EPA'S COMMENTS ON DOD's FY 04 LEGISLATIVE PROPOSALS TO THE NATIONAL DEFENSE AUTHORIZATION ACT

Proposal No. 064 – Authorize Transfer of Vessels Stricken from the Naval Vessel Register for Use as Artificial Reefs

EPA's Position: EPA opposes this proposal, which removes safeguards and allows for sinking of vessels that could pose future clean-up problems and unreasonable risks to human health and the environment. This provision would exempt both the Navy and the recipients of any Naval vessels from all sections of the Toxic Substances Control Act, not just the PCB prohibitions under TSCA section 6(e), as long as the ship is used as an artificial reef. It would also limit any future liability on the part of the Navy for remedial action under CERCLA and exempt vessels from regulation as hazardous waste as provided by the Solid Waste Disposal Act (SWDA).

EPA recognizes Navy's compelling interest in disposing of obsolete vessels and has been working with both Navy and the Maritime Administration (MARAD) to facilitate this concern. Currently, EPA is working with Navy, MARAD, Coast Guard, NOAA, the Corps of Engineers and the National Marine Fisheries Service to develop a reefing Protocol that would begin to address environmentally appropriate use of Navy and MARAD vessels as reefs. EPA is committed to working with the Navy and others to develop a responsible plan for disposition of these vessels.

Comments:

In Section (f), lines 7-9, DoD is requesting an exemption from all sections of the Toxic Substances Control Act (TSCA), not just section 6(e). This exemption from TSCA would apply to both the Navy and their ship recipients as long as the ship is used as an artificial reef. Navy and its transferees also would be exempt from the record keeping and reporting rules under TSCA section 8. Thus, if they received new information that indicated a potential unreasonable risk (section 8(e)), they would not have to report it. They also would not have to keep records of significant adverse human health or environmental reactions to their activities under section 8(c).

If this exemption is granted, these ships would not be subject to the TSCA distribution in commerce prohibition and could possibly be exported. MARAD has, on occasion, stated that several Caribbean nations (e.g., Bahamas, Cayman Islands) are interested in their ships for artificial reefs in order to develop eco-tourism.

In paragraph 6 of the section-by-section analysis, Navy states that NOAA, in consultation with EPA, sets standards for the use of vessels as artificial reefs, which would allow EPA to establish any necessary requirements under TSCA. NOAA has not established standards for artificial reefs. The National Artificial Reef Plan, which is guidance, does not go into sufficient detail on vessel cleanup which is why EPA, Navy, Corps of Engineers, NMFS, US Coast Guard and MARAD are currently drafting Best Management Practices for reefing at the request of

MARAD. Neither the National Artificial Reef Plan, nor the best management practices we are currently working on adequately address the requirements of TSCA.

Navy also states that transfers under this arrangement would not be considered as disposal under any statute. EPA has already taken the position that sinking a ship for an artificial reef constitutes disposal of PCBs (not the ship), and that an approval under 40 CFR 761.62(c) must be applied for and issued. This position has been discussed at Navy/EPA REEFEX meetings; at MARAD/EPA meetings; and during the USS Spiegel Grove project. The Navy has invested significant resources on a risk assessment for an approval under 40 CFR 761.62(c).

In the section-by-section analysis, it is not clear which statutory authority DoD is referring to in the 3rd paragraph. As mentioned above, EPA has been working on developing Best Management Practices for reefing with other Federal agencies in order to allow MARAD to estimate cleanup costs for the sinking of ships as artificial reefs. Additionally, EPA was involved in the transfer of the Spiegel Grove from MARAD to the State of Florida. Both of these projects exist because TSCA prohibits the distribution in commerce of these ships, due to the PCB contamination.

Also, DoD puts the entire burden of complying with the National Artificial Reef Plan and any other applicable requirements for artificial reefs on the recipient, with no recourse in the event that the work will not be done in an environmentally sound manner.

In the 5th paragraph of the section-by-section analysis, the language reads: "This provision would give the Navy flexibility, subject to the availability of funds, to tailor the terms of a transfer to the particular situation." This language could be interpreted to mean that it is up to the discretion of the Navy as to whether or not financial or other assistance will be provided. Additionally, it is not clear what is included in the phrase: "any other requirements he may find necessary." It appears that the Secretary of the Navy could require ship recipients to perform, or not perform, environmental cleanups.

In the 6th paragraph of the section-by-section analysis, DoD is attempting to create an exemption from TSCA by having the Administrator transfer authority under section 9 of TSCA to other statutes. It is not clear what these "other statutes" are. DoD claims that TSCA requirements will be met by these other statutes and the proposed reefing standards plan. However, if DoD is completely exempt from TSCA, then section 9 would no longer apply and the transfer of authority to other statutes would not be available as an option to DoD.

EPA has additional concerns regarding DoD's language that "nor shall the transfer [of a vessel as an artificial reef] be considered an arrangement for disposal under any statute." DoD acknowledges that this exclusion "would limit any future liability the Department of the Navy could face for remedial action under the Comprehensive Environmental Restoration, Liability, and Compensation Act."

Section 107(a)(3) of CERCLA provides for liability for any person who arranged for the disposal of a hazardous substance. CERCLA requires that liable parties provide for removal/remedial costs and natural resource damages related to the release or threatened release of such a substance. DoD does not provide the rationale for why this exclusion from CERCLA liability is needed by the Navy. Providing such an exclusion for the Navy would result in other potentially responsible parties for a transferred Navy vessel bearing full responsibility for CERCLA costs and damages resulting from a release or threatened release of a hazardous substance from the vessel. Not only would this be inequitable for such a release, it would also serve as a bad precedent for even broader CERCLA exemptions for DoD. In addition, it would create a precedent for a similar exemption for private owners of vessels transferred for this purpose.

In addition, this provision could have an adverse impact on the regulation of hazardous waste under the Solid Waste Disposal Act (SWDA). The SWDA regulates the disposal of hazardous waste, with "disposal" defined in SWDA § 1004(3) 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 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." If the transfer of a vessel for use as an artificial reef is not considered an arrangement for disposal "under any statute," this activity may well be removed from the SDWA regulatory scheme for hazardous waste treatment, storage and disposal facilities under 40 CFR Parts 260 to 265. As with the CERCLA exemption, there is no justification provided for the need for such an exemption by the Navy. Such an exemption could serve as a precedent for even broader SWDA exemptions for the DoD, and for a similar exemption for private owners of vessels that are transferred for use as artificial reefs.

Proposal No. 079 – Authorization for Federal Participation in Wetland Mitigation Banks

EPA's Position: EPA supports this proposal which authorizes the military to participate in wetlands mitigation banks and in-lieu-of-fee programs.

Technical Edits/Comments:

The minor edits to the amendment's text and the section-by-section analysis are meant to ensure consistency with existing Federal law regarding participation in these programs by another agency, the Federal Highway Administration, under TEA-21 (i.e., that approved banks are those authorized consistent with interagency guidance, of which the Army is a signatory).
The following are language changes proposed by EPA. Legislative language:

SEC. ___ . AUTHORIZATION FOR FEDERAL PARTICIPATION IN WETLAND MITIGATION BANKS.

(a) IN GENERAL.—Chapter 159 of title 10, United States Code, is amended by adding at

the end the following new section:

"§2697. Authorization for Federal participation in wetland mitigation banks

"The Secretary of a military department engaged in any activity resulting, or which may result, in the destruction of or impacts to wetlands is authorized to make payments to wetland mitigation banking programs and consolidated user sites ('in-lieu-fee' programs) that have been ~~established or~~ approved in accordance with the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks or the Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, ~~by the United States Army Corps of Engineers~~ as an alternative to creating a wetland for mitigation on federal property for construction projects. These payments may be included as eligible project costs for military construction.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"2697. Authorization for Federal participation in wetland mitigation banks.".

Report language:

Section-by-Section Analysis

This proposal would allow the Secretaries of the military departments to participate in wetland mitigation banking programs and consolidated user sites ("in-lieu-fee" programs) that have been ~~established or~~ approved in accordance with the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks or the Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, ~~by the United States Army Corps of Engineers,~~ as an alternative to creating a wetland for mitigation on federal property for construction projects.

Currently, the Department of Defense (DoD) must mitigate on-site for wetland impacts, which encroaches on the ability of the military to train and otherwise perform its mission. Costs and requirements associated with mitigation include development of a mitigation plan, construction, and ~~five year~~ monitoring for at least five years at each site. If the mitigation does not meet the requirements, more funds are necessary to bring the mitigation site up to required specifications. Currently, the Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) recognize the importance of this type of mitigation and offer it as an option to onsite mitigation. By giving DoD the authority to pursue mitigation banking and consolidated user sites, land could be used for other mission essential programs.

Section 404 of the Clean Water Act (CWA) requires mitigation in order to replace aquatic resource functions and values that are adversely impacted under the CWA. The Corps, EPA, FWS, and NMFS issued final policy guidance on mitigation banking (Fed. Reg. Vol. 60, Nov. 28, 1995) and "in-lieu-fee" arrangements for the purpose of providing compensation for adverse impacts to wetlands and other aquatic resources. (Fed. Reg. Vol. 65, No. 216, Nov. 7, 2000), and may update it in conjunction with the Corps as appropriate. DoD seeks authority to participate.

This provision would not result in increased cost to DoD, and may result in substantial savings due to an anticipated decrease in mitigation costs.

Proposal No. 101 – Department of Defense Explosives Safety Board

EPA's Position: EPA opposes this proposal because of its potential impacts on waste non-chemical munitions in storage.

Comments:

This proposal would repeal 10 U.S.C. section 172. Section 172 established the Ammunition Storage Board that is now known as the Defense Department Explosives Safety Board (DDESB). Thus, the effect of repealing section 172 would be to eliminate the DDESB.

Elimination of the DDESB would potentially have a direct impact on the management of waste non-chemical military munitions. Under the Military Munitions Rule (40CFR 266 Subpart M), waste non-chemical military munitions are exempt from the definition of hazardous waste, and therefore, exempt from RCRA Subtitle C storage requirements, so long as the waste non-chemical munitions are (1) subject to DDESB jurisdiction and (2) stored in accordance with DOD storage requirements. (40 CFR 266.205) Thus, if the DDESB were eliminated all stored waste non-chemical military munitions would potentially become hazardous waste subject to RCRA Subtitle C regulations.

In the preamble to the Military Munitions Rule, EPA justified the conditional exemption from RCRA C regulation in part on the independent oversight of the DDESB. 62FR 6637 (February 12, 1997).

Dozens of states have adopted the Military Munitions Rule. So, any potential changes to the rule would also have to be adopted by the states. Of course, potential amendments to the MMR to reflect the disbanding of the DDESB would probably require notice and comment rulemaking and might re-open the rule to legal challenge.

Proposal No. 103 – Credit for Hybrid Vehicles and Alternative Fuel Infrastructure

EPA's Position: EPA supports this proposal.

Technical Edits/Comments:

In the section-by-section analysis of the this amendment, the last sentence of the 2nd paragraph refers to an EPA credit of 450 gallons. That credit was established by Department of Energy regulations and is not EPA's. So, the reference to EPA should be changed to DOE.

Proposal No. 115 – Readiness and Range Preservation Initiative

EPA's Position on "§ 2016. Definitions" ("military readiness activities"): EPA believes that DoD should clarify the proposed definition of "military readiness activities" which covers "all training and operations that relate to combat."

Comments:

The definition is broad and unclear and could be read to encompass more than the Department intends. We recommend that the definition be refined to more specifically describe the activities considered to be military readiness activities.

EPA's Position on "§ 2018, Conformity with State Implementation Plans for air quality": EPA has no objection to this section. This section maintains DoD's obligation to conform its military readiness activities to applicable SIPs but allows DoD 3 years to demonstrate conformity.

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 section 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.

Comments:

(A) DEFINITION OF SOLID WASTE.

Section 2019 would amend the Resource Recovery and Conservation Act (RCRA) statutory definition of "solid waste" to exclude used explosives, munitions, munition fragments, or constituents thereof that are or have been deposited and remain on an operational military range incident to their normal and expected use, unless such used or fired material: (1) is removed from the range for reclamation, treatment, or disposal, treatment prior to disposal, or storage prior to or in lieu of reclamation, treatment, disposal, or treatment or disposal; (2) is recovered, collected, and then disposed of by burial or land filling; (3) migrates off range, requires a response under [the Comprehensive Environmental Response, Compensation, and

Liability Act (CERCLA)], and is not addressed thereunder; and (4) lands off-range, and is not promptly rendered safe and/or retrieved.

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.

The Agency acknowledges that under this proposal, it would retain authority to address the release of a hazardous substance under section 106 of CERCLA, which would include many of the conditions that could give rise to an imminent or substantial endangerment to health or the environment. However, this authority does not extend to redressing serious impacts resulting from the discharge of petroleum, which is not within the scope of CERCLA's coverage.

EPA believes the RCRA Military Munitions Rule, finalized in 1997, substantially addresses the concerns raised by the Department. The Military Munitions Rule generally shields active ranges from RCRA Subtitle C regulation. Under the regulation, munitions landing on an operational range as a result of their intended use are not a regulated solid waste, therefore, the munitions are not a regulated hazardous waste. When munitions land off-range and are promptly recovered or rendered safe, then they are not classified as statutory waste. If they are not promptly recovered or rendered safe, then they are considered solid waste under the statutory definition.

The rule does not address when fired or used munitions on operational ranges become a solid waste under the statutory definition, and thereby when they are subject to RCRA's remedial authority, such as section 7003 and possible citizen suit under section 7002. EPA's position has been, consistent with its position regarding lead shot on private ranges, that at least when a military range is closed (i.e., put to a use inconsistent with a range) then the remaining fired or used munitions have been discarded and, therefore, are a solid waste for RCRA statutory purposes. Over 30 states have now adopted the Munitions Rule. The proposal to amend the definition of solid waste could, if enacted, have the effect of invalidating the Munitions Rule and eliminating the environmental safeguards provided in that rule.

The Department has expressed its concern that the Agency, states or third parties may assert that fired or used munitions on operational ranges at some point in time become solid waste subject to regulation, thereby effecting military readiness activities on operational ranges.

The EPA has not imposed and does not intend to impose regulatory requirements on operational ranges, but believes it is important to retain adequate authority to require the abatement of an imminent and substantial endangerment to health or the environment, when it determines that such conditions are present on an operational range.

EPA recommends further discussion with DoD to determine how best to clarify remaining ambiguities regarding the regulation of operational ranges, while preserving the Agency's ability ensure the protection of human health and the environment.

Both RCRA and CERCLA have provisions that allow for use of a national security waiver should it be required. The waiver under RCRA is currently being employed at the Groom Lake Air Force Facility in Nevada. That waiver was put in place in 1995 and has been renewed annually since then. Administratively, this process has been fairly straightforward and simple. It is EPA's position an across the board exemption for potentially hundreds of "operational ranges" is too sweeping. Rather, should there be a need for a waiver at an individual installation, the Services should make use of the options already at their disposal. The use of the RCRA waiver for the Air Force base demonstrates that it is a viable option.

(B) DEFINITION OF RELEASE.

As drafted, section 2019(b) would amend the term "release" in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to exclude the "presence, on an operational range, or any explosives, munitions, munitions fragments, or constituents thereof that are or have been deposited thereon incident to its normal and expected use and remain thereon."

The amendment would have the primary effect of exempting operational ranges from two requirements under CERCLA: (1) the requirements under section 103 to report releases of hazardous substances, and (2) the requirement under section 120 that EPA assure that a preliminary assessment is conducted of all federal facilities in the Federal Agency Hazardous Waste Compliance Docket.

EPA opposes this amendment because it is not necessary and, as written, could be read to prevent the Agency from exercising its authority to address off-range impacts. As a matter of longstanding policy, EPA has not required the Department to report releases from active ranges under section 103. Similarly, the EPA has not required the Department to conduct preliminary assessments under section 120 at operational ranges, though it does require such assessments at the time operational ranges are closed or transferred. EPA suggests that it administratively address the concerns expressed by the Department by formalizing its historic approach to the application of these provisions to operational ranges.

The current draft EPA Policy, "Guidelines for Addressing Ordnance and Explosives at Non-operational Ranges and other Sites," clearly requires EPA consultation before any EPA

region takes a response action on an operational range. While EPA recognizes that it does have authority on active ranges through various statutes, the Agency has been judicious in the use of that authority. EPA will ensure appropriate consultation with DoD leaders to minimize any disruption in military readiness.

As drafted, the changes to the definition of release under CERCLA and to the definition for solid waste for RCRA would require EPA, and delegated states under RCRA, to wait for human health and environmental effects to occur beyond the boundaries of the operational range before the Agency or a state could take action. This ignores the substantial benefits, including reduced cost to respond, that could be generated under a RCRA/CERCLA response prior to contamination migrating off an "operational range." For example, containing a migrating plume under a range before it impacts a water supply will ultimately save the Services money and better protect the health and environment of citizens living adjacent to military ranges.

Proposal No. 145 – Right of Removal to Federal District Court in Clean Air Act and Safe Drinking Water Cases Filed Against the Federal Government

EPA's Position: EPA opposes this provision which would amend the Clean Air Act and Safe Drinking Water Act to provide that a Federal agency has a right of removal to Federal District Court of any proceeding in State court against such agency.

Comments:

EPA opposes this provision because it could interfere with the ability of States to enforce air pollution and drinking water requirements that protect public health and the environment.

There are two general removal statutes, 28 U.S.C. §1441 and 1442, which allow state civil and criminal enforcement actions to be removed to federal court. The CAA has a specific provision, 42 U.S.C. 7604(e), which states that "nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court...against the United States, and Department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control or abatement of pollution."

The DoD authorization bill proposes to negate this CAA provision, and a similar provision in the SDWA, arguing that State judges may face pressures not present in Federal courts.

Proposal No. 151 – Updating Definitions in Title 10, United States Code

EPA's Position: EPA opposes this provision which broadens the definition of ranges.

Comments:

The section-by-section analysis accurately states that the proposal removes definitions from 10 USC 2710 (the Defense Environmental Restoration Program) and adds them in 10 USC 101 (the general definitions section applicable to the entire Title), in order to "... simplify legislative drafting and eliminate the need for repetitive definitions throughout Title 10 and in annual Defense Authorization Acts that simply could refer to section 101, without having to recite the entire definition."

However, there is one significant change to the definition of "range": the addition of the words "or in operations and tactics" to the end of its first sentence. This addition, the section-by-section analysis asserts, "recognizes that ranges have multiple uses that include training military personnel in operations and tactics, as well as the use and handling of weapons." The proposal potentially enlarges the universe of "ranges" significantly by including land used for "operations and tactics" in addition to land used for actually firing munitions. When considered in conjunction with the exemption from pollution control statutes that DoD seeks for these "ranges," the proposal would greatly increase the amount of DoD land that would be exempt from pollution control law.

This change could significantly increase the number of parcels of land defined as "ranges" beyond those where weapons are actually live-fired to include land where maneuvers and simulated weapons training occurs. Therefore, EPA guidelines that refer to "ranges" may need to be re-examined in this light.