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Unexploded Ordnance (UXO): An Explosive Issue?

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The recent increase in transition of military ranges to non-military uses has increased public and environmental regulatory agency concern regarding ranges. Much of this concern stems from the identification of UXO and its constituents as possible contributing sources of contamination of groundwater and soils. Making the situation potentially more explosive are EPA Region 1 actions at one of those installations, Massachusetts Military Reservation (MMR), where groundwater contamination has halted live-firing on ranges. This article highlights recent developments in the areas of munitions and ranges that influence the ability of installations to use their ranges.

In 1997, EPA Region 1 asserted the Safe Drinking Water Act (SDWA)[25] as the primary basis for prohibiting the use of lead, propellants, explosives, and demolitions, based on suspicion that ongoing training activities could contaminate the sole-source aquifer underlying the MMR impact area, thereby creating an imminent and substantial endangerment to human health and the environment. The EPA relied upon the SDWA to issue two administrative orders (AOs). These two orders required a complete groundwater study for the area underlying the impact area, provided for extensive EPA participation and oversight of the response action, established a citizens advisory committee to monitor the work, and ordered the cessation of all use of lead ammunition, high explosive artillery and mortars propellants, and demolition of ordnance or explosives (except for UXO clearance). In a third AO, the EPA ordered feasibility studies and removal of contaminated soil. The EPA's actions at MMR have Army-wide implications because other installations have training areas that overlay sole-source aquifers.

The Army has some provisions for dealing with military munitions, such as EPA's Munitions Rule (MR).[26] The MR provides some clarification for the treatment of military munitions by excluding training (including firing, research and development, and range clearance on active and inactive ranges) and materials recovery activities from being classified as waste management activities. The MR also allows the DOD storage and transportation standards to supplant environmental regulations under certain conditions. Additionally, the EPA postponed the decision regarding the status of military munitions on closed, transferred, and transferring (CTT) ranges pending DOD's publication of the Range Rule, which would govern military munitions at those areas. The DOD published the Proposed Range Rule in 1997. The DOD, the EPA, and other Federal Land Managers are currently participating in discussions with the Office of Management and Budget as part of the interagency review process regarding the Draft Final Range Rule, the last step before promulgation of the rule. Publication is expected in January 2001.

Recently, further Army guidance was issued in the *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges* ("*Management Principles*"), available on the Internet at http://www.dtic.mil/enviroDOD/UXO-Mgt-Principles.pdf. In March 2000, the Deputy Under Secretary of Defense (Environmental Security) and EPA Assistant Administrator for Solid Waste and Emergency Response signed the *Management Principles* as an interim measure effective until DOD issues the final Range Rule. In August 2000, the Army's Assistant Chief of Staff for Installation Management and Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) forwarded the *Management Principles*, along with an associated "Frequently Asked Questions," to the Major Army Commands (MACOMs) for distribution to their field organizations. The MACOMs and field organizations must consider these *Management Principles* in planning and execution of response actions at CTT ranges. Department of Defense and the EPA Headquarters negotiated the *Management Principles* and they have been shared with the states and tribes.

The *Management Principles* indicate that a process consistent with the CERCLA and the *Management Principles* provide the preferred response mechanism to address UXO at a CTT range. Response activities may include removal actions, remedial actions, or a combination of both, when necessary to address explosive safety, human health and the environmental hazards associated with a CTT range. Prior to accommodating any EPA request deemed unsafe (for example, from an explosives safety, occupational health, or worker safety standpoint), unreasonable, or inconsistent with CERCLA, the *Management Principles*, or other DOD or Army policy, installations must resolve those concerns. When necessary, installations should raise unresolved issues or disputes through the chain of command to the Assistant Chief of Staff for Installation Management or through other established mechanisms for resolution.

Installations must provide regulators and other stakeholders an opportunity for timely consultation, review, and comment on all response phases, except for certain emergency response actions. Installations should conduct discussions with local land use planning authorities, local officials, and the public, as appropriate, as early as possible in the response process to determine anticipated future land use.

Those in the field should be advised to follow the requirements set forth in the EPA's MR when dealing with military munitions used in training, testing, materials recovery, and range clearance activities. Until the DOD issues the Final Range Rule, installations must also comply with the *Management Principles* when conducting response actions for munitions and their constituents at CTT ranges. As for active range

24. *Id.* at 91.

25. 42 U.S.C. §§ 300f–300j-26 (2000).

26. 62 Fed. Reg. 6621 (Feb. 1997).

challenges, the Army's Assistant Chief of Staff for Installation Management recently requested that some installations test for explosive contaminants in their drinking water sources and groundwater adjacent and down gradient of impact areas. Clearly, the EPA's actions at MMR have garnered significant attention throughout the Army as it seeks to formulate workable approaches to assessing the costs and risks that this and similar scenarios pose to military training. Lieutenant Colonel Schenck.

Update on Punitive Fines and Federal Facilities

During the past year significant developments have effected notable change in the regulatory landscape of federal facilities. One particular issue that has ripened on the vine involves the authority of environmental regulatory agencies to subject federal facilities to punitive fines. This discussion highlights the recent key events that surround this issue. Moreover, a table at the end of this discussion provides a ready synopsis of punitive fines as they currently apply to the primary media programs.

The 1992 amendments to the Resource Conservation and Recovery Act (RCRA Amendments),[27] authorize the EPA to assess fines for past violations of underground storage tank (UST) requirements. Five years after the enactment of the RCRA Amendments, the EPA began a policy of interpreting the RCRA Amendments so as to impose punitive fines against federal facilities with respect to USTs. From the onset of this policy, military services argued that the RCRA Amendments authorized EPA to impose only fines for hazardous and solid waste provisions in RCRA, but not for the independent federal facilities provisions for USTs. They also began challenging EPA's enforcement actions in litigation before the EPA administrative law judges (ALJs) and asked the Office of the Secretary of Defense (OSD) General Counsel to seek resolution of the issue from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ).

After OSD submitted a request to OLC in April 1999, the services asked for stays of administrative litigation in pending cases. Shortly before a stay was requested in one Air Force case, however, an ALJ rendered a decision upholding DOD's objections. The EPA appealed that decision to the Environmental Appeals Board (EAB). After the OLC decided in June 2000 that the EPA has authority to impose fines for UST violations, the Air Force asked the EAB to uphold the favorable ALJ decision. The EAB did not reach the merits of the dispute, but found that there was no compelling need to set aside the OLC opinion. Installations are now settling pending UST cases.

Whether the limited waiver of sovereign immunity in the Clean Air Act (CAA)[28] allows state regulators to impose penalties against federal facilities continues to be a hotly disputed issue. This situation has been exacerbated by recent cases. In a bizarre ruling last year, the United States Court of Appeals for the 6th Circuit found that the CAA's savings clause for its citizen suits provision contains an independent waiver of sovereign immunity authorizing punitive fines against federal facilities.[29] The DOJ chose not to appeal that case to the Supreme Court because there was no split of authority among the circuits. Instead, the military services anxiously awaited the decision of the United States Court of Appeals for the 9th Circuit on an appeal of a federal district court decision in California that had adopted the United States' position.[30] Instead of addressing the central issue, however, the Ninth Circuit Court held that the case should not have been removed to federal court.[31] The DOJ is now considering whether to pursue the issue before the Supreme Court. Final resolution of this issue is probably several years away. Major Arnold.

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27. 42 U.S.C. §§ 6901–6991(h)7.

28. *Id.* §§ 7401-7671.

29. U.S. v. Tennesse Air Pollution Control Bd., 185 F.3d 529 (6th Cir. 1999), rehearing *en banc* denied without opinion (Nov. 15, 1999).

30. Sacramento Metro. Air Quality Mgmt. Dist. v. U.S., 29 F.Supp.2d 652 (E.D. Cal. 1998).

31. Sacramento Metro. Air Quality Mgmt. Dist. v. U.S., 215 F.3d 1005 (9th Cir. 2000).