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DoD Range Rule Withdrawn with a View Towards Reproposal

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Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

DOD Range Rule Withdrawn With a View Towards Reproposal

During the Department of Defense's (DOD) Environmental Cleanup Stakeholders Forum in St. Louis, Missouri, in November 2000, the Deputy Under Secretary of Defense (Environmental Security), Ms. Sherri Goodman, announced that she had withdrawn the Range Rule[1] from the Office of Management and Budget (OMB), with the intent to repropose the Rule.[2]

As Ms. Goodman pointed out, she withdrew the rule from the OMB for several reasons. First, DOD and the Environmental Protection Agency (EPA) must resolve difficult issues, especially the role of explosives safety. Second, as the Environmental Council of the States and National Association of Attorneys General pointed out to DOD, after several years of sorting through and refining the draft range rule, it is time to step back and hear from all the stakeholders and state regulators. Third, all the parties involved must achieve a greater understanding and consensus regarding the processes, tools, techniques, and end goals of the unexploded ordnance cleanup program. Keeping the Range Rule at OMB excludes further input from our community and state stakeholders. Finally, as DOD develops the major initiative of defining a range sustainment program, Ms. Goodman wants to be sure that everyone's concerns are included in that process.

In the interim, DOD will issue a DOD Directive (DODD) and DOD Instruction (DODI) to provide consistent guidance regarding how to proceed with a closed, transferred, and transferring range response program. The *DOD Policy for Closed, Transferred, and Transferring Ranges Containing Military Munitions Fact Sheet*[3] and the outlines for the proposed DODD and DODI were provided for public comment at DOD's Environmental Clean-up Stakeholders Forum.

Environmental law specialists should continue to use DOD and EPA's interim final guidance for implementing response actions[4] until DOD issues the DODD and DODI. Lieutenant Colonel Schenck.

New Executive Order on Tribal Consultation

On 6 November 2000, President Clinton signed Executive Order (EO) 13,175, *Consultation and Coordination with Indian Tribal Governments*.[5] Consistent with the Presidential Memorandum of 29 April 1994, *Government-to-Government Relations with Native American Tribal Governments*, EO 13,175 recognizes the following fundamental principles: (1) Indian tribes, as domestic dependent nations, exercise inherent sovereignty over their lands and members; (2) the United States government has a unique trust relationship with Indian tribes and deals with them on a government-to-government basis; and, (3)

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1. Closed, Transferred and Transferring Ranges Containing Military Munitions, 62 Fed. Reg. 50,796 (proposed 26 Sept. 1997) (to be codified at 32 C.F.R. pt. 178). The proposed rule is summarized as follows:

> The Department of Defense (DoD) is proposing a rule that identifies a process for evaluating appropriate response actions on closed, transferred, and transferring military ranges. Response actions will address safety, human health, and the environment. This rule contains a five-part process that is not inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and is tailored to the special risks posed by military munitions and military ranges. All closed, transferred, and transferring military ranges will be identified. A range assessment will be conducted in which a site-specific accelerated response (various options for protective measures, including monitoring) will be implemented. If these measures are not sufficient, a more detailed site-specific range evaluation will be conducted. Recurring reviews will be conducted, and an administrative close-out phase also is included.

Id.

2. The full text of Ms. Goodman's remarks is available at http://www.denix.osd.mil/ denix/Public/ES-Programs/Speeches/speech-68.html.

3. U.S. DEP'T OF DEFENSE, FACT SHEET, DOD POLICY FOR CLOSED, TRANSFERRED, AND TRANSFERRING RANGES CONTAINING MILITARY MUNITIONS (Nov. 2000), *available at* http://www.denix.osd.mil/denix/Public/ES-Programs/Cleanup/Rangefact/forum1.html (containing outlines for the proposed DODD and DODI).

4. Memorandum, DOD and EPA Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred (CTT) Ranges (7 Mar. 2000), *available at* http://www.dtic.mil/envirodod/UXO-Mgt-Principles.pdf.

5. 65 Fed. Reg. 67,249 (6 Nov. 2000) (superseding Exec. Order No. 13,084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998)).

Indian tribes have the right to self-government and self-determination.[6]

When developing and implementing "policies that have tribal implications,"[7] section 3 of EO 13,175 directs federal agencies to adhere to the fundamental principles listed above in order to "respect Indian tribal self-government and sovereignty, to honor tribal treaty rights and other rights, and to strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."[8] In addition, federal agencies are required, when developing such policies, to encourage tribal development of policies to meet the agency's program objectives, to defer to tribally established standards, and to consult with tribes to consider the need for federal standards and alternatives that would preserve tribal authority and prerogatives.[9]

The EO also imposes significant new responsibilities on federal agencies that promulgate regulatory policies or rules that impact tribes or tribal governments. By February 2001, each federal agency must designate an official responsible for implementing the order.[10] By March 2001, the designated agency official must submit documentation to the OMB describing the agency's process for ensuring timely and meaningful consultation with tribes early in the rule-making process.[11]

Prior to going forward with any regulation that imposes substantial direct compliance costs on a tribal government[12] or any regulation that preempts tribal law, an agency must meet several cumbersome procedural requirements. The agency must consult with affected tribes early in the promulgation process, prepare a tribal summary impact statement as part of the regulation's preamble, and submit to the Director, OMB, any written communications from tribal officials.[13] When transmitting a draft final regulation with tribal implications to OMB, the agency must certify that "the requirements of EO 13,175 have been met in a meaningful and timely manner."[14]

How will this impact the Army in its day-to-day operations? Initially, it is important to note that EO 13,175 is not limited to natural and cultural resource actions; it applies to any regulations or policies that have the potential to directly impact tribes, tribal governments and tribal resources. At Headquarters, Department of the Army (HQDA), EO 13,175 imposes several new responsibilities. Headquarters, Department of the Army must designate an agency official responsible for implementing EO 13,175 and forwarding a tribal consultation procedure to OMB. In addition, HQDA and the secretariat will need to ensure that proposed regulations and policies are reviewed early in the developmental process for potential impacts to tribes, tribal resources or tribal governments. Where such impacts are identified, HQDA and the secretariat must determine whether any of the requirements of EO 13,175 apply.

At the local installation level, EO 13,175 will apply to "policy statements or actions that have substantial direct effects on one or more tribes."[15] This term is not defined in EO 13,175, and will be subject to interpretation by local decision makers. Management plans that impact tribally protected resources are the types of "actions" most likely to trigger section 3 of EO 13,175.[16] For all practical purposes, section 3's requirements can be met by consultation with federally recognized Indian tribes in accordance with the principles and procedures set forth in the *Department of Defense American Indian and Alaskan Native Policy*,[17] and *Department of the Army Pamphlet 200-4*'s *Guidelines for Army Consultation with Native Americans*.[18]

6. Exec. Order. No. 13,175, § 2, 65 Fed. Reg. 67,249.

7. The EO broadly defines "policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." *Id.* § 1(a), 65 Fed. Reg. at 67,249.

8. *Id.* § 3, 65 Fed. Reg. at 67,249-50.

9. *Id.* § 3(c), 65 Fed. Reg. at 67,250.

10. *Id.* § 5, 65 Fed. Reg. at 67,250.

11. *Id.*, 65 Fed. Reg. at 67,250.

12. These requirements only apply to proposed regulations that are not mandated by statute.

13. Exec. Order. No. 13,175, § 5, 65 Fed. Reg. at 67,250.

14. *Id.* § 7, 65 Fed. Reg. at 67,251. Similar certification requirements apply to proposed legislation with tribal impacts submitted to OMB.

15. *Id.* § 1, 65 Fed. Reg. at 67,249.

16. Master Plans, Integrated Cultural Resource Management Plans, Integrated Natural Resource Management Plans and Range Management Plans are the types of planning documents that might trigger compliance requirements.

17. Memorandum, The Secretary of Defense, to Secretaries of the Military Departments, et al., subject: American Indian and Alaska Native Policy (20 Oct. 1998), *available at* http://www.aec.army.mil (Homepage/Publications).

Environmental law specialists (ELS) should work with cultural resource managers and the designated Coordinator for Native American Affairs to identify federally recognized tribes affiliated with their installation, and land impacted by installation activities. Environmental law specialists can then assist in identifying installation plans and policies with the potential to impact tribal governments or tribal resources protected by law or treaty.[19] Where development and implementation of installation plans and policies[20] may directly effect tribal governments or resources, ELSs should ensure that early tribal consultation occurs on a government to government basis in a manner consistent with Army policy and the principles discussed above. Mr. Farley.[21]

NEPA and Cumulative Impacts Analysis

Army environmental law practitioners should be well familiar with the requirements of the National Environmental Policy Act of 1969 (NEPA).[22] Requirements involving the use of categorical exclusions,[23] and the merits of using an Environmental Assessment[24] or an Environmental Impact Statement[25] are generally well known and regularly applied by environmental lawyers. An area that can be overlooked in NEPA practice, however, is the analysis of the cumulative impacts of a federal action. [26] This section will highlight the area of cumulative impacts analysis under NEPA and provide an example of a scenario where the need for cumulative impacts analysis may not be readily apparent.

The Council on Environmental Quality (CEQ) defines cumulative impact as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[27]

Army Regulation 200-2 requires consideration of cumulative impacts at all levels of NEPA analysis. The screening criteria of *Appendix A* dictate that categorical exclusions may only be used if "[t]here are minimal or no individual or cumulative effects on the environment as a result of this action."[28] Paragraph 5-2 states that "[a]n [Environmental Assessment] is required when the proposed action has the potential for . . . [c]umulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration."[29] The considerations above also apply to Environmental Impact Statements. In sum, cumulative impacts must be considered in the analysis of Army actions under NEPA.[30]

Environmental attorneys must be cognizant of cumulative impacts in rendering advice on NEPA issues. Environmental Assessments and Environmental Impact Statements will include a section analyzing cumulative impacts. However, situations may arise where cumulative impacts might be overlooked. Consider a set of facts where there are several building projects on an Army installation either recently completed or where construction is ongoing. Assume that all of these

18. U.S. DEP'T OF ARMY, PAM. 200-4, CULTURAL RESOURCES MANAGEMENT, app. F (1 Oct. 1998), *available at* http://www.aec.army.mil (Homepage/Publications).

19. Protected tribal resources usually involve cultural resources such as those covered by the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (burial of ancestral human remains), and the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000) (properties of traditional religious and cultural importance), or access to natural resources on traditional hunting areas guaranteed by treaty.

20. For example, an installation may develop a policy that restricts access to a site that is significant to a tribe for practice of traditional religion and culture.

21. Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

22. 42 U.S.C. §§ 4321-4370 (2000).

23. *See* U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, paras. 4.0-.4, app. A (23 Dec. 1988) [hereinafter AR 200-2].

24. Council on Environmental Quality, Terminology and Index, 40 C.F.R. § 1508.9 (1999).

25. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.

26. *See* 40 C.F.R. § 1508.7.

27. *Id.*

28. *See* AR 200-2, *supra* note 23, app. A-31(b).

29. *Id.* para. 5-1(a).

30. The methodology for examining the cumulative impacts of Army actions under NEPA is beyond the scope of this article. For those interested in the technical aspects of such analysis, see COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), *available at* http://www.ceq.eh.doe.gov/nepa/nepanet.gov.