental laws. Yet, because of litigation the work was never permitted to go forward even though two successful Presidents found that it was in the paramount interest of the United States.

A more recent example from the Department of Defense's own experience has occurred annually since 1997. In litigation in the west concerning reporting requirements about activities the military has at a highly classified installation, the DOD attempted to classify according to Congress and the public not so that we could alter our cleanup activities but so that we could then release to the public and our potential adversaries extraordinarily sensitive information about certain of our activities.

A district court in the Justice Department in our view quite incorrectly handled that. The executive branch lacks the authority to

classify that information and, therefore, we would have to release that information to the world, notwithstanding that it was highly classified. The President has ever since annually exempted the release of that information to the public pursuant to the paramount interest standard under RCRA.

That has proven to be an extraordinarily cumbersome and burdensome exercise to the Air Force, the Defense Department, and the White House. It involves annually submitting over the course of a 5 or 6-prong process through the general counsel of the Air Force, the Secretary of the Air Force to me, to my general counsel, to the Deputy Secretary of Defense, Secretary of Defense, the National Security counsel, the National Security Adviser, the counsel to the President, the Chief of Staff, and the President all for one misdecided district court decision with respect to one base. It is an extraordinarily onerous, time-consuming procedure to go through on an annual basis.

Sir, the Department believes that this experience demonstrates that these emergency exemptions, although they can occasionally be useful for extraordinary circumstances, are not as a matter of public policy an acceptable way for us to manage routine ongoing activities that have occurred in our military ranges as long as we have our forces and will have to occur in the future as long as we have any national events.

Sir, we believe as a matter of public policy that the way to deal with this issue is to adjust the law to conform to reality rather than to require the President to make emergency findings.

If I could use an example, sir, we think that every automobile ought to have an emergency repair kit but if the only way you get to work every morning is using that kit, there is something wrong with your car and it needs to be repaired.

Mr. HALL. I will ask you this question. Can you tie your position to the affect it would have on readiness for the position we find ourselves in today?

Mr. COHEN. Yes, sir. The Department of Defense has for a long time used industrial pollution statutes to govern our military test and training on our ranges. It would not be consistent with our ability to train as we fight here.

Mr. HALL. Give us an example of some of the thrust of the request?

Mr. COHEN. Sure. Sir, there are two good examples that come to mind. We pursued at the former Vieques Range in Puerto Rico litigants who were trying to claim that the live-fire test and training at that range, that naval artillery was a Superfund still or release and that it was a waste management activity.

The relief that they sought was to shut down live-fire test and training at the range. That litigation was brought as part of a concerted campaign to force the range to close. As you know, sir, that campaign was actually successful. The range was forced to be closed.

Mr. HALL. And that live-fire is what type military hardware?

Mr. COHEN. I believe, sir, it was naval artillery.

Mr. DUBOIS. It was actually air to ground bombardment. I moved here after the initial suit was filed. Although the court found they

could continue training, it did not allow live bombs to be dropped. They were dummy bombs.

I can tell you as someone who has dealt with these things, the young man or young woman on the rolling deck of an aircraft carrier deals with it differently with bolting it onto the underside of the wing than he or she does when they are putting concrete live bombs on it. There is a significant difference and that occurred. I think Mr. Cohen wants to also remind the committee of the issue at Fort Richardson in Alaska.

Mr. COHEN. Thank you, Ray. Yes. Fort Richardson, sir, is ongoing litigation today that was filed several years ago. It concerns a very large installation that supports one our largest brigades. General Weber can probably speak to the importance of the testing and training that goes on there.

Again, litigants at Fort Richardson claimed that the live-fire test and training that was taking place at the Fort Richardson Eagle River Flats Range was a waste management activity under RCRA and was a Superfund spill or release under CERCLA and had to be managed accordingly.

We are seriously concerned about the risks that litigation poses to our military test and training at that base and believe that treating live-fire test and training as if it were an industrial waste management activity is fundamentally inconsistent with the need to train the way we fight.

Mr. HALL. I thank you. My time has expired. The Chair recognizes Mr. Dingell for 5 minutes.

Mr. DINGELL. Could you please tell us if you concur with the statements made by Mr. Wolfowitz on this matter speaking on behalf of the Department of Defense in which he said that in most instances the Department of Defense was able to comply with the requirements of these laws?

Mr. DUBOIS. Mr. Dingell, I think that the Secretary reads the——

Mr. DINGELL. Do you agree with them or not?

Mr. DUBOIS. I agree with them but only insofar as the Department of Defense——

Mr. DINGELL. Well, let me read this to you. My time is limited. I have 5 minutes so I have to proceed rather rapidly. Mr. Wolfowitz was asked whether there had been any conflicts between RCRA, CERCLA, Clean Air, and military readiness. He said as follows. He said that in the vast majority of the cases we have demonstrated we are able to comply with departmental requirements and to conduct the necessary military training and testing. He directed the secretaries to give greater consideration to using existing exemption processes in these environmental and national resource laws. In the exceptional cases it may present conflicts. Do you agree with those statements?

Mr. DUBOIS. Insofar as the military——

Mr. DINGELL. Just yes or no, if you please.

Mr. DUBOIS. The statement——

Mr. DINGELL. Do you agree with the Secretary or you don't?

Mr. DUBOIS. I agree with the Secretary insofar as the military had to provide work-arounds for the situation.

Mr. DINGELL. All right. Now, to date no exemptions have been invoked. Have you ever requested any exemptions from RCRA, CERCLA, or the Clean Air Act or the Department of Defense?

Mr. COHEN. Sir, only the annual exception requested from 1997.

Mr. DINGELL. Only what?

Mr. COHEN. Only the one that we had to request annually from 1997 on as a result.

Mr. DINGELL. And that is where?

Mr. COHEN. That concerns a classified location in the west.

Mr. DINGELL. Where?

Mr. COHEN. A classified location in one of our western States.

Mr. DINGELL. So you have one instance, right?

Mr. COHEN. Annually. Yes, sir.

Mr. DINGELL. And you have gotten that every year?

Mr. COHEN. Yes, sir.

Mr. DINGELL. Okay. Now, 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 every 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.

Mr. DINGELL. Very good. Now, you did a press background briefing in which you said legal and regulatory regimes that have enabled you to protect readiness while you protect the environment is "under siege." What is the siege that you are confronting there?

Mr. COHEN. The litigation, sir, that exist at Fort Richardson, that until recently existed at Vieques, and that the Fort Richardson plaintiffs have stated they want to start a campaign up nationwide.

Mr. DINGELL. Now, please name the States' Governors that have you under siege by using the current Solid Waste Disposal Act or 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 Levitt 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 has defined in the Superfund statute?

Mr. COHEN. No, sir.

Mr. DINGELL. I am kind of curious. With 43 seconds remaining to me, I am trying to figure out what you are doing here. You apparently have no significant complaints about how things are going. You cannot tell me where you were under siege or what is denying you the opportunity to proceed to conduct military training that is necessary to have the necessary stage of readiness.

Mr. Chairman, I thank you for the use of the time.

Mr. HALL. I thank the distinguished ranking member. Let me follow up on his line of questioning which concludes you have no significant complaints. I take it that you do, in fact, have signifi-

cant complaints but your complaints are not with the regulatory agencies and the way that they have been able to work with you, but in terms of the end result you have significant complaints mainly because of the litigation process. Is that correct?

Mr. COHEN. Yes, it is. That is exactly right. Our worry is that existing State and Federal policy which does, in our view, right the balance of readiness and the environment and has for 30 years on a very bipartisan basis, that that is a risk in court.

Mr. HALL. So even in a relationship with State agencies, and the EPA is a good done, you still have problems. Let me ask you this. The clarifying language that you are seeking, for example, the waste release, since your problem is litigation, also you have the problem of classification. Are you satisfied that this clarifying language would protect you from the litigation or do we need to go further?

Mr. COHEN. Sir, we work closely with EPA and the Justice Department and our partners in State government. We believe that it goes exactly far enough. It strikes the right balance.

Mr. HALL. Okay. Let me ask you, some of the witnesses on our second panel are going to talk, I think, about the difference between an active range or an inactive range and if that is different from an open or closed range. Under the language your obligation for cleanup is going to be triggered by a range being closed. What would be the difference between an inactive and a closed range and how long could a range stay open but still be inactive?

Mr. COHEN. Sir, the difference between an inactive range and a closed range is that the inactive range remains in the reserve of lands that an installation has that we can use. It is critical for us and I think I will defer to my Army colleagues. It is critical for us to have the flexibility to alter the configuration of our range lands and the way in which we use them on a frequent basis for the body of training but I will defer to the experts on that.

Mr. WEBER. Sir, currently the Army ranges that we have, 3 percent of our ranges are in inactive status currently which implies what Mr. Cohen was saying, that we have decided to eliminate the need for the range. You may use the range to do something else with it. You may stand up the range additionally. Some of the ranges are in a connected status because we don't have the forces that some of our installations need to train on a daily basis with the range.

It could be any number of foundational things but an inactive range is set aside, of course, to decide, (1) do we still need it to train under its current configuration which clearly is not a requirement for today possibly; (2) do we need to reconfigure, reuse the land, rebuild a different type of range, etc.; or (3) a closed condition which we no longer have the need or requirement for the range at all.

Mr. GILLMOR. Thank you. I want to go, if we could, to Assistant Administrator Horinko. First, I want to commend EPA. Apparently you have been able to work very well with DOD, as I take it, in support of the clarification. But I do want to ask if the Readiness and Range Preservation Initiative does replace EPA's authority under Superfund Section 104 on operational range, the Superfund's

eminent hazard authority. Can you give us some comments on how EPA feels about those limitations?

Ms. HORINKO. EPA feels that notwithstanding these specific fairly modest exemptions that we have sufficient authority that we have retained but we can gather the information and enforce the laws to address serious sources of contamination. Importantly, this doesn't affect the safe drinking water which allows us to protect aquifers that are sources of drinking water.

That is where we are cleaning up the Massachusetts military reservation. We can use Superfund Section 106, Imminent and Substantial Endangerment Authority, to abate immediate threats, even from munitions on active ranges. Certainly we will be aggressive and continue to be aggressive for any offsite migration of contamination at these sites. All of our priority there is retained across all of these statutes.

Then even on active ranges we still retain authority to deal with munitions that have been disposed of, landfills buried and contamination resulting from the munitions disposal and also from other activities on the base or on the range. These are often very large installations with lots of solvents, degreasers, TCE, other types of contamination. EPA will still have full and complete authority there.

Then, of course, the Department of Defense has pledged to share its own assessment information with us at EPA so we think we have got a full tool box that we can use to assess and address contamination on these ranges.

Mr. GILLMOR. Thank you very much. I have a couple of other areas to cover but my time has expired so let me recognize the gentlelady from California, Ms. Solis.

Ms. SOLIS. Thank you, Mr. Chairman. I will direct my questions to Ms. Horinko. The question I have is am I correct in stating that when the EPA encounters ground water contamination, one of the first actions EPA takes is to control the source and prevent migration of the contaminants if possible?

Ms. HORINKO. That is partially correct. The first thing we would do is assess the aerial extent of the contamination. Then once we determine the source then, yes, we do prefer source control.

Ms. SOLIS. Would you agree that it makes no sense to eliminate State authorities authorized to them by EPA that allow States to control the source and prevent migration of military munitions constituents like perchlorate in ground water even if under an operational range?

Ms. HORINKO. I would not say that makes sense in a situation where there is live-fire training going on and actually putting your State or Federal folks in harm's way by virtue of conducting a cleanup activity would be unwise. There are a few cases where I would not send my folks or State folks to do assessment or cleanup.

Ms. SOLIS. However, I guess what I am trying to get at here is that the munitions rules, as I understand it, don't apply to constituents. For example, military munitions like perchlorate and royal demolition explosives. I don't think we have a problem here.

Ms. HORINKO. The munitions rule was actually put out in 1997 so it predates my time at EPA. I don't believe it applied to constituents but I would have to go back and check on that.

[The following was received for the record:]

The Munitions Rule referred to by Congresswoman Solis applied to munitions and did not apply to constituents.

Ms. SOLIS. Would you? Please report back to the committee. My second, or third, question for you is under Section 7002 of the Solid Waste Disposal Act the only Federal authority that allows the State, a drinking water utility, or a citizen like the Marine families at Camp Lejeune to bring an action in Federal court to address perchlorate contamination on an operational range if it may present an imminent and substantial endangerment to human health or the environment. How would you answer?

Ms. HORINKO. First of all, again we still retain our authority under the Safe Drinking Water Act to compel training activities to halt or be changed.

Ms. SOLIS. But that is not for citizens, as I understand it.

Ms. HORINKO. I will have to check on that as well.

[The following was received for the record:]

Under the Safe Drinking Water Act, the Citizens Suit provisions would not provide the authority for a citizen to take legal action against persons that caused or contributed to contamination to an underground source of drinking water that posed an imminent and substantial threat to health. EPA would have the authority to take such action under the Safe Drinking Water Act.

Ms. SOLIS. Can you please report that back to the committee?

Ms. HORINKO. Absolutely.

Ms. SOLIS. And isn't it correct that the EPA in their comment to the Office of Management and Budget previously opposed these DOD proposals to change the Solid Waste Disposal Act and Superfund Act and one of the reasons was because it eliminates the eminent and substantial endangerment authority of the Solid Waste Disposal Act for military munitions on operational ranges.

Ms. HORINKO. First of all, I would never comment on the interagency process. There is always a healthy debate that goes on as there is a healthy debate that goes on in Congress. I think that is important for government agencies to be able to debate internally and in a very full and candid way.

But I would point out that we do still retain imminent and substantial endangerment authority under Superfund. If a citizen or a State had a concern and thought they couldn't address it under their own law, they could bring it to our attention. It is the same threshold that you have to meet under either statute and we at EPA could take action as warranted.

Ms. SOLIS. Mr. Chairman, I would like to request unanimous consent to submit for the record the EPA comments in fiscal year 2003 and fiscal year 2004 which outlines their definition according to my line of questioning here and how they responded.

Mr. GILLMOR. Without objection.

[The following was received for the record:]

[RELEVANT EXCERPTS FROM] EPA'S COMMENTS ON DOD'S FY 04 LEGISLATIVE PROPOSALS TO THE NATIONAL DEFENSE AUTHORIZATION ACT

[pg. 6] Proposal No. 115—Readiness and Range Preservation Initiative

[pg. 6]

EPA's Position on "2019, Range management and restoration": EPA opposes this section. EPA believes the RCRA Military munitions rule, finalized in 1997, substantially addresses the concerns raised by the Department. EPA also opposes this sec-

tion because it eliminates the ability of a state or other person to request that the President exercise his authority under 106(a) to address an imminent and substantial endangerment to the public health or welfare or the environment. It fails to provide for the rights of states and citizens to address imminent and substantial endangerment issues at federal facilities.

[pg. 7, comments]

Exempting used or fired munitions on operational ranges from the definition of solid waste, would, among other things, prevent the Agency from exercising its authority to order the abatement of an imminent and substantial endangerment of health or the environment caused by the handling of "solid waste," when the Agency determines that such a condition exists on an operational range. In addition, section 2019, would limit the exercise of the same authorities by states and citizens.

In addition to eliminating the Agency's authority to order corrective action and the authority of states, it would eliminate the Agency's authority to abate an imminent or substantial endangerment without providing an equally strong and unambiguous authority to act to redress such conditions when they are found to exist on operational ranges.

Ms. SOLIS. And, last, this is for Brigadier General Weber. Perchlorate, as you know, is a component of a rocket fuel that has been connected to thyroid cancer. It is my understanding that it is the military's intent to include perchlorate contamination in the scope of these exemptions. Can you please site exact instances where preventive monitoring of ground water and soil has impeded military training in California?

Mr. WEBER. Congresswoman, I do not believe that we have any restrictions or any imposition restrictions in the State of California due to perchlorate and limits on operations. The two places that we limited our operations because of perchlorate are Aberdeen Proving Grounds in Maryland and also the Massachusetts Military Reservation in Massachusetts.

Ms. SOLIS. Thank you.

Mr. GILLMOR. Thank you, gentlelady. The Chair recognizes the chairman of the full committee, Mr. Barton.

Chairman BARTON. Thank you, Mr. Chairman. Before I ask my questions, I want to recognize two distinguished guests in the audience. We have former Congressman Pete Garron from Fort Worth, Texas, who is now an assistant to the Secretary of Defense. We are always delighted to have him.

We also have a former counselor of this committee, Charles Ingebretson, who is now an Assistant Secretary for Legislative Affairs at the EPA and we are glad to have him back. We are used to having him up here instead of out there.

I want to point out that all of these proposals that the Department of Defense has been posturing to us include only training and operations that relate to combat and the adequate and realistic testing of military equipment vehicles, weapons, and sensors for the proper operation and suitability for combat use. None of these proposals, as I understand it, deal with routine operation of an installation of an itself. Is that right, Mr. DuBois?

Mr. DUBOIS. Yes, Mr. Chairman. That is precisely the case.

Chairman BARTON. So we are not talking about exempting DOD facilities from their routine operations. We are talking about some very targeted specific exemptions for certain laws that deal specifically with training and operations that relate to combat and the readiness thereof.

Mr. DUBOIS. That is correct.

Chairman BARTON. I want to specifically relate it to the Clean Air Act because if a reserve squadron is training to be deployed overseas to Iraq or Afghanistan, is the takeoff and landing of those aircraft for their training exercise, is that an example of an activity that would be exempted from a State implementation plan if those takeoffs and landings were related to training exercises to prepare them to go to Iraq or Afghanistan or for combat operations?

Mr. DUBOIS. That is correct, Mr. Chairman.

Chairman BARTON. That is correct. Okay. Now, I want to ask Mr. Holmstead, who is my good friend with the EPA for air quality issues, the Department of Defense proposal that deals with the Clean Air Act conformity. Given a military installation that is conducting training exercises preparing aircraft for deployment for combat operations to give them 3 years to conform with the specific State implementation plan. If that particular base is in a non-attainment area is the EPA supportive of that proposal?

Mr. HOLMSTEAD. We absolutely are. I am not familiar with all the other statutes but under the Clean Air Act this is not an exemption in any way. What it simply does is let the military move forward in that case with the training exercise and then they would have 3 years essentially to offset those emissions. It would just give them a little extra time so they are not held up in the meantime. We think that this strikes the right balance between preserving air quality and also preserving the military's ability to perform needed training exercises.

Chairman BARTON. Under the existing Clean Air Act and the citizen lawsuit provision of the Clean Air Act, is it theoretically possible that a litigant, a citizen, an environmental group, any person who is standing in court could go to court and request an injunction to prohibit the Department of Defense from conducting such training operations because of the new 8-hour standard that was promulgated last week, the regulations for that, that lowers that standard from 120 to 80 parts per billion?

If a litigant went into court and said these operations are not going to be in compliance with that, would such a lawsuit have standing in court under the current Clean Air Act?

Mr. HOLMSTEAD. The answer is yes and that is one of the concerns that I think you heard Mr. Cohen talk about. We believe that the relationship among States, EPA and local governments would be such that at the government or agency level no one would stand in the way of that. However, there is a concern about activist groups or individuals who could seek to get into court to try to prohibit that sort of activity. So it really, I think, is the concern about litigation from individuals.

Chairman BARTON. When former Chairman Dingell was here, he asked Mr. DuBois and Mr. Cohen if there were examples of actual lawsuits that had been filed and things like this. But it is a fact that numerous environmental groups have threatened lawsuits almost routinely on Clean Air Act potential, or at least alleged Clean Air Act violations around the country to force some sort of out-of-court settlement. Is that not true, Mr. Holmstead?

Mr. HOLMSTEAD. I know that we were threatened with lawsuits over——

Chairman BARTON. I know of one that is being threatened in the Dallas Fort Worth area right now.

Mr. HOLMSTEAD. Mr. Cohen may know of others but I do know that it is a pretty common way of proceeding in these sorts of cases.

Chairman BARTON. My time has expired. Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you, Mr. Chairman. The gentleman from Maine.

Mr. ALLEN. Thank you, Mr. Chairman. Mr. Holmstead, in EPA's testimony it is stated that DOD would be given 3 years to ensure that its actions are consistent with the States given State implementation plan. The administration believes this provision effectively addresses the military's readiness concerns while ensuring timely compliance with air quality standards.

When I look at the proposal in the section entitled Air Quality Plans and Range Management, Section A says, "Conformity with the Clean Air Act," and that is the section that has this 3-year provision. There are all sorts of questions about whether the 3-year provision will be renewed over and over again but that is the section that has the 3-year provision.

I don't see any 3-year provision in Subsections B, C, D, and E which relate to EPA approval and compliance with ozone, carbon monoxide, and PM_{10} standards. It seems to me that these other provisions, at least in this text that we have got before us, all apply permanently. They are not subject to the 3-year limitation in Subsection A. Can you comment?

Mr. HOLMSTEAD. That is certainly not the intent of the legislation, nor do we read it that way. We believe it is essentially a period during which the base would have to come into compliance and once that period is up, then——

Mr. ALLEN. So you wouldn't object to changing the language so that it is crystal clear that the 3-year limitation applies to those other sections?

Mr. HOLMSTEAD. I think we can work with you on that.

Mr. ALLEN. Thank you. Ms. Horinko, when Administrator Whitman was ending her term, she wrote to members of this committee to assure us the work in developing the mercury MACT rule, the maximum achievable control technology rule, is continuing even though some of the analyses would be delayed.

In her correspondence to us she said that there would be a limited number of analyses based on those scenarios that are believed to represent viable alternatives for mercury MACT standard. This is really about that standard. We don't have you here so often so I wanted to ask this question.

She thought that the modeling would be done after she left. The current Administrator Levitt now says that the process is not complete. That is the process with respect to the development of a mercury MACT standard. So you were the Acting Administrator between Ms. Whitman and Mr. Levitt.

It seems to me it was your responsibility to ensure that the EPA stayed on track to propose a legal and defensible MACT standard under Section 112 of the Clean Air Act but it didn't happen. My question is when was the decision made to cancel the IPM mod-

eling of a variety of different mercury MACT standards and cut the technical experts out of that process.

The New York Times reported that on July 14, 2003, that the IPM modeling was delayed immediately following a meeting between Mr. Holmstead and people at the White House. My question to you, Ms. Horinko, is were you involved in the decision not to proceed with a variety of different analyses of the proposed mercury MACT standard? If you were, when were you involved in it?

Ms. HORINKO. I will say no and then pass this over to Jeff. No, I was not involved.

Mr. ALLEN. Mr. Holmstead, who was?

Mr. HOLMSTEAD. The commitment that Governor Whitman made in her letter to this committee was absolutely fulfilled by EPA. What she was very careful to say as you read in that letter is that if we would be analyzing viable alternatives for producing mercury emissions and that is what——

Mr. ALLEN. But isn't it a fact, Mr. Holmstead that the alternatives you analyzed, two of them were both simply consistent. Different approaches to get to the same goal, namely the Clear Skies Act. What you didn't do was do any modeling that was of the kind requested by the stakeholder group. Basically you didn't get——

Mr. HOLMSTEAD. We were very careful. The big issue here, sort of the fallacy of all of this and, again, as far as I know the military is not a big emitter of mercury. But, if I can just take a second to answer this question. What this stakeholder group asked us to do would have been scientifically indefensible with the model that we had because as we learned about the model, it was designed to look at longer scenarios.

What they were asking us to use that model to do was to look at something that had to apply in 3 years. So, it was not defensible from a scientific perspective to use that model to analyze those outcomes.

Mr. ALLEN. But sure, Mr. Holmstead, with all the staff and all the talent you have got at that meeting, you could have developed other scenarios that were tougher than the one you came up with.

Mr. GILLMOR. The gentleman's time has expired. I would also point that that the line of questioning is frankly not relative to the—you are talking about mercury MACT standards which are not a part of the DOD proposals.

Mr. ALLEN. Mr. Chairman, I take the point but Mr. Holmstead has not come back since that July meeting for further examination of this particular point and I wanted to make sure that since we are talking about the EPA's management of these Clean Air Act rules and regulations. It does seem to me what they are doing on Clean Air generally does have some application but I take the point. My time has expired. I thank you for your patience.

Mr. GILLMOR. You have to get them when you can get them.

The gentleman from Idaho.

Mr. OTTER. Thank you, Mr. Chairman. Mr. Chairman, I am glad that I didn't use my time up in my opening statement because I think there are an awful lot of things here that we need to clarify. I would like to start with Mr. Cohen who I think is the legal representative for this group that is sitting at the table.

The ranking member made much to do about the fact that no States have you under siege at this point. No agencies have you under siege at this point in time. Could they?

Mr. COHEN. Sir, we are concerned about the potential for a hostile regulatory environment.

Mr. OTTER. I understand that. The way the law is today relative to the regulations and the noncodification of those regulations which do not give you legal relief, could they bring a suit?

Mr. COHEN. Sir, yes.

Mr. OTTER. Okay. The fact that they haven't means that the DOD has done a very good job of working with—is prima facie evidence that the DOD has done a very good job of working with the States and working with the agencies and that is why you don't have a lot of legal things pending today.

Mr. COHEN. Yes, sir. And it has been a two-way street. We have gotten good support from these State and Federal laws.

Mr. OTTER. Well, I want to remind us all here that we are a government of laws and not a government of appended. Just the fact that we have in this administration people who are willing to work together because they recognize that the defense of this country is our highest priority as the constitution pretty well outlines. They are working together and we are moving forward. That is why there isn't the legal problems that could otherwise be engaged.

Are there any laws today or without these laws today are there military operations going on in the theater of Iraq and Afghanistan today that should you need to change military operations, mil ops, and train for them, how long would it take you to come home, come back to the United States? Say, we need to train for something that has been going on in Iraq in order to deploy the next group of freedom fighters. We need to deploy another group to Afghanistan but we need to set up that training first in Idaho. How long would it take you in order to get permission under today's rules and regulations in order to save lives, in order to make our fighting force an effective force by that training? How long would it take you to accomplish that?

Mr. COHEN. Sir, I think today with the good understanding we have with the regulators it would take us no time at all. Under the legal paradigm which says that test and training is "waste management," it could take a very long time.

Mr. OTTER. How long?

Mr. COHEN. To work through the regulatory process with a State or Federal regulator it could take any amount of time, sir. It is just something that we think is unnecessary and highly undesirable and risky.

Mr. OTTER. General.

Mr. WEBER. I have no grounds for the legal basis. In terms of training it wouldn't take us too much time to spin some element that we need to in Idaho to help the training aspects of it. It is the regulatory piece that would potentially constrain us.

Mr. OTTER. That is exactly my point. If you find out because we are not fighting my father's war here or my grandfather's war here. We are fighting a whole new war. As the Chairman pointed out in his opening remarks, they don't have a capital that we can bomb. They don't have a uniformed military force that we can just go and

conquer. This is an all together different war and it requires different kinds of military operations as we are seeing right now in Iraq.

I know the kind of training that I went through as an Army Cav in the 116th Army Cav between 1968 and 1973. We trade pretty much for the same stuff. We knew what the theater was. We knew it was Vietnam. We had a pretty good idea that wasn't going to change. Fortunately for us it didn't. Could active anti-war activists indeed bring environmental lawsuits? In other words, they are against the war in Iraq. We certainly have a group of those people. People are against the war in Afghanistan. Could they then bring lawsuits under this to delay the training operations?

Mr. COHEN. Sir, that is our concern right now. Not suggesting you have a motive or the people involved but that legal theory is just sort of lying out there for anyone to use for whatever needs they might have.

Mr. OTTER. I see. In my other life I was both a businessman as well as a member of the guard. I know that as a businessman that employed about 12,000 employees, as a lieutenant Governor in the State of Idaho which had to deal with an awful lot of Federal rules and regulations, but also as a guard I recognize that there were a lot of rules and regulations that the military was exempt from that business was not, nor was the States. Let me refer to some of the labor laws, especially under OSHA, perhaps some of the military code of justice as opposed to the local law enforcement and the State laws.

Have you had any major problems? Are you aware of any major problems that you have had with either the Labor Department or the Justice Department because you have been exempt from the State laws? And because you have been exempt from those laws that now seem to be creeping into the discussion here, that because you would be exempt from certain laws codified under the present working operations that there would be these major problems?

Mr. COHEN. Sir, I am not although it is not my area and I should probably take that back.

Mr. OTTER. I say again, I am aware that there were many labor laws but I don't ever recall there being a lawsuit between the State branch of labor law enforcement in the State. It is not unusual for the military to be exempt from some of the State laws. After all, this is one of the legitimate Federal requirements as we outlined earlier that the constitution dictates.

Mr. COHEN. Yes, it does.

Mr. OTTER. Let me just close this by asking one final question. That has to do with the present codification. It is my understanding that there is not a lot of difference between the interagency government combined group, the rules and regulations that they came up with since 1997 in order to allow the military expeditious permission in order to engage in certain training operations. I do not have a problem with environmental lawsuits. Is there a major difference between those regulations that you have been operating under since 1997 and what you are asking now to codify? Is there a major difference between those two?

Mr. COHEN. No, sir.

Mr. OTTER. With one exception. It gives you legal relief, right?

Mr. COHEN. Well, yes, that is right. It gives us protection against the lawsuit that the regulation cannot.

Mr. OTTER. So in essence all we are asking to do here is to be allowed to go forward with the training of our troops and the defense of our Nation without a lot of harassing lawsuits.

Mr. COHEN. Yes, sir.

Mr. OTTER. Thank you. Thank you, Mr. Chairman. I yield back my 3 seconds.

Mr. GILLMOR. The gentleman yields back 3 seconds. I want to go to Ms. Capps now but let me also announce we have five votes on the floor. That is going to take over an hour. I want to get through as many people asking questions now and if we can, then I will ask the members who haven't had a chance to ask questions if they would be willing to submit them in writing. If they are willing to do so, then we can dismiss this panel, come back and start with the second one. If members do want to verbally ask their questions, then we will have to ask you to hang around.

Ms. Capps.

Ms. CAPPS. Thank you, Mr. Chairman. Ms. Horinko, I would like to speak with you and bring up again Fort Richardson in Alaska which we know is a Superfund national priority list site. EPA used the normal Superfund process of remedial investigation and feasibility study followed by a record of decision to successfully remediate white phosphorous that was killing thousands of migratory ducks on Eagle River which is an operational range. Did the EPA abuse its authority in this case?

Ms. HORINKO. No. I think EPA worked in a collaborative fashion with the Department of Defense.

Ms. CAPPS. Excellent. Now, if the Pentagon is changed to the definition of release and Superfund were adopted, EPA would not be able to do this cooperative action and use its normal Section 104 authorities to clean up a release or substantial threat of a release like it did so successfully in Fort Richardson. If you agree that the EPA did not abuse its authority, what is the public policy rationale for changing the normal Superfund process?

Ms. HORINKO. My colleagues at DOD can explain this better than me. I was not involved in this part of the cleanup but there were other lawsuits filed surrounding Fort Richardson and my understanding is that DOD desires to put this legislation forward——

Ms. CAPPS. Excuse me. I did want to keep this little part to the EPA and I am going to ask Mr. DuBois another kind of question. The Pentagon's proposal would require that the EPA issue an abatement order to DOD under Section 106 and meet the higher standard of proof. We know that in almost 20 years the EPA has never used a unilateral abatement order to the DOD under Superfund.

This proposal would also require EPA to obtain the concurrence of the Justice Department before issuing DOD this order. It appears EPA's inspection and sampling authorities would be eliminated from military munitions and constituents on an operational range and EPA would never be able to obtain information to support an abatement order for a site like Eagle Flats.

But I do want to turn in my remaining time to Mr. DuBois. Mr. DuBois, the GAO report states that encroachment was reported as

having affected some training range capabilities. It goes on to state, "Most encroachment issues are caused by population growth and urban development." The report sites several specific examples where sprawl and the resulting land use conflict between residential use and military training have caused DOD to alter or suspend training activities.

It doesn't site any instances in which RCRA or CERCLA or the Clean Air Act have impacted military readiness or were reported to have done so. You already acknowledged earlier today that there are no specific instances of RCRA, CERCLA, or Clean Air Act impairing readiness of a particular group squadron or battalion.

Now, over the last 20 years States have worked with the DOD to better protect our military bases from unplanned urban sprawl which is a threat. How does amending RCRA, CERCLA, and the Clean Air Act solve the readiness issues specifically caused by sprawl?

Mr. DUBOIS. Ms. Capps, my understanding to you is actually amending a report to focus on some of the issues that you also heard today. Issues pertaining to Vieques or other potential litigation are clear examples of where we believe we are. I do not wish to use Mr. Dingell's word "siege" but we have great concerns for what might happen.

Now, does urban sprawl connect to the issues that we are dealing with today? I think to some extent it might.

Ms. CAPPS. Well, that is a might. I am talking about sprawl as a known serious encroachment issue. You are not talking about sprawl in this presentation. You are talking about gutting environmental and public health laws. I do recognize that sprawl causes DOD to alter some training activities but amending the kind of laws you are bringing before us today will do nothing really to resolve readiness issues caused by sprawl.

Mr. DUBOIS. I question your use of the word sprawl.

Ms. CAPPS. Well, I am talking about sprawl in this instance. You really haven't cited any examples where RCRA, CERCLA, or the Clean Air Act have impacted readiness. I would suggest that this is not about readiness. It is about control. If the water supply on a military base is contaminated, really it needs to be cleaned up.

State enforcement agencies need to be able to identify the problem and begin to address it. You seem to be suggesting that States and EPA shouldn't be able to solve this problem. It then would result that our armed services and their families would be drinking polluted water. It sounds like you are saying that it really wouldn't be a problem as long as the range was open and training could continue. I think this is highly unacceptable.

I can't believe you would suggest that our brave men and women who defend our Nation would drink unhealthy and toxic water. Given a choice, our military would surely pick safe water for themselves and their family. This proposal takes that choice away from them. Today I believe we are asking to make that kind of choice between combat readiness and the protection of our health. Both are necessary. I see no evidence that points out that either is mutually opposed to one another. Both are possible and I yield back to what lack of time I have.

Mr. BENEVENTO. Mr. Chairman, if I might just take a few seconds. I wish to go on record as categorically rejecting Ms. Capps' assertion. We are not here today to ask for any amendments whatsoever with respect to the Safe Drinking Water Act. Mr. Chairman, may I address at least a part of that question, some of the questions that have been raised with respect to ground and drinking water contamination.

Mr. GILLMOR. Oh, yes indeed. You have the biggest picture in the room. I don't know how I missed you. Please proceed.

Mr. BENEVENTO. Thank you. I think as a practical matter it will be helpful to the committee to sort of understand what we have seen in Colorado, at least, with respect to sources of contamination from historical military operations. My experience, particularly with drinking water or ground water and surface water, the source of the contamination does not come from where the military trained. They come from where they were doing routine maintenance just like any other facility. It would be the areas that are not exempted that would cause the ground and surface water contamination, not the areas that are, in fact, where they are doing their training. I think that the focus on where they do their training with respect to being concerned about water contamination is really misconceived. It is the areas that are not exempted where they store fuel, where they fuel up rockets and tanks and what not are the areas where you find the contamination. Therefore, as a State official I can tell you I think a lot of the concerns are a bit of a tempest in a teapot.

Mr. GILLMOR. Thank you very much, Mr. Benevento. We have less than 5 minutes for this vote. I would like to dismiss this panel if we can. We do have another panel when we come back. I would like to ask unanimous consent that we dismiss this panel, that all members be able to submit further questions to the panel in writing. When we resume we will start with the second panel. Is there objection to the request?

Mr. STUPAK. I would object, Mr. Chairman.

Mr. GILLMOR. You want the whole panel to come back?

Mr. STUPAK. Well, I would like at least Mr. Dubois and Ms. Horinko to stay. That is where my questions are going to go.

Mr. GILLMOR. Do you have any objection to dismissing the rest of the panel?

Mr. GONZALEZ. In the spirit of trying to find some compromise, and this is going to sound strange, I would still like the opportunity to pose my questions in this vein because they are based on other questions that were posed from members on the other side and only will make sense in that context.

Not just for, I guess, the advantage of those that are present here on the committee, but as well as members in the audience for this interesting debate. If you would allow me to pose my questions in this vein when we return to any of the remaining witnesses, as well as addressing the absent witnesses and I will follow up with a written question. With that curtesy, I would be happy to——

Mr. GILLMOR. We can do that. I think we want to get through these votes. I would suggest we return at 1:45. We should have completed the votes at that point and we will conclude with this

panel and then we will move to the second panel. I thank you all very much.

[Whereupon, off the record at 12:37 p.m. until 1:52 p.m.]

Mr. HALL. Okay. We have come to order. The Chair at this time recognizes Mr. Stupak for 3 minutes.

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.

Mr. STUPAK. Okay. Mr. DuBois, in listening to this discussion here today and questions and sitting through the whole hearing, I get the distinct impression you guys are looking for like immunity in certain circumstances from these environmental laws. Is that a fair way to say it? You don't have any specific cases you can give me. I keep hearing about Fort Richardson and the threat of a lawsuit and in Vieques there was a threat. It sounds like you are trying to get immunity from possible threats of a lawsuit.

Mr. DUBOIS. Mr. Stupak, I am not a lawyer and I hesitate to use the term immunity. In fact, I won't. I think it is a fact, however, that our experience with litigation, litigation with respect to the Migratory Bird Treaty Act or the Marine Metal Protection Act, or the Native Species Act, as we have pointed out, the RCRA issues at Fort Richardson, they have forced action. They have changed behaviors in parts of the Department that we feel have impacted negligently our ability to train——

Mr. STUPAK. Because of that proposal you want immunity from these law. Right?

Mr. DUBOIS. We want careful consideration of the aspects of the law that pertains to operational ranges.

Mr. STUPAK. Why should the military be treated any differently than General Motors, let us say?

Mr. DUBOIS. I think that the military is arguably—not arguably but legally the only organization within the United States of America which is by law allowed to fire guns and drop bombs.

Mr. STUPAK. Sure. And with that comes responsibilities.

Mr. DUBOIS. It certainly does.

Mr. STUPAK. And from what I am hearing, you can't give me any examples on how these laws have restricted your ability for military preparedness.

Mr. DUBOIS. The laws have been used as we have cited.

Mr. STUPAK. But has it hurt military preparedness? Can you give me a specific example where it has?

Mr. DUBOIS. We are very ready. There is no question about that.

Mr. STUPAK. You are what?

Mr. DUBOIS. The United States military is a very ready force. Readiness is clearly first and foremost an obligation and responsibility. This is a prospective issue, the threat of litigation.

Mr. STUPAK. Okay. You have no specific examples then. Let me give you a couple of examples. I am looking at two separate locations, Maryland, one in Massachusetts where military munitions have forced the closure of drinking water wells due to contamination from operational ranges. There is another example in Iowa where contamination has caused offsite private drinking wells to close.

There are at least 40 DOD facilities with known contaminants of ground or surface water in this country. Can you really sit here today before us and assure us that if these broad exemptions are granted, our citizens will not be exposed to further contamination?

Mr. DUBOIS. We need to only look at the example of the Massachusetts military reservation on the upper cape and what we have done there. I went up there on two occasions. In fact, the second occasion I inaugurated the well that we had dug and the pipeline that we had built because, you are quite right, sir, we did find that there was contamination.

Mr. STUPAK. In fact, EPA had put out four orders that you had to go up there and do some work up in Massachusetts. Did they not?

Mr. DUBOIS. That is correct.

Mr. STUPAK. So it seems when we talk about the responsibilities, that is our concern here, and we start giving exceptions. The track record here of 40 DOD facilities, and even the one in Massachusetts, we have to rely on the EPA to make sure that things were being properly treated so the citizens' health was not harmed.

Mr. DUBOIS. We are not here to amend the Safe Drinking Water Act.

Mr. STUPAK. Which you have exceptions to certain parts of it.

Mr. DUBOIS. No, sir.

Mr. STUPAK. Not Safe Drinking, RCRA, CERCLA. CERCLA, of course, takes in water. The Clean Air Act. That is the pushback.

Ms. Horinko, I said I had a question for you because I am concerned. EPA recently announced that certain areas around the country were not meeting the 8-hour ozone attainment standard. Clearly 25 counties in Michigan are not meeting EPA standards and will now be considered nonattainment zones. How do we justify these exemptions when if enacted they would allow DOD to really worsen the air quality of Michigan with counties already struggling to deal with polluted air?

Ms. HORINKO. Congressman, I will defer to my colleague, Jeff Holmstead, who runs the air program.

Mr. STUPAK. Sure.

Mr. HOLMSTEAD. There are no exemptions from the Clean Air Act here.

Mr. STUPAK. You are seeking some.

Mr. HOLMSTEAD. No, no. The bill that we worked on with the Department of Defense doesn't have exemptions. It has a lightly modified set of regulations that we think strikes the right balance between allowing military activities to occur as long as there is an acknowledgement of the emission impacts and as long as those emission impacts will be dealt with within a period of 3 years. We feel as though this does strike the right balance between achieving our goals of clean air and maintaining military readiness.

Mr. STUPAK. But my counties in Michigan, if 25 of them are underneath this EPA nonattainment zone while your military operations are firing shells and things like that, that would only add to that.

Mr. HOLMSTEAD. I am not aware of any areas where military activities, training activities are of significant air pollution concern. They are part of a much broader mix. We have a national plan that is looking at power plants and diesel engines and many, many types of sources. We do think it is important for military operations to be one of those types of sources.

Again, we are not exempting those at all. One of the big concerns that people generally have about the Clean Air Act is that sort of permitting requirements and the delays. I think we agree that there is a concern. That if there is a need to move a number of planes to a new location for training exercise, that they shouldn't essentially need to go through a long permitting process. We would let them go ahead and make the decision that they need for military readiness as long as they report those emissions beforehand and work with EPA and the States within 3 years to offset those emissions.

Mr. STUPAK. Right, but for those 25 counties how do we justify giving the exception for the military because, as you just said, there are aircraft taking on and off. You have emissions issues there that has to be approved. How do I justify to those 25 counties if we allow DOD to go with that exception? DOD would probably worsen the air quality in Michigan counties already struggling with air pollution.

Mr. HOLMSTEAD. The need to plan for air quality improvement is an ongoing thing that the States work out with many, many different sources of air pollution. This change in the law would have a very modest impact on that. The way this is carefully written wouldn't affect their ability to meet the standard or wouldn't affect the possibility of the kind of sanctions that they would otherwise face. We try to very carefully strike the right balance here.

Mr. STUPAK. The Boy Scouts are actually having a jamboree at Fort Hill in Virginia. That is an operational range. Right?

Mr. WAXMAN. Mr. Stupak, I don't know if you still have more time but I wanted to pursue that issue that you were just questioning about.

Mr. STUPAK. Sure. Chairman, is my time up?

Mr. HALL. Yes.

Mr. STUPAK. I think you are next.

Mr. HALL. Go ahead, Mr. Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman. I just want to follow further along on the air quality issues. I want to start off by saying this is interesting that EPA a year ago testified when Christine Whitman came before the Senate she was not aware of any particular area where environmental protection regulations were preventing the desired training.

She did not believe there was a training session anywhere in the country that is being held up or not taking place because of environmental protection regulations. Today we are having EPA testify in favor of this effort to weaken the environmental protections for military families and local communities in which they live. The EPA is now claiming the public health will adequately be taken into account.

I want to pursue that with you, Mr. Holmstead, with regard to the Clean Air Act. The language of this proposal says ensure military readiness activities conform with the requirements of Section 176(c) within 3 years of the date new activities begin. That sounds to me like there is a 3-year period for which they don't have to comply, the Federal Government does not have to comply with the State implementation plan. Is that right?

Mr. HOLMSTEAD. No, that is not quite right. The distinction is the way the law works today. If the military wants to move a new squadron, and I am struggling for the right terms here, but a new group of planes to a new base for military training exercises, before they can do that, they would have to get it changed to the State implementation——

Mr. WAXMAN. Just a minute, Mr. Holmstead. Let me pursue this because I have a very limited period of time.

Mr. HOLMSTEAD. Yes.

Mr. WAXMAN. Right now the law 176(c) says that the Federal Government has to comply with the State implementation plan. You are suggesting they would have to get a change in there. This language says they don't have to read that as I read it within a 3-year period. Now, my first question is what types of public health impacts can we expect if there is going to be this increased air pollution for that 3-year period?

Mr. HOLMSTEAD. In the case, for instance, as I think you are well aware, and certainly in the State of California is probably the biggest issue, what it would mean is as part of this inventory of thousands and thousands of tons of NO_X and VOCs for a short period of time——

Mr. WAXMAN. Short being up to 3 years?

Mr. HOLMSTEAD. Up to 3 years.

Mr. WAXMAN. So within that 3-year period there can be a lot more air pollution.

Mr. HOLMSTEAD. No. We looked at this issue and I think our general view was it would be a barely perceptible issue.

Mr. WAXMAN. I know you don't think it is perceptible but a lot of people have asthma attacks or premature mortality or other respiratory ailments. Some people do feel that is a problem. As I read it, this would allow DOD to receive a 3-year waiver for certain ac-

tivities complying with the State implementations of the Clean Air Act. Is there any reason that a facility cannot have successive 3-year periods granted to them?

Mr. HOLMSTEAD. That is not the intent of the statute at all.

Mr. WAXMAN. But the statute doesn't prohibit it.

Mr. HOLMSTEAD. No. I think we already talked about that issue earlier.

Mr. WAXMAN. But you would like to have a limitation to one 3-year period only?

Mr. HOLMSTEAD. That is certainly the intent of what we are talking about, yes.

Mr. WAXMAN. Is there any limit to the amount of increased air pollution that can result from one of these waivers? It may not be a small source. It can be a huge source of pollution. Is there any limit?

Mr. HOLMSTEAD. Mr. Waxman, there are practical limits. I would just note that Carol Browner, the Director of——

Mr. WAXMAN. Excuse me. I don't know what practical means. The statute says they don't have to meet with the requirements.

Mr. HALL. Let me answer, Mr. Waxman.

Mr. WAXMAN. Mr. Chairman, I will pursue my questions in my own way.

Mr. HALL. No, you will——

Mr. WAXMAN. The statute that you are proposing says that they don't have to comply. If they don't have to comply, that can be for a large amount of pollution or it could be for a small amount of pollution. Where does it say anything different?

Mr. HOLMSTEAD. Let me just point out that the Defense Department sources are a very, very small part of the overall pollution issue. As a legal matter, they could be allowed to emit huge amounts of pollution but they don't today and we are not aware of any instance where this is going to be a significant issue. Again, that is not just my view. That is what Carol Browner said a few years ago when she was head of the EPA.

Mr. WAXMAN. So it is not a significant issue. They are up to 3 years. You would limit it to one 3-year period. Right?

Mr. HOLMSTEAD. Yes.

Mr. WAXMAN. And then if a State feels it is a large amount and you think it is a small amount, the law says it doesn't make any difference what they say. It is up to EPA. Correct?

Mr. HOLMSTEAD. As you well know, States have a great deal of flexibility in terms of managing their own air quality.

Mr. WAXMAN. Does that mean in their flexibility they would have to turn to other industries to make up the difference?

Mr. HOLMSTEAD. That is what States are doing today. There are many, many sources——

Mr. WAXMAN. But doesn't that require an implementation plan change? As I read this proposal——

Mr. HOLMSTEAD. It doesn't require an implementation plan change. States can do many things of their own volition that have nothing to do with——

Mr. WAXMAN. The States are letting the military off the hook for 3 years. They can't without revising their plan say, "Well, since we are going to have more air pollution, I want this industry in our

State to reduce even more than they otherwise would have been required to do under the implementation plan."

Mr. HOLMSTEAD. States can do that. Sure they can.

Mr. WAXMAN. Without a change in the implementation plan?

Mr. HOLMSTEAD. There is no need to change the implementation plan. The States are always free to do that. In fact, typically what the State of California does is they change their local regulations and they do that very quickly. Then the State implementation plan may be several years behind that but it is enforceable immediately by the State and local governments.

Mr. WAXMAN. I think businesses ought to be on notice that they may have to pick up the slack.

Mr. HOLMSTEAD. No, because the statute basically doesn't penalize other businesses for that.

Mr. WAXMAN. Well, doesn't penalize them meaning requiring them to reduce pollution more?

Mr. HOLMSTEAD. The State is free to do that but they are not required to.

Mr. WAXMAN. Not required to but the State could?

Mr. HOLMSTEAD. The State can always do that.

Mr. WAXMAN. So businesses ought to be on notice that the States might do that.

Mr. Chairman, you have been very generous in allowing me to ask questions.

Mr. Holmstead, I am going to ask for some more responses for the record but I want to point out that last time you testified I wrote you a follow-up questions for the record and it took you 7 months to answer. I think that is a delay that I find unacceptable so I hope you will commit yourself today to answer questions for the record on a more timely basis. Would you?

Mr. HOLMSTEAD. I will certainly do my best. Given all the questions that we get I will try to answer them as quickly as I can.

Mr. WAXMAN. Thank you.

Mr. HALL. The gentleman's time has expired. I recognize Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I thank my colleague from California. He just walked out but I would just say it must have been a very good question. It took a long time and he is known for probing and is an ardent spokesman.

But I want to continue on his initial line of comments based on my opening statement real quick. The State SIP, State implementation plan, in a nonattainment area. If we don't pass authorization and legislation like this in a BRAC situation where an air base is in the attainment area right now, as Chairman Barton said, 50 percent of areas in the country with large numbers of population are not under the new standard.

If we don't give a 3-year leeway for that facility and that SIP area within the State to meet the standard, and this is really, you know, for the military guys too, could that prohibit the moving of combat airplanes, refueling tankers, transports into bases throughout this country that are looking as we come to the approaching BRAC environment?

Mr. HOLMSTEAD. I think that is one of the legitimate concerns that we think DOD has. I think, again, it is all about sort of the

process. Can they quickly make those moves or they need to wait for a lot of regulatory changes before they can do that. Our solution here is to say you can go ahead and make that move and then you have 3 years to offset any of those emissions. So it is designed to not stand in the way of those sorts of activities.

Mr. SHIMKUS. Not only is it time but isn't it an expense of money because really if the military wanted to pursue rebasing of facilities, then you would have years of litigation probably to effect these moves in attainment areas.

Mr. HOLMSTEAD. Well, there is always the prospect of a lot of litigation and that is——

Mr. SHIMKUS. In this debate there is probably a lot of litigation. Let me ask for my military friends, we have gauged this debate on training issues. Does the rebasing of squadrons fall under the training classification or is that regular operations and management or not?

Mr. WEBER. Sir, speaking only for the Army, I can't respond to inquiries about squadron relocations, but the training facility availability, the ranges that we have, and the maneuver space that we have in any or all of our installations is a factor and a criteria for how we base and locate formations. Given that the Army is now standing up more brigades, we are going to have to base those organizations throughout the country and other places. Clearly that is a criteria for selection for where we decide to put those formations.

Mr. SHIMKUS. And I was interested in this debate on these two phrases. This is really a debate about industrial waste management versus activity on training ranges. Is that really the debate? And industrial waste management which falls under Superfund issues and the like which I have dealt with in Quincy and trying to get liability.

Superfund authorization is being held up because a lot of the money that goes into Superfund cleanup is going into litigation and court cost and the like. What I think the public wants to see is for that money that would go in the Superfund fund to go to help expedite cleanup. Part of this is kind of a defensive measure against war, courtroom activities, more delay which prohibits cleanup in meeting standards. Does anyone want to comment on that?

Mr. COHEN. I think that is exactly right. I think that the Defense Department's concern is that the Superfund and RCRA statutes are fundamentally designed for industrial waste management paradigm and we don't think that firing on an operational range is waste management.

Mr. SHIMKUS. There are some industrial military sites.

Mr. COHEN. Sure.

Mr. SHIMKUS. This would not affect any of those facilities? This is just——

Mr. COHEN. Absolutely. In fact, it wouldn't even affect waste management on a range. Real waste management as opposed to training.

Mr. SHIMKUS. My last question. Do the provisions in the Readiness and Range Preservation Initiative also cover State and national guard unit facilities?

Mr. COHEN. I believe that they would cover large facilities at Federal ranges from the use of Federal ranges in training under Federal command.

Mr. DUBOIS. Mr. Shimkus, it is similar to the BRAC situation. If those installations are under the authority, direction, and control of the Secretary of Defense, the answer is yes, and some are. However, some are under the authority, direction, and control of the Governor and solely the Governor, then they would not.

Mr. SHIMKUS. I am going to finish by saying I do think there is concern, Mr. Chairman, that if we proceed with this route on ranges, and we haven't really defined what type of ranges; small-arm ranges, artillery ranges. There are a lot of different ranges in the military that we use.

I do think there is a concern that when you start talking about sportsmen's ranges, you start talking about ranges for the State police, local police forces, that there is a precedent being set that if we allow these laws to start closing down ranges, that could then affect municipal police officers, State police officers, and trap and shooting folks who like to recreate as sportsmen. I am very concerned about that. I applaud the efforts and I yield back my time.

Mr. GILLMOR. The gentleman yields back and the gentleman from Texas has been waiting extraordinarily patiently and we now recognize the gentleman from Texas.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. The first observation, there is no one on this committee or this Congress that doesn't want the best armed services we have out there. We are all going to be there for you. We may have a difference of opinion on certain things. I am just afraid that many times if there is any objection to any proposal that one has characterized as not being supportive of our men in women in uniform, that is just not true.

But you do have the burden to come here before us today because you are asking that it all be changed and that you be exempt from certain regulatory schemes. It may be operational ranges. Maybe we need to really try to figure out how precise and how narrow the focus is. It will make more sense to many members of the committee. But if you take all the testimony today, you will have not made the least bit, much less a compelling case that the law needs to be changed.

You haven't indicated specific instances that have placed readiness training in jeopardy because of these regulations. At least, I haven't really heard direct testimony on that or a long list. You may have that and I would wish that you would provide each member with a list of all those readiness activities and training that have been jeopardized that has come to fruition and is not prospective in nature where they can fear someone may be filing a lawsuit.

My understanding is that there is only one civilian lawsuit in the entire country pending and that is in Alaska and this is the Alaska Community Action on Toxics, et al. versus the United States Department of the Army, et al. I would ask the unanimous consent at this time, Mr. Chairman, that this particular joint motion by the attorneys representing both sides of the litigation, the proposal order submitted to the Federal judge, be admitted.

Mr. GILLMOR. Without objection.

[The material appears at the end of the hearing.]

Mr. GONZALEZ. Thank you. The parties here are asking this case be stayed until May because they are so close to resolution. In other words, they are going to work it out themselves, but this is the lawsuit that I am aware of.

You also indicated that there is potential for abuse. There is always potential for abuse. Does that mean you do away with the remedy or the regulatory scheme? You can't do that. The next logical step is just to do away with the courts if they are such an inconvenience and impediment to whatever activity one is engaged in doing at any certain time.

These are basic principles. These are the very reasons that we are in Iraq. This is what we are trying to import to Iraq is a democratic system that includes a judiciary for overview and balance and separation of powers. I guess that is what upsets me. We have lost focus. When I had my opening statement, I always waive opening statements, I simply said let us stay focused. You tell us the reason that a change is required. I haven't really heard it. I am still open to that.

I heard, Mr. DuBois, you indicated, and I am going to paraphrase, that the health and environmental laws or regulatory scheme were never intended to apply to military activities. I wouldn't want you to respond if you believe that because then it makes your testimony somewhat suspicious because then you start off from a position where you think they should have never come under this umbrella or regulatory scheme.

The next thing with Mr. Cohen sitting next to you, you have already told us that there is an alternative and it is Presidential exemption power. And if my colleague was indicating about operational ranges and such, couldn't you narrow it where they could be a Presidential exemption that wouldn't be subject to that kind that President Carter underwent? I have no idea why it has been so difficult.

Those are my questions to Mr. DuBois and Mr. Cohen.

To Ms. Horinko, and of course Mr. Holmstead is free to chime in on this thing, the way I read this it says this proposal will amend the definition of release under CERCLA thereby alternating the statutory disposal and cleanup environments to exclude military munitions, unexploded ordinance, and materials related to these items as long as these materials have been placed on a military range consistent with their intended usage.

Does that mean that you are in the period of activity of exemption and anything goes? You have jurisdiction, you do have overview but only after the fact, after the activity because by then the problem has been created and to remediate obviously is a real problem at a certain point because it can pose certain health hazards. I would be asking you that. I think that Mr. Benevento may still be in the other room. Can you hear me, sir? I know it is a lonely existence over there.

Mr. BENEVENTO. Yes.

Mr. GONZALEZ. My understand, and because you are here representing the State of Colorado, or at least the review the State gave it, and I have a heading here in our briefing papers that says, "Right to remove Clean Air Act and Safe Drinking Water Act cases

to Federal court." Would agree that it is necessary to remove any such lawsuits to Federal court away from the State courts? Those are my questions to the panel and I do thank you for your time and the tremendous inconvenience that resulted as a result of my votes.

Mr. DUBOIS. Mr. Chairman.

Mr. GILLMOR. Yes, Mr. Dubois.

Mr. DUBOIS. I don't know the protocol here but——

Mr. GILLMOR. The protocol is we are out of time for questions but we want to be as open and flexible as we can. If there are some brief comments you can make in respect to the questions Congressman Gonzalez raised, please do so but we are technically out of time.

Mr. DUBOIS. I just want to make one final comment and it is in response to Congressman Gonzalez. In no way, shape, or form does the Department of Defense wish to exempt itself from issues pertaining to pollution of the environment. We have an obligation for those families living on military installations, as well as those who live in the surrounding communities. Nothing that I have said or any of my colleagues, I hope, would be interpreted to the contrary.

The other brief issue is when you say are we asking for exemptions, I think as Mr. Cohen and others have said, much of what we have asked for is really a codification of what already exists, what historically we have been exempt from in terms of our operational training ranges. But it is by this litigation and the threat of cross-litigation that we believe the only recourse we have is to ask the Congress for its assistance. Thank you, Mr. Chairman.

Mr. GILLMOR. Ms. Horinko.

Ms. HORINKO. Just for a minute. We have plenty of authority in EPA still at these operating ranges even if this legislation is passed. We have authority under the Safe Drinking Water Act to protect sole source aquifers which we have used successfully at Massachusetts Military Reservation. We have authority under CERCLA to address an imminent and substantial endangerment. We have authority under CERCLA and RCRA to oversee any activity with respect to these munitions or their constituents that constitute disposal, landfill, waste management, anything other than shooting a gun. And we have authority over all the other activities that go on in these spaces with respect to chemical management, solvents, degreasers, fuel, and things of that nature. We have lots of other tools in our toolbox at EPA to make sure these ranges are properly managed.

Mr. GILLMOR. Any further comments? If not, that will conclude this panel. I want to thank all of the panelists and you also, Mr. Benevento, for your patience and all the panelists here. I appreciate your input. Thank you.

The Chair will call up the second panel.

We will begin our witnesses. I want to start at the request of Congressman Burr of North Carolina who advises that Jerry Ensminger has to be leaving so we want to take you first for your testimony. Then we will take everybody else's testimony. After that we are going to questions. It is up to you, Mr. Ensminger, if you want to stay for the question period or leave after your presentation.

Mr. Ensminger.

STATEMENTS OF JERRY ENSMINGER, CAMP LEJEUNE; DAN MILLER, FIRST ASSISTANT ATTORNEY GENERAL, NATURAL RESOURCES AND ENVIRONMENTAL SECTION, COLORADO DEPARTMENT OF LAW; STEVEN BROWN, EXECUTIVE DIRECTOR, ENVIRONMENTAL COMMISSIONERS OF THE STATES; RONALD GASTELUM, PRESIDENT AND CEO, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; S. WILLIAM BECKER, EXECUTIVE DIRECTOR, STATE AND TERRITORIAL AIR POLLUTION PROGRAM, ADMINISTRATORS/ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS; SYLVIA K. LOWRANCE, THE NATIONAL ENVIRONMENTAL TRUST, ACCOMPANIED BY DAVID BARON, EARTH JUSTICE LEGAL DEFENSE FUND; AND JOHN C. KUNICH, ASSOCIATE PROFESSOR OF LAW, ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW

Mr. ENSMINGER. Good afternoon. First, I would like to say that I am greatly honored and appreciative to the Chairman and the members of this committee for affording me this opportunity to testify before you.

My name is Jerry Ensminger. I spent 24½ years serving my country faithfully in the United States Marine Corps. I am here to testify for a group of our citizens who are unable to speak for themselves. They are the growing list of children who were conceived while their parents lived on military bases where their drinking water was contaminated.

Many of these children were born with serious debilitating birth defects or with defects serious enough to kill them. Many more of these children who were exposed while in utero that were born seemingly normal later developed childhood cancers. Such was the case with my daughter, Jane.

Janie was conceived while her mother and I lived in military housing at Marine Corps Base Camp Lejeune, North Carolina. When Jane was 6 years old she was diagnosed with acute lymphocytic leukemia, or ALL. Beginning in 1999 the Agency for Toxic Substances and Disease Registry, or ATSDR, conducted an adverse pregnancy outcome survey of women who were pregnant and living on base between the years of 1968 through 1985.

The ATSDR survey located 12,598 out of an estimated 16,500 and they released their findings in a report on 18 July 2003. ATSDR identified 33 neural tube defects, 41 oral clefts, 22 cases of childhood leukemia, seven cases of childhood lymphoma for a total of 103 adversely affected children who were exposed to contaminated drinking water while in utero.

To give you an idea of how Camp Lejeune stacked up against the rest of our Nation for this same time period, I have compiled the following statistics. Camp Lejeune was 265 times higher than the national average for neural tube defects and 15.7 times higher in the childhood cancer rate.

These numbers do not take into consideration the staggering number of spontaneous abortions suffered by Camp Lejeune women during this time period. To date no survey or study has been conducted, nor have any been proposed for the non in utero children or the adult populations that were exposed while at Camp Lejeune.

It has since been discovered that the United States Marine Corps and the Department of the Navy authorities knew that the drink-

ing water at Camp Lejeune was highly contaminated with volatile organic chemicals, or VOCs, cleaning solvents. The most appalling fact is that these authorities knew about this contamination for nearly 5 years before they took any action to correct it.

Several different analytical laboratories told Camp Lejeune officials that they had found high levels of these chemicals in their drinking water. Mr. Bruce Babson, a chemist at Grainger laboratories of Raleigh, North Carolina, went to the extreme of writing a 10 August 1982 letter to the commanding general of the Marine Corps Base Camp Lejeune.

In his letter Mr. Babson told Camp Lejeune that the high levels of chemicals that he had found in their finished drinking water were of more importance from a health standpoint than what they had initially set their water to be tested for which was TTHMs. Did military officials take any action? Absolutely not.

Even though this was the third different analytical laboratory to tell them they had VOCs in their drinking water, they went as far as to question the findings by this very laboratory.

Military officials did not even bother to test their individual drinking water supply wells until July 1984. This was the month after the United States Environmental Protection Agency announced that they were proposing regulatory levels for the same exact chemicals which had been found in Camp Lejeune's drinking water for 4 years by that point.

Had the EPA not announced these proposed regulatory levels for these chemicals, would the military have taken the necessary action to alleviate them from their drinking water? The answer to that question is something that none of us can answer. However, by reviewing the inactivity by the military prior to the EPA's announcement, it is highly probable that they would have continued to do what they had done up to that point, absolutely nothing.

The only reason the United States Marine Corps and Department of Navy officials can give today for not taking any action to alleviate these known chemicals in their drinking water is that there were no enforceable regulatory levels established for these chemicals.

Recently documents have been discovered that strongly suggest that the United States Marine Corps and the Department of the Navy officials provided the ATSDR with incorrect water system data in hopes of minimizing their findings of adverse health effects in their studies.

These are only a few examples of why the Department of Defense does not need immunities from any environmental regulations. Currently there are also no enforceable maximum contaminant levels for perchlorates, TNT, RDX, HMX, and white phosorous in drinking water either. It is quite apparent from examining Camp Lejeune's situation that the military will not and cannot be trusted to police themselves.

From my own past experiences it makes me shudder to think that the military would be granted immunities from any environmental regulations or the oversight by the Federal and State agencies that were created for these purposes. To grant immunities we would be affording the Department of Defense a license to kill their

own personnel and their families in a far more terrible way than any foreign enemy could ever kill them with bombs or bullets.

One hundred and forty-one out of the 171 federally operated sites that now appear on the national priority list for contamination are military installations. This alone should be testimony enough for the disregard that the Department of Defense has for the environment and the welfare of their own people.

However, if this fact is not enough of a deterrent, perhaps this next fact will convince you. My daughter, Jane, fought a courageous battle against her malignancy for nearly 2½ years. She literally went through hell and all of us that loved her went through hell with her. The leukemia eventually won that war. On 24 September 1985, Jane succumbed to her disease. She was only 9 years old.

No, DOD does not need, nor do they warrant less scrutiny from environmental agencies. In fact, it is my opinion that they need stricter oversight. I would like to point out to the gentleman that is testifying from Colorado that military munitions contaminants are created in training areas, not in rear area maintenance sites as he suggested.

This past Monday evening on 19 April 2004 I addressed a public meeting of the Onslow County Commissioners. Onslow County is the home of Marine Corps Base Camp Lejeune, North Carolina. They have entered into an agreement with the United States Marine Corps to provide potable drinking water to the citizens of that county.

The Onslow County Commissioners approved this agreement Monday night with a vote of three for and two against. Without maximum contaminant levels for munitions contaminants current being in place, what could possibly be in store for the citizens of Onslow County? Thank you.

[The prepared statement of Jerry Ensminger follows:]

PREPARED STATEMENT OF JERRY ENSMINGER

First, I would like to say that I am greatly honored and appreciative to the chairman and the members of the House Energy and Commerce Committee for affording me this opportunity to testify before them. My name is Jerry Ensminger; I spent 24½ years serving my country faithfully in the United States Marine Corps. I am here to provide testimony for a group of our citizens who are unable to speak for themselves. They are a growing list of children who were conceived while their parents lived on military bases where their drinking water was contaminated. Many of these children were born with serious debilitating birth defects or with defects serious enough to kill them. Many more of these children who were exposed while in utero, that were seemingly normal, later developed childhood cancers. Such was the case with my daughter Jane. Janey was conceived while her mother and I lived in military housing at Marine Corps Base, Camp Lejeune, N.C. (MCB, CLNC). When Jane was 6 year old, she was diagnosed with acute lymphosytic leukemia (ALL). Beginning in 1999, the Agency for Toxic Substances and Disease Registry (ATSDR) conducted an Adverse Pregnancy Outcome survey of women who were pregnant and living on base between the years of 1968-1985. The ATSDR survey located 12,598 out of an estimated 16,500 children and they released their findings in a report on 18 July 2003. ATSDR identified 33 Neural tube defects, 41 Oral clefts, 22 Childhood leukemia, 7 Childhood lymphoma, for a total of 103 adversely affected children who were exposed to contaminated drinking water while in utero. To give you an idea of how Camp Lejeune stacked against the rest of our nation for this same time period, I have complied the following statistics. Camp Lejeune was 265 times higher than the national average for Neural Tube defects and 15.7 times higher in childhood cancer rates. These numbers do not take into consideration the staggering number of spontaneous abortions suffered by Camp Lejeune

women during this time period. To date, no survey, or study has been conducted (nor have been proposed) for non in-utero children or adult populations that were exposed while at Camp Lejeune.

It has since been discovered that United States Marine Corps (USMC) and Department of the Navy (DoN) authorities knew that the drinking water at Camp Lejeune was highly contaminated with volatile organic chemicals (VOCs), cleaning solvents. The most appalling fact is that these authorities knew about this contamination for nearly 5 years before they took any action to correct it! Several different analytical laboratories told Camp Lejeune officials that they had found high levels of these chemicals in their drinking water. Mr. Bruce A. Babson, a chemist at Grainger laboratories of Raleigh, N.C. went to the extreme of writing a 10 August 1982 letter to the Commanding General of Marine Corps Base, Camp Lejeune, N.C. In his letter, Mr. Babson told Camp Lejeune that the high levels of chemicals that he had found in their drinking water were of more importance from a health standpoint than what they had sent the water to be tested for in the first place (TTHM's). Did military officials take any action? Absolutely not, even though this was the 3rd different laboratory to tell them they had VOC's in their drinking water, they went as far as to question the findings by this laboratory. Military officials did not bother to test their individual drinking water supply wells until July 1984. This was the month after the United States Environmental Protection Agency (EPA) announced that they were proposing regulatory levels for the same exact chemicals, which had been found in Camp Lejeune's drinking water for 4 years by this point.

Had the EPA not announced these proposed regulatory levels for these chemicals would the military have taken the necessary actions to alleviate them from their drinking water? The answer to that question is something that none of us can answer. However, by reviewing the inactivity by the military prior to the EPA's announcement, it is highly probable that they would have continued to do what they had done up to that point: ABSOLUTELY NOTHING! The only reasoning that USMC and DoN officials give for not taking action to alleviate these known chemicals in their drinking water is that there were no "enforceable" regulatory levels established for these chemicals! Recently, documents have been discovered that strongly suggest that USMC and DoD officials provided the ATSDR with incorrect water system data in hopes of minimizing their findings of adverse health effects. These are only a few examples why the Department of Defense does not need immunities from any environmental regulations. Currently, there are not any "enforceable" Maximum Contaminant Levels (MCL's) established for Perchlorate, TNT, RDX, HMX, and White Phosphorus in drinking water. It is quite apparent from examining the Camp Lejeune situation that the military will not, and cannot be trusted to police themselves. From my own past experiences, it makes me shudder to think that the military would be granted immunities from any environmental regulations or the oversight by the federal and state agencies that were created for these purposes. To grant these immunities we would be affording the DoD "a license to kill" their personnel and their families in far more terrible ways than any foreign enemy could do with bombs or bullets!

141 out of the 171 federally operated sites that now appear on the National Priority List for contamination are military installations. This alone should be testimony enough for the disregard the DoD has for the environment and the welfare of their own people. However, if this fact is not enough of a deterrent, perhaps this next fact will convince you. My daughter Jane fought a courageous battle against her malignancy for nearly 2½ years, she literally went through hell and all of us who loved her went through hell with her. The leukemia eventually won the war, on 24 September 1985 Janey succumbed to her disease; she was only 9 years old. No! DoD does not need, nor do they warrant less scrutiny from environmental agencies, in fact, it is my opinion that they need stricter oversight.

Mr. GILLMOR. Thank you very much.

Mr. Dan Miller of Colorado.

STATEMENT OF DAN MILLER

Mr. MILLER. Thank you, Mr. Chairman, and members of the committee. My oral and written testimony today is on behalf of the Attorneys General of Colorado, California, Idaho, Utah, and Washington. I would also like to submit for the record a letter signed and dated this past Monday signed by 39 Attorneys General opposing the DOD's proposed amendments for RCRA, CERCLA, and the Clean Air Act. There is an omission error that needs correcting, an

inadvertent omission in my written statement on page 2. The word "effectively" needs to be inserted before the word "powerless."

I would like to be clear that the Attorneys General absolutely support maintaining military readiness. The fact is that in 3 years DOD has not identified even one single instance for RCRA, CERCLA, or the Clean Air Act have had any adverse impact on military ranges whatsoever. There is simply no factual basis to amend these laws.

I will focus today on the amendments to RCRA and CERCLA. These amendments would for practical purposes preempt most States and EPA authority to require the investigation or cleanup of munitions constituents within the external boundaries of operation areas and includes the investigation of cleanup of ground water contaminated with munitions constituents such as perchlorate and other toxic substances on over 24 million acres of operational ranges throughout the U.S., an area equivalent to six States.

Even if munitions contamination threatened to move off-range and contaminate drinking water supplies, DOD's proposed amendments would in most cases preempt States from using their hazardous waste and State Superfund authorities to require DOD to address the contamination anywhere within these 24 million acres.

It has become increasingly clear that munitions contamination of ground water supplies is a real problem. Nationwide there are at least 40 DOD facilities with known perchlorate contamination of ground water or surface water. Perclorite contaminated ground water at operational ranges in Massachusetts Military Reservation, Aberdeen Proving Grounds, has forced the closure of municipal drinking water supplies wells. And, the full extent of munitions contamination is not yet known.

DOD maintains that States basically have no interest in whether the ground water underneath military ranges is contaminated. We disagree. Protecting ground water supplies is a matter of State's rights. In many States, the ground water is the property of the State.

In addition to their property interests, the States have a clear responsibility to protect their water supplies to ensure the health of their citizens and vitality of their economies. Parts of the country are in a sustained drought and we simply cannot afford to sacrifice large areas of ground water to munitions contamination.

DOD seems to believe that investigating and cleaning up conditions of contamination on ranges necessarily impacts readiness. That is simply not the case. There is substantial flexibility in how we investigate and clean up ground water contamination. The location and timing of remedial activities can be changed to accommodate readiness activities.

For example, Colorado Department of Public Health and Environment worked with range officials at Ft. Carson to establish some groundwater monitoring wells on an active range without impacting readiness. We simply installed the wells on a day when the range was not being used, and we adjusted the normal sampling period to coincide with range use.

State regulators have worked effectively for decades to enhance environmental protection at the Department of Defense and the

Department of Energy facilities without compromising defense considerations. We think that future conflicts are very unlikely because competing environmental and readiness concerns can be worked out if both parties have an incentive to do so. That is why it is important for us to retain our authorities.

If there are cases where these competing concerns cannot be reconciled, DOD already has the ability under existing law to obtain exemptions under RCRA and CERCLA. These exemptions are basically at the discretion of the President.

DOD has argued that its amendments simply codify existing regulatory policy regarding military munitions. If that were true, they would be simply unnecessary. But, in fact, these amendment reverse existing policy. When Congress passed the Federal Facility Compliance Act in 1992 it directed EPA to determine when military munitions become hazardous waste for purposes of RCRA's day-to-day management requirements.

In response, EPA promulgated the munitions rule. All that says is DOD does not have to get a permit to conduct training and testing with munitions. However, after they have been used, these munitions and their constituents are subject to RCRA's cleanup requirements in appropriate cases. And the munitions rule does not preempt any State authorities over munitions.

Contrary to the munitions rule DOD's proposed legislation exempts military munitions from RCRA cleanup requirements, including munitions constituents and largely preempts States from regulating them.

Thank you for the opportunity to testify today and I will be glad to answer any questions.

[The prepared statement of Dan Miller follows:]

PREPARED STATEMENT OF THE ATTORNEYS GENERAL OF CALIFORNIA, COLORADO, IDAHO, UTAH AND WASHINGTON

I. Introduction

In February 2004, the Department of Defense ("DOD") proposed legislation (the "Readiness and Range Preservation Initiative" or "RRPI") that would grant it exemptions from the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Clean Air Act. DOD has asserted that the amendments are necessary to maintain military readiness. This is the third successive year that DOD has proposed similar legislation. Over the past two years, a large number of state and local government officials and associations voiced strong opposition to the proposed amendments to RCRA, CERCLA, and the Clean Air Act.[1]

As we have previously emphasized, we absolutely support the need to maintain military readiness, and to provide our armed forces with appropriate realistic training to minimize battlefield casualties and increase their combat effectiveness. There is no question of the importance of maintaining military readiness.

[1] The National Association of Attorneys General passed a resolution in March 2003 opposing any proposed amendments that would impair states' authority to protect the health of their citizens, such as the 2003 RRPI amendments to RCRA, CERCLA, and the Clean Air Act. The Environmental Council of the States passed a similar resolution in April 2003. The Association of Metropolitan Water Agencies, the American Water Works Association, the National Association of Water Companies, and the Association of California Water Agencies wrote a letter in April 2003 opposing the 2003 RRPI's amendments to RCRA and CERCLA. The national associations of state and local air pollution control officials wrote a letter in March 2003 opposing the 2003 RRPI's proposed amendments to the Clean Air Act. The association of state hazardous waste management officials wrote a letter in May 2003 opposing the 2003 RRPI's proposed amendments to RCRA and CERCLA. And the National Association of Counties wrote a letter in May 2003 opposing the 2003 RRPI's proposed amendments to RCRA, CERCLA and the Clean Air Act. These letters and resolutions are attached as Exhibit 1.

However, military training activities have caused adverse impacts on human health and the environment, and resulted in expensive cleanups. For example, there are currently approximately 129 DOD facilities on the Superfund National Priorities List. There is increasing evidence that military training and testing activities on ranges can contaminate groundwater. To date, 40 DOD installations have had perchlorate, a constituent of rocket fuel and many military munitions, detected in their groundwater or surface water. Perchlorate impacts the thyroid. Other toxic munitions constituents, such as RDX, TNT, and white phosphorous, have also been found to contaminate groundwater.

Are there really conflicts between requirements under RCRA, CERCLA, or the Clean Air Act and military readiness? DOD has not identified any such conflicts to date, and we are not aware of any. We think that the likelihood of future conflicts is small. The question, then, is whether the existing environmental laws allow the military to conduct necessary activities in a manner that maintains readiness while ensuring protection of human health and the environment. With respect to RCRA, CERCLA, and the Clean Air Act, we believe that they do. In our view, furthering military readiness and ensuring environmental protection are compatible goals, not mutually exclusive.

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 likely 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 health. And it is likely that DOD's amendments would be construed more broadly to exempt even more contamination from state and EPA oversight.

Under the 2004 RRPI, states and EPA would be essentially powerless to require investigation or cleanup of munitions-related groundwater contamination beneath an operational range, even if the contamination had migrated offsite and was impacting drinking water wells. If we have learned anything in the past thirty years of environmental regulation, it is that relying on federal agencies to "voluntarily" address environmental contamination is often fruitless. One need look no further than the approximately 130 DOD facilities on the Superfund National Priorities List, or DOD's poor record of compliance with state and federal environmental laws to see that independent, legally enforceable state oversight of federal agencies is required to achieve effective results.

DOD has stated that its language is intended to preempt state and EPA cleanup authorities at operating ranges, even though it acknowledges there have never been any conflicts between RCRA or CERCLA cleanup requirements and military readiness, and in particular that neither state nor federal regulators have taken any action under these laws that has adversely impacted military readiness.[2] DOD instead proposes to address any environmental contamination on or under its ranges through self-oversight.

We oppose DOD's proposed amendments to RCRA, CERCLA, and the Clean Air Act for the following reasons:

- First, as far as we are aware, the Department of Defense has not identified any cases in which these three laws have actually adversely impacted readiness. Nor are we aware of any such cases. Indeed, in a recent meeting between states and DOD representatives, DOD acknowledged that preempting state authority under these laws was "not a matter of readiness, but of control." Consequently, we do not believe that the proposed amendments are necessary.
- Second, RCRA, CERCLA, and the Clean Air Act already provide sufficient flexibility to accommodate potential conflicts, in the unlikely event they occur. Each of these laws provides for case-by-case exemptions. In addition, states have a track record of working with DOD and other federal agencies to ensure that environmental requirements do not impede national security objectives.
- Third, the magnitude and nature of DOD's past and current activities present a significant risk of environmental contamination. Experience over the past thirty years shows that independent state oversight is necessary to ensure protection

[2] DOD representatives met with representatives of State Attorneys General and state environmental agencies in December 2003 to discuss DOD's concerns with the Clean Air Act and with the application of RCRA and CERCLA to military ranges. At that meeting, DOD stated that one of its main objectives in its proposed legislation was to preempt state and EPA authority over operating ranges. A summary of the meeting representing the perspective of the state attendees is attached as Exhibit 2.

of human health and the environment. This same experience also shows that states are sensitive to DOD's national security mission, and have consistently found ways to balance military and environmental requirements.

- Fourth, the Department of Defense's amendments would radically change existing law and policy, and would impair state and EPA authority to ensure protection of human health and the environment.

Each of these points is discussed in greater detail in the sections that follow.

II. DOD's proposed amendments to RCRA, CERCLA, and the Clean Air Act are unnecessary, and would impair protection of human health and the environment, without improving military readiness.

II. A. DOD has not demonstrated any conflicts between RCRA, CERCLA, or the Clean Air Act.

DOD has urged Congress to amend these laws, and has testified about the impacts of these and other environmental laws on military readiness at over 12 Congressional hearings since 2001.[3] Just last month, in response to Congressional directives, DOD submitted a report to Congress addressing the impacts of RCRA, CERCLA, and the Clean Air Act on military readiness.[4] Yet, nowhere in any of this testimony or its report to the Congress did DOD identify even a single instance in which RCRA, CERCLA, or the Clean Air Act have impacted military readiness.

Last year, EPA Administrator Christine Whitman testified that she was not aware of any training mission anywhere in the country that was being held up or not taking place because of RCRA, CERCLA, or the Clean Air Act. 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 related to military readiness.

And in December, 2003, representatives of several western Attorneys General and state environmental agencies met with representatives of the Department of Defense (DOD) and the military services to discuss the underlying concerns that prompted DOD to promote proposed legislation to amend several environmental laws. DOD acknowledged that there have not been any instances in which RCRA or CERCLA have impacted readiness, and specifically that no state has ever used its RCRA or state superfund authority in a manner that has impacted readiness.[5]

II. B. RCRA, CERCLA, and the Clean Air Act provide sufficient flexibility to accommodate any conflicts between their requirements and military readiness, in the unlikely event such conflicts occur.

It is noteworthy that in the four years DOD has been warning of conflicts between military readiness and requirements under RCRA, CERCLA, or the Clean Air Act, no such conflicts have arisen. We think that the likelihood of such conflicts in the

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[3] Senate Committee on Environment and Public Works hearing on Impact of Military Training on the Environment, April 2, 2003, opening statement of Chairman James Inhofe. Chairman Inhofe displayed an exhibit showing the following hearings on encroachment issues: 1. Senate Armed Services Readiness and Management Support Subcommittee, 20 March 2001; 2. House Government Reform Committee, 09 May 2001 ; 3. House Armed Services Military Readiness Subcommittee, 22 May 2001; 4. Senate Armed Services Readiness and Management Support Subcommittee, 28 February 2002; 5. House Armed Services Military Readiness Subcommittee, 08 March 2002; 6. House Government Reform Committee, 16 May 2002; 7. Senate Environment and Public Works Committee, 09 June 2002; 8. House Resources Subcommittee on Fisheries Conservation, Wildlife, and Oceans 13 June 2002; 9. Senate Armed Services Readiness and Management Support Subcommittee, 06 March 2003; 10. House Armed Services Military Readiness Subcommittee, 13 March 2003; 11. Senate Armed Services Readiness and Management Support Subcommittee, 01 April 2003; 12. Senate Environment and Public Works Committee, 02 April 2003.

[4] "Report to the Congress: Implementation of the Department of Defense Training Range Comprehensive Plan," February 2004. This report was submitted pursuant to section 366 of the National Defense Authorization Act for FY 2003 and section 320 of the National Defense Authorization Act for FY 2004. Section 366 required the report to identify and evaluate training constraints caused by limitations on the use or military lands, marine areas, and air spaces at each training range. Section 320 required a study that specifically identified the impacts of RCRA, CERCLA, and the State Implementation Plan requirements of the Clean Air Act on specific military installations.

[5] Exhibit 2, at pp. 3-4.

future is low, because of inherent flexibility in implementing requirements under these laws. In the unlikely event such a conflict occurs, the existing exemption provisions in these laws provide further flexibility. They allow the military readiness concerns to override the environmental considerations, while preserving environmental regulators' authority in the vast majority of cases where there is no conflict.

II. B. 1. There is substantial flexibility in implementation of environmental requirements under RCRA, CERCLA, and the Clean Air Act.

States have been regulating the Departments of Defense and Energy—the two federal agencies with national security missions—for decades without impacting national security. We have been able to do so because there is substantial inherent flexibility in most environmental regulatory programs. This is especially true in investigating and cleaning up contaminated sites under both RCRA and CERCLA. There are a variety of approaches to investigating and cleaning up contamination, and cleanup strategies are invariably site-specific.

For example, 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.

The December 2003 meeting of state and DOD officials mentioned above highlighted just how much flexibility there is "on the ground" to address the environmental impacts of military munitions without impacting readiness. DOD representatives explained that 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 on some ranges for recreational purposes when such activities do not conflict with DOD's own use of the range. State officials asked why, if recreational activities in buffer zones and maneuver zones can exist compatibly with range operation, installing a groundwater monitoring well or treatment system in such areas would cause any difficulties.[6] Ultimately, DOD responded that preempting state authorities was "not a matter of readiness, but of control."[7]

There is also significant practical flexibility in the Clean Air Act. DOD acknowledged at the December 2003 meeting with state representatives that advance planning, combined with existing thresholds and exemptions in the Clean Air Act regulations would resolve its clean Air Act concerns in most cases.

It's easy to hypothesize potential conflicts between environmental regulations and military training. It takes a little more work to balance readiness and environmental concerns on a case-by-case basis, but the track record of the past several decades shows that resolution of competing considerations is the normal practice.

II. B. 2. RCRA, CERCLA, and the Clean air Act each provide simple exemption processes that may be used in the unlikely event of a conflict between readiness and environmental requirements.

In the unlikely event that state or EPA regulators believed that environmental contamination at an operational range required remediation measures that did adversely impact readiness, RCRA and CERCLA already allow DOD to seek an exemption from such requirements on the basis of the paramount interests of the United States (RCRA) or national security (CERCLA). According to the existing case law, rather than being "exceptionally high," (as DOD has claimed)[8] 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.

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[6] If it were necessary to install a well in an impact area, it could be hardened against the possibility of being damaged or destroyed by a military munition.

[7] Exhibit 2, at p. 4.

[8] *See, e.g.,* testimony of Benedict S. Cohen, Deputy General Counsel, U.S. Department of Defense before the Senate Environment and Public Works Committee, April 2, 2003, at p. 7. ("Under these statutes, the decision to grant an exemption is vested in the President, under the highest possible standard: 'the paramount interest of the United States,' a standard understood to involve exceptionally grave threats to national survival.") (Available at http://epw.senate.gov/stm1__108.htm.)

In *Kasza v. Browner,*[9] 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 held:

> 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.[10]

(Emphasis added.) Similarly, in *Colon v. Carter*,[11] 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."* [12]

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

In addition to providing a case-by-case exemption, section 118(b) of the Clean Air Act authorizes the President to "issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any state and which are uniquely military in nature." [13] This provision allows even greater flexibility than the case-by-case exemptions in managing any potential conflicts between Clean Air Act requirements and readiness concerns. And this three-year exemption provision in the Act goes directly to the heart of DOD's concern—that the Act's federal conformity provisions may limit its ability to move or add military vehicles—planes, tanks, etc.—among its various installations. And the EPA regulations implementing the federal conformity provisions also contain substantial flexibility. These regulations allow DOD to set aside clean air requirements for up to six months in response to "emergencies," which, by definition, include responses to terrorist activities and military mobilizations. This exemption is renewable every six months through a written determination by DOD.[14]

II. C. DOD's activities pose a substantial risk of harm to human health and the environment that must be managed through independent state oversight.

II.C.1. DOD's activities present a significant risk of harm to human health and the environment.

DOD is responsible for far more contaminated sites than any other federal agency. There are 158 federal facilities currently listed on the Superfund National Priorities List (NPL); another 13 federal facilities have been deleted from the NPL, and 6 are proposed for listing. Of these 177 federal facilities, 142 are DOD facilities.[15] All together, DOD is responsible for addressing over 28,500 potentially contaminated sites across the country.[16] Through fiscal year 2001, DOD had spent almost $25 billion cleaning up sites for which it is responsible.[17] DOD recently estimated that it would

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[9] *Kasza v. Browner,* 133 F.3d 1159 (9th Cir. 1998).
[10] *Id.* at 1173-74.
[11] *Colon v. Carter,* 633 F.2d 964 (1st Cir. 1980).
[12] *Id.* at 967.
[13] 42 U.S.C. § 7418(b).
[14] 40 C.F.R. 93.153(d)(2), 93.153(e); 40 C.F.R. 152.
[15] Information from EPA's Superfund website at http://epa.gov/swerffrr/documents/fy2003.htm#b . Data current through FY 2003.
[16] *See* "Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress," p. 19. This document is available at the following DOD website: http://www.dtic.mil/envirodod/DERP/DERP.htm
[17] *Id.,* p. 21.

take another $14 billion to complete the remediation of environmental contamination at active, realigning and closing sites.[18]

But the need for cleanup of active and closing bases is only part of the picture. DOD is also responsible for assessing and cleaning up thousands of potentially contaminated "Formerly Used Defense Sites" ("FUDS") in the United States and its territories and possessions.[19] Many FUDS are former bombing or gunnery ranges that contain unexploded ordnance. The GAO estimated recently that unexploded ordnance contamination may exist at over 1,600 FUDS.[20] DOD estimates that approximately *16 million acres* of land on transferred ranges are potentially contaminated with unexploded ordnance.[21] There are no reliable data on the cost of addressing the contamination at these former ranges and other FUDS. DOD's recent estimates for unexploded ordnance cleanup vary from $14 billion to over $100 billion.[22]

There is increasing evidence that DOD's activities on its ranges may pose a threat to groundwater supplies. Some constituents of explosives and munitions contamination, such as TNT, RDX and white phosphorous, have toxic or potential carcinogenic effects.[23] Another munitions constituent that is currently causing much concern is perchlorate. Perchlorate is a chemical widely used in solid rocket fuel and munitions. It interferes with iodide uptake into the thyroid gland, and disrupts the thyroid function. The *Wall Street Journal* has reported that EPA is concerned that fetuses and newborn babies may be particularly sensitive to exposure to perchlorate.[24]

Little is known about the factors affecting the movement of munitions constituents such as perchlorate and TNT through soil and groundwater.[25] However, there is increasing evidence that such munitions constituents on operational ranges can contaminate drinking water supplies. Nationwide, there are at least 40 DOD facilities with known perchlorate contamination of groundwater or surface water.[26] Live-fire training at the Massachusetts Military Reservation (MMR) over several decades has contaminated large amounts of groundwater in the sole source drinking water aquifer for the Cape Cod area. Recently, the Town of Bourne closed half of its drinking water supply wells due to contamination by perchlorate that migrated from MMR. Subsequently, DOD spent approximately $2 million to hook the town up to an alternate water supply.[27] Reportedly, explosives contaminants have been detected in about 100 groundwater monitoring wells on MMR, and have exceed EPA health advisory limits at 53 of those wells.[28] Similarly, military training activities at the Aberdeen Proving Ground have contaminated groundwater there with perchlorate, again prompting closure of a municipal water supply well that had been contaminated.[29]

Perchlorate contamination is also a problem at many DOD contractor facilities. Some of these facilities may be considered ranges under the 2004 RRPI. Defense contractors could thus argue they are insulated from state and EPA oversight under RCRA and CERCLA-type authorities. Examples of such facilities may include the Aerojet-General facility in Rancho Cordova, California, or Kerr-McGee's perchlorate production facility in Henderson, Nevada, above Lake Mead. Contamination from

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[18] *Id.,* pp. 27-28. The $14 billion figure combines the total cost-to-complete sums given for active installations in Figure 8 and Base Realignment and Closure Sites in Figure 10.

[19] "ENVIRONMENTAL CONTAMINATION: Cleanup Actions at Formerly Used Defense Sites," GAO-01-557 (July 2001), p. 1. FUDS are properties that were formerly owned, leased, possessed, or operated by DOD or its components.

[20] *Id.* at 2.

[21] "DOD Training Range Cleanup Cost Estimates Are Likely Understated," GAO-01-479 (April 2001), p. 11.

[22] *Id.*, pp. 5 and 13.

[23] Fact sheets or public health statements, all published by the Agency for Toxic Substances and Disease Registry, for four common explosives or munitions constituents (DNT, RDX, TNT and white phosphorous), are attached as Exhibit 3. Also included in Exhibit 3 are two EPA documents regarding perchlorate, another common munitions constituent.

[24] "A Fuel of Cold War Defenses Now Ignites Health Controversy," 12/16/2002 article by Peter Waldman, reported on page 1 of the *Wall Street Journal,* attached as Exhibit 4.

[25] *See, e.g., Munitions Action Plan,* prepared by the Operational Environmental Executive Steering Committee for Munitions (DOD), November, 2001. It is available on the web at https://www.denix.osd.mil/denix/Public/Library/Munitions/MAPCRD/map-finalnov01.doc.

[26] Assessment compiled by 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 . This chart is attached as Exhibit 5.

[27] "Military Cash Flows for New Water Supply," story by Kevin Dennehy, Cape Cod Times, April 24, 2002.

[28] "Work to Clean Cape Cod Continues as Pentagon Seeks Environmental Exemptions," 5/27/2002 story by Melissa Robinson, reported in Boston Globe Online, 5/29/2002.

[29] "Group calling for cleanup of perchlorate in Aberdeen," 10/3/2002 article by Lane Harvey Brown in the Baltimore Sun.

the Kerr-McGee facility is a major contributor to perchlorate levels in the Colorado River, which typically measure 10 to 12 parts per billion in Las Vegas, and from 5 to 8 parts per billion in southern California, where the Metropolitan Water District withdraws it for use in Los Angeles's drinking water supply. Roughly 15% of California's water supply comes from the Colorado River.[30]

II.C.2. Independent state oversight is needed to ensure DOD complies with environmental requirements.

Under current law, DOD may obtain exemptions from requirements under RCRA, CERCLA or the Clean Air Act in the unlikely event such requirements conflict with military readiness. But under the 2004 RRPI, DOD would be exempt from these requirements in *all* cases, even though there would seldom, if ever, be a conflict. Obviously, a case-by-case approach to resolving any future potential conflicts between readiness and the requirements of RCRA, CERCLA and the Clean Air Act results in more environmental protection at no cost to military readiness.

The case-by-case exemption approach afforded by existing law is also preferable to sweeping statutory exemptions because the case-by-case approach provides much-needed accountability. Experience since the 1992 Supreme Court decision in *U.S. Department of Energy v. Ohio*[31] demonstrates that federal agencies in general, and DOD in particular, are far more likely to comply with environmental requirements when they can be held accountable. In that case, the Supreme Court held that federal agencies were not subject to penalties for violating state hazardous waste and water quality laws. In response, Congress swiftly amended RCRA by passing the Federal Facility Compliance Act (FFCA).[32] The FFCA made federal agencies subject to penalties for violating hazardous waste laws. Once Congress clarified the states' authority to hold federal agencies accountable for violating hazardous waste requirements, DOD and other federal agencies began steadily improving their RCRA compliance rates, bringing the percentage of facilities in compliance from a low of 55.4% in FY 1993 to 96.9% in FY 2002.[33]

This salutary trend stands in stark contrast to federal agency performance under the Clean Water Act. Unlike RCRA, Congress did not amend the Clean Water Act following the *Ohio* decision to subject federal agencies to penalties for violating Clean Water Act requirements. Since the Supreme Court decision removed the threat that states could hold federal agencies accountable for violating Clean Water Act requirements by assessing penalties, the percentage of federal facilities in compliance with the Clean Water Act has fallen fairly steadily from a high of 94.2% in FY 1993 to a low of 51.9% in FY 2001, rebounding in 2002 to 67.3% in 2002.[34] DOD's Clean Water Act compliance rates have generally been slightly worse than the federal agency totals.[35]

III. DOD's proposed amendments would radically change existing law and policy, and would impair state and EPA authority to ensure protection of human health and the environment.

In response to criticisms of the 2002 and 2003 versions of the 2004 RRPI, DOD has made some revisions to its proposed language amending RCRA and CERCLA. DOD has not made any revisions in its Clean Air Act proposal. A careful analysis of the revised version of the RCRA/CERCLA amendments indicates that they still create broad exemptions, as described below.[36]

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[30] "Colorado River Taint Worries Some Officials," article in the Los Angeles Times, February 2, 2003, attached as Exhibit 6.

[31] 503 U.S. 607 (1992).

[32] P.L. 102-386.

[33] "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities FY 2001-2002" USEPA Office of Enforcement and Compliance Assurance, EPA 300-R-04-001, January 2004, p. 13. Available on the web at http://www.epa.gov/compliance/resources/reports/accomplishments/federal/soff0102.pdf .

[34] *Id.* While federal facilities' Clean Water Act compliance rates as a whole rebounded somewhat in FY 1999 and 2000, the overall trend is still downward.

[35] *Id.* In 2002, DOD's CWA compliance rate exceeded the overall rate for federal agencies. Id. at p. 20. DOD's Clean Water Act compliance rates for FY 1996-2000 were slightly lower than federal agencies as a whole. "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities FY 1999-2000" USEPA Office of Enforcement and Compliance Assurance, EPA 300-R-01-004, September 2001, at p. 24; "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities, FY 1997-98," USEPA Office of Enforcement and Compliance Assurance, EPA 300-R-00-002, January 2000, p. 26; "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities, FY 1995-96" USEPA Office of Enforcement and Compliance Assurance, EPA 300-R-98-002a, June 1998, pp. ES-11 and ES-12.

[36] DOD has also responded to some of the criticisms of its proposal in a document titled "Readiness and Range Preservation Initiative (RRPI): Myth and Fact." We have analyzed DOD's

III. A. DOD's proposed 2004 amendments to RCRA create sweeping exemptions from state and EPA oversight

In summary, DOD's proposed amendment to RCRA exempts certain military munitions from RCRA's definition of "solid waste," the fundamental jurisdictional definition in RCRA. As a result, DOD's proposed amendments likely preempt state and EPA authority to require cleanup of a wide variety of munitions-related contamination. This is because EPA's authority under RCRA only extends to materials that are solid wastes, and because RCRA's waiver of sovereign immunity applies to state requirements respecting control and abatement of "solid waste." (States may only regulate the federal government to the extent Congress has authorized such regulation through a waiver of sovereign immunity.) Thus, the scope of the RCRA sovereign immunity waiver will likely be affected by amendments to RCRA's definition of solid waste. And because waivers of immunity are construed extremely narrowly, any ambiguity in the definition of solid waste will likely be construed in the way that results in the narrowest waiver.[37] If the 2004 RRPI were enacted, we are concerned that DOD would argue that substances that are excluded from RCRA's definition of solid waste are not subject to the waiver.

DOD's proposed definition of solid waste reads:

> "Section ———. Range management.
>
> (a) DEFINITION OF SOLID WASTE.
>
> (1) 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, including unexploded ordnance, and the constituents thereof, that are or have been deposited, incident to their normal and expected use, on an operational range, and remain thereon.
>
> (2) Paragraph (1) shall not apply to military munitions, including unexploded ordnance, or the constituents thereof, that—
>
> (A) are recovered, collected, and then disposed of by burial or landfilling; or
>
> (B) have migrated off an operational range; or
>
> (C) are deposited off of an operational range; or
>
> (D) remain on the range once the range ceases to be an operational range.
>
> (3) Nothing in this section affects the authority of federal, state, interstate, or local regulatory authorities to determine when military munitions, including unexploded ordnance, or the constituents thereof, become hazardous waste for purposes of the Solid Waste Disposal Act, as amended (42 U.S.C. 6901 et seq.), including, but not limited to, sections 7002 and 7003, except for military munitions, including unexploded ordnance, or the constituents thereof, that are excluded from the definition of solid waste by this subsection.

Thus, DOD's proposed amendment to RCRA's definition of solid waste consists of three paragraphs. The first paragraph excludes certain military munitions from the definition of solid waste, and the second paragraph creates certain limitations on exclusion. The third paragraph likely preempts federal, state, interstate and local authorities from defining as solid waste any military munitions excluded from the definition by the first two paragraphs.

DOD's proposed amendment excludes certain classes of munitions from EPA regulation under RCRA by excluding them from the statute's definition of "solid wastes," which is a fundamental jurisdictional prerequisite to RCRA regulation.[38] By narrowing this definition, DOD's proposed amendment also likely limits the scope of *state* authority under state hazardous waste laws. That's because the term "solid waste" appears in RCRA's waiver of federal sovereign immunity—the provision of the law that makes DOD subject to state hazardous waste laws.[39] The scope of the RCRA sovereign immunity waiver will likely be affected by amendments to RCRA's definition of solid waste. And because waivers of immunity are construed extremely narrowly, *any* ambiguity in the definition of solid waste will likely be construed in the way that most restricts state authorities over DOD.[40]

"Myth and Fact" paper in a separate paper titled "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, attached as Exhibit 7.

[37] *Department of Energy v. Ohio,* 503 U.S. 607 (1992).

[38] *See* 42 U.S.C. § 6903(5) and (27). Section 6903(5) defines "hazardous waste" as "a solid waste, or combination of solid wastes," that exhibits certain characteristics. Section 6903(27) defines "solid waste." Therefore, hazardous wastes are a subset of solid wastes.

[39] The RCRA waiver of immunity applies to state "requirements respecting the control and abatement of solid waste or hazardous waste disposal and management." 42 U.S.C. § 6961(a).

[40] *Department of Energy v. Ohio,* 503 U.S. 607 (1992).

III. A. 1. Even under a narrow reading, DOD's proposed language would likely preempt state and EPA authority under RCRA and analogous state laws to require investigation and cleanup of UXO or other munitions contamination on over 24 million acres of "operational ranges," including ranges that have not been used in decades.

If proposed subsection (a) is read such that the phrase "that are or have been deposited, incident to their normal and expected use, on an operational range, and remain thereon" modifies "military munitions," then the exemption provided in paragraph (1) would be limited to "operational ranges."[41] As discussed below in III.A.3., the term "operational range" may include contractor-owned facilities. But even construed to mean only ranges owned or leased by the United States, this exemption would still be very far-reaching, as there are over 24 million acres of operational ranges owned or leased by the United States and under DOD's control.[42] This is roughly equivalent to an area the size of Maryland, Massachusetts, New Jersey, Hawaii, Connecticut and Rhode Island combined. These 24 million acres include an unknown number of ranges that have not been used in years, or, in some cases, decades.[43]

The 2004 RRPI likely prevents states or EPA from requiring any investigation or cleanup of munitions-related contamination under RCRA, CERCLA, or analogous state laws within the exterior boundary of an operational range, regardless of whether such contamination presents an imminent and substantial endangerment, is threatening to migrate off-range, or actually has migrated off range. 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. Under The 2004 RRPI, states and EPA would be powerless to require that this contamination be addressed.[44]

Under DOD's proposed legislation, the presence of munitions contamination in groundwater below a range is *not* considered to be "off-range."[45] Instead, the contamination must move beyond the lateral boundary of the range before it is considered off-range.

Preempting state and EPA RCRA authorities on operational ranges significantly impairs these regulators' ability to protect human health and the environment for several reasons. We know from decades of experience in cleaning up plumes of groundwater contamination that the only really effective strategy is to address the plume at its source, but the 2004 RRPI would likely eliminate state and EPA authority to require investigation or cleanup of an on-range source of contamination. Some ranges encompass hundreds of square miles, so munitions contamination could spread vast distances before it crosses a range boundary where state or EPA

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[41] The Defense Authorization Act for FY 2004 contains provisions defining "range" and "operating range." Under the new definition,

(3) Operational range.—The term "operational range" means a range that is under the jurisdiction, custody, or control of the Secretary of Defense and—

(A) that is used for range activities, or

(B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

H.R. 1588, section 1042 (codified at 10 U.S.C. § 101(e)(3)). The term "range" is now defined as a designated land or water area that is set aside, managed, and used for range activities. 10 U.S.C. § 101(e)(1)). "Range activities" are further defined as research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems, and the training of military personnel in the use and handling of military munitions, other ordnance, and weapons systems. 10 U.S.C. § 101(e)(2).

[42] 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).

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

[44] 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. Justice E.O. 12580(4)(e). In our view, EPA's § 106 authority is not an adequate safeguard.

[45] DOD's proposed language certainly can be read this way, and DOD representatives confirmed this was their intent in the December 2003 meeting with state officials. See Exhibit 2 at p. 3.

authority would begin. Allowing contamination to spread so far may create vast sacrifice zones of unusable groundwater, because cleanup may not be technically or economically feasible over such large areas. Groundwater supplies are scarce in parts of the country, particularly in the West, and particularly in times of drought. States have a vital interest in preserving their groundwater resources to protect the health of their citizens and the welfare of their economies.

Even if cleanup of such large plumes is technically feasible, DOD's policy of allowing groundwater contamination to spread within the exterior boundaries of its ranges substantially increases the costs of cleaning up the contamination. It also substantially increases the risk of unanticipated exposures to the contaminants, because our understanding of the subsurface environment is limited at best. Finally, without authority to require investigation of groundwater contamination, how would regulators ever become aware of munitions contamination in groundwater until it had impacted drinking water supplies? These concerns underscore the importance to the states of retaining the authority to require investigation and cleanup of munitions contamination on ranges.

It is also important to recognize that the term "operational range" includes ranges that have not been used in years, or even decades.[46] In a 1998 survey EPA noted that many ranges which had not been used in decades had not been formally closed by DOD, and so were considered "inactive".[47] 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.

There also will likely be practical difficulties in applying the concept of "operational range" to determine where state or EPA authority begins or ends. At the December 2003 meeting between DOD and state officials to discuss DOD's concerns with RCRA, CERCLA and the Clean Air Act, DOD representatives indicated they were not aware of any guidelines or procedures for designating ranges. When asked if each range had a legal description, they responded that some do, while others do not.[48] Without knowing precisely where a range boundary is, it is not possible to define where state or EPA authority begins or ends under RRPI. And it also appears that under the RRPI, DOD could eliminate state or EPA authority in a given area simply by considering it to be part of a range—perhaps an expansion of a buffer zone.

As a practical matter, even read in the narrowest fashion, the 2004 RRPI would likely preempt state and EPA authority under RCRA and analogous state laws to require DOD to investigate or control an on-range source of groundwater contamination, even if:

- drinking water wells onsite or offsite were contaminated;
- the contamination were causing an imminent and substantial endangerment;
- the range was on land owned by the state; or
- it was on a range that had not been used in decades.

In addition, states and EPA would likely be preempted from regulating the open detonation of unexploded ordnance.[49]

III. A. 2. DOD may argue that its proposed amendment to RCRA's definition of solid waste should be construed more broadly to exclude nearly all military munitions and related contamination from RCRA and corresponding state regulation.

As noted above, federal courts construe waivers of federal sovereign immunity extremely narrowly.[50] So a federal court, when faced with alternative interpretations of a waiver of immunity, will choose the one that results in the narrowest possible waiver. DOD's proposed language is particularly troubling when considered in light of this rule of statutory construction. That's because proposed (a)(1) 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 limiting subordinate clause that starts "that are or have been deposited, incident to their normal and expected use, on an operational range, and remain there-

[46] 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).

[47] 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.

[48] *See* Exhibit 2 at p. 5.

[49] In states that have adopted the munitions rule as finalized by EPA, open detonation of UXO is not a waste management activity; however, these states are not preempted from choosing to regulate such activity.

[50] *Department of Energy v. Ohio,* 503 U.S. 607 (1992).

on" could modify the term "military munitions," or it could modify the phrase "including unexploded ordnance, and the constituents thereof." Both readings create broad exemptions, but the difference has significant implications.

If the limiting clause "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 there is no language in (a)(1) that limits or modifies "military munitions." 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." All military munitions and munitions constituents[51] such as perchlorate, TNT, RDX, and other chemical explosives and propellants—except those described in (a)(2)—would likely be completely exempt from state and EPA regulation under RCRA and analogous state laws.

Although this definition does not include the word "constituents," it does define munitions to include their components, including propellants and explosives, the two main sources of chemical constituents of munitions.

We are concerned that a federal court reviewing the 2004 RRPI would adopt this interpretation because it would result in a narrower scope of state authority over DOD. Subparagraph (2)(C) also supports this reading. If paragraph (1)'s exclusion is limited to munitions that were deposited, incident to their normal and intended use, *on* an operational range, then (2)(C) would be surplusage. Because courts strive to give meaning to all parts of a statute, the inclusion of (2)(C) suggests the broader reading of (1) is appropriate.

This broader reading of (a)(1) would likely preempt state and EPA authority to require the investigation or cleanup of nearly all munitions-related contamination, not just contamination arising from the normal and intended of munitions on an operational range. Even munitions contamination that arose from improper management of discarded munitions or munitions constituents would likely be excluded from RCRA. One such example would be ammunition washout activities. At the Pueblo Chemical Depot in Colorado, ammunition washout created a plume of TNT-contaminated groundwater that has traveled over two miles, and has gone off the Depot to contaminate drinking water wells nearby.

In addition, contamination caused by munitions or their constituents that have been disposed through discharge, injection, dumping, spilling or placing on or off of an operational range would likely be excluded from state and EPA RCRA cleanup authorities. 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. However, DOD's proposal does not define the word "deposited." "Deposit" is one of several different actions that constitutes "disposal" under RCRA.[52] Because paragraph (a) of the 2004

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[51] The Defense Authorization Act for FY 2004 added a definition of military munitions to 10 U.S.C. § 101(e):

(4) Military munitions.—(A) The term "military munitions" means all ammunition products and components produced for or used by the armed forces for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard.

(B) Such term includes the following:

(i) Confined gaseous, liquid, and solid propellants.

(ii) Explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives, and chemical warfare agents.

(iii) Chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges.

(iv) Devices and components of any item specified in clauses (i) through (iii).

(C) Such term does not include the following:

(i) Wholly inert items.

(ii) Improvised explosive devices.

(iii) Nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) have been completed.

(5) Unexploded ordnance.—The term "unexploded ordnance" means military munitions that—

(A) have been primed, fused, armed, or otherwise prepared for action;

(B) have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(C) remain unexploded, whether by malfunction, design, or any other cause.

[52] RCRA defines disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid

RRPI amends the definition of solid waste in RCRA, a court interpreting this language would certainly look to the definition of "disposal" in interpreting the word "deposited." Again, because courts strive to give meaning to all words in a statute, "deposit" would likely be construed as meaning something different than the other actions that constitute disposal under RCRA. 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. Examples of such contamination include:

- 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;
- contaminated groundwater from ammunition washout activities; and
- UXO and munitions-contaminated groundwater at Department of Energy facilities such as Los Alamos National Laboratory.

The broader reading of the 2004 RRPI could also preempt state and EPA regulation of the destruction of the nation's stockpile of chemical weapons such as nerve gas and mustard agent. These munitions do not meet any of the criteria in paragraph (a)(2), and thus would be exempt from the definition of solid waste under (a)(1). 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.

States and EPA would also likely be preempted from regulating open burning and open detonation activities on operating ranges. There is some evidence to suggest that open detonation of unexploded ordnance on ranges is a significant source of munitions contamination in groundwater.

Finally, this reading would also exempt from RCRA several categories of munitions that are currently regulated under EPA's "munitions rule."[53] For example, used or fired munitions that are removed from an operational range for treatment or disposal other than by landfilling would no longer be subject to RCRA.[54] Nor would munitions that have deteriorated or been damaged to the point that they cannot be put into serviceable condition and cannot reasonably be recycled or used for other purposes.[55]

III. A. 3. DOD's proposed language may exempt defense contractor facilities from federal cleanup requirements under RCRA.

DOD says that its proposed exemptions from RCRA do not include munitions contamination at defense contractor facilities. We are concerned that this is not the case, and that the 2004 RRPI's exemptions from EPA authority under RCRA may extend to defense contractor facilities.

Our concern arises because of recently adopted definitions for "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."

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 the definition of "operational range" states that it means a range "under the jurisdiction, custody or control of the Secretary concerned," this phrase does not

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waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3).

[53] 40 CFR Part 266, Subpart M.

[54] *Cf.* 40 CFR 266.202(c)(1).

[55] *Cf.* 40 CFR 266.202(b)(3).

mean the range must be owned by the United States. [56] 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.[57] And in the fall of 2001, DOD forwarded proposed legislative 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).[58]

DOD—and attorneys for defense contractors—could make similar arguments were these amendments to pass. For example, they might assert that defense contractor facilities are under DOD "control" because of contractual provisions that give it ownership of weapons or munitions, or some degree of control over their manufacture or use. They might also assert that DOD 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." [59]

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 des-

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[56] 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.)

[57] 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 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).

[58] 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".

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(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.

By adding the phrase "listed in paragraph (c) of this section," DOD's amendment would have created an argument that the facilities listed in paragraph (c) are all under DOD's jurisdiction. And the new language in (c)(1)(B) would have allowed DOD to argue that by carrying out a response action at a site it no longer owned, leased or possessed, it had obtained jurisdiction over the site.

[59] 40 C.F.R. § 300.120(d).

ignates 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.

III. A. 4. The 2004 RRPI may be read to preempt state authority to regulate munitions-related contamination at private defense contractor facilities.

Privately-owned federal contractor facilities are not shielded from regulation by the limits of a waiver of sovereign immunity, so simply exempting military munitions from RCRA's definition of solid waste would not preempt state regulation of such munitions at private contractor sites. (As explained in the previous section, it would likely exempt them from EPA regulation under RCRA.) However, new language in paragraph (a)(3) of the 2004 version of DOD's proposal may preclude states from defining military munitions excluded from the definition of solid waste under paragraph (a)(1) as hazardous waste under state laws.

Paragraph (a)(3) provides "[n]othing in this section affects the authority of federal, state, [or other] regulatory authorities to determine when military munitions . . . become hazardous waste for purposes of [RCRA], except for military munitions . . . that are excluded from the definition of solid waste by this subsection." This language clearly implies that states may not pass laws or regulations defining as solid waste any munitions that are excluded from the federal definition by the RRPI.

Because (a)(1) excludes at least those munitions and constituents that were deposited incident to their normal use on operational ranges at contractor facilities (and may exclude nearly all munitions and their constituents at defense contractor facilities, depending on how it is read), (a)(3) may preempt states from regulating at least some categories of UXO and other munitions contamination at private contractor sites. Thus, the RRPI could preempt state authority over the cleanup of perchlorate-contaminated groundwater at DOD contractor facilities under RCRA or analogous state laws. It could even preclude states from regulating the management of waste streams from the production of propellants and explosives used in military munitions—thus potentially leading to even more groundwater contamination by such toxins.

III. A. 5. DOD's proposal does not codify existing policy or practice.

DOD has repeatedly asserted that its legislative proposals, including the 2004 RRPI, simply codify existing regulatory practice and policy. Specifically, DOD asserts these amendments simply codify EPA's "military munitions rule." [60] These assertions are simply untrue. The 2004 RRPI represents a near 180 degree turnaround from the munitions rule. To understand why, it's necessary to briefly explain key RCRA provisions and summarize the munitions rule.

RCRA contains a broad *statutory* definition of solid waste and hazardous waste.[61] 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.[62] 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 statutory hazardous wastes are only subject to RCRA's cleanup authorities, not its permitting requirements.[63]

In 1992, Congress passed the Federal Facility Compliance Act.[64] In that Act, Congress directed EPA to promulgate regulations defining when military munitions become *regulatory* hazardous wastes.[65] Because regulatory hazardous wastes are a subset of statutory solid wastes, *passage of the Federal Facility Compliance Act*

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[60] *See, e.g.,* DOD News Transcript titled "Roundtable on Range and Readiness Preservation Initiative," Tuesday, April 6, 2004, on the web at http://www.dod.mil/transcripts/2004/tr20040406-0582.html; testimony of Benedict S. Cohen, Deputy General Counsel, U.S. Department of Defense before the Senate Environment and Public Works Committee, April 2, 2003, at p 5. Mr. Cohen's testimony may be found at the Committee's website at http://epw.senate.gov/stm1_108.htm.

[61] 42 U.S.C. § 6903(6) and (27).

[62] 42 U.S.C.§ 6921.

[63] 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, manifesting, training, etc.).

[64] Pub. L. No. 102-386.

[65] 42 U.S.C. § 6924(y).

means that military munitions are statutory solid wastes if they meet the statutory definition, i.e., if they have been "discarded."[66]

In 1995, EPA published its proposed "munitions rule" in the Federal Register.[67] Among other things, EPA proposed that munitions used for their intended purpose (including research, development, testing and training) are not *regulatory* hazardous wastes, such that DOD would not need a RCRA permit to use munitions for such purposes.[68] EPA also proposed to define when used or fired military munitions would be *statutory* solid wastes.[69] Specifically, 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.[70]

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.[71] EPA postponed action on the proposal to define when discharged munitions would be statutory solid wastes, as well as the sunset provision.[72] 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."[73] 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 insufficiently protective, EPA stated it would be prepared to address the issue under Federal environmental laws.[74] DOD did publish a proposed range rule, but following strong opposition from states and others, never published a final range rule.[75]

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.[76]

Thus, the current state of the law is that:

- munitions use does not require a RCRA permit; but
- used or fired munitions are subject to RCRA's cleanup authorities in appropriate circumstances;
- contamination from munitions constituents such as perchlorate, RDX, and TNT is subject to RCRA's cleanup authorities in appropriate circumstances; and
- nothing in the munitions rule preempts states from adopting additional or more stringent requirements than those set forth in the rule.

The 2004 RRPI differs from the munitions rule in at least four significant ways. First, this statutory change would likely preclude states and EPA from using RCRA's imminent and substantial endangerment authorities to address most (or all)

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

[67] 60 Fed. Reg. 56468.

[68] *Id.* at 56492.

[69] *Id.*

[70] *Id.*

[71] 62 Fed. Reg. 6625, 6654 (Feb. 12, 1997), *codified at* 40 CFR § 266.202.

[72] *Id.* at 6632.

[73] *Id.*

[74] *Id.*

[75] The proposed range rule was published in 62 Fed. Reg. 50796 (September 26, 1997). Twenty-four Attorneys General joined in a letter to the Office of Management and Budget urging OMB to disapprove the final range rule, and the Environmental Council of the States also passed a resolution opposing promulgation of the final rule. See Exhibits 8 and 9. Again, states and others commented that DOD did not have statutory authority to promulgate such a rule, and that in passing the Federal Facility Compliance Act, Congress had intended for states and EPA to oversee management of waste munitions, including cleanup of munitions on closed and transferred ranges.

[76] The Department of Justice took this position in recent litigation. *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.")

munitions-related contamination on operational ranges (and perhaps elsewhere), because the 2004 RRPI exempts certain munitions from RCRA's statutory definition of solid waste.[77]

Second, RRPI likely preempts state authority to require the cleanup of most munitions-related contamination on operational ranges, including unexploded ordnance and perchlorate contamination, under RCRA.[78] (Again, if read broadly as described in III.A.2., the preemptive effect would encompass nearly all munitions contamination.) 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."[79]

Third, by including munitions constituents in paragraphs (a)(1) and (a)(2), DOD's proposal likely preempts 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. In contrast, 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.[80]

Fourth, as described in III.A.4., above, the 2004 RRPI may preempt states from regulating certain categories of munitions and related contamination at defense contractor sites. The munitions rule does not preempt state authorities over defense contractors.

Finally, if read broadly as described in III.A.2 above, the 2004 RRPI would also exempt from RCRA several categories of munitions that are currently regulated under EPA's munitions rule, including used or fired munitions that are removed from an operational range for treatment or disposal other than by landfilling, and munitions that have deteriorated or been damaged to the point that they cannot be put into serviceable condition and cannot reasonably be recycled or used for other purposes.

III. B. DOD's proposed amendment to CERCLA likely impairs state and EPA cleanup authorities, and may bar cost recovery and natural resource damage claims regarding munitions-related contamination.

DOD's 2004 proposed amendment to CERCLA provides:

"(b) Definition of Release.—

"(1) The term "release" as used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9601 et seq.), does not include the deposit or presence on an operational range of any military munitions, including unexploded ordnance, and the constituents thereof, that are or have been deposited thereon incident to their normal and expected use, and remain thereon.

"(2) Paragraph (1) shall not apply to military munitions, including unexploded ordnance, and constituents thereof, that "

"(A) migrate off an operational range; or

"(B) are deposited off of an operational range; or

"(C) remain on the range once the range ceases to be an operational range.

""(3) Notwithstanding the provisions of paragraph (1), the authority of the President under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9606(a)), to take action because there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance includes the authority to take action because of the deposit or presence on an operational range of any military munitions, including unexploded ordnance, or the constituents thereof that are or have been deposited thereon incident to their normal and expected use and remain thereon.

"(c) DEFINITION OF CONSTITUENTS.—For purposes of this section, the term "constituents" means any materials originating from military munitions, including unexploded ordnance, explosive and non-explosive materials, and emission, degradation, or breakdown products of such munitions.

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[77] As noted above in III.A.1. and III.A.2., RRPI may be read in different ways that affect the reach of its preemptive effect.

[78] By narrowing the statutory definition of solid waste, a term used in RCRA's waiver of sovereign immunity, RRPI likely narrows RCRA's waiver of immunity. *Department of Energy v. Ohio*, 503 U.S. 607 (1992).

[79] 62 Fed. Reg. 6625 (Feb. 12, 1997).

[80] In fact, EPA revised to final rule to make it absolutely clear that contamination of soil and groundwater is not part of the "intended use" of munitions. *See* 62 Fed. Reg. 6631.

"(d) CHANGE IN RANGE STATUS.—Nothing 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.

"(e) Nothing in this section affects the authority of the Department to protect the environment, safety, and health on operational ranges."

DOD's proposed amendment to CERCLA will likely impair EPA and state authorities under CERCLA and related state laws to require the investigation and cleanup of munitions-related contamination in many cases. It is clearly intended to preempt such authorities in most, if not all, situations on operational ranges. It may also impair state and EPA authorities on ranges that are no longer operational. And it may preclude parties that spend their own money cleaning up DOD's munitions-related contamination on former DOD facilities from recovering their response costs from DOD. Finally, it may preclude states and Indian Tribes from recovering damages for injuries to their natural resources that were caused by military munitions.

DOD's language may have all these impacts because under CERCLA, "release" is a fundamental jurisdictional prerequisite. The scope of nearly all CERCLA authorities or requirements, including sections 104 (removal and remedial authority), 106 (imminent and substantial endangerment order authority), 107 (liability for response costs and natural resource damages), and 120 (relating to federal facilities) is premised on the existence of a "release" or a "threatened release" of a "hazardous substance, pollutant or contaminant."

III. B. 1. DOD's proposed language likely encompasses not only used and fired munitions, but munitions and related contamination from production, maintenance activities, and proper or even improper waste management activities.

Like DOD's proposed definition of "solid waste," the proposed definition of "release" under CERCLA is somewhat ambiguous. Paragraph (1) of DOD's proposed definition contains a sentence structure that is very similar to its proposed definition of "solid waste." And again, the phrase "that are or have been deposited thereon incident to their normal and expected use, and remain thereon" could modify either "military munitions" or "unexploded ordnance, and the constituents thereof." If it modifies "military munitions," then the exemption is limited to those munitions that were deposited on an operational range incident to their normal and intended use. But if it modifies "unexploded ordnance, and the constituents thereof," then any military munitions or constituents that have been deposited or are present on an operational range are excluded, regardless of whether such presence was the result of their normal and intended use.

The more natural reading of this language is for the phrase "that are or have been deposited thereon incident to their normal and expected use, and remain thereon" to modify "unexploded ordnance, and the constituents thereof." That's because the earlier part of the sentence already includes the "deposit" of military munitions on an operational range. Consequently, (b)(1) would exempt from CERCLA and state superfund type laws any munitions-related contamination on an operational range, not just contamination associated with the use of munitions in training and testing. EPA would have no CERCLA authority to require the investigation or cleanup of contamination on an operational range (including ranges on contractor-wined facilities) that arose from any of the following activities:

- spills, leaks, or even intentional disposal of wastes from the production of munitions propellants or constituents, even if such contamination were migrating offsite;
- spills, leaks, or even intentional disposal of wastes from ammunition maintenance activities, even if such contamination were migrating offsite (as is occurring at the Pueblo Chemical Depot in Colorado);
- the use or firing of munitions on a range, even if such contamination were migrating offsite; or
- burial of munitions on a range.

II. B. 2. DOD's proposal would impair several federal cleanup authorities at operational ranges.

By excluding munitions on operational ranges from CERCLA's definition of "release," DOD's proposed amendment will likely impair EPA's authority under CERCLA to require investigation or remediation of most, if not all, munitions-related environmental contamination on operational ranges.

For example, DOD's proposed amendment appears to eliminate existing EPA authority to gather information under CERCLA § 104(e) regarding munitions-related and explosives-related contamination. Without this authority, it would be difficult

indeed for EPA to determine whether munitions were contaminating drinking water sources under an operational range. Consequently, the fact that RRPI preserves EPA's § 106 imminent hazard authority is largely meaningless. Nationwide, there are at least 40 DOD facilities with known perchlorate contamination of groundwater or surface water. Nineteen of these facilities are on the Superfund National Priorities List.[81]

DOD's proposed amendment also appears to remove cleanup of munitions-related contamination from the scope of CERCLA section 120 interagency agreements for sites on the National Priorities List. This means that EPA will no longer have authority to select (or concur in) remedies for munitions- and explosives-related contamination at operating ranges on the 14 NPL sites mentioned above—or indeed, any of the approximately 129 DOD facilities currently on the NPL.

This provision may also be read to eliminate the requirement that investigation and cleanup of munitions-related contaminants on operational ranges be conducted according to standards that apply to all other CERCLA cleanups.[82] By removing these public involvement, procedural, substantive and technical safeguards, subsection (b) would severely undermine the goal of achieving cleanups that adequately protect human health and the environment.

III. B. 3. DOD's proposed definition of release will likely impair state superfund-type authorities at operational ranges.

The change in the definition of "release" also may narrow the scope of state authority under state superfund-type laws, because it may narrow CERCLA's waiver of immunity. CERCLA's waiver of immunity includes state laws "concerning removal and remedial action."[83] CERCLA's definitions of "removal" and "remedial action" are limited by the definition of "release."[84] Thus, by excluding the "deposit or presence on an operational range of any explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that are or have been deposited thereon incident to their normal and expected use" from the definition of "release," this provision likely precludes state superfund authority over munitions-related contamination on operational ranges. DOD's language would likely impair state authority over munitions contamination that arose from any of the following activities:

- spills, leaks, or even intentional disposal of wastes from the production of munitions propellants or constituents, even if such contamination were migrating offsite;
- spills, leaks, or even intentional disposal of wastes from ammunition maintenance activities (such as the ammunition washout that created the TNT plume at Pueblo Chemical Depot), even if such contamination were migrating offsite;
- the use or firing of munitions on a range, even if such contamination were migrating offsite; or
- burial of munitions on a range, even if such contamination were migrating offsite.

III. B. 4. DOD's proposal may impair state and EPA superfund-type cleanup authorities on ranges that are no longer operational.

The 2004 RRPI may also impact state and EPA authority to require cleanup of 16 million acres of closed and transferred ranges that DOD estimates may be contaminated with UXO and munitions constituents. (Many of these ranges are now in private ownership.) On the one hand, proposed (b)(2)(C) 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)."[85] 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

[81] See Exhibit 5; also available on the Committee's website at http://www.house.gov/commerce_democrats/press/dod_final_chart.pdf .

[82] 42 U.S.C. § 9620(a)(2).

[83] 42 U.S.C. § 9620(a)(4).

[84] 42 U.S.C. § 9601(23) and (24).

[85] 42 U.S.C. § 9601(22). Note that release includes "disposal," and CERCLA defines "disposal" to have the same meaning as provided in RCRA, which includes "deposit." 42 U.S.C. §§ 9601(29), 6903(3).

that the mere presence of unexploded ordnance on a now-closed range still does not constitute a release. Because this argument would be made in the context of 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.

III. B. 5. DOD's proposed definition of release may be read to impair state and EPA authority over munitions-related contamination at contractor-owned facilities.

As noted above, the definition of "operational range" may include land owned by defense contractors.[86] The 2004 RRPI could preclude EPA from using its CERCLA authorities to require investigation or cleanup of munitions-related contamination at operational ranges on contractor-owned lands.

To the extent that RRPI narrows CERCLA's waiver of sovereign immunity, it would not impact state authority at operational ranges on contractor-owned facilities, because such facilities do not have the shield of sovereign immunity. However, there are states whose superfund-type laws are tied to definitions in CERCLA. In such states, DOD's proposed definition of release may prevent the state from using its superfund law to require a DOD contractor to clean up munitions contamination at its facility.

III. B. 6. DOD's proposal may shift the costs of cleaning up munitions-related contamination to states, local governments, water utilities, and private parties by precluding cost recovery claims against DOD.

DOD's proposal could shift the costs for cleaning up munitions-related contamination to states, local governments, water suppliers, farmers and others by precluding CERCLA cost recovery claims against DOD. 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 revised (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 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.

Such cost recovery claims are not hypothetical. Private entities are spending their own money to clean up DOD's UXO at former ranges because the DOD cleanup program does not have the resources to address the existing priorities. For example, several developers have spent millions of dollars to investigate and clean up potential UXO contamination at the former Lowry Bombing Range near Denver so they can proceed with plans to build housing and commercial developments. One of these developers recently filed a CERCLA cost recovery suit.[87]

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[86] *See* III.A.3., above.

[87] *Lennar Colorado, Inc. v. U.S.,* case no. 04-Mk-0627, filed March 31, 2004.

The number of cases where private entities pay to clean up DOD's contamination will likely increase substantially over the coming years because the federal budget for cleaning up UXO on closed ranges (a subset of the Formerly Used Defense Site program) is not adequate to address the number of sites requiring cleanup. 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."[88] 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."[89] However, these former ranges are increasingly subject to development pressures. Under DOD's proposed legislation, the developers at the Lowry Bombing Range, and others like them, will likely have to bear the financial responsibility for cleaning up DOD's mess.

III. B. 7. DOD's proposed definition of release may also be read to impair claims for CERCLA response costs or for natural resource damages.

Natural resource damages under CERCLA may be sought from the same classes of persons as may be liable for response costs. Therefore, DOD may be able to assert the same defenses to a natural resource damage claim for injuries to groundwater or other natural resources described above regarding cost recovery claims.

III. B. 8. Preserving EPA's CERCLA § 106 order authority does not does not ensure effective oversight.

DOD points out that paragraph (3) of its proposal preserves EPA's authority to issue a CERCLA administrative order under section 106(a). In the states' view, this does not provide any assurance of effective oversight. EPA has never once issued a CERCLA § 106 order to DOD. EPA may not issue such orders without the concurrence of the Department of Justice.[90] Further, under the 2004 RRPI, EPA has no information gathering authority on operational ranges. Thus, it is difficult to see how EPA could obtain information necessary to support issuance of an imminent hazard order under CERCLA § 106.

III.C. DOD's proposed amendments to the Clean Air Act would reverse the fundamental principle of that Act to prevent unhealthy levels of air pollution.

Section 176 of the Clean Air Act provides that the Federal Government must ensure that its significant actions "conform" to requirements of the applicable state air quality implementation plan, thereby ensuring that federal actions will not cause or contribute to any violation of the National Ambient Air Quality Standards (NAAQS).[91] These are health-based limits on common serious pollutants like ozone, nitrogen oxides, and carbon monoxide, which cause health effects ranging from increased rates of asthma and hospital admissions to premature death.[92] And section 118 of the Clean Air Act already makes clear that the Federal Government is required to comply with state and federal air pollution control requirements like any other polluter. Together, these provisions clearly establish that federal entities, like DOD, cannot add to dirty air problems and must do their part to reduce air pollution.

The 2004 RRPI would exempt DOD, for the first three years of any significant federal "military readiness action," from the requirements of § 176(c) of the Clean Air Act. That provision requires any federal agency, before it proceeds with a significant federal action, to complete a conformity analysis for the lifespan of the action and make a determination that the action will not cause or contribute to new violations of NAAQS, increased frequency of violations, or a delay in attaining NAAQS. In addition, it would allow a state[93] to be considered legally in compliance with some air quality standards even if, in fact, those standards are violated—if the violation is caused by pollutants from DOD's action. And because there is also no limit on the definition of what constitutes a particular "activity," multiple re-basing or training activities could be redefined from year to year, thereby allowing successive

[88] "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.

[89] *Id.* at 17.

[90] Pursuant to executive order, EPA cannot issue a CERCLA § 106(a) (imminent and substantial endangerment) order to another federal agency without the concurrence of the Department of Justice. E.O. 12580 § (4)(e).

[91] 42 U.S.C. § 7506.

[92] 42 U.S.C. § 7409.

[93] In some areas of the country, regional air authorities rather than states regulate air quality. The analysis in this testimony for states applies to these authorities as well.

three-year exemptions from general conformity—essentially obviating its intended purpose. So, DOD's proposal may permanently legalize unhealthy levels of air pollution near military bases. This would violate a bedrock principle of the Clean Air Act, which makes clear that the goal of the Act is to actually attain and maintain air that is "requisite to protect public health" throughout the nation, not just in areas geographically removed from military bases.[94] Under the DOD proposal, people living in areas near military bases would receive less protection under the Clean Air Act.

DOD's proposal would force states to accept unhealthy levels of air pollution for their citizens or require private industries or other governmental agencies to make significant cuts in their air pollution emissions. DOD has suggested that the proposed exemption from conformity requirements would not impose an undue burden on states because the total quantities of pollutants is not likely to be large. DOD gave examples of actions that would use ½ of 1% of the region's total NO_X budget. However, nothing in the proposed legislation would limit the amount of pollution that would be exempted from conformity requirements. And it is also important to understand how competitive the pollution budgeting situation is in many non-attainment areas. The amounts used in DOD's examples are significant in that environment; highway projects regarded by local authorities as critical have been stopped or delayed over these kinds of amounts.

Mr. GILLMOR. Thank you, Mr. Miller.

Mr. Steven Brown.

STATEMENT OF STEVEN BROWN

Mr. BROWN. Thank you, Mr. Chairman and the committee for inviting the Environmental Counsel of the States to present testimony on this issue. I am the Executive Director of ECOS testifying on their behalf. Congressman Gillmor, the President of ECOS, Chris Jones, also the Director of the Ohio EPA, sends his regrets that he could not be here.

ECOS is a national nonpartisan nonprofit association of all the State and territorial executives that run the environmental agencies in the States. ECOS opposes RRPI for at least three reasons but I am going to focus on one that I was able to speak to my members about at our recent meeting which just ended yesterday, our spring meeting.

ECOS does not believe that DOD has documented its problems with these acts. I surveyed all of the ECOS members in attendance over the past 4 days at the 2004 ECOS spring meeting and not a single one of them can cite a single example of a case where a base had asked for help with air or waste in which the State agency had been unable to accommodate the request.

Most States said that the bases themselves had not expressed any problems with compliance with these facts at all. We discussed this matter with Texas, Ohio, California, Michigan, and at least 20 other States directly in a plenary session with all 37 States of everyone in attendance.

Second, we believe that the proposal would have unintended and undesirable outcomes, that it would disrupt a State's ability to protect the health of its citizens, and, as others as stated, that we believe in principle that the Federal Government, including DOD, should be a stellar model in compliance to the Federal environmental law.

Our third reason is that all three laws already have the exemptions that others before me have spoken about. ECOS has addressed this issue twice before. Last year we passed a resolution

[94] 42 U.S.C. § 7409.

opposing the effort that was before Congress at the time. We sent a letter opposing the previous attempt in 2002 as well. Those are attached to my written testimony.

Our members, of course, support military readiness and training. In fact, one of my members is a retired major general in the U.S. Army. We also note, though, that the distinction between legitimate training and routine activities is very blurry. My member from Nevada, for example, told me that the DOD Air Force Base there had insisted that a paint booth be exempted from the Clean Air Act. Well, a paint booth sounds like routine maintenance to me. Perhaps it sounds like training to you. I will leave it to you to decide.

Both ECOS and the individual States have many examples where you have worked very cooperatively with DOD. When a circumstance or situation arises that requires some expedited response, or an action out of the normal channel of operations, you worked very creatively and quickly with those spaces to achieve solutions to the problem.

For example, when there has been a need States worked with DOD facilities to issue emergency permits even over the telephone in less than 24 hours at your request. Many of our members meet regularly with their bases to address problems before they become serious and ward off difficulties that might have otherwise occurred.

As an association, ECOS works very cooperatively with DOD on many issues including long-term stewardship, remediation, waste cleanup, regulatory and nonregulatory initiative on air, waste, and water issues. We are certain and have documented that these have improved the environment and saved the Department of Defense both money and time. One activity with the Navy saved them a million dollars a year.

Yesterday, ECOS created a new work group to work with DOD on the encroachment issues regarding urban sprawl that was mentioned previously. We have three other bodies that also work with DOD on a variety of these issues.

Finally, we understand that the Department of Defense has completed a study that it was directed to do as part of last year's Events Reauthorization Bill. This study was commissioned to gather additional data as well as examples of where environmental statutes have thwarted military readiness. My understanding that this is done on an annual basis but DOD has not asked for State input on this. We encourage them to do so and we stand ready to help them with State examples where we can.

In short, ECOS urges the subcommittee, and Congress in general, to reject these actions that have been requested. I would be happy to take questions when you are ready.

[The prepared statement of Steven Brown follows:]

PREPARED STATEMENT OF R. STEVEN BROWN, EXECUTIVE DIRECTOR, ENVIRONMENTAL COUNCIL OF THE STATES

Thank you, Mr. Chairmen and members of the Committees, for providing the Environmental Council of the States (ECOS) the opportunity to present testimony on the Department of Defense's Readiness and Range Preservation Initiative (RRPI). My name is Steve Brown, and I am the Executive Director of ECOS.

Chris Jones is the Director of the Ohio EPA and the current President of ECOS. He regrets that he could not be with you today, but asks that I formally present the organization's testimony on this important topic.

ECOS opposes RRPI because it 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. It could have severe public health repercussions.

ECOS also believes that the Department of Defense (DOD) has not documented its problems with these Acts. In a broad survey of many ECOS members conducted in the past few days at the 2004 ECOS Spring meeting, no ECOS member could cite a single example of a case where a base had asked for help with any air or waste rule in which the state agency had been unable to accommodate the request. Most states said that bases had no expressed any problems with compliance with these acts at all. We discussed this matter with California, Texas, Virginia, Ohio, New Jersey, Missouri, South Carolina and about a dozen others.

ECOS members passed a resolution at our spring meeting in 2003 opposing DOD's RRPI effort. The organization also sent a letter outlining our opposition to RRPI to Congress in 2002. Those materials are attached to my written testimony.

BACKGROUND

The Environmental Council of States is the national non-partisan, non-profit association of state and territorial environmental commissioners. Each State and territory has some agency, known by different names in different states, that corresponds to the United States Environmental Protection Agency. Our members are the officials who manage and direct the environmental agencies in the States and territories. They are the state leaders responsible for making certain our nation's air, water and natural resources are clean, safe and protected.

ECOS members strongly support military readiness, adequate training and preparation for military personnel. Our members recognize that military readiness requires DOD to train armed forces under realistic conditions, including field-testing and evaluating weapons systems and other military equipment. We further recognize that "external" factors such as urban and suburban sprawl and increasing wildlife habitat pressures have affected DOD's training and equipment testing and evaluation activities. However, we also note that there are military activities with recognized environmental impacts.

States have the challenging job of front-line implementation of our nation's environmental pollution laws. States have increased their capacity and as environmental protection has become increasingly important to the general public, more and more responsibilities have been moved to the level of government best able to carry them out—State and local governments—which are best able because they are closest to the problems, closest to the people who must solve the problems, and closest to the communities which must live with the solutions.

Today states are responsible for:

- Managing more than 75% of all delegated environmental programs;
- Instituting 90% of all enforcement actions;
- Collecting nearly 95% of environmental monitoring data; and
- Managing all state lands and resources.

These responsibilities have become even more challenging in the face of severe budget deficits. About two thirds of the $15 billion states spend annually on environment and natural resources originate from non-federal sources.

To achieve state goals of protecting the environment for its citizens, it is imperative that the Department of Defense meet the same goals required by others in society. It is critical that DOD be seen as a role model for others in both the public and private sectors, by meeting the same environmental standards.

DOD AND STATES WORK COOPERATIVELY TOGETHER

States have a long history of working cooperatively with DOD to resolve competing needs. When a circumstance or situation arises that requires an expedited response or an action out of the normal channel of operations, states work creatively with the bases in their jurisdictions to achieve mutually beneficial solutions.

For example, when there has been a need, states work with DOD facilities to issue emergency permits (some even by telephone), ensure that installation of well monitoring stations and other environmental safeguards and procedures are not disruptive to normal base activities as well as handle special requests as expeditiously as possible.

STATES AND THEIR BASES

Over the past weekend, ECOS held the Spring Meeting of its membership. During this meeting, we polled our members about their experiences working with both training and non-training bases of all the services, both active and reserves. In every case, our members said that either the base commanders had not expressed any problems with the Acts, or that the state had made an accommodation under the law to the base. Each member was committed to working with the military to resolve problems under each of the Acts, should they occur. Many of the states said they met regularly with the bases to anticipate problems and resolve them before they escalated.

As an association, ECOS has several collaborative partnership efforts with DOD on a variety of environmental programs. We host a Federal Facilities Forum, which helps to foster linkages between the Department of Defense and the Department of Energy with ECOS members. The issues addressed by the ECOS Federal Facilities Forum include long-term stewardship (LTS), remediation, regulatory and non-regulatory initiatives on air, waste and water, sustainable development and pollution prevention. The Forum also has a rich history of being involved with innovative partnership efforts on the national level.

In addition, ECOS and participating federal agencies developed a Memorandum of Understanding (MOU) to address LTS needs and activities at federal clean up sites. ECOS LTS workgroup is helping to implement the agreement to foster greater discussion and coordination between ECOS and relevant federal agencies conducting both clean-up and stewardship activities. The LTS workgroup also provides an active forum for an exchange of expertise and approaches on best practices and lessons learned.

ECOS educational arm, the Environmental Research Institute of the States (ERIS) also houses a state-led coalition, the Interstate Technology Regulatory Council (ITRC), working together with industry and stakeholders to achieve regulatory acceptance of environmental technologies.

ITRC consists of 40 states, the District of Columbia, multiple federal partners, industry participants, and other stakeholders, cooperating to break down barriers and reduce compliance costs, making it easier to use new technologies, and helping states maximize resources. ITRC brings together a diverse mix of environmental experts and stakeholders from both the public and private sectors to broaden and deepen technical knowledge and streamline the regulation of new environmental technologies. ITRC accomplishes its mission in two ways: it develops guidance documents and training courses to meet the needs of both regulators and environmental consultants, and it works with state representatives to ensure that ITRC products and services have maximum impact among state environmental agencies and technology users. The main partners for ITRC are DOE, DOD and EPA.

ECOS POSITION ON RRPI

ECOS is opposed to the effort by the Department of Defense (DOD) to grant far reaching exemptions to three key environmental statutes, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Clean Air Act. Although the proposal addresses other laws, these three are at the core of ECOS member agencies' missions.

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.

There is no evidence that any of these statutes have adversely impacted the military readiness training. Former EPA Administrator Christine Todd Whitman stated in testimony on February 26, 2003 that she knew of no instance where environmental regulations impacted military readiness. In fact our organization does not know of any circumstance where one of our members has been asked by base commanders in their states, for special treatment or exemptions from environmental requirements.

FLEXIBILITY ALREADY EXISTS

Further, existing laws provide flexibility to accommodate DOD's current short-term concerns about regulatory impacts to military training and readiness activities

All three laws already have provisions for the President or Secretary of Defense to exempt DOD from its statutory and regulatory requirements upon finding that

it is necessary for national security or in the interests of the United States. These three laws also contain other provisions providing for flexibility.

Specifically, Section 188 of the Clean Air Act allows the President to exempt DOD from requirements upon a finding of "paramount national interest." The exemption can last up to one year, but can be renewed. Under the conformity requirements, DOD can already get a six-month reprieve in response to emergencies. This exemption is also renewable every six months.

Section 6001 of RCRA and Section 120j of CERCLA also contain national security provisions, allowing the President to exempt DOD facilities from any statutory or regulatory authority on a case-by-case basis.

In 1995, then President Bill Clinton exercised his authority under RCRA when he exempted the United States Air Force's operating location near Groom Lake, Nevada from any applicable requirement for the disclosure to unauthorized persons of classified information concerning that operating location. Therefore, pursuant to 42 U.S.C. § 6961(a), Clinton exempted the facility from any "Federal, State, interstate or local provision respecting control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information concerning that operating location to any unauthorized person."

THE CLEAN AIR ACT

This is perhaps the most problematic area for our members. As you all are aware EPA recently released, under court order, a list of 474 Counties failing to meet air standards. These counties were identified as areas not meeting federal health standards in regards to smog-causing ozone. They either have air that is too dirty or the area is contributing pollution to neighboring jurisdictions.

If states are to do their jobs to successfully meet the challenge of getting these and other jurisdictions into compliance, then all parts of the community need to contribute, including DOD facilities. However the RRPI proposal would lead us down another less environmentally sound path. It provides DOD facilities exemptions from air statutory or regulatory requirements, allowing them abdicate responsibility for any pollution they generate. This would serious compromise state and federal efforts to attain and maintain the health based-National Ambient Air Quality Standards (NAAQS).

Specifically DOD's RRPI would do two things that are not in the best interest of the public.

1) It would provide DOD with an exemption from general air conformity rules for up to three years for "military readiness activities." These activities are generally defined as all training and operations relating to combat. The definition is not clear on what constitutes a particular activity, so that multiple re-basing or training activities could be redefined from year to year, thereby allowing successive three-year exemptions from general conformity. Activities could include relocation of entire fleets of aircraft or other military vehicles from one base to another.
2) RRPI would require EPA to approve a state implementation plan (SIP) regardless of what impact the military installation had on the area. As long as the applicable state air quality plan, demonstrates that the health based air quality standards would be met, except for the emissions stemming from military readiness activities, it would be approved. As a consequence, areas not meeting standards because of their bases, would have no recourse and either have to rely on other members of their area to pick up the slack to compensate for the DOD facility, or be resigned to living in a dirty community. This would directly impact the publics right to clean air and seriously hinder the states ability to develop a SIP that is responsive to the needs of its citizens

The RRPI air provisions undermine state planning efforts and seriously impact the states ability to deliver basic environmental services. It would contribute to a twisted process whereby air emissions from DOD facilities would be essentially neglected and the remainder of the community would have to compensate for their delinquent neighbor. This would result in unfairly burdening other community members as well as increasing the potential for serious environmental and economic risk.

RCRA AND CERCLA

Under RRPI, sweeping, large-scale exemptions would be granted to DOD, which would have a dire affect on states abilities to protect the nation's water supplies. These exemptions would also seriously curtail our remediation efforts on impacted sites. There is a long history of widespread contamination resulting from military activities and ECOS feels strongly, given the good track record of states in working

with DOD on these issues, that these provisions to preempt state authority are unwarranted.

Military ranges that would be exempted under these provisions cover thousands of acres in every state in the country. Military munitions that would be exempted from RCRA under RRPI are also far reaching, and could include munitions not used in training or testing as well as munitions (including explosives and components) that may be discharged, injected, dumped, spilled or placed off an operational range. In addition, RRPI could also pre-empt state and EPA regulation of the destruction of the Nation's stockpile of chemical weapons.

Specifically RRPI provisions include:

1) Pre-empting state RCRA authority to require investigation or clean up of environmental contamination from used/fired munitions with the external boundaries of a range, even if the contamination has migrated off the range. 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;
2) Pre-empting state authority under state Superfund or other remedial authorities to require investigation or clean up of environmental contamination from used/fired munitions within the external boundaries of a range, even if the contamination has migrated off the range;
3) Eliminating EPA's RCRA imminent hazard authority and normal superfund clean up authority with respect to military munitions; and
4) Removing the authority of the Agency for Toxic Substance and Disease Registry to conduct health assessments for constituents of military munitions.

CONCLUSION

ECOS is part of a long list of state associations and environmental organizations that oppose this legislation, including the National Association of Attorney's General, the Association of State and Territorial Air Pollution Administrators, the Association of Local Air Pollution Control Officials, the National League of Cities, the National Association of Counties and scores of major environmental associations.

We want to emphasize that DOD should complete the study it was directed to do, as part of last years Defense Reauthorization bill. The study was commissioned to gather additional data as well as examples of where environmental statutes have thwarted military readiness. ECOS also encourages DOD to solicit comment and feedback from the states and other stakeholders on the report, in order to develop a more comprehensive study of the issues on a nationwide basis.

ECOS urges both Sub-Committees to reject actions to exempt DOD from RCRA, CERCLA and CAA requirements. The Readiness and Range Preservation Initiative is essentially a solution in need of a problem and therefore is unnecessary. ECOS encourages DOD to continue to work with states to harmonize military readiness activities with environmental protection so that public health and the environment are not compromised.

Thank you, Mr. Chairman, for this opportunity to testify.

Mr. GILLMOR. Thank you very much, Mr. Brown.

Mr. Ronald Gastelum.

STATEMENT OF RONALD GASTELUM

Mr. GASTELUM. Good afternoon, Mr. Chairman. I am pleased to be here and participate in this very important discussion hearing today. I do have a written comment I will submit for the record. My comments will be shorter in recognition of our time today.

My name is Ronald Gastelum, and I am the President and CEO of the Metropolitan Water District of Southern California. MWD is a consortium of 26 cities and public water districts that provides drinking water to nearly 18 million people in Los Angeles, Orange, San Diego, Riverside, San Bernardino and Ventura counties.

I am testifying today on behalf of the Association of Metropolitan Water Agencies (AMWA), the American Water Works Association (AWWA), and the Association of California Water Agencies (ACWA). AMWA is a nonprofit organization serving the Nation's largest publicly owned drinking water agencies.

AWWA is the world's largest and oldest scientific and educational association representing over 58,000 drinking water supply professionals and 4,800 utilities that provide over 80 percent of the Nation's drinking water. ACWA is the largest coalition of public water agencies in the country, representing most of the public agencies in California. I would add that I am also here representing the National Association of Water Companies. Together we provide the drinking water and the agricultural water to most of the population of the United States.

We appreciate the opportunity to testify before this very important joint hearing today for perchlorate contamination is indeed a national issue. I want to observe that I found this a very informative and unusual hearing. I have learned a lot today listening to the testimony. I am also encouraged by the Department of Defense's statements of commitment to protect our public water sources. I convey that feeling as well.

The full extent of the problem is not yet known, however. Although it is clear that perchlorate has been detected in the water supplies serving many millions of people and farms throughout the country, it is also clear that there is a link between contamination of our water supplies and our country's past and present military programs.

The Department of Defense is proposing language that modifies environmental laws that would effectively exempt them from Federal regulation of perchlorate contamination on, and possibly near, what they have characterized as "operational ranges." We are here to question the need and necessity for such a broad exemption bill at this time.

That is not to say, however, we would oppose an appropriately crafted proposal that accomplishes what we hear the Department of Defense says it needs. That is, the authority to continue to use munitions and other implements containing perchlorate and other chemicals at specific facilities without violating the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environment Response, Compensation, and Liability Act (CERCLA).

In ongoing work constructively in the Department of Defense, we ask that they accept the fact that their issue is just one part of a much bigger problem. As characterized by Mr. Dingell, the horse is definitely out of the barn. I would add that it is running at a full gallop away from us. The concern of water providers is not based on speculation or theory. The documented extent of perchlorate contamination in public water supplies is truly extraordinary.

I have maps in my testimony illustrating the extent of releases known contamination throughout the United States. The entire lower Colorado River and ground water basins in large portions of Nevada, Arizona, and Southern California have been contaminated with perchlorate clearly linked to past military programs.

State and local public water suppliers and local agricultural water industries had to shut down wells to face the prospect of having to find alternative supplies in the Cohijilla Valley and in the Imperial Valley in Southern California. Tremendous agricultural production, tremendous amount of percholorate contamination in the ground water supplies. We have seen evidence of that

in the lettuce crops that are being identified with perchlorate contamination.

Public water agencies are being asked to pay for the cost of remediation for a problem we did not cause. We believe both objectives, military preparedness and protection of public health can be met. What we are seeking is a partnership with the Federal Government to do our best to be public projectors today, not decades from now. In this partnership we are seeking tangible recognition of the equal priority of protecting the Nation's water supplies.

I would observe this. As we are preparing our military, as we are sending our military abroad to defend us, we are making sure that we have provided them with the latest training. We haven't talked about this, but we would absolutely make sure that they have clean water. They could not survive without clean water. There is clearly a recognition that you need both. On a broader scale we are asking you today is that we put into action as we address the perchlorate contamination issue that commitment.

So what are we offering as a solution? If the Congress deems it necessary in providing for the national defense to grant the Department immunization, the exemption should be narrowly defined to apply to specific essential facilities and should be periodically reviewed by Congress.

We were encouraged today to hear the Department say categorically the exemption would not apply to contractors. We have had major problems with contractors and if, indeed, that is the case, we would urge the language of any exception clearly specified that it would not apply to contractors. Additional work should be done to narrow the range and make it abundantly clear which facilities are affected.

The Department should be directed by a date certain to identify and monitor contamination at affected facilities and report results to the EPA and the public. This is necessary in order to detect contamination before it has migrated beyond boundaries and into a source of water used for domestic, municipal, or agricultural purposes.

Location and extent of that migration should also be identified and appropriately reported. Again, you heard today the Department of Defense's commitment to do that. We are looking for specifics and dates certain by which we will know exactly what the extent of the problems are.

Finally, we would suggest a new national strategy should be developed to fund the assessment and remediation of percholorate contamination wherever it exist in public water supplies. Current law and financial strategy will invariably lead to attractive litigation where the contamination spreads. This would not meet our collective responsibility to the public or the environment. We do not accept that we have remedies, public water systems, the public at large, to address contamination that has left these sites.

What it amounts to is getting in line with everybody else to go through a very cumbersome litigation strategy unless we do, indeed, have a partnership with the Federal Government to proactively get in, identify these sites, and clean them up. That is what we are seeking. We look forward to working with this committee and the Department of Defense. Thank you, Mr. Chairman.

[The prepared statement of Ronald Gastelum follows:]

PREPARED STATEMENT OF RONALD GASTELUM, PRESIDENT AND CEO, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON BEHALF OF THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, AMERICAN WATER WORKS ASSOCIATION, AND THE ASSOCIATION OF CALIFORNIA WATER AGENCIES

Good morning, my name is Ronald Gastelum, and I am the President and CEO of the Metropolitan Water District of Southern California. MWD is a consortium of 26 cities and public water districts that provides drinking water to nearly 18 million people in Los Angeles, Orange, San Diego, Riverside, San Bernardino and Ventura counties.

I am testifying today on behalf of the Association of Metropolitan Water Agencies (AMWA), the American Water Works Association (AWWA), and the Association of California Water Agencies (ACWA). AMWA is a nonprofit organization serving the nation's largest publicly owned drinking water agencies. AWWA is the world's largest and oldest scientific and educational association representing over 58,000 drinking water supply professionals and 4,800 utilities that provide over 80 percent of the nation's drinking water. ACWA is the largest coalition of public water agencies in the country, representing the 447 public agencies, which deliver 90 percent of the water used by cities, farms, and businesses in California.

We appreciate the opportunity to testify before this very important joint hearing today. Perchlorate contamination is a national issue.

The full extent of the problem is not yet known, although it is clear that perchlorate has been detected in the water supplies serving many millions of people and farms throughout the country. It is also clear that there is a link between the contamination in our water supplies and our country's past and present military programs.

The Department of Defense is proposing language that modifies environmental laws that would effectively exempt them from federal regulation of perchlorate contamination on, and possibly near, what they have characterized as "operational ranges." We are here to question the need and necessity for such an exemption at this time.

We would not oppose an appropriately crafted proposal that accomplishes what we hear the Department of Defense says it needs. That is, the authority to continue to use munitions and other implements containing perchlorate and other chemicals at specific facilities without violating the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environment Response, Compensation, and Liability Act (CERCLA).

The proposal by the Department of Defense (D.O.D.) would amend RCRA and CERCLA to redefine the terms "solid waste" and "release." These re-definitions would inhibit the ability of EPA, its state partners or water systems to prevent contamination and the loss of drinking water sources. We are concerned that amending these statutes in this way could endanger the health of Americans, including soldiers and their families living on or near military facilities.

The D.O.D. 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 could result in unnecessary public health risks, unacceptable losses of water sources, and high costs to clean up water supplies and/or secure alternative sources.

Worse, even in the event of contamination beyond the boundaries of a range, the language would appear to deny accountability to clean up sources and prevent further migration of contamination.

The problems associated with the D.O.D. proposal are compounded by language enacted last year to redefine "operational range." The geographic areas designated to be operational ranges, according to the word's new definition, could be interpreted to be nearly limitless and include contractor facilities. The term is overly broad and could provide too many opportunities for D.O.D. to block EPA, its state partners or even water systems from requiring action to protect a water source threatened with contamination from or on a defense-related site.

D.O.D. officials have stated that the only goal of the re-definitions is to avoid a situation in which the firing of weapons on ranges is considered a "release" under RCRA or CERCLA. If this is the case, then we encourage the Administration to narrow the scope of its initiative to reflect this concern. We believe that our armed forces should be able to conduct weapons training, yet still cleanup hazardous waste on its ranges that threaten sources of drinking water both on and off military installations.

This may only be a definitional or drafting problem. However, based on the limited information available to us to date, we think the problem is greater. The current proposal is too broad. But the bigger issue is the proposal's failure to respond to the basic public health threat presented by the perchlorate that has already escaped into the country's water supplies.

We frankly do not believe we can meet our responsibility to the public if we cannot identify with more certainty which facilities would be exempted, their proximity to public water supplies, how the Department will assure that it will contain existing and future perchlorate contamination at these facilities, and when the perchlorate contamination in drinking and agricultural water supplies will be remediated.

The concern of water providers is not based on speculation or vague theory. The documented extent of perchlorate contamination in public water supplies is extraordinary. For your convenience and review, I am enclosing, along with our written comments, some maps that we hope will illustrate the extensive, almost ice burg-like presence of perchlorate as a moving, persistent threat to Nation's water resources: First I refer you to a map detailing drinking water resources in California that have been curtailed by perchlorate. Our second map identifies perchlorate releases as they are currently known throughout the United States. Finally, we have enclosed a third map to highlight the location of perchlorate manufacturers and users within the United States. These mapping details suggest that we are only beginning to understand the magnitude of perchlorate as a growing national challenge.

The entire lower Colorado River and groundwater basins in large portions of Nevada, Arizona, and Southern California have been contaminated with perchlorate clearly linked to past military programs. State and local public water suppliers and local agricultural water districts have had to shut down wells and face the prospect of having to find alternative supplies. Public water agencies are being asked to pay for the costs of remediation for a problem we did not cause.

Perchlorate is a moving target; it has been released into the environment and will likely continue to be released into the environment in locations throughout the country on land used for important and sensitive military operations. If the Defense Department is willing to develop and provide more information about these sites, concerned water providers would be better equipped to evaluate the threat of perchlorate migration in a cooperative and strategic manner. We are really only beginning to understand the magnitude of this problem and the potential impacts that we must work together at the federal, state and local levels to address. Just as we need to monitor existing areas of contamination, it is also imperative that we work cooperatively to develop strategies to prevent future contamination sites.

What is the solution? We would offer the following:

1. If the Congress deems it necessary in providing for the national defense to grant the Department an exemption, the exemption should be narrowly defined to apply to specific essential facilities, and should be periodically reviewed by the Congress.
2. The Department should be directed by a date certain to identify and monitor contamination at affected facilities and report results to the EPA and the public. This is necessary in order to detect contamination before it has migrated beyond the boundaries, and into a source of water used for domestic, municipal, or agricultural purposes. The location and extent of that migration should also be identified and appropriately reported.
3. A new national strategy should be developed to fund the assessment and remediation of perchlorate contamination wherever it exists in public water supplies. Current law and financial strategy will invariably lead to protracted litigation while the contamination spreads. This would not meet our collective responsibility to the public or the environment.

We thank you for this opportunity to testify. We are committed to working cooperatively with the Department of Defense and the Congress to both support our national defense and protect the public's water supplies.

Mr. GILLMOR. Thank you.

Mr. S. William Becker.

STATEMENT OF S. WILLIAM BECKER

Mr. BECKER. Thank you, Mr. Chairman. My name is Bill Becker, Executive Director of STAPPA the State and Territorial Air Pollution Program Administrators and ALAPCO the Association of Local

Air Pollution Control Officials the two national associations of air quality officials in 53 States and territories and over 165 major metropolitan areas throughout the country.

We really appreciate this opportunity for provide our association's perspectives on proposed changes to the Clean Air Act to exempt military readiness activities of the Department of Defense.

I want to be clear from the outset. The issue before us is not whether State and local air pollution control agencies support military readiness activities and their timely implementation. Of course we do. The issue is whether additional exemptions, and these are exemptions, beyond those that already exist are necessary.

We believe they are not. Our association is opposed to such exemptions when they were proposed last year and the year before. We oppose them just as forcefully now. In fact, we firmly believe the exemptions DOD seeks are not only unnecessary, but unjustified and unfair as well, and would improperly compromise the intent of the Clean Air Act and the responsibilities of State and local officials to protect public health and safeguard air quality.

Despite decades diligent efforts, at least 160 million people still live in areas with unhealthy air. Four hundred and seventy-four counties throughout the country violate the 8-hour ozone standards. Nearly 60 areas violate the PM_{10} standards. About 145 counties appear to be in violation of the $PM_{2.5}$ standard. At least a dozen areas violate the carbon monoxide national standard.

DOD's proposal would exacerbate these air quality problems by exempting the military from statutory requirements for general conformity that currently hold it like all other sources of air pollution accountable for the emissions it creates. Further, the amendments would require EPA to improve an area as being in attainment even when the area, in fact, is not.

Notwithstanding DOD's persistence in seeking exemptions from the Clean Air Act, the Department, as has been pointed out many times today, has not backed up its request with a single example of a military readiness activity that has been prevented or delayed. In fact, general conformity compliance and military readiness have peacefully coexisted and there is no evidence to suggest that successful achievement of these dual purposes will not continue.

Further, if an instance were to arise where flexibility could deviate from law or regulation as necessary for the purposes of timely military readiness, both the Clean Air Act and the general conformity regulations already provide DOD ample flexibility to carry out its duties as necessary. I want to site four examples.

First, States routinely set aside a emission allotments in their State implementation plans to address special circumstances whether it is for new source growth or for military readiness activities. The set up of mentioned allotments is prevalent in many States' plans.

Second, the general conformity requirements don't apply unless the emissions are above de minimis levels, unless the emissions are significant. Congress and the EPA define significant anywhere from 25 to 100 tons per year. Third, as has been discussed, Section 118(b) of the Clean Air Act allows the President to exempt DOD

from any requirements of the statute upon finding that it is in the "paramount interest of the United States to do so."

Finally, under the general conformity regulations assuming the emissions exceed the de minimis threshold, DOD is allowed to suspend compliance in the case of emergencies, which by definition include terrorist activities and military mobilizations, and also to conduct routine movement of material, personnel, and mobile assets.

However, DOD's proposal would create a blanket exemption for military readiness activities, allowing them to avoid compliance for 3 years, irrespective of the need for the exemption or the impact on air quality and public health. As a result, the military would circumvent the process to which all other sources of air pollution are subject and would only be required to begin taking responsibility for its emissions if the exempted activity is still occurring after 3 years.

DOD has asserted that the emissions associated with military readiness activities are minor on the order of one-half of 1 percent of an area's overall emissions inventory. However, the proposed amendments place no limit on emissions to result from an exempted activity. Even more significant, however, is the fact that areas with unhealthful air don't have the luxury of overlooking any amount of pollution.

Allowing the military to unilaterally decide that its emissions need not remain within the allotted emissions budget of a State's implementation plan will result in excess emissions and unhealthy air. This is unfair to the public's health and it is unfair to other regulated sources who may have to make up for these excess emissions.

The only remedy DOD has offered in return for creating excess emissions without justification is to simply ignore the emissions and declare the air clean, even though it is not. Such an approach wholly undermines the integrity of the Nation's health-based air quality standards and the ability of State and local air pollution control agencies to achieve clean air goals.

Our associations fully recognize that under certain circumstances DOD legitimately must be able to take immediate action for the purposes of military readiness, with no time for environmental compliance. Current statutory and regulatory flexibilities already provide for such action to take place unencumbered. What DOD seeks, however, are free 3-year passes for military activities to pollute at the expense of air quality unnecessarily placing at risk the health of those who live and work on, near or downwind of military bases.

Our associations respectfully urge Congress to reject these proposed amendments to the Clean Air Act and to urge the military, like all other sources of emissions, to take responsibility for the pollution it creates and do its fair share to clean up our Nation's air. Thank you.

[The prepared statement of S. William Becker follows:]

PREPARED STATEMENT OF S. WILLIAM BECKER, EXECUTIVE DIRECTOR, STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS AND THE ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS

Good morning, Mr. Chairman and members of the Subcommittee. I am Bill Becker, Executive Director of STAPPA—the State and Territorial Air Pollution Program Administrators—and ALAPCO—the Association of Local Air Pollution Control Officials—the two national associations of air quality officials in 53 states and territories and over 165 major metropolitan areas across the United States.

The members of STAPPA and ALAPCO have primary responsibility under the Clean Air Act for implementing our nation's air pollution control laws and regulations and, even more importantly, for achieving and sustaining clean, healthful air throughout the country. Accordingly, we are pleased to have this opportunity to provide our perspectives on proposed changes to the Clean Air Act to exempt military readiness activities of the U.S. Department of Defense (DOD). Our associations opposed such Clean Air Act exemptions when they were proposed last year and the year before, and we oppose them just as forcefully now.

Let me be clear. The issue before us is not whether state and local air agencies, or Congress, or the nation as a whole, support military readiness activities and their timely implementation—of course we do. The issue is whether additional exemptions beyond those that already exist are necessary. And STAPPA and ALAPCO believe they are not. In fact, we firmly believe the exemptions DOD seeks are not only unnecessary, but unjustified and unfair as well, and would improperly compromise the intent of the Clean Air Act and the responsibilities of state and local officials to protect public health and safeguard air quality.

As we discuss the proposed amendments and their impact, it is important to do so in the appropriate context. Perhaps the most complex air quality problem our nation faces is achievement and maintenance of the health-based National Ambient Air Quality Standards (NAAQS). Notwithstanding decades of diligent effort, at least 160 million Americans still live in areas with unhealthful air quality.

One week ago, EPA designated 125 metropolitan areas (covering 474 counties) throughout the country as nonattainment for the 8-hour ozone NAAQS. The health and environmental impacts associated with elevated levels of ozone are serious, including aggravation of asthma and chronic lung disease, permanent lung damage, reduced lung function, irritation of the respiratory system and cardiovascular symptoms. Although even healthy individuals can be at risk from exposure to elevated levels of ozone, children, seniors and those with compromised respiratory systems are especially vulnerable.

Pollution from airborne particulate matter also plagues our nation. In fact, fine particles pose the greatest health risk of any air pollutant, resulting in as many as 30,000 premature deaths each year. These fine particles are also responsible for a variety of other adverse health impacts, including aggravation of existing respiratory and cardiovascular disease, damage to lung tissue, impaired breathing and respiratory symptoms, irregular heart beat, heart attacks and lung cancer. Nearly 60 areas of the country continue to violate the PM10 standard. Moreover, based on preliminary data, it appears that PM2.5 concentrations in as many as 145 counties across the nation exceed the health-based standard.

In addition, at least a dozen areas of the country experience unacceptable levels of carbon monoxide, which can affect the central nervous system and poses a special risk to those with heart disease.

The Clean Air Act amendments DOD proposes would exacerbate these air quality problems. These amendments would exempt DOD from statutory requirements that currently hold the military, like all other sources of air pollution, accountable for its emissions. Specifically, emissions caused by military readiness activities conducted in areas with air quality that does not meet federal health-based standards would be exempt from the "general conformity" provisions of the Act, which require that such emissions conform to the State Implementation Plans designed to meet the health-based air quality standards.

These exemptions would allow military readiness activities—alone among the activities that state and local air pollution control agencies regulate—to cause or contribute to violations of the NAAQS, increase the frequency or severity of such violations or delay timely attainment of the standards or interim milestones. Further, the amendments would require EPA to approve an area as being in attainment with the ozone, carbon monoxide and PM10 air quality standards—even when the area, in fact, is not in attainment—if the area would be in attainment but for air pollution from military readiness activities.

Notwithstanding DOD's persistence in seeking exemptions from the Clean Air Act, the Department has not backed up its request with a single example of a mili-

tary readiness activity that has been prevented or delayed due to general conformity requirements. In fact, general conformity compliance and military readiness have peacefully coexisted and there is no evidence to suggest that successful achievement of these dual purposes will not continue.

Further, although there has yet to be an instance where flexibility to deviate from law or regulation was necessary for the purposes of timely military readiness, if one were to arise, both the Clean Air Act and the federal regulations implementing the statute's general conformity provisions already provide DOD ample flexibility to carry out its duties as necessary.

Under Section 118(b) of the Act, the President may exempt DOD from any requirements of the statute upon finding that it is in the "paramount interest of the United States to do so." Further, under the general conformity regulations, which apply only if emissions are above a specified de minimus level, DOD is allowed to suspend compliance in the case of emergencies—which, by definition, include terrorist activities and military mobilizations—and also to conduct routine movement of material, personnel and mobile assets, such as ships and aircraft, provided no new support facilities are constructed.

However, the statutory amendments proposed by DOD would create a blanket exemption for military readiness activities, allowing them to avoid compliance for three years, irrespective of the need for an exemption or the impact on air quality and public health. As a result, the military would circumvent the process to which all other sources of pollution are subject and would only be required to begin taking responsibility for its emissions if the exempted activity is still occurring after three years.

Although DOD has asserted that the emissions associated with military readiness activities are minor—on the order of one-half of 1 percent of an area's overall emissions inventory—we note two critical points. First, the amendments proposed by the Department place no limit on emissions to result from an exempted activity. Second, and more importantly, areas with unhealthful air do not have the luxury of overlooking any amount of pollution, let alone the unchecked level of emissions that would be allowed under the proposed amendments.

Under the Clean Air Act, states are responsible for developing State Implementation Plans—or SIPs—for areas that violate air quality standards. A SIP must contain a detailed blueprint of how a nonattainment area will achieve the standard by the applicable deadline, including an inventory of all emission sources in the area, a breakdown of the level of emissions from each and a specification of the control measures to be implemented.

A critical element of the SIP is the emissions budget, which is the amount of air pollution an area can accommodate and still meet the health-based air quality standard. This budget is divided among all sources in the area, which must then operate so that their respective emissions remain within their allotment of the budget. Allowing the military to unilaterally decide that its emissions need not remain within its allotted budget will result in excess emissions and unhealthy air. Our associations find this unacceptable to public health and unfair to other regulated sources.

The only remedy DOD has offered in return for creating excess emissions without justification is to simply ignore the emissions and declare the air clean, even though it is not. Such an approach wholly undermines the integrity of the nation's health-based air quality standards and the ability of state and local air pollution control agencies to achieve clean air goals. Because state and local air agencies will still feel the responsibility to deliver truly healthful air to the public they serve, they will have no choice but to return to other sectors and ask for additional reductions in order to make up for the excess emissions from military facilities.

Our associations fully recognize that under certain circumstances DOD legitimately must be able to take immediate action for the purposes of military readiness, with no time for environmental compliance. Current statutory and regulatory flexibilities already provide for such action to take place unencumbered. The Clean Air Act exemptions sought by DOD, however, go far beyond what is necessary for military readiness and, instead, provide free, three-year passes for military activities to pollute at the expense of air quality, unnecessarily placing at risk the health of those who live and work on, near or downwind of military bases.

In the clear absence of even one instance in which general conformity requirements under the Clean Air Act have in any way impeded military readiness, STAPPA and ALAPCO respectfully urge Congress to reject DOD's proposed amendments to the Clean Air Act and to urge the military, like all other sources of emissions, to take responsibility for the pollution it creates and do its fair share to clean up our nation's air.

Thank you.

Mr. GILLMOR. Thank you, sir.

We will now go to Ms. Sylvia Lowrance.

STATEMENT OF SYLVIA K. LOWRANCE

Ms. LOWRANCE. Thank you, Mr. Chairman. My name is Sylvia Lowrance and I retired from the U.S. EPA about 1½ years ago after 24 years with the agency. While there I served——

Mr. GILLMOR. Too young to retire.

Ms. LOWRANCE. I served in the Superfund program and the RCRA program as well as the Enforcement Program. I am here today representing the National Environmental Trust, NRDC, and the League of Conservation Voters. Others have articulated these issues very well and in the sake of time will make only a few points.

My first one is I don't believe there is a conflict between readiness and environmental laws. I am a so-called Air Force brat and I think there is an unambiguous need to make sure that our soldiers are the best prepared in the world. However, I did spend much of my career working with dedicated people at DOD and at EPA who were driven by the principle that government can perform its mission and be a model of environmental protection.

DOD and the States and EPA have worked together to make tremendous progress in the last 20 years in environmental protection. These proposals, I think, tipped this balanced relationship and make it very one sided. Let me explain why I say that. We talked a lot. The emissions proposal, I believe, is broad. In fact, broader than has been brought out today.

On its face the proposal eliminates EPAs and State RCRA authorities to secure sampling, to do investigations, and clean up serious problems caused by emissions on operating ranges. Citizen authority for that cleanup under RCRA is also gone under the amendments. Authorities under Superfund to investigate and respond to serious releases on ranges are eliminated.

What is left? One authority. The sole authority remaining under this proposal is CERCLA Section 106 authority to respond to imminent threats. Even there I question how EPA can show that imminent hazard at the facility if its sampling and analysis authorities are gone. They cannot investigate.

I also think that the scope of 106 has changed. Other proposals are also troubling. For example, the 3 year conformity exemption under the Clean Air Act is unconditional. I in looking have not been able to find any assessment of the air quality impacts of that provision.

Third, I don't believe the facts presented merit this action. I think we have heard a lot about one or two cases today. There are many existing routes to resolve these problems today that are untested for those cases. Most States' personnel I have worked with take great pride in working out their issues with locals and with your State governments.

There is a process for elevation to Washington and these don't just come in to a staff person in Washington. Executive orders get disputes if there are specific cases out there to the Attorney General of the United States, the Administrator of EPA, and the head

of the Office of Management and Budget where they can be resolved.

We talked about today the national security exemption. It has not been used for the matters addressed in this bill today. I think it could quite easily be used when we are in the middle of a war.

Finally, I don't think exceptions merit such sweeping change. There is a real difference of opinion we've heard today on the scope of this legislation and how much of the waste and range that it encompasses and how big it is. I would hope that we can gain a better understanding of why we have such a large gap in the views. I think many provisions in the drafting are very ambiguous. I think that they need to be clarified.

If they are enacted without clarification, I would just point out that disputes between DOD and EPA under executive orders go to either the Justice Department or the Office of Management and Budget for the executive branch's position. These, I think, would end up being decided not by Congress but by the Office of Management and Budget.

Last and most importantly, I think cutting out the regulators and making DOD self-regulating for these ways undercuts the government's credibility in the eyes of its citizens. EPA and the States play a very critical role for citizens in establishing the legitimacy of DOD's actions.

I think the elimination of this oversight authority will simply bring more mistrust, not less. Thank you.

[The prepared statement of Sylvia K. Lowrance follows:]

PREPARED STATEMENT OF SYLVIA K. LOWRANCE REPRESENTING THE NATIONAL ENVIRONMENTAL TRUST, THE NATURAL RESOURCES DEFENSE COUNCIL, AND THE LEAGUE OF CONSERVATION VOTERS

I am Sylvia K. Lowrance and I am pleased to be here representing the National Environmental Trust, The Natural Resources Defense Council, and the League of Conservation Voters. I appreciate the opportunity to appear before the Subcommittees today to share my perspective on the Administration's proposed exemptions for the Department of Defense from national environmental laws. I retired from EPA in 2002 after about 24 years at the Agency. During that time I was privileged to serve in a number of senior management positions in the Superfund, Hazardous Waste and Enforcement Programs. In each of these positions I was involved in policies and issues pertaining to federal agency compliance with environmental laws.

During my time in public service, I worked with many dedicated individuals in agencies throughout the federal government, and at DOD in particular, who were committed environmental protection. Despite significant fiscal constraints and institutional barriers, the federal government has made great progress in complying with environmental laws and in seeking to become environmental stewards. This change was fostered, in no small part, by our government's long standing principle that the federal government should comply with environmental laws in the same manner and to the same extent as private parties, and should serve as a model for others. This fundamental principle has been adopted by the political leadership of many Administrations. Unfortunately, the proposals to exempt DOD from environmental laws mark a departure from this long standing commitment. These proposals are not justified by the facts and do not merely "confirm" long standing policy, as DOD asserts. These proposals roll it back the principles that have guided the government's environmental stewardship for decades. They could cause real harm to the health and welfare of our servicemen and women and their families living on military bases across the country. And they could impact on the public health of the surrounding communities.

The DOD asserts that "encroachment-induced restrictions are limiting realistic preparations for combat" and that many of the proposed exemptions are necessary to ensure military readiness by protecting live fire training opportunities for the men and women of our Armed Forces. As the daughter of a career Air Force officer and sister of two brothers who served collectively in three wars, I sincerely appre-

ciate the unambiguous need today to assure that our nation's military is the best trained and most prepared in the world. Nothing less is acceptable for our soldiers and their families.

I believe that military preparedness and environmental protection can go hand in hand. Unfortunately, these proposals appear to tip today's careful balance without adequate justification, and they deserve careful scrutiny. First, the case specific factual justification for these proposals should be closely examined to assure they justify such extraordinary changes in environmental laws. Second, the legislative proposals themselves should be carefully examined to assure that they are protective and appropriate national environmental policies. And finally, specific language should be scrutinized to assure that it achieves the stated purpose, addresses the stated need and does not have a broader effect than intended.

As detailed below, the proposed DOD exemptions unfortunately fall short of meeting any of these criteria.

As to the factual justification, most are justified based upon speculation about problems in the future, not based upon real world problems posed today. As recently as last year former EPA Administrator, Governor Christine Todd Whitman said that she does not "believe that there is a training mission anywhere in the country that is being held up or not taking place because of an environmental protection regulation." (Governor Christine Todd Whitman, Congressional Testimony before the Committee on Senate Environment and Public Works, February 26, 2003)

DOD's Fact Sheets, accompanying the proposed amendments, cite few actual cases as support for these proposals; where they do, it is far from clear why a national exemption is merited by the case. Examples cited to justify sweeping changes to the CAA conformity provisions are justified by cases in which conformity was in fact achieved without exemptions. DOD cites the Massachusetts Military Reservation as a site at which the National Guard must travel to other locations to train due to restrictions on live fire training. MMR is located on Cape Cod over a sole source aquifer that serves hundreds of thousands of people. It is an extraordinary case. Severe contamination occurred over decades. An examination of the facts at MMR shows that had the regulators not had the legal tools to get the attention of DOD to the problems at hand, public health and community concerns would not have been addressed in as timely or comprehensive fashion. In fact, prior to EPA issuing its orders, the public had been trying to engage the base on these issues for two decades. Now, while some controversy remains, assessment and cleanup are proceeding, and relationships between the base and the community and regulators have improved. Response to contaminated sites, whether publicly or privately owned, is always controversial. Over the last 25 years, we have learned there is only one way to deal with that controversy—through openness with the public by regulators and those responsible for the site and aggressive programs to involve citizens in decision making about the cleanup.

Exceptional cases do not justify sweeping legislative proposals. In my experience, while exceptional cases do occasionally arise, the vast majority of environmental issues are dealt with at the local and State level without problem. I have found that DOD base level personnel take great pride today in working through environmental issues with their communities and in partnership with regulators. Where exceptions arise, there are means to creatively work them through. There are existing means to elevate these cases, from the field to DOD and EPA Headquarters for resolution and there are executive orders to further elevate controversies to the Justice Department and Office of Management and Budget. And most importantly to the situation at hand, there are national security exemptions in CERCLA, RCRA and the Clean Air Act that were enacted by Congress. In a March 7, 2003 memorandum, Deputy Secretary of Defense Paul Wolfowitz called upon all the services to have in place procedures to ensure that any cases involving the need for a national security exemption under these laws are raised in a timely fashion. He states "In the vast majority of cases, we have demonstrated that we are both able to comply with environmental requirements and to conduct necessary military training and testing. In those exceptional cases where we cannot . . . we owe it to our young men and women to request an appropriate exemption." Since this memorandum, no exemption requests have been sought publicly and there has been no use of these exemptions to address DOD's readiness concerns. And finally, it has been my experience that where the executive branch has difficulty working through an exceptional case, members of Congress can and do get involved and facilitate a tailored and narrow resolution, without setting overbroad precedents in national law. None of these existing means have been fully tried to respond to DOD's readiness concerns. Instead of using these existing tools to resolve specific cased, major legislative changes are proposed.

The DOD proposals constitute poor environmental policy and as drafted, contain many technical ambiguities. In terms of policy, the proposals represent a step backwards for public health and environmental protection. They provide DOD with exemptions that can cause significant harm to public health and the environment on and off base at military facilities.

The proposals deprive States and EPA of much needed authorities to ensure that public heath and the environment are protected, to ensure that problems are addressed before they become more widespread(and costly) to address and dramatically alter today's system of checks and balances between the regulators and DOD. There are numerous examples of this:

1. RCRA

Protections afforded by the nation's hazardous waste laws are keyed to whether a material is considered a "solid waste" as defined in RCRA. If so, provisions for proper management of hazardous wastes and cleanup of waste contamination may be triggered under the law. The law also establishes a strong role for States and EPA to ensure that these protections are carried out, and provides the authority for them to do so. The DOD proposal undercuts the law by exempting from the category of solid waste, "military munitions, including unexploded ordinance and constituents thereof that are or have been deposited, incident to their normal and expected use, on an operational range and remain there." This exemption eliminates key authorities under RCRA and jeopardizes use of this important environmental law to protect public health and the environment at military facilities. For these exempted wastes, the State, EPA and citizen authority to secure cleanup and investigate are eliminated. The most obvious examples include:

—EPA's authority under section 7003 of RCRA to address imminent hazards posed by solid waste on operational ranges is eliminated;

—EPA's authorities under RCRA to sample and inspect under section 3007 and authorities to compel corrective action are eliminated or constrained;

—State authority to compel investigations and cleanup on operational ranges is preempted;

—State and citizens' ability to seek redress in Court when an imminent and substantial endangerment may exist is eliminated.

It is important to note that imminent hazard authorities are not routinely used. They exist to allow environmental officials to respond to very serious situations. The mere existence of these authorities acts as an incentive for the regulated community to avoid such hazards in the first instance. Given their sparse use, it is very difficult to understand the need for these changes. Similarly, authorities to require investigation of releases are used to determine, as early as possible, whether suspected problems have in fact occurred. We have learned the importance of early detection and response over the last 25 years. The more the contamination has migrated, the higher the likelihood of public health and environmental impacts and the higher cost of cleanup.

These RCRA amendments are even more troubling due to their very broad scope. First, it is keyed not simply to the nature of the material, but to a location (a range) and its status (operational or non-operational). Under this complex definition it appears that an inactive range is not synonymous with a range being non operational, and fully subject to RCRA. This means that exemptions could last for many years, whether active munitions training is occurring or not. For example, the definition of operational range appears to be very broad.

It is neither time limited nor does it contain significant constraints on the area that may be included as part of the range. Certainly, DOD may legitimately desire to make a range inactive, but keep it ready for operations in the future. This would keep EPA, States and citizens from using RCRA authorities at these facilities for some time. I would urge an examination of data on the number and frequency with which sites ceased to be operational in the past to help in evaluating the breadth of this term. Second, the solid waste exclusion goes beyond munitions to cover not only the munitions, but also 'unexploded ordinance, *and the constituents thereof,* that are or have been deposited, *incident to their normal and expected use.* This language appears to exempt many activities on operational ranges from RCRA, not simply the firing of munitions.

There are also a number of less obvious problems in these amendments where there is ambiguity in how the provisions could be interpreted. For example, one way a material becomes a solid waste at an operational range is if it has migrated offsite. It is not clear whether this provision would then be interpreted to limit RCRA authorities to materials that migrated offsite, or whether it would authorize RCRA authorities to be used to secure cleanup of the source and contamination inside the range. DOD's Fact Sheets contain a number of assertions regarding the scope of the

exemption and their intent that do not do not appear in legislative text. I would suggest these intentions be clarified in legislative text.

Finally, EPA's munitions rule, promulgated in 1997, exempts munitions landing on an operational range as a result of their intended use from regulation as a solid waste (and therefore, exempts them from being a hazardous waste). It further clarifies that munitions landing offsite, that are immediately recovered and rendered safe are not within the statutory definition of solid waste. Taken together these provisions allow DOD training to go forth expeditiously. The munitions rule provides adequate assurances to DOD that their training on operational ranges will not be regulated, while still providing states and EPA important authorities to respond to immediate threats at ranges.

2. CERCLA:

DOD's proposes to amend CERCLA's definition of release. Like the solid waste definition under RCRA, the definition of release is a key to jurisdiction under many of CERCLA's environmental response provisions. The proposal excludes from the term release, the "deposit" or "presence" on an operational range of any military munitions. It goes on to state that this change is not intended to affect the President's authority to take action under the imminent threat authorities of section 106(c) of CERCLA.

This section likewise is problematic. It precludes EPA's use of other CERCLA authorities that are conditioned on a release or a threatened release. For example, EPA's ability to investigate and perform sampling under section 104 is taken away. This presents a catch-22. How would EPA gather data to support a finding of imminent hazard, without using its sampling and investigative authorities? If it is the intent of the proposal is to in no way impact EPA's 106 authority today, it simply does not accomplish that goal.

I would also note that two additional facts that should be weighed by policy-makers when considering the sufficiency of CERCLA 106 authority for onsite releases. The CERCLA statute authorizes the President to exercise such authority. By executive order, this authority was delegated to EPA and EPA was required to consult with the Justice Department before exercising this authority at federal facilities. Executive Orders are subject to change and EPA's role could be further modified. And, while EPA's working relationships with the DOJ are very good, consultation does take time, and section 106 is designed to address imminent threats.

The CERCLA proposals, like those for RCRA, also present a number of questions on how various provisions will be interpreted. For example, since the proposed definition of release does not include the deposit or presence of any military munitions (and constituents etc.) on operational ranges, one is left to question whether these already released materials would be considered a release (and thus subject to CERCLA authorities after closure) or whether in absence of new evidence of release after closure the release would continue to be exempt. More clarity is needed.

Taken together these changes to RCRA and Superfund eliminate major oversight tools EPA and States currently have to assure public health or environmental problems are addressed expeditiously. If these are enacted, unlike today, States and EPA likely would have to wait until pollutants to migrate outside the operational range before they are authorized to act. Lack of clear authority for onsite investigations and response and ambiguity surrounding remaining authority for offsite migration of contamination would make it response more complex and lengthy. Contamination problems do not have property boundaries. The net result of these amendments would be to subject surrounding communities, on and off the facility, to greater health effects and increased costs of responding to the contamination. This only ensures a higher likelihood of adverse impacts, a more technically complex response, and a higher price tag for the response.

3. CLEAN AIR ACT; SAFE DRINKING WATER ACT

Changes to the Clean Air Act likewise are not unjustified. DOD proposes a three year extension of the conformity deadline for its activities. In effect, States are deemed in conformity if its plan would be adequate but for the emissions from the DOD 3 year exemption. DOD says this provision is necessary for it to move operations from base to base as needed to support readiness. This language is likewise overbroad and unjustified. First, there is no oversight of these determinations. Second, the legislation does not establish any threshold for DOD to utilize this exemption. It appears to give them a three year exemption whether it's needed or not. The net effect of this would be to allow violations of air quality requirements, where they could have been avoided. This can cause unnecessary and avoidable environmental and public health impacts. It puts states in the very awkward position of explaining to the public why these emissions are not being addressed. And, as was noted above,

it is difficult to understand why the national security exemption provided by section 118 of the Clean Air Act would not be sufficient to address DOD's stated concern that a specific case may arise in the future. This authority is well suited to dealing with a specific case, and it does not open the door for many communities to be subject to excess emissions.

DOD also proposes to amend the Safe Drinking Water Act and Clean Air Act to provide a right of removal to Federal courts for actions filed against the Federal government. DOD's proposal effectively negates the clear provisions of the Clean Air and Safe Drinking Water Acts, which explicitly recognize the ability of state, and local authorities, to bring actions in any State or local court under state or local pollution abatement laws. This is an unnecessary change, premised on concern that state judges may face local pressures. In fact, there is no record of state judges having any pattern of rendering unreasonable decision under these laws that have affected DOD's readiness. Of all our nation's environmental laws the Safe Drinking Water Act and the Clean Air Act are the most dependent on state law and implementation.

CONCLUSION

Based upon the many concerns cited above, I cannot conclude these special exemptions for DOD are merited. They are overly broad responses to problems that are largely speculative. And there are many available tools to resolve real problems. My experience in government is that in the vast majority of cases, environmental laws work well in the military setting. Moreover, in those exceptional cases in which the regulated community faces a significant problem, those problems can be worked out by the regulator and the regulated community. This is true whether it involves DOD's need to maintain military readiness or a company's need to avoid shutting down a plant that is a town's major employer. For those willing to work cooperatively, solutions to such issues have been and can continue to be found. In the case of DOD, national security exemptions already exist which can be brought to bear if merited. This exception has already has been successfully used at Groom Lake, survived challenge and has been consistently renewed. Yet DOD has not sought to use these existing means to address its concerns. Only when these efforts have failed do we need to consider legislative change. That need has not been identified under the CERCLA, RCRA or Clean Air Act conformity provisions.

A December 2003 report by the General Accounting office, which examined the program to assess and remedy contamination at closed munitions sites, identified 1,387 sites that are yet to be assessed. It stated that over 15 million acres in the U.S. are known or suspected of being contaminated by military munitions at closed, closing and formerly used defense sites. The price tag for remedying this existing contamination was estimated at 8-35 billion dollars. We cannot afford to add to this legacy by creating new contamination or worsening that which has already occurred at operational ranges. These amendments threaten to do so.

Lastly and importantly, I am concerned that these amendments would undermine much of the progress EPA, States and DOD have made in protecting public health and the environment and working with local communities around military installations. Cutting out the regulator and making DOD self regulating undermines the credibility of the government in the eyes of citizens and the regulated community. Citizens depend on these checks and balances as assurance that they and their children are protected, and the private sector expects a level playing field. Abandoning these principles without adequate cause will only hurt DOD's environmental program by making relationships with communities more, not less, contentious in the long run.

In addition, attached to this testimony is a memorandum from David Baron of Earth Justice that contains further elaboration of Clean Air Act issues for the Committee's consideration.

EARTH JUSTICE
April 20, 2004

TO: Sylvia K. Lowrance, Representing National Environmental Trust, The Natural Resources Defense Council, and the League of Conservation Voters
FR: David Baron, Attorney, Earthjustice
RE: Defense Department proposals to relax Clean Air Act requirements and allow removal of state clean air enforcement actions to federal court

This memo provides an analysis of the Department of Defense's proposal to exempt a variety of DOD activities and the communities in which they are located from timely compliance with specified requirements of the Clean Air Act. I am very

familiar with the Clean Air Act, having specialized in enforcement of that statute for more than twenty years at the local, state, and national levels. In 1996-97, I served on the Subcommittee for Development of Ozone, Particulate Matter and Regional Haze Implementation Programs, a Federal Advisory Committee to the U.S. Environmental Protection Agency (EPA). I have also taught environmental law courses as an adjunct professor at the University of Arizona College of Law and Tulane Law School.

The DOD proposal would needlessly place millions of Americans at risk—including members of our armed forces—by delaying anti-pollution measures that would otherwise be required to meet clean air health standards. There is no evidence that the Clean Air Act has ever impaired military readiness or training for combat. Moreover, the law already has ample provisions to exempt readiness activities should the need to do so ever arise.

Background

According to the U.S. Environmental Protection Agency (EPA), air pollution today threatens the health of more than 150 million Americans. Just last week, EPA identified 480 counties throughout the nation that violate health standards for ground level ozone, a severe lung irritant that is the principal component of urban smog. This contaminant can cause shortness of breath, chest pains, increased risk of infection, aggravation of asthma, and significant decreases in lung function.[1] Elevated ozone levels have been linked to increased hospital admissions and emergency room visits for respiratory causes.[2] Ozone presents a special health risk to small children, the elderly, persons with lung ailments, and adults who are active outdoors. When ozone levels exceed alert thresholds—something that happens all too often in cities throughout the nation—children are warned to limit outdoor play, and people with respiratory disease are warned to stay indoors.

Many communities also suffer from dangerous levels of airborne particle pollution (referred to by EPA as "PM"), consisting of soot, soil, smoke, metals, and other material. Small PM particles can pass through the natural filters in the nose, mouth, and throat, penetrate the upper airways, and travel deep into the lungs.[3] PM pollution has been linked to very severe health impacts, including premature deaths, reduced lung function, aggravation of heart and lung disease, aggravated coughing, difficult or painful breathing, and decreased lung function.[4] Scientific studies have found that tens of thousands of premature deaths each year are associated with elevated levels of PM pollution in the United States. Another pollutant regulated by EPA—carbon monoxide—poses a special threat to persons with heart disease.

The 1970 Clean Air Act, as amended in 1977 and 1990, was enacted specifically to attack the kinds of health threats presented by ozone, PM, and carbon monoxide pollution. Pursuant to the Act, EPA has adopted national health standards for allowable levels of each of these pollutants in the ambient air.[5] EPA designates communities as "attainment" or "nonattainment" areas based on whether they meet the standards.[6] Nonattainment areas are further given classifications, such as "moderate" or "serious,"[7] depending on the severity and persistence of the pollution problem. For each nonattainment area, states must submit to EPA a state implementation plan ("SIP" or "plan") containing enough pollution control measures to assure attainment of the standards by deadlines set forth in the Act.[8] The statute details a number of specific emission reduction measures that must be included in ozone SIPs, with additional and more protective measures required for more severe classifications. If a nonattainment area fails to meet its attainment deadline, it must be reclassified ("bumped up") to a higher classification.[9] Areas with higher classifications are given more time to attain the standard, but must implement stronger pollution control measures. Congress adopted this graduated system of pollution control to ensure the air would finally be cleaned up in areas with chronic air pollution problems.

The Clean Air Act also requires federal agencies to play their part in fighting dirty air. They must comply with all federal, state and local air pollution laws to

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[1] 66 Fed. Reg. 5002, 5012/3 (2001)
[2] 65 Fed. Reg. 6698, 6707/1 (2000)
[3] H.R. Rep. No. 490, 101st Cong., 2d Sess. 207-08 (1990).
[4] *Id.* 210-11
[5] 42 U.S.C. § 7409; 40 C.F.R. Part 50
[6] 42 U.S.C. 7407(d)
[7] The possible classifications for ozone nonattainment areas are marginal, moderate, serious, severe, and extreme. 42 U.S.C. § 7511. For PM-10 and carbon monoxide nonattainment areas, the possible classifications are moderate and serious. Id. §§ 7512, 7513.
[8] Id. §§ 7410 , 7502, 7511a, 7512a, 7513a
[9] Id. §§ 7511(b)(2), 7512(b)(2), 7513(b)(2)

the same extent as private industries.[10] Federal agencies must also take steps to ensure that their actions "conform" to state anti-pollution SIPs in areas that violate standards, so federal actions don't thwart or delay state efforts to clean up the air.[11] To implement this requirement, EPA's "conformity" rules require federal agencies to evaluate the air quality impacts of proposed actions, and to mitigate impacts that would conflict with state plans for timely attainment of standards.[12] However, these requirements apply only to federal actions that would result in significant air pollution emissions.[13] Moreover—and significantly for present purposes—actions responding to emergencies, including specifically "military mobilizations" and responses to "terrorist acts," are exempt from the conformity requirement for up to six months, with the exemption renewable for successive six month periods where properly justified .[14] Also exempt are actions that implement a foreign affairs function of the United States, and the routine movement of ships and aircraft or transportation of materiel and personnel.[15]

Even where an action is not otherwise exempt from clean air requirements, the Clean Air Act gives the President authority to grant an exemption for any federal emission source "if he determines it to be in the paramount interest of the United States to do so."[16] As far as we can determine, the President has only exercised this exemption authority in two instances, and neither situation involved a military readiness activity. In addition, the President may, if he determines it to be in the paramount interest of the United States to do so, adopt rules exempting "any weaponry, equipment, aircraft, vehicles, or classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature."[17] As far we can determine, the President has never adopted such rules, nor has he even proposed to do so.

The DOD Proposal Would Needlessly Threaten Public Health

As indicated above, the Defense Department has yet to identify a single instance in which military readiness has in any way been compromised by Clean Air Act requirements. Nor has DOD cited a single instance in which it has even sought a Presidential exemption from Clean Air Act requirements based on military readiness concerns. Nevertheless, the bill most recently proposed by the Defense Department would grant a blanket exemption for all military readiness activities from timely compliance with the Clean Air Act's conformity requirements. Under the DOD proposal, such activities could cause or contribute to unhealthful levels of air pollution in a community for up to three years before having to conform with state clean air plans. This delay would be allowed even if DOD could readily avoid it by providing offsetting emission cuts from other DOD facilities in the area. The bill would further allow affected communities to delay compliance with clean air standards for up to three years where emissions from the exempted readiness activities preclude timely attainment. And the bill would also allow those same communities to delay stronger anti-pollution measures that would otherwise be required to protect public health. DOD's proposal would produce that result by delaying bump ups to higher classifications that would otherwise be triggered by failure of the community to timely attain health standards.

These exemptions could end up threatening the lungs of millions of Americans. The DOD bill defines readiness activities as including "all training and operations that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use." It further defines "combat" and "combat use" as including "all forms of armed conflict and operational employment as well as those support functions necessary for armed conflict and operational employment . . ." Thus, readiness activities exempted from timely clean air conformity under the bill would encompass actions at literally dozens of military facilities throughout the nation, ranging from testing complexes to large military bases.

A three year delay in compliance with clean air standards is a matter of profound public health concern. It means three more years of added suffering for people with asthma, bronchitis, and other respiratory ailments, and of recurrent days when children are warned not to play outside because the air is not safe to breathe. In PM

[10] 42 U.S.C. § 7418(a)
[11] 42 U.S.C. § 7506
[12] 40 C.F.R. §§ 93.150 to 160
[13] Id. § 93.153(b)
[14] 40 C.F.R. §§ 93.152, 93,153(d)(2), (e)
[15] Id. § 93.153(c)(2)(vii), (viii), (xviii)
[16] 42 U.S.C. § 7418(b)
[17] Id. 42 U.S.C. § 7418(b)

nonattainment areas, it can literally mean additional premature deaths due to continued violation of health standards. Dangerously polluted air threatens not only the civilian population but also members of our armed forces and their families as well. Furthermore, since a separate exemption applies to each readiness activity, some non-attainment areas may be subject to a series of exemptions causing delays in attaining healthful air well beyond a single three year period.

No one doubts the importance of ensuring military readiness, but there is no evidence that we have to sacrifice public health in the name of readiness. The Clean Air Act has been around for more than 30 years, yet in all that time there has never been a serious conflict between clean air requirements and military readiness—at least none that have been identified by DOD . Moreover, the DOD bill grants an automatic delay in clean air compliance for readiness activities *even where no clean air delay is actually needed* to accommodate the particular readiness activity at issue. Thus, the bill will only encourage poor environmental planning while needlessly threatening public health. As further discussed below, there are already carefully crafted provisions in the law to exempt readiness activities from clean air requirements should there truly be a need to do so.

Current Law Has Ample Provisions to Exempt Readiness Activities If the Need Arises

DOD has yet explain why the exemption provisions already on the books are insufficient to protect readiness activities from any possible conflict with clean air requirements. As noted above, EPA rules already exempt emergency situations like military mobilizations and responses to terrorist acts from compliance with the Clean Air Act's general conformity requirements. Routine movement of materiel and transportation of troops is also exempt. Also as noted above, the Clean Air Act allows the President to exempt specific emission sources, and to adopt rules exempting entire classes or categories of military property (including weaponry, aircraft, equipment and vehicles) from clean air requirements, when he finds it in the paramount interest of the nation.

DOD has asserted that the "paramount interest" standard for a presidential exemption is high, but does not claim it is unduly so, or that it could not be met where truly necessary. Moreover, DOD can hardly claim that these exemptions are too hard to get, when—as far as we can determine—the Department has never even tried to get one for readiness activities. DOD has also suggested that it is "bad policy" to seek a presidential exemption for activities that are part of a day-to-day training regimen, but does not explain why this is so. If DOD is seeking to prolong exposure of the public to unhealthful air—thereby increasing the risk of premature deaths and other serious health impacts—that is a decision of extraordinary import plainly worthy of Presidential attention. If anything, the matter is even more deserving of Presidential attention if it involves authorizing a pollution generating activity that will be ongoing for an extended period and will therefore have long term air quality impacts.

In addition to the above-cited exemption provisions, the Secretary of Defense has authority under 10 U.S.C. § 2014 to temporarily suspend an EPA action that he finds, in consultation with the Joint Chiefs, "affects training or any other readiness activity in a manner that has or would have a significant adverse effect on the military readiness of any of the armed forces or a critical component thereof." The suspension remains in effect for up to five days, unless EPA finds it would pose an actual threat of imminent and substantial endangerment to public health or the environment. During the suspension, EPA and the Secretary must attempt to mitigate or eliminate the adverse impact of the EPA action on readiness, consistent with the purpose of that action.

The Presidential exemption provision in the Clean Air Act and the DOD Secretary's authority under 10 U.S.C. § 2014 allow legitimate readiness concerns to be addressed while maximizing protection of public health. Rather than granting a blanket delay in clean air conformity by all readiness activities—as DOD now proposes—existing law properly requires DOD to make the case that a specific readiness activity (or class of such activities) cannot be accommodated with clean air requirements, and is important enough to justify the increased risk to public health from allowing the activity to proceed without complying with the law. The DOD proposal would irresponsibly allow DOD to proceed with any readiness activity—no matter how injurious to public health—without even attempting to ensure conformity with state clean air plans until three years later.

The Proposed Removal Provisions are Unnecessary and Counterproductive

The DOD proposal would also allow state clean air enforcement actions against federal agencies to be "removed" from state court and moved to federal court—even

where they only involve enforcement of state (not federal) environmental laws. This proposal has absolutely nothing to do with preserving military readiness—indeed, the bill's language would extend this "removal" right to all federal agencies, not just DOD. Rather, the proposal is an attempt to give federal agencies accused of violating state and local anti-pollution laws the right to circumvent state courts and state procedures when they think they can gain a procedural or other advantage in federal court.

Congress should not be in the business of authorizing federal agencies to play procedural games to delay or impair enforcement of state and local laws designed to protect the public from dirty air. The federal facility and enforcement provisions of the Clean Air Act were designed to ensure that federal agencies would follow the same anti-pollution laws and procedures as private entities, and those procedures include being subject to suit in state court for noncompliance.

Mr. HALL. The chair recognizes Mr. Kunich.

STATEMENT OF JOHN C. KUNICH

Mr. KUNICH. Mr. Chairman, thank you for this opportunity to testify. I have submitted my prepared remarks for the record so I am going to summarize them and to some extent paraphrase them here today.

I am Professor John Kunich and I am here in my individual personal capacity and not as a representative of Roger Williams University School of Law. At that school of law I specialize in environmental law and natural resources law, national security law, and biodiversity law. I published several major law review articles on these subjects and also a book, "Ark of the Broken Covenant: Protecting the World's Biodiversity Hotspots," which was published last year by Praeger.

The spirit of full disclosure compels me to admit that I am something of an endangered species myself because not only am I a law professor and an enthusiastic tree hugger, but I am also a 20-year Air Force veteran and a conservative republican. If you can find anyone else who answers to that description, I would like to meet them. I am rather lonely.

Well, prior to entry in academia in 1999 I did serve 20 years as an active duty Air Force officer, mostly as a judge advocate. I specialized in environmental law for the last half of my Air Force career. I was well suited to this by virtue of my bachelors and master of science degrees in biological sciences from the University of Illinois, and also my law degree from Harvard Law School and my masters of law degree, my LOM in environmental law from George Washington University School of Law.

During the 1990's amongst other things I was the chief environmental legal officer for Air Force Space Command, United States Space Command, and NORAD. As you may know, Air Force Space Command includes the major installations some of which were mentioned today by the Members of Congress in their opening statements including Vandenberg Air Force Base in California as well as F. D. Warren Air Force Base in Wyoming and Patrick Air Force Base in Florida.

In addition to my work with NORAD and the space commands, I serve as the Chief of the Environmental Compliance and Planning Branch of Headquarters Air Force Environmental Law and Litigation Division in Washington, DC. I have the responsibility of balancing and Air Force's mission requirements with our legal du-

ties under all applicable Federal, State, and international environmental and natural resource laws.

I worked extensively in the Air Force's compliance programs regarding RCRA, CERCLA, and the Clean Air Act, as well as the other major Federal environmental statutes. I also served as the litigator with the Headquarters Air Force General Litigation Division at Buzzard Point in Washington, DC from 1990 to 1992. In that capacity I litigated numerous cases brought against the Air Force and it's people in both Federal and State courts around the Nation. These are mostly constitutional tour cases, the so-called Bivens actions, but they also involve the same jurisdictional issues as the environmental law cases I subsequently handled.

During my two decades of military legal service which included the first Gulf War, our intervention in Kosovo and several major operations other than war, I never became aware of even one instance in which the Clean Air Act, RCRA, or CERCLA posed an impediment to the military mission.

The Air Force is able to comply with every provision of environmental law applicable to all American citizens, corporations, and Federal agencies with no harmful affect on military readiness, training or, indeed, on the actual successful conduct of wartime operations. The Air Force found a way to comply with all the legal mandates arising out of these key hazardous material statutes and Clean Air Act regulations. Military did not need to choose between environmental compliance and mission accomplishment. The two were not considered mutually exclusive in any respect.

In fact, out military's record of success in both Gulf Wars and Afghanistan and Kosovo and many other large-scale missions does not reveal any deleterious effects attributable to the necessity of complying with generally applicable environmental laws. In fact, amongst myself and my fellow Air Force officers it was a matter of honor, duty, and pride for us that we did not need any special favors or preferential treatment to do our job.

It was a matter of honor, duty, and pride that we could meet our mission requirements within the bounds of the law just as did the local electric company, the nearby toy factory, and everybody else. We all had different missions, different jobs, but the same laws and we all obeyed in our own spheres which is as it should be.

Now, within the Air Force we may have occasionally grumbled amongst ourselves about how inconvenient it was that we had to abide by these environmental laws. Would we have preferred to be exempt? Of course. It was costly and, in some cases, inconvenient and burdensome for us to do so. It required time, money, and effort to obey the law just as it is for everybody. But it was our duty to obey it just as it was our duty to obey our commanding officers in other aspects of our mission.

In fact, it was part of our mission to do all that we did within the bounds established by law. The Air Force motto was, "Aim high, not by any means necessary." Unfortunately, the proposals now before this committee would needlessly weaken important safeguards in three of our most vital Federal environmental statutes. Others today have here suggested that effectively we are at war justifies the sweeping exemptions. But the proposals are not

tied to the war and they do not expire upon the cessation of the war.

Even if they did by their own terms, how would we know when this war is over because, after all, this is a war on terror, very different from the kinds of wars we are used to fighting and that is the core problem when we wage war against not a nation but a notion. How do we know when it is over? It is rather self-defining and, therefore, these exemptions, anything that is tied to the war could go on indefinitely quite easily.

Allowing the military to do less than its fair share to clean up our air and the hazardous materials that they have spilled will usher in what might be called the shock and awe phase of American environmental history. DOD asserts that there is insufficient flexibility in our current law to accommodate its needs of the Clean Air Act as well as RCRA already provides ample mechanisms for exempting agency activities when there truly is a military or national security need.

As we have seen many times today, the military has rarely if ever even asked for one of the already existing exemptions. Certainly no new ones are called for, particularly in light of the severity of the environmental problems we now face both in the United States and in the world as a whole is anything but the time to declare victory in the environmental war and go home.

The world is now in the midst of our sixth mass extinction and this is a phenomenon of historic dimensions not seen for the last 65 million years. Now is the worse possible time to be contemplating new and wide-open exemptions to keep provisions of RCRA, CERCLA, and the Clean Air Act. Any weakening of these laws will inevitably result in harm to living things both human and nonhuman.

The United States should be exercising global leadership and crafting stronger more effective legal standards and safeguards for our people and our dwindling biodiversity. Instead, the proposed exemptions will do exactly the opposite.

If the objective is to avoid the lengthy, costly, burdensome litigation as has been stressed by some members of the first panel, this proposal is not the answer. It is not a panacea and it is not even going to help in my view. Nothing in this proposal would hand DOD a get out of court free card. There would still be plenty of opportunity for NGO's and citizen groups and anyone to challenge the proposals in court even if these were to become law. In fact, the unavoidable ambiguities and definitional gray areas that some of you have identified today could lead to even more litigation against the DOD than we now have. It is not going to eliminate litigation. It may, in fact, lead to more of it.

Finally, I will address one point that has mostly been not addressed today. There is no justification for the proposed right of removal provisions either. In my experience as an Air Force litigator there was no emission degradation associated with the occasional need for us to defend ourselves in State court. Like any other litigant we conducted our legal defense work within the jurisdictional and procedural rules generally applicable to everyone. Again, we prided ourselves on our skill as trial attorneys and we did not fear any forum whether State or Federal and our record of success in

hundreds of cases in various State and Federal courts belies the notion that we somehow were weak and needed special favors to protect us from the system when no one else needed such protection. The standard removal provisions available to all litigants were quite adequate for Air Force purposes if and when they were needed. Many times they were not needed at all.

Thank you for this opportunity to testify and I would be happy to answer any questions you might have.

[The prepared statement of John C. Kunich follows:]

PREPARED STATEMENT OF JOHN CHARLES KUNICH, ASSOCIATE PROFESSOR OF LAW, ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW

Mr. Chairman, members of the Committee, thank you for this opportunity to testify. I am here in my individual, personal capacity, and not as an official representative of my university. As a Professor of Law at Roger Williams University School of Law in Rhode Island, I specialize in Environmental, Natural Resources, and Biodiversity Law. I have published several major law review articles dealing with various aspects of environmental law, and I wrote a book "Ark of the Broken Covenant: Protecting the World's Biodiversity Hotspots" published in 2003 by Praeger Publishers.

Prior to entering academia in 1999, I served 20 years on active duty with the United States Air Force as a judge advocate, and I specialized in these same areas for the second half of my Air Force career. I was well suited to this specialty by virtue of my Bachelor of Science and Master of Science degrees in Biological Sciences, as well as my Juris Doctor degree from Harvard Law School and my Master of Laws degree in environmental law from George Washington University School of Law.

During the 1990's, I was the chief environmental law attorney for Air Force Space Command, United States Space Command, and the North American Aerospace Defense Command, and I served as the Chief of the Environmental Compliance and Planning Branch of the Headquarters Air Force Environmental Law and Litigation Division. I had the responsibilities of balancing the Air Force's mission requirements with our legal duties under all applicable Federal, state, and international environmental and natural resources laws. I worked extensively in the Air Force's compliance programs regarding the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Air Act (CAA), the Endangered Species Act, and all other major federal environmental statutes.

I also served as a litigator with the Headquarters Air Force General Litigation Division in Washington, D.C., from 1990 to 1992. In this capacity, I litigated numerous cases brought against the Air Force and its people, in both federal and state courts around the nation. These were mostly constitutional tort cases, but they involved the same jurisdictional issues as the environmental law cases I subsequently handled.

During my two decades of military legal service, which included the first Gulf War, our intervention in Kosovo, and several major operations other than war, I never became aware of even one instance in which RCRA, CERCLA, or CAA posed an impediment to the military mission. The Air Force was able to comply with every provision of environmental law applicable to all American citizens and federal agencies, with no harmful effect on military readiness, training, or, indeed, on the actual successful conduct of wartime operations. The Air Force found a way to comply with all the mandates arising out of the key hazardous materials statutes and regulations. The military did not need to choose between environmental compliance and mission accomplishment. The two were not mutually exclusive in any respect. In fact, our military's record of success in both Gulf Wars, in Afghanistan, in Kosovo, and in many other large-scale missions does not reveal any deleterious effects attributable to the necessity of complying with generally applicable environmental laws.

Within the Air Force, we may have occasionally grumbled among ourselves about how inconvenient it was that we had to abide by these environmental laws. Would we have preferred to be exempt? Of course. It required some time, money, and effort to obey the law. But it was our duty to obey it, just as it was our duty to obey our commanding officers in other aspects of our mission. It was part of our mission to do all that we did within the bounds established by law. The Air Force motto was "Aim high," not "By any means necessary.'" Unfortunately, the proposal now before

this Committee would needlessly weaken important safeguards in three of our most vital federal environmental statutes, RCRA, CERCLA, and CAA. I will briefly explain.

RCRA is the nation's premier law for regulating "hazardous wastes" and is meant to prevent toxic pollution and ensure that the parties responsible for hazardous wastes pay to clean them up. Military munitions contain heavy metals and other toxic substances that escape into the air, soil, and water when the munitions are fired and if they do not explode or only partially explode, and when munitions and their components are produced or destroyed. This proposal would exempt munitions and their toxic components from virtually any regulation under RCRA by exempting "explosives, unexploded ordnance, munitions, munition fragments, or constituents thereof" on operational military ranges from RCRA's definition of "solid waste." The proposed language would allow the Defense Department simply to leave munitions releasing toxic substances lying on or in the ground where they can leach into the environment, without any independent oversight or regulation. This would have the perverse effect of eliminating RCRA regulation of some of the most dangerous substances in existence. It would also seek to exempt from RCRA ordnance and toxic munitions contamination at sites other than training ranges. Army Ammunition Plants and facilities that have produced, tested, and demilitarized military rockets are some of the nation's most contaminated public and private sites warranting inclusion on EPA's National Priorities List under CERCLA.

The Defense Department is already responsible for more NPL sites than any other party—at least 140 at present. Yet this proposal seeks to exempt the DoD from having to remediate the toxic substances that leach from military explosives and munitions on "operational ranges," a vague term which includes dozens of ranges that have been inactive for years or decades. CERCLA is our nation's main law for cleaning the worst toxic waste sites. The proposal would allow the military to wait to remediate such sites until after toxic contamination has increased for years, has spread off-site, and has driven clean-up costs much higher. CERCLA's remediation provisions are triggered by a "release" of a toxic substance, but the proposed language exempts from the term "release" any "explosives, munitions, munitions fragments, or constituents thereof" unless the range is closed or the toxic substances migrate off the range. CERCLA would only apply to these substances after the contamination has spread for years or decades, threatening public health and environmental quality, and adding years and potentially billions of dollars to any final remedial actions.

DoD appears to have made a conscious decision to exclude munitions constituents from oversight not because it interferes with readiness B there has never been a documented instance where this has happened B but because of the staggering liability it will bear for the characterization and remediation of Perchlorate and other deadly contaminants such as RDX and HMX. The current legal authority on munitions contamination is the Military Munitions Rule promulgated by EPA in 1997 as directed by Congress in the Federal Facilities Compliance Act of 1992. The Munitions Rule determines, among other things, when munitions become a hazardous waste. However, it does not cover munitions constituents. DoD apparently deliberately decided to include these constituents in the items to be excluded from our nations' hazardous waste laws despite the real risks they pose to human health.

DoD asserts that this proposal would simply codify or clarify existing regulatory policy. However, the RCRA and CERCLA proposals, when taken together, would force nearly all responses to munitions contamination to take place under CERCLA. Moreover, even within CERCLA, the normal CERCLA 104 RI/FS process would be made unavailable, with the only option being the CERCLA 106 abatement order regimen. Abatement orders require a much higher risk threshold showing of imminent and substantial endangerment, as well as Department of Justice concurrence. This is significant, because EPA and DoJ have never issued an abatement order to DoD. Also, because the CERCLA 104 sampling and inspection authority is eliminated, the regulators would be deprived of the very means to obtain the information necessary to support an abatement order.

Unless an active military range is listed on the Superfund National Priorities List (which is highly unlikely), DoD would itself, as the lead agency, be leading the response to both on- and off-range munitions contamination. Under DoD's proposal, EPA and, by extension, the state regulators would likely have no independent authority under RCRA to issue binding orders or go to court to address on-range contamination, even in the case of an imminent and substantial endangerment to human health. And under CERCLA, DoD would be the lead agency in a process limited to the most severe abatement order situations, where only a showing of imminent and substantial endangerment will suffice. The result is that EPA and the states could be cut off from any effective oversight of contamination caused by mili-

tary munitions. And this is proposed not because of any identifiable mission degradation owing to the need to comply with existing law, but as a matter of expediency for DoD. The prospect of litigation over its practices at ranges from Eagle River Flats to Vieques is not a valid justification for making legal requirements disappear.

Proposed revisions to the Clean Air Act seek to exempt DoD from having to comply with NAAQS. This means that those living in areas near military bases could breathe dirtier air, which could result in more premature deaths, asthma attacks, cardiopulmonary problems, and other adverse health and environmental effects, especially among the very young and the very old. The sweeping exemptions within this proposal are unnecessary, because the CAA has ample provisions to reconcile clean air requirements with national security and military readiness concerns.

Because the proposal defines military readiness so broadly, it attempts to permanently exempt DoD from conforming to federal or state implementation plans for attaining the NAAQS for a broad range of activities. The proposal attempts to give DoD a three-year extension on its conformity analysis and allow the federal government to proceed with its activities while analyzing those same activities' effects on air quality. Although it contains language requiring DoD to cooperate with a state to ensure conformity within three years of the date of new activities, it subsequently attempts to remove all the meaningful enforcement mechanisms for ensuring that they do so and to preempt a state from taking action to require reductions from the DoD. Thus, an area that violates the NAAQS because of these military activities could no longer have to take steps to meet them or to reduce air pollution.

Moreover, the proposal actually defines dirty air to be clean air. Section 2018 does this by allowing EPA to approve areas as if they had attained the CAA's health-based standards, even though areas have not attained them, if the reason for the nonattainment is military air pollution. This is without precedent in the CAA and a direct attack on the protectiveness and truthfulness of what it means to attain the Act's health-based air quality standards. Relieving DoD from its obligation to control its own air pollution, moreover, will only shift that burden to private industry, small businesses and the public. Responsible state and local officials will not allow unhealthy air caused by military pollution to remain unaddressed, and they will be forced to turn to local businesses and members of the public (through measures aimed at cars and trucks) to make up the emissions reductions to which the military should have contributed. Allowing the military to do less than its fair share to clean up our air will impose burdens upon industry and small businesses and the public, in what might be termed the "shock and awe" phase of American environmental history.

DoD asserts that there is insufficient flexibility in current law to accommodate its needs, but the CAA (as with RCRA and CERCLA) already provides ample mechanisms for exempting agency activities from conformity requirements where there truly is a military or national security need. In actuality, the military has rarely, if ever, perceived the need to invoke these long-available exemptions. Certainly, no new ones are called for, particularly in light of the severity of the environmental problems we now face, both in the United States and in the world as a whole. This is anything but the time to declare victory in the environmental war and go home.

The world is now in the midst of, our sixth mass extinction. The five previous mass extinctions, during which huge numbers of speciesBup to 95 percent of all life on EarthBwent out of existence in a short span of time, all took place before human beings came on the scene. We have an air-tight alibi on the first five mass extinctions, but we are primarily responsible for the mass extinction now just beginning. Through our deliberate or inadvertent alteration or destruction of enormous amounts of critical habitat, we have severely jeopardized at least 40 percent of all known species now in existence on the planet, as I spell out in detail in my book, "Ark of the Broken Covenant."

Now is the worst possible time to be contemplating new and wide-open exemptions to key provisions of RCRA, CERCLA, and the CAA, in the United States or anywhere else. Any weakening of these laws will inevitably result in harm to living things, both human and non-human. A mass extinction is no time for weakening the few effective legal protections now in place in defense of biodiversity. All or part of 3 of the 25 world's biodiversity hotspots are within the United States, and these hotspots would be further imperiled by the proposed exemptions. The United States should be exercising global leadership in crafting stronger, more effective legal safeguards for our dwindling biodiversity and our embattled environment. Instead, the proposed exemptions would do exactly the opposite.

I am aware of only one instance in which the President has ever exercised any of the provisions already available in several of the major federal environmental statutes for a national security exemption. In the Groom Lake case, the President invoked the national security exemption in RCRA, and this was unequivocally

upheld by the Ninth Circuit Court of Appeals in the case of Kasza v. Browner, 133 F. 3d 1159, 1173-74 (9th Cir. 1998), in which it was held that this exemption is solely within the President's discretion. This is evidence that national security exemptions from these laws, including the three under review here, have virtually never been needed or justified, even in the opinion of the President as advised by the Secretary of Defense. There is certainly no military exigency requiring new, sweeping exemptions for the Department of Defense.

Neither is there any justification for the proposed right of removal provision. In my experience as an Air Force litigator, there was no mission degradation associated with the occasional need for us to defend ourselves in state court. Like any other litigant, we conducted our legal defense work within the jurisdictional and procedural rules generally applicable to everyone. We prided ourselves on our skill as trial attorneys, and we did not fear any forum, whether state or federal. And our record of success in hundreds of cases in various state and federal courts belies the notion that we somehow needed special favors to protect us from the system. The standard removal procedures available to all litigants were quite adequate for Air Force purposes, if and when they were needed. Many times, they were not needed at all.

Thank you for the opportunity to testify at today's hearing. I would be happy to answer any questions you may have.

Mr. HALL. All right. Thank you, Professor Kunich. All right. We thank you all for your testimony and I guess you will get some questions from us at this time. I will start out and ask Mr. Brown, your testimony refers to a survey that somebody conducted at your spring meeting regarding involvement with military facilities needed for RCRA, Superfund, or Clean Air compliance. Would you expand on these discussions and what precipitated these discussions and any planned follow-up that environmental commissioner of the States of that ECOS have planned for the record?

Mr. BROWN. Yes, sir. I regret I didn't get that into my written testimony to you because it hadn't occurred yet. I had an opportunity to speak directly to our member over there and meeting representatives of about 25 of the States about this matter.

The question I put to them was do you know of any examples in your State where your agency was unable to accommodate a request from any Defense facility, training or otherwise, on air matters and waste matters where you were unable to help them resolve their problem under the existing law.

The answer from all of them was, "No. We have always been able to accommodate any request that they had to comply with the acts as they are currently written." As far as follow-up, don't have any plans to do so but we might if the committee were interested.

Mr. HALL. Your statement also indicates that the Clean Air Act provision would allow training activities to be redefined from year to year and in some way allow an exemption from general conformity. Is it your opinion that considering the testimony we received earlier, you were in here when the other testimony was given, that DOD would try and circumvent the intent of its own provision and disregard its own testimony on this matter and engage in such a scheme and, if so, what information would lead you to that conclusion?

Mr. BROWN. I think ECOS didn't hesitate a specific opinion on that as a body. It was a matter of concern that was an ambiguous area. But we didn't take an official position on it.

Mr. HALL. But it is not your position that the Clean Air Act provision for a 3-year delay could be avoided by relocating entire fleets of aircraft and military vehicles from one base to another? You are not going that far, are you?

Mr. BROWN. I am not sure I understand the question.

Mr. HALL. Well, do you have any evidence to support an assertion that the Clean Air Act provision for a 3-year delay in conformity of determination could be avoided by simply relocating entire fleets of aircraft and military vehicles from one base to the other?

Mr. BROWN. If I understood the question, I think the answer is no.

Mr. HALL. Okay. And do you have any evidence to support that assertion? That is not your assertion, is it?

Mr. BROWN. No.

Mr. HALL. And I have one other question for Mr. Becker. You mentioned Section 188(b) of the Clean Air Act being available to address military readiness situations. Is it the case or is it not the case that the President could promulgate a rule which would totally exempt certain types of classes of aircraft or military equipment from all Clean Air requirements, not just conformity determinations?

Mr. BECKER. There are provisions in the Clean Air Act that I believe would allow the President to do so, yes.

Mr. HALL. So which would be better for the environment, a 3-year delay in the conformity or a permanent exemption from military readiness for weaponry, equipment, aircraft, vehicles, or other classes of DOD property which conceivably could be promulgated under Section 118 that you refer to subject only to trying the old review. It would be better, would it not, to have that delay?

Mr. BECKER. Sir, you are presenting a Hobson's choice.

Mr. HALL. I'm not giving you a good choice.

Mr. BECKER. We think that we don't need to get to either of those options because, as Mr. Brown as stated and I testified during my statement, that States have been able to work cooperatively with the Department of Defense whenever such a situation arose and prevented this from ever becoming a problem.

May I also take the opportunity to respond to the last question. The Department of Defense's proposal allows unlimited 3-year delays. They can recur based upon a different activity so this is not such a 3-year limited period not withstanding what the witnesses of the Department of Defense testified depending on each activity for ad nauseam.

Mr. HALL. I thank you very much. I yield my time. I recognize Ms. Solis. Sorry, I recognize Mr. Dingell for 5 minutes, 8 minutes, 10 minutes, 15.

Mr. DINGELL. Gracious. I don't think I will need that much time. We may find some very interesting answers. First, Mr. Ensminger. DOD claims that essentially all Camp Lejeune 152,000 acres is an operational range. You served there. Is this statement true?

Mr. ENSMINGER. Absolutely not, sir.

Mr. DINGELL. Second, there are widespread activities that are permitted on the "operational ranges" at Camp Lejeune, i.e., golfing, tennis, recreation, swimming, hiking, going to theaters, concerts, hunting, and things of that kind. Is that not so?

Mr. ENSMINGER. Yes, sir. Most of the training areas aboard Camp Lejeune are open if there is not a unit that has it checked

out for training. All of them are available unless they are in an impact area for hunting and fishing.

Mr. DINGELL. Thank you very much. Now, for Mr. Miller and Mr. Brown. Gentlemen, in turn, can each of you please describe how important it is to the States to retain independent oversight authority over military munitions and such substances on operational ranges and explain why it is possible to investigate contamination or stop contaminated ground water without affecting military readiness. In any order, Mr. Miller, Mr. Brown, if you please.

Mr. MILLER. It is very important to the States to retain their independent authority over the operational ranges. Our experience with the Department of Defense and other Federal agencies is that they are in compliance with the environmental laws is best when there is independent State oversight. The experience under the Clean Water Act and Resource Conservation Recovery Act since 1992, which I described in my written testimony, provides I think pretty compelling evidence that when you have clear independent State authority, Federal agencies will comply with the law. When the authority is not so clear, their record isn't so good.

We have had examples in our State that potentially could be affected by this legislation. Several years ago, a munition was found on the Rocky Mountain Asenal. It was a bomblet containing sarin nerve agent. The Department of Defense wanted to blow this bomblet up just in the open air. The State didn't like that idea. We had conducted some modeling that showed under some atmospheric conditions a plume of sarin nerve agent could travel several miles into populated areas so we issued an order under our State hazardous waste law preventing them from going through with this plan and requiring them to submit a proposal to us that would destroy the bomb in a fashion that ensured the protection of humans and the environment.

Mr. DINGELL. Thank you, Mr. Miller.

Mr. Brown.

Mr. BROWN. Well, the States believe they have the right and responsibility to protect the health of their citizens when they delegated a Federal program as most States have been for RCRA and Clean Air. And they have an obligation to the Federal Government to exercise the portions of the program that require them to regulate whoever is regulated and the military is in these cases. It is our obligation to regulate them.

Mr. DINGELL. Gentlemen, again for Mr. Miller and Mr. Brown, can you discuss any concerns you have with what appears to be a complete delegation of discretion to the Secretary to identify property as a "operational range" and the jurisdictional implications of such a delegation on State authorities?

Mr. MILLER. Yes. We are very concerned with the definition of operational range that was incorporated into law this past year in the Defense Authorization Act of 2004. It does provide broad discretion to the Department of Defense in identifying a range. We had a meeting with several Department of Defense officials in December where we asked them what criteria are used to designate a range. Are there standards, written standards. The people who were at that meeting were not aware of any criteria used in designating a range. As far as we could tell there don't appear to be any

written standards. The definition in the statute defines a bunch of things that can be included in ranges such as impact areas, maneuver zones, buffer zones, etc. There has been some discussion already today that the public has access to portions of ranges when they are not being used for military training.

Mr. DINGELL. I have a limited time, Mr. Miller.

Mr. Brown, if you please.

Mr. BROWN. Our focus has been less on the definitional difficulties in the act which we think there are many of them than it has been on the lack of need based on no examples that have been brought forward.

Mr. DINGELL. Gentlemen, I want you to comment on this and tell me if I am correct. Under current law the Department of Defense is covered like anybody else but has the capacity to either procure a direct exemption of the President or from the administrator of EPA functioning under regulations which were negotiated by and between the Department of Defense and the EPA. Under current law if you had a problem with this kind of situation where they were either contaminating the ground water or polluting the air, you would be able to address the problem. Is that right? Using your own authorities or authority delegated to you by EPA and would be able to go to the military directly to discuss these questions with them. Would you not?

Mr. BROWN. Yes, sir.

Mr. DINGELL. Is that right, Mr. Miller?

Mr. MILLER. That is correct.

Mr. DINGELL. All right. Under the proposal that DOD has submitted to us, you would not be able to do that. Would you?

Mr. BROWN. That is my understanding.

Mr. DINGELL. You would not? Is that right, Mr. Miller?

Mr. MILLER. DOD's proposal would preempt a broad range of State authority.

Mr. DINGELL. So you would essentially not be able to address these questions at the State level. This would be done at the will and caprice of the Department of Defense and the will and caprice of the Secretary. Is that right?

Mr. BROWN. It would severely constrain both State and EPA oversight of these issues.

Mr. DINGELL. Okay. And they would be out of the act. Is that true, Mr. Brown?

Mr. BROWN. I'm sorry? What was that last part?

Mr. DINGELL. That you would no longer be able to go to address the questions within your own power or by working with EPA. The best you could do is go to the Secretary and hope that he might see you or receive your mail. Is that right?

Mr. BROWN. We think our jurisdiction would be impaired.

Mr. DINGELL. Mr. Chairman, I have used more time than I am entitled to. I thank you for your curtesy. Gentlemen and ladies, thank you.

Mr. HALL. Thank you, Mr. Chairman. The Chair now recognizes Mr. Burr. First I just want to make a statement. Mr. Ensminger left the room. I just want to say that inasmuch as your daughter was diagnosed with and passed away from Leukemia, and it is your belief and your testimony it was the result of contaminated

drinking water on the base, and that officials were told of that contamination but nothing was done for nearly 5 years, I think, under your testimony until required to do so with new regulations.

I just say this is my hope and my sincere prayer that with DOD's environmental guidelines and whatever new regulations that you use to bring to make that happen.

With the program currently in place and the new clarifications that are sought that this could never happen to anybody else again. I want to thank you for your testimony here. I think it was received very well and reached the hearts and minds of everyone of us. Mr. Burr, as a matter of fact, had asked that you be recognized first to give your testimony as did Chairman Dingell.

I recognize the gentleman from North Carolina.

Mr. BURR. I thank the Chair and once again I thank him for this hearing and apologize with the schedule today that I have been in and out. I also apologize to this panel for the fact that I was not here to hear your testimonies and will make sure that I go back and read all that were supplied to us. I did read yours last night, Mr. Ensminger. I want to thank you personally for your willingness to come here to testify.

It is obvious you will get less questions than everybody else just simply because of the nature of what we are here to discuss. I think it is appropriate to say we take this very seriously, our responsibility in this decision and the impact that it could potentially have. I think that is why my hope is that we move slower rather than faster and we try to get as many of the answers as close to perfect as we possibly can in our minds and that those are confirmed by those individuals who we perceive to be knowledgeable of what the impact would be.

I really only have one question. I am curious if there is anybody in the audience from DOD or from the Corps who was assigned to come here and listen to Mr. Ensminger's testimony as it relates to what I think is a tragedy at Camp Lejeune?

Mr. Chairman, seeing no hands or no one standing, it once again to some degree disgusts me when we have a problem, whether it is in the military or it is in another area of the Federal Government, that the areas of responsibility aren't interested enough in making sure that not only that we fix the problem but that we show the level of concern that individuals and their families deserve, the fact that we would send somebody to listen to the testimony from somebody who is willing to take their time, and probably pay their way, to come and sit through a very lengthy hearing and to wait to make one very, very important statement.

Not just for you and not just for your daughter, but potentially for every man and woman who serves and every family who could potentially live on a base that is faced with this type of problem. Once again, I thank you, Mr. Chairman. I would yield back the balance of my time but I would also take this opportunity to warn the Chair I have an extensive list of questions that I will submit to the committee to be passed on to our witnesses. Thank you.

Mr. HALL. The Chair recognizes Ms. Solis for 5 minutes.

Ms. SOLIS. Thank you, Mr. Chairman. I also want to commend Mr. Ensminger for coming here today and sharing his quite moving story. You are definitely a hero and a very courageous man to come

here and continue to speak as a voice for those who don't have a voice.

I say that sincerely because at Camp Lejeune it is a center where many from my district are assigned. We have families that leave California that are assigned there so we all, I think, have the responsibility to know what goes on there.

I am not quite satisfied with what I am hearing here today about cleanup. I haven't been there myself and I hope that at some point our committee might take a group of members who are interested to go out and visit because I certainly would like to do that. I want to thank you for being here.

I know and kind of understand where you are coming from because in the district that I represent we have a lot of similarities where we have perchlorate that we found in our drinking water. We have water agencies and groups that have been fighting with EPA to help provide cleanup and working with responsible parties. It seems like we go in circles at times.

What angers me in many cases is that there isn't enough cooperation. Yes, there is money that goes to litigants and to courts. The fact of the matter is that there is an injustice when rate payers and consumers and people that are there are affected. Either they are left with a contaminated land or they are faced with cancer, disease, or what have you. We do have a responsibility to clean up and I would hope that DOD would come back here with a more solidified plan and give us some facts and credibility behind the statements they are making. I didn't hear that today.

And I was very pleased to hear from our other witnesses here, in particular Mr. Miller. You raise something that caught my interest. You said something about States' rights. That is something that we hear a lot about up here. People give that a lot of lip service. I think on this particular moment I would like to hear a little bit more about that States' rights because you said something about water being owned by the State and that is the first time I heard that phrase articulated before this committee so I would like you to touch base on that if you can.

Then I would also like to ask Mr. Gastelum who came far from California to talk a little bit about what implications the definitions that DOD is trying to propose and how that would make it harder for you to do your job to clean up our water in California and the other parts of the country that you serve. If we could possibly get those two answers. Thank you.

Mr. MILLER. Very briefly, in Colorado the State constitution provides that ground water is the property of the people of the State and that is the law in some other States as well. The water does not belong to the surface owner, it belongs to the State so, we have a property interest for ground water underneath military ranges in our State. As I said earlier, one of the fundamental aspects of State sovereignty is the authority to implement State laws within the boundaries of the State and to protect the health of the people in the State and the vitality of the States' economies. That is the purpose of our hazardous waste laws is to prevent contamination of our ground water supplies and to clean it up when it does occur.

Ms. SOLIS. You mentioned that these exemptions would preempt your ability to do your job. Do you have any estimate of what that might mean?

Mr. MILLER. Well, as we discussed here today, we are just beginning to learn the extent of ground water contamination across the country caused my military munitions but it is apparent that it is a problem in a number of the States. We have talked about the 40 DOD facilities that have perchlorate contamination in ground water or surface water. There are hundreds of defense contractor facilities around the country that may also be affected by this legislation because of ambiguities in the definition of operating range.

So it is difficult to quantify in terms of dollars or anything like that but certainly perchlorate is a very widespread problem across the country. Any change in the law that would inhibit the ability of States or others to require the Department of Defense to clean up that contamination or to pay for it would be a problem, I think.

Ms. SOLIS. And you know that California just issued their guidelines.

Mr. MILLER. Yes.

Ms. SOLIS. Right. And our DOD and our Federal Government is not yet ready to accept what States are doing to try to provide mitigation for that.

Mr. Gastelum.

Mr. GASTELUM. Coming from California I would just observe that in California in-ground water is recognized as a property right but there is an overriding public interest that is recognized as State law. Under no circumstance can anyone pollute our water with impunity because it is owned as a property right.

Relative to your question about the definitions, I think our major concern is that the definitions are still rather broad and it is very difficult for us to tell which facilities will be impacted. Above and beyond that, however, we do not have sufficient data to understand even if we had more precise technicians what the extent of the problem would be or how it would be addressed. For us that is the priority. More information would make all of this discussion less academic.

Mr. BECKER. May I talk about another State's right and that is the right for clean air. While the DOD proposal excuses the State from having a plan that balances, it ignores totally the extra pollution in the air that results that aggravates asthma and exacerbates significant respiratory disease caused by air pollution. There is a more significant bedrock State's right issue here and that is the right that every citizen deserves clean air which would be jeopardize by the DOD proposal.

Mr. HALL. The gentlelady's time has expired. The Chair recognizes Chairman Barton for 5 minutes.

Chairman BARTON. Thank you. I have been watching and hearing on my television set as I am doing hearings in my office. I don't want this panel to think I didn't listen to what you said. Through the miracle of technology I could watch what you were doing while I was doing meetings so I appreciate you all being here.

My question is kind of a general question. I want to make sure I understand. When I was briefed on this by the Pentagon they went to great lengths to tell that they were trying to limit their

amendments to missions that were for training purposes and that they were not trying to exempt themselves from ongoing day-to-day operations of the bases.

I just listened to your opening statements and some of the questions that have been asked. My sense is that you all dispute that, that you think that the Department of Defense is trying to circumvent its responsibilities on a routine normal basis in addition to the training readiness mission to keep our troops ready to engage in combat. Is my assessment fair or not fair? Whoever wants to answer.

Mr. GASTELUM. If I could respond. I think the Department is represented by capable lawyers who have drafted the language and have given it as much flexibility as they would like to have. But if you match the words we heard today, the language is far broader just on an objective reading than what they said they wanted.

Chairman BARTON. That is the whole purpose of having this hearing. If we can narrow down so that the day-today operations at a base, the water and the sewer and air issues and just deal with having that many people in a specific area, if we are satisfied that those aren't going to be exempt, we can expect some cooperation on the live-fire training exercises and air operations that are necessary to keep our pilots combat ready.

Mr. GASTELUM. Speaking for the water agencies, I think that would be a productive exercise.

Chairman BARTON. Okay. The gentleman on the end.

Mr. MILLER. I think the way I would respond to that question is that we need to recognize that activities that the military does or activities that the Department of Energy does at the nuclear weapons labs don't have a parallel in some ways in the private sector but they do have environmental consequences. In 1992 Congress amended RCRA with the Federal Facility Compliance Act to specifically require regulation of military munitions in certain circumstances.

A lot of the problems that we have at DOE and DOD facilities are caused by activities that don't have a common parallel in the private sector. So we are definitely concerned about contamination of ground water from the use of munitions on operating ranges. But we don't think that there has to be any conflict between ensuring the protection of ground water and the military's use of its ranges. We have worked with the Army at Fort Carson, as I have stated earlier, to site ground water monitoring wells on an active range at Fort Carson in a way that did not impact readiness whatsoever.

We just worked with the people who schedule the use of the range to be sure that the wells could be installed on a day when the range wasn't being used. Then we adjusted our normal monitoring cycle so that——

Chairman BARTON. Would anybody on this panel encourage a lawsuit to prevent a live training exercise to prepare our troops for potential combat to defend our Nation? That is my question. I understand that we want environmental laws that protect our citizens, and whether it is a military base or a factory, we ought to be able to run our bases in a way that the water is clean and the air is clean.

Even on the Clean Air Act request that is pending it is just to give an additional 3 years to comply with the existing State implementation plan so they are not trying to exempt themselves from it. I would hope that you all don't want us to not do a live training exercise or not conduct some operation if it means that our troops are not going to be as effective or as ready as they could be if they have to defend our Nation. That is my question.

Mr. BROWN. Congressman, our members certainly would not want to have a suit but what concerns us is where are the examples. When I poll my members they don't know of any examples. They talk with the bases on a very regular basis. These are people that are actually doing the training and they don't have examples. Many people have asked the Department of Defense to bring more of these things but they still haven't done it.

The second problem that we have is what I would call the fuzzy edges of the applicability here. What constitutes training and what constitutes routine maintenance?

Chairman BARTON. I understand that. I've got two people that want to answer and then I am going to have to yield back to the chair. The lady and then the gentleman at the end.

Ms. LOWRANCE. If I could add one additional point. I think one of the major concerns that the Department of Defense seems to have citizen suits, not actions by the Federal Government or by States.

In the course of appearing for this hearing I examined the citizen suits that they cited. In fact, most of those citizen suits are unaffected by the limits that they have here. I don't think citizens are suing in most cases to in any way shut down ranges. I think they are trying to get at some environmental issues even though they are not the ones addressed here.

Mr. HALL. Okay. The gentleman's time has expired.

Chairman BARTON. I think one more answer, Mr. Chairman, and then I will yield back.

Mr. ENSMINGER. Sir, I spent 24½ years in the Marine Corps. I was involved in the armition in North Norway to protect North Norway from the evil empire of the Soviet Union. When we were training in Norway we had environmental impacts on our training maps that we had to avoid. We had caribou slaughter in areas where the Laps slaughtered and raised their caribou, fur farms.

We honored their wishes and stayed away from those areas. They were sensitive areas. Even in combat we have areas such as mosques or temples in Vietnam which we honored and stayed away from. To have to honor something like that in training you could take that bit of training and use it as a real scenario. It depends on how you look at it.

And another thing about the exemptions, as Congressman Dingell brought up in his opening statement, Camp Lejeune has 153,000 acres total. They are asking for exemptions for 152,000. Now, I can just about guarantee you that Camp Lejeune's two golf courses take 1,000 acres. Not to mention their housing areas, their barracks areas.

Chairman BARTON. I need to yield back, but we are not trying to protect the Department of Defense from having to be responsible in their ongoing routine operations just to maintain the bases. On

the Clean Act issue which I am more familiar with, if you don't fly a plane—to prevent an emission, you don't fly the plane. You can do a little bit in simulation and you can do simulators but eventually you have to put the pilots in the seat. You have got to let the plane take off. When you have a clean air standard that is now 80 parts per billion, we have to work on that a little bit.

With that, Mr. Chairman, I yield back and thank you for the curtesy of letting me go after. And I thank the panelists for being here.

Mr. HALL. I thank the gentleman. The gentleman's time has expired. We recognize Mr. Stupak from Michigan.

Mr. STUPAK. Thank you, Mr. Chairman. Mr. Ensminger, thanks for being here as I mentioned in my opening statement. Thanks for coming down. Right now at Camp Lejeune you are getting potable water there shipped in?

Mr. ENSMINGER. Excuse me, sir?

Mr. STUPAK. Are you getting water being shipped in to Camp Lejeune right now?

Mr. ENSMINGER. No, sir.

Mr. STUPAK. Nothing yet?

Mr. ENSMINGER. They have relocated their wells away from the contamination plumes which exist close to what they call their industrial areas and other areas where they created plumes from improper disposal. But the bad thing is, and I didn't even realize this until I was showing someone around the base 2 months ago, they created a brand new well field down grading it and right beside the largest impact area on the base. That is why I am asking why has no one ever tested for these constituents in that water?

Also, sir, I would like to mention that Mr. Burr brought up the fact that nobody from the Marine Corps was here to hear my testimony or the DOD but there is also another gentleman here whose daughter was identified in 103 children by ATSDR and he is from Ohio. It's Mr. Jeff Byron.

Mr. STUPAK. So no time since the mid 1980's have they brought in potable water or anything like that?

Mr. ENSMINGER. No, sir.

Mr. STUPAK. And there are no plans for a new water treatment or water system? It is going to be the wells? That is the plan at Camp Lejeune, just more wells?

Mr. ENSMINGER. Yes, sir. What I am concerned about, and I think the citizens of the county down there ought to be concerned about, is that where they placed this new well field, that is about their last ditch effort for any clean drinking water on that base for the main part of Camp Lejeune. I think the county is being finagled into a deal where they might end up having to find the base a source of water.

Mr. STUPAK. Thanks. Along those lines, Mr. Miller, DOD said that States will retain their safe drinking water act authority over operational ranges. Is that an adequate substitute for State authorities under RCRA or CERCLA?

Mr. MILLER. No, sir. It is not. The Safe Drinking Water Act doesn't reach water used for agricultural purposes. It doesn't reach private wells. And the fact is that the Safe Drinking Water Act is really not a cleanup program. In our State we don't have any au-

thority to require cleanup of contaminated ground water under our Safe Drinking Water Act authority. I think that is relatively common among the States. We are replacing the authority we do have in the RCRA with no authority under a program that primarily regulates suppliers of drinking water.

Mr. STUPAK. Well, let us go back to Camp Lejeune here. Who should take the responsibility to get this place cleaned up or a safe drinking water supply for these people? Does anyone want to comment on that? State? Feds? EPA? DOD?

Mr. MILLER. It seems to me it should be DOD's responsibility to provide clean water.

Mr. STUPAK. Sure, but obviously they are not doing it if it has been since the mid 1980's. You've got 20 years here. Where does one go if DOD is not doing it? Yes, Ms. Lowrance. I was waiting for you.

Ms. LOWRANCE. I do think this is a classic situation that requires all parties. It requires the States, it requires the Federal, DOD, as well as EPA because the short-term solution is dealing with the drinking water. The longer-term solution requires the Safe Drinking Water Act, State authorities, and it requires the Federal, CERCLA and RCRA authorities to make sure that appropriate prevention and cleanup action is taken in the long run.

Mr. STUPAK. That's why I asked about bringing in water. That is usually the first thing to do until you can figure out what is going to be done and get all the parties together. It just seems like no one wants to accept responsibility here on this whole situation. We are going around and around in circles. DOD is still sitting there asking for further exceptions. It doesn't make much sense to me.

Mr. ENSMINGER. Sir, I would like to also mention that last September I made a complaint through our Department of Justice, Environmental Crime Section.

Mr. STUPAK. Yes.

Mr. ENSMINGER. And an EPA criminal investigator was assigned to this situation. I am sure you have dealt with Federal agents before. I am very, very limited as to what knowledge or where this man is at with his investigation. I don't see a whole lot happening.

Mr. GASTELUM. Mr. Stupak, if I can say something.

Mr. STUPAK. Yes.

Mr. GASTELUM. Municipal water agencies, private water utilities are routinely required to disclose to the public what is in the water. It seems to me that it would be very useful for military personnel to receive on a regular basis that information. People, being people, will seek out remedies and I think that it will be an important step in getting relief, that simple disclosure.

Mr. STUPAK. I agree. With private individuals and the water systems up north we do the same thing. What do you do here with the military base? Where does that information come from? If it is not provided by the military, it is just not provided. Most people don't know.

Mr. GASTELUM. I think if the military is asked to do that by the U.S. Congress, that would be a good and important step for military families.

Mr. STUPAK. Let me ask you one question while you have the mike there. Would you agree that we need to be far more aggressive in sampling ground water on these operational ranges for these military munitions and live firing ranges? What are your feelings on that? Should we go aggressive?

Mr. GASTELUM. Yes. Information will help a lot in assessing the need for action or not.

Mr. STUPAK. Could I just have Mr. Ensminger follow up with his answer.

Mr. ENSMINGER. I feel the question that he just had, all would be required is downgrading monitoring wells that have to be sampled periodically for these constituents.

Mr. STUPAK. Sure. Thanks.

Mr. HALL. The gentleman's time has expired. We thank you. The Chair recognizes Chairman Gillmor.

Mr. GILLMOR. Thank you, Mr. Chair. I only have one comment and then just one short question. The comment is regarding the authority to regulate drinking water, it is my understanding EPA does have the authority to regulate drinking water whenever there is an imminent or substantial threat of contamination. That can be done before the contamination actually takes place as long as there are either 15 connections or 25 people served by the source.

My comment is I wanted to thank this panel for their testimony. Also for their patience. We have all been here a very long time and I do thank you. Your testimony has been very helpful and I appreciate that.

My one question is for Mr. Kunich. I am going to ask it for two reasons. Since I am also an ex-Air Force JAG I thought I had better ask a question. You said something that piqued my interest that is not real relevant here but I am really interested. You closed by talking about that we're in the 6th major extinction. I know you have written a wide variety of subjects. You said 65 million years so I presume that goes back to the meteor and the dinosaurs 65 million years ago. What are the other five extinctions? Could you fill us in?

Mr. KUNICH. Yes, sir. This goes back to before even I was a kid. We're talking many millions of years ago. The most recent was the so-called KT extinction that wiped out the dinosaurs at the end of the Curtacious period. It is widely thought that was caused by a meteor strike. I wasn't there so I can't say for sure.

With regard to these five previous mass extinctions when as much as 95 percent of all species went out of existence fairly quickly, human being have an airtight alibi on all those. We weren't around yet. As for the sixth one that is now underway, we are primarily responsible for this one because of environmental degradation. We created habitat destruction, pollution of ground water, the surface water, the air, soil. I know biodiversity issues are not really in this committee's purview. That's why I skipped over that a little bit.

That is just one more reason amongst the many other powerful reasons you have heard today not to loosen the standards for the DOD. If ever a military residency really was there that required an exemption, they've got the provision. They have invoked it precisely

one time in all of history so that must mean there is not exactly a crying need for more relaxation of the standards.

Mr. GILLMOR. Thank you.

Mr. HALL. If it gives you any solace, Mr. Kunich, it was a meteor that killed them. I was there.

The Chair recognizes Ms. Capps.

Ms. CAPPS. I thank the Chairman. I also want to add my thanks for your courage, Mr. Ensminger, and assure you that your words have not fallen on deaf ears. Many of us are determined that our decisions and our actions will do honor to your daughter's memory. Thank you for being here.

I have four questions and there is not a lot of time. Professor Kunich, I'll start with you because I was pleased to hear you speak with your responsibilities for NORAD. I represent Vandenberg Air Force Base and I have been so impressed with—I want to underscore what you were saying about these not being mutually exclusive, the environmental standards and the military emission, and the commercial space emission at that facility as well, and acknowledge what a very strong proponent I am of the local air pollution control district as it has worked as a local agency with the State space authority and with the Air Force.

They have achieved remarkable standards in that fragile coastal environmental setting. I believe that the local and the State have really added to the military standards and achieved a remarkable outcome. I wanted to be sure I heard your testimony correctly. You were in charge of these issues for the Air Force and you heard the DOD testify today. There is a question mark at the end of each of these sentences. You see no need for the exemptions that they are seeking?

Mr. KUNICH. Absolutely not.

Ms. CAPPS. Thank you.

Mr. KUNICH. And, indeed, the Vandenberg Air Force Base example is a great one because here is a cutting edge mission. It is one we haven't seen before, military and civilian space cooperation. Yet, Vandenberg has done a super job of complying with all existing environmental laws. They haven't seen any need for special exceptions or special treatment.

Ms. CAPPS. Thank you. I now will turn to Mr. Gastelum. It being a foregone conclusion that military activities on operational ranges will generate contaminate levels sufficient enough to pose a risk for local water supplies. What does your local or your organization believe the Pentagon's response or prevention plan should be? That is, should the Pentagon act to prevent contaminant plumes on active ranges or only respond once that contamination has dispersed and then entered the water supply?

Mr. GASTELUM. The former.

Ms. CAPPS. Thank you. This is going faster than I assumed it might but that is great. We can go back and revisit some of these topics. They are very large. But many of you have hit on these topics already.

Another question, and the National Association of Attorneys General, Mr. Miller, with your wearing of that hat, underlying the Pentagon's concern is the assumption that any response action addressing military munitions related contamination would nec-

essarily impact readiness. I understand there is a wide range of alternative approaches to cleaning up contamination.

This is what I would like you to speak about if you would. Are legal exemptions the only way for DOD to deal with such a problem? Would installation of monitoring wells or ground water treatment system disrupt its readiness activities? And if you could give an example or two in Colorado of successfully coordinating environmental cleanup and training activities.

Mr. MILLER. It certainly is possible to investigate and remediate ground water contamination on active ranges without adversely impacting readiness. I did give an example earlier of the ground water monitoring wells that were installed at Fort Carson. We simply adjusted the timing of installation and timing of sampling so as not to conflict with the military's use of that range.

If I may say in response to that question, as well as Chairman Barton's question, clearly the Attorneys General do not support lawsuits that would shut down the use of our military training ranges, but these proposed amendments go so far beyond that, and take away the authority that the States have to do these kind of reasonable approaches to addressing problems on ranges, working with DOD in a manner that does not impact readiness.

Ms. CAPPS. Thank you. That speaks to the adage. As a public health nurse I agree with an ounce of prevention versus a pound of cure.

Finally, Mr. Baron, environmental groups and public health nurses are concerns about impacts that air pollution has on the health of our citizens, particularly vulnerable populations like the children and the elderly. Some of these are located very near or on bases. Ozone pollution is a cause of increased cases of asthma, hospital admissions and missed school days.

It is a major problem in California where there is a very large military presence and a very big air quality concern. It appears that DOD is seeking the right to make air pollution worse without doing their part to reduce emissions at all. If I could have a couple more seconds to have you respond to your perspective on this proposal.

Mr. BARON. Well, can I respond?

Mr. GILLMOR. Yes, go ahead.

Mr. BARON. My name is David Baron, by the way. I am an attorney with Earth Justice which is a nonprofit law firm. We strongly oppose this Clean Air proposal because contrary to what some of the DOD witnesses said, this is not just 3 more years for them to get their act in order. We have deadlines in the Clean Air Act for meeting health standards to protect people from those very health effects she mentioned.

These deadlines are set far enough into the future so State level governments and the military has time to meet them. What they are asking for is to delay those deadlines in communities wherever they decide they want to. They don't have to testify to anybody. They can just do it. That means prolonging exposure of people in those communities unhealthful air and adverse health effects and premature deaths that we have seen that are associated with that pollution. They have got exemption authority in the current law that is more than adequate to address those situations that haven't

arisen yet, that have yet to arise where there really is a true conflict between readiness and clean air compliance.

Mr. GILLMOR. The gentlelady's time has expired. The gentleman from Maine.

Mr. ALLEN. Thank you, Mr. Chairman. I want to thank all the witnesses for being here. I apologize for not being able to be present earlier during your testimony. But I do have several questions. Mr. Baron, according to the EPA earlier today, these proposals as they relate to the Clean Air Act are intended to be temporary and to last no more than 3 years.

But as I read the provisions, and I mentioned this to Mr. Holmstead, Section B, C, D, and E have no 3-year limit. In fact, they seem to require EPA to approve State implementation plans even when those plans fail to attain national ambient air quality standards. Does this concern you and, if so, why?

Mr. BARON. Representative Allen, this is a major concern because the way the law is set up now if an area fails to meet one of those clean air deadlines, it is required to adopt stronger pollution controls. This bill, on its face anyway as it is currently written, once DOD triggers the 3-year exemption, those stronger pollution control requirements go away and there is no provision to make them come back after the 3 years. The same is true with the waiver of the attainment demonstration. There is no provision in there that says when if ever the State would have to come back and make up for those emission reductions, those emissions that the military activity would cause. Plus you have the additional concern which I don't think was addressed adequately by the EPA witnesses. They can do repeated 3-year activities. They can move a new wing to a base every 3 years and trigger the 3-year extension again and again and again. That means that the people in those communities will never get clean air.

Mr. ALLEN. Thank you. I share many of those concerns. That is why this proposal in its current form does look to me like an effort to simply weaken the Clean Air Act in ways that are not related to readiness.

I do have a question for the State witnesses, particularly Mr. Becker. This morning we heard from DOD that they have been working with the States. For any of you who are on that side of the table, is it true? Have they been working with the States? Have they made any adjustments to their proposals when they listened to the concerns of you or anyone else representing States?

Mr. BECKER. Thank you, Mr. Allen, for asking. They had met with us, and with me in particular over the past 2½ years regarding the proposal. I remember on a couple of occasions I said to them—the short answer is no, they haven't changed anything. I even made a recommendation as to how they might use their proposal.

I said, "You are seeking a 3-year exemption and you are not obligating yourself to comply until 3 years. If you came back and decided to make up for the excess emissions during the 3-year period in addition to complying at the end of 3 years, that would be an improvement. I am not saying we would support it but it would be less offensive to the environment." We expected to see this in the next proposal and never saw any change to the kind we suggested.

It is not fair to them to say they were working with the States intimating that they were making changes in response to State concerns, at least on the air problem.

Mr. BROWN. I would say for our organization we work with DOD both as an organization and individual States on a wide variety of topics. But with respect to this legislation we were never approached about it.

Mr. MILLER. We had one meeting with DOD in December not to negotiate any changes to the legislation, because as has been made clear today, our position is that it is not necessary. But we did meet to talk about and try to better understand DOD's underlying concerns. We did not expect any changes as a result of that meeting, and none were made. That was a group of five western States.

Mr. ALLEN. Finally, I just want to make one other point. I am very troubled by the fact that if you have an exemption for DOD readiness activities that it is not at all clear to me how anyone is going to be able to separate the air pollution that is attributable to DOD readiness activities from all the other air pollution that is supposed to be regulated by the States. I see, Mr. Chairman, my time has run out but I did want to leave that as a hanging question. If anyone would like, maybe we can submit that in writing.

Mr. GILLMOR. Maybe someone wants to hang out and answer.

Mr. ALLEN. Could anyone respond to that? I would appreciate it.

Mr. BECKER. Just a quick response. I think you are absolutely correct. I would even add to that. What is to stop other sources of pollution under the guise of an important military issue seeking the same kind of relax exemptions? Those are the expectations. There is an inequity argument here and I think it is very unfair to other sources of pollution who have already reduced their emissions.

Mr. ALLEN. Mr. Baron?

Mr. BARON. I just had one other thought on that, all of this involves predicting the future. When they are proposing to move, say, a wing of an aircraft to a base, under current law they are required to predict, and even under the DOD laws they are required to predict what the air quality impacts going to be.

My concern is that if they are not required to do that ahead of time, which is what the DOD proposal would let them do, let them move all these forces of training and whatever to a base before making that analysis, by the time they do it, it will be too late.

Mr. GILLMOR. Okay. Once again, we appreciate all of you coming and the hearing will stand adjourned.

[Whereupon, at 4:11 p.m. the hearing was adjourned.]

[Additional material submitted for the record follows:]

W.J. "BILLY" TAUZIN, LOUISIANA
RALPH M. HALL, TEXAS
MICHAEL BILIRAKIS, FLORIDA
FRED UPTON, MICHIGAN
CLIFF STEARNS, FLORIDA
PAUL E. GILLMOR, OHIO
JAMES C. GREENWOOD, PENNSYLVANIA
CHRISTOPHER COX, CALIFORNIA
NATHAN DEAL, GEORGIA
RICHARD BURR, NORTH CAROLINA
ED WHITFIELD, KENTUCKY
CHARLIE NORWOOD, GEORGIA
BARBARA CUBIN, WYOMING
JOHN SHIMKUS, ILLINOIS
HEATHER WILSON, NEW MEXICO
JOHN B. SHADEGG, ARIZONA
CHARLES W. "CHIP" PICKERING, MISSISSIPPI
VITO FOSSELLA, NEW YORK
STEVE BUYER, INDIANA
GEORGE RADANOVICH, CALIFORNIA
CHARLES F. BASS, NEW HAMPSHIRE
JOSEPH R. PITTS, PENNSYLVANIA
MARY BONO, CALIFORNIA
GREG WALDEN, OREGON
LEE TERRY, NEBRASKA
MIKE FERGUSON, NEW JERSEY
MIKE ROGERS, MICHIGAN
DARRELL E. ISSA, CALIFORNIA
C.L. "BUTCH" OTTER, IDAHO
JOHN SULLIVAN, OKLAHOMA

BUD ALBRIGHT, STAFF DIRECTOR

ONE HUNDRED EIGHTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

JOE BARTON, TEXAS
CHAIRMAN

JOHN D. DINGELL, MICHIGAN
HENRY A. WAXMAN, CALIFORNIA
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TOM ALLEN, MAINE
JIM DAVIS, FLORIDA
JAN SCHAKOWSKY, ILLINOIS
HILDA L. SOLIS, CALIFORNIA
CHARLES A. GONZALEZ, TEXAS

June 4, 2004

Mr. Robert S. Taylor
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Dear Mr. Taylor:

On April 21, 2004, the Subcommittee on Environment and Hazardous Materials and the Subcommittee on Energy and Air Quality conducted a joint hearing on the Department of Defense's (DOD) legislative proposals seeking to amend the Clean Air Act, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), and the Solid Waste Disposal Act. These proposals are components of DOD's Readiness and Range Preservation Initiative.

A DOD official testified at the hearing that what DOD is proposing "is in large measure what the Clinton defense department sought." During the Administration of President Clinton you served as Deputy General Counsel (Environment and Installations) at the DOD. Therefore, I request your response to the following question:

> Did the Clinton Administration ever send Congress legislative proposals similar to the Readiness and Range Preservation Initiative seeking to amend the Clean Air Act, CERCLA, and the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act)?

Thank you for your cooperation.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Paul E. Gillmor, Chairman
Subcommittee on Environment and Hazardous Materials

The Honorable Hilda L. Solis, Ranking Member
Subcommittee on Environment and Hazardous Materials

The Honorable Ralph M. Hall, Chairman
Committee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

ROBERT S. TAYLOR, ESQ.

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R_TAYLOR@COMCAST.NET

June 7, 2004

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515-6115

Dear Congressman Dingell:

Following a joint hearing of the Subcommittee on Environment and Hazardous Materials and the Subcommittee on Energy and Air Quality on April 21, 2004, you wrote to me on June 4 to ask me to respond to the following question:

> Did the Clinton Administration ever send Congress legislative proposals similar to the Readiness and Range Preservation Initiative seeking to amend the Clean Air Act, CERCLA, and the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act)?

My response to this question is as follows:

> The Clinton Administration did not send to Congress legislative proposals similar to the components of the Readiness and Range Preservation Initiative dealing with the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and the Solid Waste Disposal Act.

During the Administration of President Clinton, I served as Deputy General Counsel (Environment and Installations), Department of Defense, from May 1995 through January 20, 2001. In that position, my responsibilities included providing advice to the leadership of the Department on the legislative program of the Department concerning environmental matters, and providing information and explanations about the legislative program to Congressional staff.

Sincerely,

Robert S. Taylor

Robert S. Taylor

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Paul E. Gillmor, Chairman
Subcommittee on Environment and Hazardous Materials

The Honorable Hilda L. Solis, Ranking Member
Subcommittee on Environment and Hazardous Materials

The Honorable Ralph M. Hall, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

Encroachment Impacts on Training and Readiness at Marine Corps Base Camp Pendleton

Prepared for:

Marine Corps Base Camp Pendleton

Assistant Chief of Staff
Environmental Security

March 2003

Prepared by:
SRS Technologies
1401 Wilson Boulevard, Suite 1200
Arlington, Virginia 22209

EXECUTIVE SUMMARY

Camp Pendleton's mission is to provide ranges, training lands, and facilities on which Marines can train to achieve the highest state of combat readiness. Over time, and particularly in the past 10-15 years, the ability of Camp Pendleton to provide the training environment required to prepare Marines for combat has eroded significantly due to a variety of factors. Today, these factors, which are termed encroachment by the Department of Defense (DoD), present an immediate, serious challenge to the capability of the Base to perform its military mission. Encroachment is defined as any non-DoD action that has the potential to impede or interfere with Camp Pendleton's capability to perform its military mission. Encroachment factors with the potential to impede training include urban growth, competing land use, airspace restrictions, airborne noise, endangered species, cultural resources, wetlands, and air quality.

Marines who train at Camp Pendleton and the leaders at the Base who are responsible for providing the best possible training environment have observed that the Base's capability to provide realistic combat training has degraded due to encroachments. What has been lacking is a quantitative tool to examine and assess those observations by measuring the impacts of encroachments on training and readiness at Camp Pendleton. The purposes of this study are to: (1) develop that quantitative tool; and (2) assess and quantify impacts on the Base's mission capability from various categories of encroachment.

The following objectives were developed by the Base to guide this and any future quantification efforts: At a minimum, the assessment methods should:

- Capture the costs of encroachment, in terms of degradation in the mission capabilities of the Base.
- Apply to a representative cross-section of training requirements for Military Occupational Specialties (MOSs), units, and weapons systems that utilized the Base.
- Focus on the perspectives and experience of the operational forces (i.e., subject matter experts) that train on the Base.
- Identify the work-arounds that have been used to address training events impacted by encroachment and begin to develop a picture of the value of the Base as part of a regional complex of Marine Corps ranges and installations.
- Be capable of repeat application in a consistent manner in future assessments and have utility as an analytical tool that can be readily applied by operational commanders and training managers at intermediate command levels.

The focus of the assessment is on Marine Corps Base Camp Pendleton, rather than on any specific Marine Corps unit. The assessment does not analyze the readiness of individual Marines or units of Marine operating forces. It is concerned solely with the capability, or "readiness," of Camp Pendleton as a Base to provide a realistic training environment.

The scope of this initial assessment focused on several components of a Marine Expeditionary Unit (Special Operations Capable) (abbreviated "MEU" in this Report). The MEU is a task-organized force comprised of ground combat, air combat, combat support, and command and control elements. The MEU deploys from Camp Pendleton embarked on Navy amphibious ships that comprise an Amphibious Ready Group (ARG). Pre-deployment training is designed to

ensure that the MEU is prepared to perform a wide variety of missions. Consistent with Marine Corps training doctrine, MEU training builds on previously conducted individual and small unit training. Upon arrival at an area of operations, the MEU must disembark the ships and move ashore. This movement of Marines ashore can be accomplished via landing craft to a beach, helicopters or other aircraft from the sea to an inland objective, or both. A MEU is required to be trained and capable of executing both types of movement ashore. Therefore, pre-deployment training for the MEU culminates in complex amphibious exercises.

The mission of Camp Pendleton is to provide the training areas and ranges for the entire range of individual, small-unit, and large-unit combat training required to prepare Marines for combat. Accordingly, this assessment analyzes the impacts of encroachment on a cross-section of the military occupations, units, and types of equipment found in the MEU. The following chart depicts a notional MEU organization (see Figure A), highlighting the units or elements of combat power addressed in this study. The ground combat power of the MEU is embedded in the Battalion Landing Team (BLT), which consists of about 1,200 Marines. The study looks at the BLT as a unit, as well as several of the discrete building-block components of the BLT:

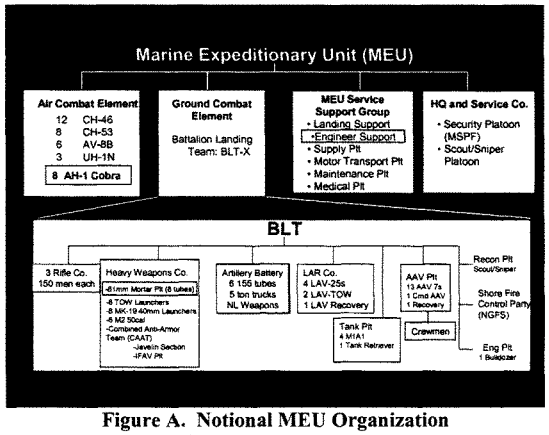


Figure A. Notional MEU Organization
(Study Units Highlighted)

The assessment of the capability of Camp Pendleton to support training was conducted at the training task level. The overall operation was broken down into tasks taken from existing Marine Corps Orders (MCO) as follows:

- Individual Training Standards (ITS) (MCO 1510 Series) for:
  - Mortarman
  - AAV Crewman
  - Combat Engineer
- Training and Readiness Manuals (MCO 3501 Series) for:
  - LAR Platoon
  - Artillery battery

  - AH-1W Cobra
- Marine Corps Combat Readiness Evaluation System (MCCRES) (MCO 3501 Series) for:
  - Rifle Company
  - MEU Battalion Landing Team

The data collection method used for this assessment was face-to-face interviews with Marine Corps subject matter experts (SME). The SMEs were Marines with a significant operational expertise, including training knowledge and experience at Camp Pendleton in the area being assessed. Their professional military judgment as to the ability to complete specific training tasks to Marine Corps standards at Camp Pendleton was the basis for the data and subsequent analysis.

Two training scenarios were selected for quantitative analysis of encroachment impacts. Optimal training replicates as closely as possible the conditions that might be encountered in a real-world operational context. The first scenario--a notional exercise--is intended to reflect the Base's requirement to provide a context for realistic, exercise-based training. The operational training scenario at Camp Pendleton selected for this quantitative analysis of encroachment impacts is a notional four-phase MEU exercise, depicted below in Figure B.1, which involves:

- Phase 1: an amphibious landing of a Battalion Landing Team at Red Beach;
- Phase 2: tactical displacement of the BLT six miles through a maneuver corridor from Red Beach to an objective in the vicinity of the live-fire impact areas;
- Phase 3: deliberate assault of an enemy objective at the impact area; and
- Phase 4: the logistics sustainment of the combat forces.

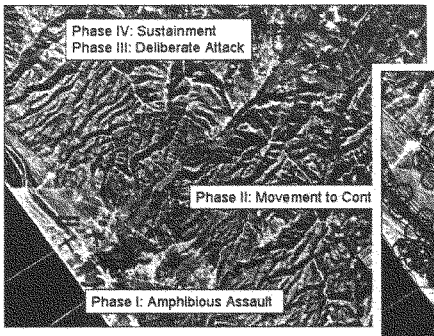


Figure B.1. BLT Operational Scenario

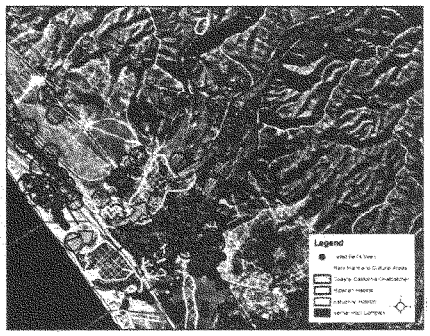


Figure B.2. Maneuver Corridor w/restrictions overlay

Figure B.2 depicts the movement corridor for the operational scenario overlaid with natural and cultural resources and man-made obstacles that impose restrictions and artificialities on the tactical realism of the tasks and the overall exercise. These restrictions are significant factors in the SME's evaluation of the individuals' or units' ability to complete the specified tasks.

The second training scenario is used to assess the capability of the Base to support required training anywhere on the Base. Some training (e.g., individual tasks) need not always be conducted in an exercise scenario to be productive. However, on Camp Pendleton, much training that preferentially should be conducted in a realistic scenario cannot be, due to encroachments.

An assessment of 739 training tasks determined that encroachment has a measurable negative impact on field training at Camp Pendleton. The data indicated that all field training assessed at Camp Pendleton is affected to some degree by encroachment with ground training tasks being impacted the most. The quantitative assessment determined that a BLT training on Camp Pendleton in a notional, four-phase tactical training scenario is able to complete its required non-firing tasks to less than 68 percent of the Marine Corps standard. The findings of this assessment demonstrate that Camp Pendleton's ability to provide the full range of realistic combat training opportunities for Marines operating on and deploying from the Base is significantly hindered by encroachment.

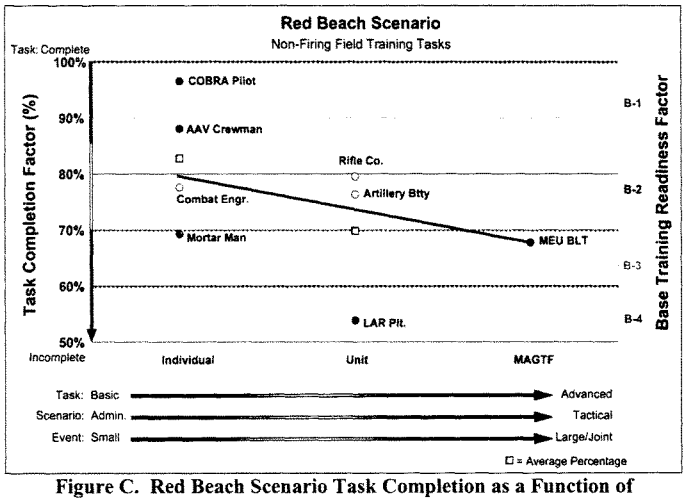


Figure C. Red Beach Scenario Task Completion as a Function of Training Event Size and Complexity

As reflected in Figure C above, the analysis finds that in the tactical training scenario Camp Pendleton can support B-1 (greater than or equal to 85 percent of standard) for only two entities (25 percent) assessed. The Base is able to support B-2 (70 to 84.9 percent of standard) for three entities (37 percent) assessed, and B-3 or below (less than 70 percent of standard) for the remaining three entities (37 percent) assessed in the tactical, operational scenario. Otherwise stated, the Base's capability to support established individual and unit tasks within the context of the notional tactical scenario is B-2 or below for 75 percent of the entities evaluated and B-3 or

below for 37 percent of the entities analyzed. Thus, the Marine Corps' effort to identify and resolve encroachment issues is targeted to secure its installations' training capabilities that are necessary to support current and future training and operational mission requirements.

Of particular significance, the study determined that the effects of encroachment on training increase according to the relative complexity and size of the training event. In general, the larger the unit involved and the more complex the training, the more the impacts of encroachment drive down the task completion percentage. Advanced, integrated combat training, involving multiple combat elements, maneuver, and tactical operations generally is more restricted by encroachment than intermediate unit level training. Intermediate unit training, in turn, generally is more restricted than individual training (see Figure C).

As expected, the Base-wide analysis reflects that many of the tasks that were degraded in the operational scenario could be "completed" elsewhere on Camp Pendleton. The analysis revealed that Camp Pendleton is capable of supporting a B-1 standard (greater than or equal to 85 percent) for 63 percent of the entities assessed. Still, today's level of encroachment has degraded the Base's capability to support individual and unit training to B-2 for 37 percent of entities when assessing task "completion" only, on a Base-wide basis. The Base-wide assessment does not consider the diminished training value of the training task, which when accomplished outside of a tactical context yields segmented and less effective results.

The necessary training objectives must nevertheless be accomplished even when they cannot be completed at Camp Pendleton. While virtual or constructive approaches can provide value, Marine Corps training doctrine mandates a high proportion of field training to achieve and maintain combat readiness. Where the capability of Camp Pendleton to support training is degraded due to encroachment, unit commanders can seek to accomplish training in some other way (e.g., on a base-wide rather than in-scenario basis) or at a different location, such as Twentynine Palms. However, training conducted outside a continuous tactical iteration yields a segmented and less effective result. Reliance on training at other ranges results in increased costs, is time consuming, and leads to additional deployed time away from home for Marines. Moreover, training events that are displaced from Camp Pendleton by encroachment may be difficult to accommodate at another base or range. Workarounds for training displaced by encroachment are costly, may not provide high training value, and are becoming increasingly difficult to schedule and implement. This Study does not address the need to assess training and readiness issues associated with "workarounds."

The analysis indicates that restrictions relating to threatened and endangered species and their habitat have the biggest impact on training. The presence of wetlands and cultural resource sites were also significant encroachment factors. Certain types of Marine activities in the field are consistently impacted by encroachment. The most common include digging (e.g. fighting positions, vehicle defensive positions, artillery and mortar positions), earth moving (e.g. berms, revetments), off-road foot and vehicular movement, noise (artillery firing, bombing, helicopter flying), and airspace use (aircraft, artillery, mortars).

This assessment only looked at a small fraction of the training tasks that are performed at Camp Pendleton. It was conducted as an initial survey to begin to understand and quantify the impacts

of encroachment. It is not comprehensive in terms of the full spectrum of training that occurs on the Base. However, it does assess in detail the impacts of encroachment on a representative range of training tasks. All field training assessed at Camp Pendleton is affected to some degree by encroachment. Ground activities and tasks are impacted the most. Camp Pendleton's ability to provide the best possible training environment for Marines preparing to deploy overseas is significantly hindered due to the impacts of encroachment.

Marines who trained at Camp Pendleton and Red Beach in the 1970s and 1980s report that the restrictions on training have increased markedly and that today's training is much less realistic. This study has validated those observations. The "net loss" of Camp Pendleton's capability to support combat readiness training requirements is a matter of concern for future readiness.

The major conclusions from the assessment are:

- Encroachments have a measurable negative impact on field training at Camp Pendleton.
- Realistic training is significantly degraded within prime maneuver corridors, training areas, and on the training beaches at Camp Pendleton due to encroachments.
    - The Base's capability to support established individual and unit tasks within the context of the notional tactical scenario is B-2 or below for 75 percent of the entities evaluated and B-3 or below for 37 percent of the entities analyzed.
    - A Battalion Landing Team could complete its required non-firing tasks to less than 68 percent of the Marine Corps standard in the notional, four-phase tactical scenario.
- The type of training that is required to prepare Marine Corps MAGTFs for deployment and combat is also the type of training most affected by encroachments at Camp Pendleton.
- The types of training activities most inhibited by encroachment include digging, earth-moving, and off-road foot and vehicular movement.
- Regulatory restrictions on impacts or potential impacts to natural and cultural resources constitute the primary encroachment factors affecting the capability of Camp Pendleton to accommodate necessary military training. Endangered Species Act compliance is the leading encroachment factor impacting military training and operations at Camp Pendleton.

Key recommendations for possible future encroachment assessments include:

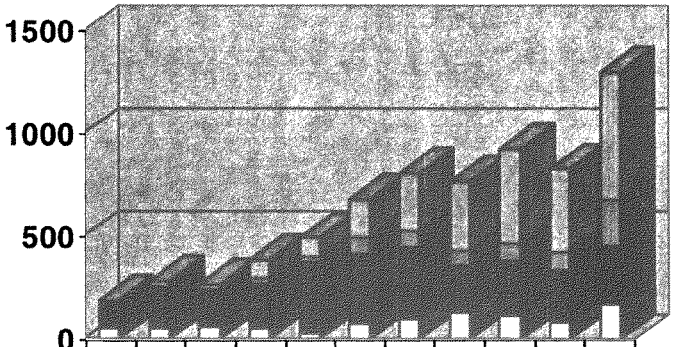
- Future assessments should consider not only the ability of the installation to support completion of a task, but also the impacts of encroachment on the training value obtained by task completion in a degraded training environment.
- The impacts of encroachment on training should be considered in both installation-specific and regional contexts to capture the cumulative and indirect impacts of encroachment on regional range complexes.
- Because the MAGTF (MEU, MEB or MEF) is comprised of distinct separate units that have their own training requirements, restrictions on unit training impact the MAGTF even before it commences its pre-deployment training sequence. Future quantification efforts should focus primarily on unit level requirements and capabilities and include assessment of MAGTF components or combined/joint unit operations.

Naval Base Coronado
California Least Tern Nesting Data

Tern Nests at NBC as of 31 Jul 03

Since 1977 Tern Nests
have increased % 9,885

Data from Reports
provided by E. Copper



	93	94	95	96	97	98	99	00	01	02	03
■ NAB OCEAN SIDE BEACHES	0	1	31	84	91	182	278	330	462	401	623
■ NAB DELTA BEACH SOUTH	8	18	1	21	25	80	80	71	81	84	217
■ NAB DELTA BEACH NORTH	127	210	177	224	349	337	344	229	271	257	285
■ NASNI RUNWAY 11	0	0	0	0	0	0	0	0	0	0	3
□ NASNI MAT SITE (1977 = 13)	52	51	60	53	27	77	102	133	113	83	170
TOTAL	*187*	*280*	*269*	*382*	*492*	*676*	*804*	*763*	*927*	*825*	*1,298*

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA AT ANCHORAGE

ALASKA COMMUNITY ACTION ON TOXICS, COOK INLET KEEPER, THE CHICKALOON VILLAGE TRADITIONAL COUNCIL, JANET DANIELS, RICHARD MARTIN, and THE MILITARY TOXICS PROJECT, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and DONALD RUMSFELD IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE, Defendants.	)	Case No. A02-0083 CV (JWS) **STIPULATION AND JOINT REQUEST TO CONTINUE STAY OF REMAINDER OF CASE UNTIL MAY 19, 2004 TO ALLOW THE PARTIES TO PURSUE SETTLEMENT**

WHEREAS, since the parties filed their previous request to continue the stay of litigation: the Defendants have submitted a revised draft settlement agreement to Plaintiffs addressing issues that were not addressed in the draft previously sent to the Plaintiffs; Plaintiffs have responded to that draft; and Defendants have submitted their counter-response to Plaintiffs;

WHEREAS, as demonstrated by the foregoing, the parties have continued moving forward with negotiation of an agreement that would resolve all remaining claims in this case;

WHEREAS, based on the terms of a proposed settlement being exchanged by the parties, the parties are optimistic they can reach a settlement of the remaining claims;

WHEREAS, based on the foregoing, Plaintiffs and Defendants agree that it would be extremely beneficial, and greatly increase the prospects for settlement of all remaining claims, to stay

the remainder of this case for an additional one month to allow the parties to work toward a final settlement; and

WHEREAS, Plaintiffs and Defendants are concerned that, if the case is not stayed to allow the parties to focus on settlement, the parties may not be able to finalize a proposed settlement toward which they have been working;

NOW, THEREFORE, the parties hereby agree and stipulate as follows:

1. The remainder of this case should be stayed for approximately one month, to May 19, 2004 to allow the parties to pursue a final settlement, and the parties should file a status report or request for extension of the stay, with a suggestion for further proceedings, by May 19, 2004 if this case has not settled by that date.

Respectfully submitted this 19th day of April, 2004.

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COX & MOYER
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San Francisco, CA 94103

Valerie Brown
TRUSTEES FOR ALASKA
1026 W. 4th Avenue, Ste. 200
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Environment & Natural Resources Division

MARK A. NITCZYNSKI
U.S. Department of Justice
Environmental Defense Section

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA AT ANCHORAGE

ALASKA COMMUNITY ACTION ON TOXICS, COOK INLET KEEPER, THE CHICKALOON VILLAGE TRADITIONAL COUNCIL, JANET DANIELS, RICHARD MARTIN, and THE MILITARY TOXICS PROJECT, Plaintiffs,	)	Case No. A02-0083 CV (JWS)
v.	)	[PROPOSED] ORDER CONTINUING THE STAY OF THIS ACTION UNTIL MAY 19, 2004 TO ALLOW THE PARTIES TO PURSUE SETTLEMENT
UNITED STATES DEPARTMENT OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and DONALD RUMSFELD IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE, Defendants.	)	

Pursuant to the stipulation of the parties, the Court hereby orders as follows:

1. The remainder of this case shall be stayed for thirty (30) days, to May 19, 2004 to allow the parties to pursue a final settlement;

2. The parties shall file a status report with a suggestion for further proceedings by May 19, 2004, if this case has not settled by that date.

IT IS SO ORDERED.

Dated:_____

_____
Chief Judge John W. Sedwick
United States District Court Judge

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and between Alaska Community Action on Toxics, Cook Inlet Keeper, Chickaloon Village Traditional Council, Janet Daniels, Richard Martin and Military Toxics Project (collectively, "Plaintiffs"), and the United States Department of the Army, United States Department of Defense and Donald Rumsfeld in his official capacity as United States Secretary of Defense (collectively, "Defendants").

WHEREAS, Plaintiffs filed and served a Complaint against Defendants in the United States District Court, District of Alaska at Anchorage, Civ. No. A02-0083 CV (JWS) ("the Litigation") on April 14, 2002;

WHEREAS, Plaintiffs filed an Amended Complaint for Declaratory and Injunctive Relief in the Litigation on June 26, 2002, alleging that some or all of the Defendants had committed violations of the Clean Water Act, 33 U.S.C. § 1251, et seq. ("CWA"), the Solid Waste Disposal Act, 42 U.S.C. § 6901, et seq. ("SWDA") and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, et seq. ("CERCLA") at Fort Richardson Alaska, an Army installation north of Anchorage, Alaska;

WHEREAS, the Plaintiffs previously agreed to dismiss their Second Cause of Action, which was brought pursuant to the provisions of the SWDA, and the Court dismissed with prejudice that cause of action by order dated August 28, 2003;

WHEREAS, on or about August 15, 2003, the Plaintiffs filed a motion for summary judgment seeking judgment in their favor on their causes of action under the CWA and CERCLA. While said motion was pending, on or about September 19, 2003, the parties agreed stay the litigation in order to negotiate this Agreement;

WHEREAS, Plaintiffs and Defendants wish to enter into this Agreement in order to benefit the environment in and around Fort Richardson Alaska ("FRA") while allowing Defendants to continue certain training at FRA;

WHEREAS, on April 24, 2002, the United States Army Alaska ("USARAK") submitted a National Pollution Discharge Elimination System ("NPDES") permit application for the discharge of munitions constituents into the Eagle River Flats artillery range ("ERF") to the United States Environmental Protection Agency ("EPA"), Region 10;

WHEREAS, USARAK currently is undertaking an active cleanup of white phosphorus at ERF that is anticipated to take approximately two (2) more years;

WHEREAS, in response to Plaintiffs' concerns about the potential use of depleted uranium at ERF, Defendants have inquired of the USAF regarding this potential use;

WHEREAS, Defendants have informed Plaintiffs of the USAF's response that the USAF has not used depleted uranium for training at ERF;

WHEREAS, as part of routine training activities at FRA, propellant bags associated with munitions firing are burned at certain points on the ranges on non-flammable, impervious surfaces;

WHEREAS, the firing restrictions and the terms regarding munitions response contained in paragraphs III.F. and III.H of this Agreement reflect current USARAK procedures;

WHEREAS, Plaintiffs and Defendants have agreed to this Settlement Agreement without any admission of fact or law;

WHEREAS, Plaintiffs and Defendants consider this Agreement to be a fair, adequate and equitable resolution of the claims that were or potentially could have been raised in the Litigation; and

WHEREAS, Plaintiffs and Defendants believe it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation;

NOW, THEREFORE, PLAINTIFFS AND DEFENDANTS AGREE AS FOLLOWS:

I. Parties Bound.

This Agreement applies to, is binding upon and inures to the benefit of Plaintiffs (and their successors, assigns and designees) and Defendants.

II. Definitions.

Unless otherwise expressly provided, terms used in this Agreement that are defined in the CWA, SWDA, CERCLA or in implementing regulations shall have the meaning assigned to them therein as of the date that this Agreement is executed by all parties or as subsequently amended. For the purposes of this Agreement, the following terms shall have the meaning provided below:

A. "Artillery firing activities" means the firing of munitions.

B. Army" means the United States Department of the Army. For purposes of this Agreement, USARAK is a subordinate Army command headquartered at FRA, and includes the FRA Army post.

C. "Direct affiliation" means, at any time during the pendency of this Agreement or during the three (3) years prior to the Effective Date of this Agreement: (1) being an officer, director, member or employee of any of the Parties; (2) participating in the day-to-day activities of any of the Parties, including by participating in making decisions, approvals, disapprovals, recommendations or the rendering of advice on such day-to-day activities, whether paid or unpaid (prior service as a technical or scientific expert or consultant for one or more of the Parties shall not necessarily be considered participation in the day-to-day activities of any of the Parties); (3) having a spouse, minor child, general partner or organization in which one is serving as officer, director, trustee, general partner or employee that is included in parts (1) or (2) of this definition; or (4) having any arrangement concerning prospective employment, or negotiating potential employment, with or in any entity that is included in parts (1) or (2) of this definition.

D. "Eagle River Flats" or "ERF" means the area consisting of approximately 2,165 acres within FRA at the mouth of the Eagle River adjacent to Upper Cook Inlet that is and has been used as the primary munitions impact area at FRA, and which is depicted on the map attached to this Agreement as Attachment A.

E. "Fort Richardson Alaska" or "FRA" means the Army post known as Fort Richardson, located north of Anchorage, Alaska.

F. "Major mammal species" means bear, coyote, fox, lynx, moose, wolf and whales.

G. "Munitions" has the meaning set forth in 40 CFR § 260.10 for "military munitions."

H. "Munitions Constituents" means and includes munitions as well as the constituents, residues and/or byproducts of munitions.

I. "National security" means the protection, preservation and securing of operations and strategy in furtherance of the national defense and foreign relations of the United States. National security includes the

protection, preservation and securing of classified missions, tactics, units, ordnance or equipment. It also includes the protection, preservation and securing of those missions, tactics, units, ordnance or equipment related to training for imminent deployment to potentially hostile areas of operation, as specifically designated by the USARAK Senior Mission Commander.

J. "Parties" means, collectively, Plaintiffs and Defendants, as set forth above.

K. "Range Facility Management Support System" or "RFMSS" means the database, maintained by USARAK, containing information concerning munitions firing at FRA training ranges (including ERF); such information includes, for example, the type and number of munitions fired, the date of firing and the range where firing occurred.

L. "United States Army Alaska" or "USARAK" is a subordinate command of the Army under the U. S. Army Pacific ("USARPAC") major Army command.

M. "UXO" means military munitions that: have been primed, fused, armed, or otherwise prepared for action; have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installation, personnel, or material; and remain unexploded either by malfunction, design, or any other cause.

III. Agreement Obligations.

A. Monitoring studies for potential migration of munitions constituents from ERF.

1. Initial monitoring study and potential additional studies. USARAK shall conduct initial studies to evaluate whether munitions constituents associated with artillery firing activities at ERF are migrating beyond the boundaries of ERF such that munitions constituents may contaminate marine resources or wildlife near ERF. If these initial studies reveal that the munitions constituents have migrated from ERF at levels for which applicable law requires remedial efforts, USARAK shall promptly take steps to comply with those requirements. If these initial studies reveal that the munitions constituents have migrated from ERF but not at levels for which applicable law requires remedial efforts, USARAK, after consultation with EPA, shall conduct additional monitoring activities for a period of five years regarding the migration of those constituents from ERF. If at the end of this five-year period, the

monitoring results show that munitions constituents are migrating from ERF, the Army, in consultation with EPA, shall determine whether to undertake an additional period of monitoring. Any monitoring requested or required by EPA under an NPDES permit or as part of the NPDES permit application process shall not be considered an extension of monitoring or additional monitoring under this paragraph III.A.1.

2. Plaintiffs' participation. USARAK shall provide meaningful opportunities for the Plaintiffs to provide input on the development of the scope and protocol of the monitoring studies discussed in paragraph III.A.1 above.

3. Technical assistance contribution. To facilitate Plaintiff's understanding of, participation in and comment on the development and results of the initial monitoring study and the potential follow-up studies discussed in paragraph III.A.1 above, the Army shall provide Plaintiffs with technical assistance, at a cost not to exceed $25,000 per year for a period of five (5) years; provided that, if the monitoring described in paragraph III.A.1 is extended beyond a five (5) year period, the provision of technical assistance to the Plaintiffs under this paragraph III.A.3 shall be extended for five (5) years or the period of additional monitoring described in paragraph III.A.1, whichever is sooner. This technical assistance shall be provided by a qualified technical assistant or assistants ("QTA") who will review the technical issues and study the protocols proposed to be used in the monitoring program. In order to enhance public accountability, the Parties agree that Plaintiffs shall promptly provide copies of all data, study results, review comments and reports generated by or under the direction of the QTA to Defendants' named representative and that Defendants may make such information available to the public upon request. The QTA shall have, at a minimum, the following qualifications: (a) Ph.D degree or equivalent in environmental studies, toxicology, public health or related subjects (e.g., biology or chemistry) and a minimum of six (6) years of experience in one or more of those fields. The following combination, in the field of expertise for which the QTA will be used, may be an acceptable substitute for a Ph.D. degree: (i) M.S. degree; (ii) graduate level study; and (iii) four (4) additional years of experience; (b) professional level experience and knowledge of laws and regulations under the CWA, CERCLA and RCRA; (c) professional level experience and knowledge in the performance and

interpretation of environmental assessments, including risk assessment and analysis; (d) professional level experience in communicating to both technical and lay audiences the results of environmental assessments and related public health issues; and (e) no direct affiliation with any of the parties to the Litigation. From time to time after execution of this Agreement, Plaintiffs may nominate in writing one or more individuals who meet the qualifications. The nomination must specify the nominee's qualifications and compensation rates. QTAs must be agreed upon by both parties. USARAK shall have thirty (30) days from USARAK's receipt of the nomination to object in writing to the nomination. If USARAK does not object in writing within thirty (30) days, the nomination shall be accepted and the individual will be retained. If USARAK objects to a nomination, USARAK and Plaintiffs shall promptly meet and confer in a good faith attempt to resolve the objection. If the objection is not resolved through this informal negotiation process within thirty (30) days from the date of Plaintiffs' receipt of USARAK's objection, or within such time thereafter as is mutually agreed, Plaintiffs may notify Defendants that Plaintiffs desire to submit the matter to non-binding mediation in accordance with paragraphs V.B and V.C of this Agreement. The mediation shall then proceed in accordance with paragraphs V.B and V.C.

B. Beluga Whale Monitoring. As part of USARAK's efforts to assist in the monitoring and protection of beluga whales within upper Cook Inlet at or in the vicinity of ERF, USARAK shall implement the measures described below:

1. National Marine Fisheries Service ("NMFS") telemetry studies and aerial surveys. USARAK will serve as an integral part of the beluga whale studies being conducted by NMFS in upper Cook Inlet. USARAK's participation in these studies shall include support activities such as assisting NMFS with: (a) equipment operation; (b) capture and processing of beluga whales for radio-telemetry work; (c) aerial survey work; or (d) photographic/video documentation of the fieldwork. In addition, USARAK personnel will facilitate and coordinate all access to FRA needed for the NMFS-led studies in and around ERF and the mouth of Eagle River in order to provide the researchers with needed access to the area while ensuring that all safety measures and precautions are being satisfied. Defendants are under no obligation to perform the activities described in this paragraph III.B.1 in any year that NMFS does not conduct beluga whale studies in upper Cook Inlet.

2. Monitoring of the health and behavior of beluga whales in and around ERF during periods of frequent whale use. USARAK Environmental Department personnel shall conduct field-monitoring to observe the apparent health, behavior and movement of beluga whales in and around the ERF. The scope and protocols for the field monitoring shall be developed by USARAK in consultation with NMFS. The Plaintiffs and the Cook Inlet Marine Mammal Council will be afforded meaningful opportunities to provide input on the development of the scope and protocols for such field monitoring. Photographic and video-graphic documentation obtained during the monitoring observations shall be made available to Plaintiffs and other interested parties upon request. The Plaintiffs may make use of the technical assistance contribution discussed in paragraph III.A.3 above in order to assist the Plaintiffs' understanding of, participation in and comment on the development and the results of the beluga field monitoring. If plaintiffs choose to use the technical assistance contribution for assistance with the beluga field monitoring, plaintiffs must first comply with the QTA selection procedures set forth in Paragraph III.A.3 above. However, for a QTA who will assist plaintiffs with beluga field monitoring, the following minimum qualifications shall be apply in lieu of the minimum qualifications set forth in paragraph III.A.3 above: (a) Ph.D degree or equivalent in wildlife biology, with expertise in marine mammals, and a minimum of six (6) years of experience in that field. The following combination, in wildlife biology with emphasis in marine mammals, may be an acceptable substitute for a Ph.D. degree: (i) M.S. degree; (ii) graduate level study; and (iii) four (4) additional years of experience; (b) professional level experience in communicating to both technical and lay audiences the results of wildlife monitoring studies; and (c) no direct affiliation with any of the parties to the Litigation.

3. Monitoring for beluga whale presence in ERF before, during and following firing activities. In addition to the monitoring described paragraph III.B.2 above, in the event that USARAK conducts artillery firing activities at ERF between July and October, USARAK Environmental Department personnel shall, during the months of July, August, September and October, conduct specific surveillance activities immediately before, during and following all ERF artillery firing activities to help ensure that beluga whales are not harmed by the artillery firing activities. Surveillance operations shall be conducted from established observation points. This obligation shall be in addition to, and shall not alter, the year-round USARAK and Army requirements that training units immediately

cease fire if major mammal species are observed in the target area.

4. Defendants' obligations under this Section III.B of this Agreement shall continue: (a) for a period of ten (10) years after the Effective Date of this Agreement; (b) until NMFS ceases its current telemetry studies and aerial surveys of beluga whales within the upper Cook Inlet; or (c) until USARAK discontinues artillery firing activities at ERF, whichever occurs first.

C. Analysis of use alternatives for ERF. Upon the completion of the active white phosphorous remediation and prior to the lifting of existing firing restrictions for ERF, USARAK shall undertake an environmental review of its use of the ERF range in accordance with the policies and guidance set forth in the National Environmental Policy Act, 42 USC §§ 4321 to 4370f, Council for Environmental Quality regulations, 40 CFR Parts 1500-1517, and Army regulations for environmental analysis of Army actions, 32 CFR Part 651. This review will include an assessment of potential alternatives to the way USARAK currently uses ERF to determine whether any aspects of that use can be modified to further minimize environmental impacts while continuing to satisfy training needs and requirements.

D. Provision of munitions data, off-range UXO impact list, and munitions constituents documentation to Plaintiffs. The Parties acknowledge that FRA has made available to Plaintiffs historical information regarding munitions that have been fired at FRA, including ERF.

1. Munitions data and off-range UXO impact list. USARAK shall provide to Plaintiffs, on a quarterly basis and in electronic format, all unclassified munitions-related data set forth in USARAK's RFMSS database for FRA. USARAK shall also provide, on a quarterly basis, a list of UXO that fall outside of the ERF impact area.

2. Munitions constituents documentation. USARAK shall also provide, within ninety (90) days of the Effective Date of this Agreement, available documentation setting forth the unclassified chemical constituents of munitions and any propellants associated with munitions firing currently used during artillery firing activities at ERF. USARAK shall provide unclassified chemical constituent information on additional types of munitions and any propellants associated with munitions firing that are used during artillery firing activities at ERF in the future within

one hundred twenty (120) days after starting to use those munitions or any such propellants associated with munitions firing.

3. Placement of Information On Internet. In order to promote easy public access to the information referred to in sub-paragraphs III.D.1 and III.D.2, USARAK shall maintain that information on a publicly accessible internet website.

4. Defendants' obligations under paragraphs III.D.1, III.D.2 and III.D.3 above shall continue for a period of ten (10) years after the Effective Date of this Agreement or until USARAK discontinues artillery firing activities at ERF, whichever is sooner.

E. Provision of munitions data and munitions constituents documentation to EPA. Within ninety (90) days of the Effective Date of this Agreement, USARAK shall provide to EPA Region 10: (i) all unclassified munitions-related data set forth in USARAK's RFMSS database pertaining to ERF; and (ii) available documentation setting forth the unclassified chemical constituents of munitions and any propellants associated with munitions firing currently used during artillery firing activities at ERF. It is the Parties' understanding that EPA may choose to use this information in EPA's review of USARAK's ERF NPDES permit application.

F. Firing restrictions.

1. USARAK shall adhere to the following prohibitions on the use of ERF: (a) absent authorization or regulatory approval from the Department of Interior or other applicable federal regulatory authority, USARAK shall not engage in artillery firing activities at ERF during periods of spring and fall waterfowl migration, as determined by the USARAK Biologist in consultation with the United States Fish and Wildlife Service; (b) USARAK shall not discharge radiological warfare agents, hazardous chemical warfare agents, biological warfare agents or depleted uranium into ERF; and (c) USARAK shall adhere to USARAK and Army requirements that no wildlife will be purposefully killed, injured or targeted, and that training units immediately cease fire if major mammal species are present in the target area.

2. In addition, through the end of the active white phosphorous cleanup, USARAK shall adhere to

the following prohibitions on the use of ERF: (a) USARAK shall not engage in artillery firing activities at ERF during ERF cleanup and monitoring operations when cleanup and monitoring equipment or personnel are actively deployed on ERF; and (b) USARAK shall not fire mortar rounds or artillery rounds when the ice cover on water bodies within ERF is less thick than specified in the restrictions set forth in the procedures established in the 1991 Environmental Assessment and associated FONSI concerning the use of ERF. Said limitations will be periodically reviewed to ensure that these firing restrictions are sufficient to ensure that firing activities do not adversely impact ERF cleanup and monitoring efforts. USARAK shall not lessen the restrictions discussed in this paragraph III.F.2 without providing prior written notice to Plaintiffs.

G. Use of munitions with reduced environmental impact. Within six (6) months of the Effective Date of this Agreement, USARAK shall informally review existing information readily accessible within the Department of Defense regarding the availability of munitions with lower environmental impacts within the Army's munitions inventory and whether it is feasible to use such munitions for ERF training operations, and provide such information to Plaintiffs. USARAK shall update the information at least every three (3) years. If EPA issues a NPDES permit for the discharge of munitions-related constituents at ERF, USARAK shall time its information updates to coincide with the NPDES permit renewals, and shall release the information to the Plaintiffs and other members of the public before the beginning of the public comment period regarding the NPDES permit renewal. If USARAK determines that munitions with lower environmental impacts can reasonably be used to satisfy training requirements at ERF and that such munitions are available within the Army's munitions inventory, USARAK shall request as many such munitions as feasible for training operations on ERF, consistent with training needs. Defendants' obligations under this paragraph III.G shall continue for a period of ten (10) years after the Effective Date of this Agreement or until USARAK discontinues artillery firing activities at ERF, whichever occurs first.

H. Munitions Response. USARAK shall comply with all applicable laws regarding cleanup or clearance action(s) for munitions at ranges at FRA if those ranges are permanently closed. USARAK shall promptly clean up and/or clear any known UXO that falls outside of the ERF impact area, adhering to the requirements set forth in 40 C.F.R. 266 Subpart M. USARAK agrees to mark and treat UXO that falls inside the ERF impact area when such

activity is necessary to facilitate ERF white phosphorous cleanup efforts and can be accomplished with reasonable safety. USARAK shall record the location of all known UXO that falls either inside or outside the ERF impact area. Such records shall include the type of munitions constituting the UXO, the date the UXO lands and is discovered, and shall describe any actions the Army takes in clearing the UXO. Defendants' obligations under this paragraph III.H shall continue for a period of ten (10) years after the Effective Date of this agreement or until USARAK discontinues artillery firing activities at ERF, whichever is sooner.

I. Government-to-Government Consultations with Upper Cook Inlet Tribes. Within sixty (60) days of the Effective Date of this Agreement, FRA shall commence Government-to-Government consultations with upper Cook Inlet tribes and, as appropriate, other interested parties regarding the ERF NPDES permit process. [Plaintiffs to provide a list of Upper Cook Inlet Tribe representatives to be contacted]

J. NPDES Permit. USARAK agrees to undertake all actions required by regulatory authorities to obtain an NPDES permit that comports with section 402 of the Clean Water Act, 33 U.S.C. § 1342 and related provisions, and to update such permit as required by law.

K. Propellant Burning. USARAK shall notify Plaintiffs in writing of any changes to training procedures regarding the burning of propellant bags associated with munitions firing at FRA.

IV. Dismissal of Claims and Releases.

A. The Parties agree that this Agreement represents a good faith compromise of all matters addressed in this Agreement. Upon execution of this Agreement, Plaintiffs and Defendants shall file the stipulation and proposed order attached hereto as Attachment B providing that the suit shall be dismissed with prejudice pursuant to Fed. R. Civ. P. 41, subject to the provisions of this Settlement Agreement. This Agreement shall be null and void if the Court does not dismiss the Litigation in accordance with the terms set forth in the stipulation and proposed order attached hereto as Attachment B.

B. Plaintiffs hereby release, discharge and covenant not to assert (by way of commencement or refiling of any action, the joinder of any or all of the Defendants in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind in law or in equity that Plaintiffs may have had, may now have

or hereafter may have against any or all of the Defendants that could have been asserted in the Litigation or any other civil or administrative action by Plaintiffs based upon the facts existing at the time Plaintiffs enter into this Agreement regarding environmental issues related to the operation of, and training practices at, FRA, including ERF. Notwithstanding the foregoing, Plaintiffs reserve the right to submit comments to the EPA regarding, and to oppose the issuance of, the NPDES permit that USARAK seeks from the EPA, and Plaintiffs reserve the right to assert a challenge to said permit, if issued, before any appropriate administrative body or court.

V. Dispute Resolution.

The parties agree that efforts shall be made to resolve any future dispute arising out of this Agreement (the "Dispute") in an amicable manner, in accordance with the procedures specified below.

A. Negotiation. In the event of a disagreement between Plaintiffs and Defendants concerning the interpretation or performance of any aspect of this Agreement, the dissatisfied party shall provide the other party with written notice of the Dispute and a request for informal negotiations within thirty (30) days of the disputed event. The parties shall meet and confer in a good faith effort to attempt to resolve the Dispute within thirty (30) days of the written notice or such time thereafter as is mutually agreed.

B. Mediation and Petition for Judicial Resolution. If the parties are unable to resolve the Dispute informally, then the parties shall endeavor to settle the Dispute by non-binding mediation. Within fourteen (14) days after the close of the informal negotiation period, each party shall provide the other with the names of at least three (3) individuals qualified by experience and background to serve as a neutral mediator, along with a brief summary of each individual's qualifications. The recommended individuals shall not be members of or otherwise affiliated with the party that recommends them. Within fourteen (14) days after delivery of the written recommendations, representatives of each party shall confer in person or by telephone to select the individual who will serve as a neutral mediator. Prior service as mediator under this Agreement shall not disqualify an individual from subsequent service. The parties shall extend their best reasonable efforts to select a mutually acceptable neutral mediator and to resolve the Dispute through the mediation process. Reasonable and customary costs of the mediator shall be paid by

USARAK unless: (1) the costs of the mediator(s) in any calendar year exceed $5000, in which case Plaintiffs and USARAK shall split equally the costs that exceed $5000; or (2) the mediator or the Court determines that Plaintiffs' position in the mediation was frivolous, in which case Plaintiffs shall pay the reasonable and customary costs of the mediator. Each party shall bear its own costs and attorney fees for the mediation. If a Dispute remains unresolved after completion of the Dispute Resolution process in this paragraph V.B., then either Plaintiffs or Defendants may petition the Court to resolve the Dispute, except that disputes under paragraph VI.B. shall not be subject to such petition for judicial resolution. The Court shall retain jurisdiction over this case for the sole purpose of resolving those disputes over which Plaintiffs or Defendants may petition the Court. Notwithstanding any other provision of this Agreement, however, Plaintiffs and Defendants expressly preserve, and do not waive or limit, any and all defenses relating to such litigation. Contempt of court is not an available remedy under this Agreement.

C. Confidentiality of Negotiations and Mediation. All informal negotiations, mediations and related communications and proceedings conducted pursuant to paragraphs A and B of this Section V are confidential and shall be treated as compromise and settlement negotiations for the purposes of applicable rules of evidence and any additional confidentiality protections provided by applicable law and by the court's Order Regarding Confidentiality of Settlement Discussions, which was entered in the Litigation on October 14, 2003.

VI. Force Majeure.

A. The possibility exists that circumstances outside the reasonable control of the Army

and/or FRA could delay compliance with the timetables contained in this Agreement. Such situations include, but are not limited to, sufficient funds not being appropriated as requested or appropriated funds not being available for expenditure. Should a delay occur due to the circumstances described in this paragraph VI .A, any resulting failure to meet the deadlines or other terms set forth in this Agreement shall not constitute a failure to comply with those deadlines or other terms, and any deadlines so affected shall be extended one day for each day of the delay. The Army or FRA will provide Plaintiffs with reasonable notice in the event that the Army invokes this term of this Agreement. Any dispute regarding invocation of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section V above.

B. In addition, the Army, acting only through the USARAK Senior Mission Commander, may determine that the Army must delay or forego compliance with obligations in this Agreement in order to ensure national security. The Army shall provide Plaintiffs with reasonable notice, consistent with the need for national security, in the event that the Army makes such a determination. It is understood that this provision may be invoked only at the discretion of USARAK Senior Mission Commander and may only be invoked at any time that the USARAK Senior Mission Commander determines that it is necessary to ensure national security. Should a delay occur due to the Army's invocation of this term, any resulting failure to meet the deadlines or other terms set forth in this Agreement shall not constitute a failure to comply with those deadlines or other terms, and the Army shall comply with its obligations under this Agreement as soon as practicable after the USARAK Senior Mission Commander determines that the need to withhold compliance in order to ensure national security has passed. Should the Army determine that the Army must forego compliance with any deadlines or other terms set forth in this Agreement in order to ensure national security, Defendants shall not be required to comply with those deadlines or other terms. Any dispute regarding invocation of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section V above. Consistent with Section V above, Plaintiffs may not petition the Court regarding disputes under this paragraph VI.B and the Court shall not retain any jurisdiction for the purpose of resolving such disputes. If Plaintiffs and Defendants are unable to resolve a dispute under this paragraph VI.B through non-binding mediation, then the dispute shall not be subject to judicial review and Defendants' invocation of this paragraph shall prevail.

VII. Preservation of Discretion.

Except as expressly provided herein, nothing in this Agreement shall be construed to limit or modify the discretion accorded the United States by any laws, including the CWA, SWDA, CERCLA, RCRA, or any other environmental statutes, or any principles of administrative law.

VIII. Effective Date.

This Agreement shall become effective upon its execution by the parties. Unless stated otherwise in this Agreement, the Army's obligations to comply with this Agreement shall terminate either ten (10) years after the Effective Date of this Agreement or when USARAK discontinues artillery firing activities at ERF, whichever occurs

first.

IX. Effect of Agreement.

This Agreement shall not constitute an admission of any fact, wrongdoing, misconduct, or liability on the part of the Defendants, their officers or any person affiliated with them. The provisions, terms and conditions of this Agreement shall not be admissible in any judicial or administrative proceeding, except at the request of the Defendants in defense of a claim that was or could have been asserted in the Litigation. A determination that the Defendants are in compliance with this Agreement shall constitute a complete defense to the assertion by any of the Plaintiffs of any claims that were or could have been brought in the Litigation, requiring dismissal of the claims.

X. Notice.

Any notice required or made with respect to this Agreement shall be in writing and shall be effective upon receipt. Any notice or other documents required pursuant to this Agreement shall be sent to the following contact persons:

For Plaintiffs:

Alaska Community Action on Toxics (ACAT)
Attn: Pamela Miller, Director
505 West Northern Lights Boulevard Suite 205
Anchorage, Alaska 99503
pkmiller@akaction.net

Scott J. Allen
Cox & Moyer
703 Market Street, Suite 1800
San Francisco, CA 94103
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Becca Bernard
Litigation Director, Trustees for Alaska
1026 W. 4th Avenue, Suite 201
Anchorage, AK 99501
bbernard@trustees.org

For Defendants:

Robert M. Lewis
Senior Trial Attorney
U.S. Army Environmental Law Division
Suite 400, 901 N. Stuart St.
Arlington, VA 22203

Staff Judge Advocate
Headquarters, U.S. Army Alaska
600 Richardson Drive #5700
Fort Richardson, AK 99505-5700

Chief, Environmental Defense Section
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986

Mark A. Nitczynski
U.S. Department of Justice
Environment & Natural Resources Division/EDS
999 18th Street
Suite 945, North Tower
Denver, CO 80202

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Agreement.

XI. Representative Authority.

Each undersigned representative of the parties certifies that he or she is fully authorized by the party to enter into this Agreement and to bind such party to comply with the terms and conditions of this Agreement.

XII. Mutual Drafting.

It is expressly understood and agreed that this Agreement was jointly drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

XIII. Counterparts.

This Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.

XIV. Compliance With Other Laws.

Plaintiffs recognize that the Army's performance under this Agreement is subject to fiscal

and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq., and nothing in this Agreement shall be interpreted as or constitute a commitment or

requirement that the Defendants obligate or pay funds in contravention of the Anti-Deficiency Act. In addition, nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that the Defendants take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the CWA, SWDA, RCRA, CERCLA or any other law or regulation, either substantive or procedural.

XV. Applicable Law.

This Agreement shall be governed and construed under the laws of the United States.

XVI. Third-Party Beneficiaries.

Nothing in this Agreement shall be construed to make any person or entity not executing this Agreement a third-party beneficiary to this Agreement.

XVII. Consent to Form and Substance.

The parties consent to the form and substance of this Agreement.

XVIII. Integration Clause.

This Agreement constitutes the final, complete and exclusive agreement and understanding between Plaintiffs and Defendants with respect to the matters addressed in this Agreement. There are no representations, agreements or understandings relating to this settlement other than those expressly contained in this Agreement.

XIX. Changes in Law

If, subsequent to the execution of this Agreement, any change in the law goes into effect that increases, reduces or otherwise alters the Defendants' obligations concerning matters addressed in this Agreement, then the Agreement shall be amended to conform to such changes. Any dispute regarding invocation or the applicability of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section V above.

XX. Modifications.

The Parties may agree, in a written document signed by all of the Parties, to modify this

Agreement.

XXI. General Reservation of Rights.

Except as set forth in this Agreement, the parties reserve and do not waive any and all other legal rights and remedies.

WHEREFORE, after having reviewed the terms and conditions of this Agreement, Plaintiffs and the United States on behalf of the Defendants hereby consent and agree to the terms and conditions of this Agreement.

DATE: _____

_____

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COX & MOYER
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