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Notes

***219 EXEMPTING MILITARY MUNITIONS FROM THE FEDERAL FACILITY COMPLIANCE ACT,
MILITARY TOXICS PROJECT v. EPA, 146 F.3D 948 (D.C. CIR. 1998)**

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INTRODUCTION

Under federal environmental laws, the Department of Defense (DOD) and all other federal agencies must comply with the same requirements that apply to state and local governments and the private sector. [FN1] The Resource Conservation and Recovery Act (RCRA), [FN2] the Clean Water Act, [FN3] the Clean Air Act, [FN4] and the Safe Drinking Water Act [FN5] specify that requirements under those laws apply to the military and all federal facilities. [FN6]

In 1992, Congress passed the Federal Facility Compliance Act of 1992 (FFCA) which amended RCRA to make clear that DOD and all other federal agencies are subject to penalties, fines, permit fees, reviews of plans or studies, and inspection and monitoring of facilities in connection with federal, state, interstate, or local solid or hazardous waste regulatory programs. [FN7] FFCA also authorizes and directs the United States Environmental Protection Agency (EPA) to take enforcement action under RCRA against any federal agency to the same extent that it would against any other person. [FN8] To address the issue of spent military munitions found throughout the 40,000 square miles of land managed by DOD, FFCA required EPA to promulgate regulations defining when military munitions become hazardous wastes under RCRA. [FN9]

In *Military Toxics Project v. EPA*, [FN10] the U.S. Court of Appeals for the District of Columbia Circuit upheld EPA's Military Munitions Rule (Rule), which excluded from the definition of solid waste spent or used munitions on military range lands, as a permissible construction of RCRA. [FN11] The court also found EPA was not "arbitrary and capricious" when it determined that unexploded munitions lodged in the ground were used for their intended purpose, and therefore exempt from RCRA's strict handling and disposal requirements. [*220 FN12]

Additionally, the Court upheld EPA's decision to exempt military munitions that are solid wastes and are transported or stored in accordance with standards promulgated by DOD, from RCRA regulations. [FN13] Specifically, the court upheld this "contingent management" conditional exclusion as a permissible construction of EPA's authority under RCRA to define solid waste. [FN14]

By promulgating a rule that exempts spent military munitions from RCRA scrutiny, EPA ignored the intent of Congress to specifically have spent military munitions regulated by the Agency. Despite EPA's signorance of a clearly stated Congressional mandate, [FN15] the court upheld the Rule, concluding it was neither arbitrary nor capricious. Part I of this note examines the Federal Facility Compliance Act of 1992 (FFCA), and EPA's Military Munitions Rule. Part II examines the court's holding in *Military Toxics Project*. The note concludes that the court's decision allows DOD to circumvent the Federal Facility Compliance Act, exempts DOD decisionmaking regarding spent munitions from EPA oversight, and creates an unstable framework for future decisions regarding the classification, storage, and transportation of spent military munitions.

PART I-FEDERAL FACILITY COMPLIANCE ACT AND THE MILITARY MUNITIONS RULE

The FFCA was passed to resolve the legal question of whether federal facilities were subject to enforcement actions



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under RCRA. [FN16] In passing FFCA, Congress expressly waived the government's sovereign immunity from prosecution. [FN17] As a result, states, EPA, and the Department of Justice can enforce the provisions of RCRA against federal facilities, and federal departments and agencies can be subjected to injunctions, administrative orders, and penalties for noncompliance. [FN18] Additionally, federal employees now face criminal sanctions, including both fines and imprisonment under any federal or state hazardous waste law. [FN19] Congress passed the FFCA to address widespread public concerns regarding the waste disposal practices of federal facilities administered by the Departments of Defense and Energy. [FN20]

FFCA required annual inspections of the military's hazardous waste, treatment, storage, and disposal facilities by EPA. [FN21] FFCA also made clear that RCRA's statutory time limits apply to the storage of hazardous wastes generated at DOD facilities. [FN22] To address concerns regarding spent military munitions, FFCA instructed EPA to promulgate regulations defining when military munitions become hazardous wastes under RCRA. [FN23]

In February 1997, EPA published the Military Munitions Rule which identifies when conventional and chemical military munitions become hazardous waste under RCRA. [FN24] The Rule establishes the regulatory definition of solid waste as it applies to: unused munitions; munitions being used for their intended purpose; and used or fired munitions. [FN25] The Rule conditionally exempts such munitions from RCRA. [FN26] The Rule also concluded that military munitions are not waste and therefore not subject to RCRA in a number of circumstances including: munitions used in training military personnel; munitions used in research, development, testing, and evaluation activities; munitions destroyed during range clearance activities; [FN27] and unused munitions that are "repaired, reused, recycled, and reclaimed" consistent with DOD's internal enforcement mechanisms. [FN28]

The Rule further provided a "conditional exemption" for DOD storage of used military munitions, concluding that DOD's management practices made it unlikely that spent munitions would be mismanaged, thereby presenting no harm to human health and the environment. [FN29] The Rule's conditional exemption for storage does not apply to chemical munitions. [FN30] The military welcomed this conditional exemption for storage of spent munitions from RCRA as an easing of RCRA's stringent storage regulations. [FN31]

The Rule also exempted the DOD from adhering to key waste transport provisions of RCRA. [FN32] For example, a RCRA manifest is not required for shipments of waste munitions and explosives. [FN33] The Rule further removed existing requirements for marking and tracking hazardous wastes transported along certain rights of way. [FN34]

The Rule also addressed the applicability of RCRA requirements to military emergency response activities. [FN35] Under the Rule, emergency response personnel are largely exempt from most RCRA provisions. [FN36] However, RCRA emergency permits are still required in certain instances. [FN37]

PART II-MILITARY TOXICS PROJECT V. EPA

Prompted by complaints from neighbors near the Aberdeen Proving Grounds [FN38] in Maryland, one of the largest federal firing ranges in the nation, a citizens group brought suit in federal court, challenging EPA's promulgation of the Military Munitions Rule. [FN39] The petitioner, Military Toxics Project, is a coalition of citizens groups, formed to address military pollution, to safeguard the transportation of hazardous materials and to advance the development and implementation of preventative solutions to toxic and radioactive pollution caused by military activities. [FN40] Petitioner first contended that the Rule was in direct conflict with the plain meaning of the FFCA and the intent of Congress in enacting the provision. [FN41] Second, petitioner maintained that the EPA's "intended use" interpretation was "arbitrary and capricious" because it was "internally inconsistent, illogical, and ignorant of substantial record evidence." [FN42] Third, petitioner attacked the Rule on the grounds that it excused the EPA from taking remedial action with respect to munitions which accidentally land on property adjacent to firing ranges, unless the military deemed such action "feasible," even in cases where the off-range property is accessible to the public. [FN43]

Finally, petitioner argued that because the Rule grants the military a conditional exemption when it transports or stores conventional munitions [FN44] already designated as hazardous waste, the military can escape most of the substantive RCRA requirements for handling, treating and disposing of waste. [FN45]

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Respondent, EPA, contested petitioner's charges by arguing in defense of its promulgated rule. EPA applied its longstanding interpretation of its regulations that products whose normal and intended use involves application "to the ground" are not "discarded" within the regulatory definition of solid waste, and therefore are not subject to RCRA. [FN46] The Agency maintained that its mandate under FFCA was simply to determine when military munitions are subject to RCRA, and EPA complied with that mandate in promulgating the Rule. [FN47]

EPA also argued that since 1988, it had recognized that the use of ammunition at non-military firing ranges constitutes "product use" not subject to RCRA, and therefore, the military should be held to the same standard. [FN48]

Next, EPA contended that the petitioners misread the Rule in concluding that it allowed the Department of Defense to exempt itself from off-range cleanup responsibilities. [FN49] EPA asserted that there was nothing in the Rule which allowed DOD to make its own "infeasibility" finding to exempt itself from any cleanup responsibilities for munitions which land off-range. [FN50]

Furthermore, EPA argued that Congress never intended all military munitions to be regulated under RCRA. [FN51] Specifically, EPA maintained that Congress did not want the Agency to ignore DOD's already well established and comprehensive storage and transportation standards for spent munitions. [FN52] Therefore, EPA determined that its reliance on these DOD standards was *224 consistent with congressional intent. [FN53]

Before addressing the arguments of the parties, the court discussed the "cradle-to-grave" framework [FN54] for the comprehensive management of solid wastes under Subtitle C of RCRA. [FN55] Such a discussion was necessary as the central argument of the petitioner was that military munitions should be regulated under this scheme.

Finding for the respondent, the U.S. Court of Appeals for the District of Columbia Circuit [FN56] upheld EPA's Military Munitions Rule, which excluded from the definition of solid waste spent or used munitions on military range lands, as a permissible construction of RCRA. [FN57] The court also found EPA was not "arbitrary and capricious" when it determined that unexploded munitions on the ground were used for their intended purpose. [FN58]

The court recognized a distinction between unexploded munitions, and munitions that are intentionally buried. [FN59] In recognizing this distinction, the court held that EPA already considers munitions, which land off-range, solid waste unless promptly rendered safe or retrieved. [FN60]

The court also upheld EPA's exemption from RCRA regulations for military munitions that are solid wastes and are transported or stored in accordance with standards promulgated by the DOD. [FN61] Specifically, the court upheld this "contingent management" conditional exclusion as a permissible construction of EPA's authority under RCRA to define solid waste. [FN62]

The court first recognized that it was bound by the "arbitrary and capricious" standard of review in making its determination of whether the Rule *225 should be set aside. [FN63] Concluding that the Rule was neither arbitrary nor capricious, the court held that EPA's interpretation of its own regulations must be given controlling weight. [FN64] Therefore, the court determined that RCRA only required EPA to identify circumstances under which munitions become Subtitle C hazardous waste, and thus rejected petitioner's assertion that the FFCA required EPA to adopt regulations identifying when military munitions become hazardous waste under RCRA. [FN65] The court said EPA interprets FFCA as only requiring the agency to identify the circumstances under which a munition is a Subtitle C listed hazardous waste, and that it would defer to EPA's interpretation. [FN66] Therefore, the court ruled that EPA did not violate the FFCA when it excluded used or spent munitions on the ground from the regulatory definition of solid waste. [FN67]

Next, the court addressed petitioner's argument that EPA failed to consistently apply its intended-use interpretation since it considered munitions fired off-range, but not those which land on-range, a waste. EPA, however, explained that it looked at munitions landing off-range to have been "discarded" within the statutory, not the regulatory, definition of solid waste. [FN68] Such munitions *226 therefore, are potentially subject to the imminent and substantial endangerment section of RCRA that charges EPA and private litigants to sue in order to compel the cleanup of an imminent environmental threat. [FN69] Again, the court sided with EPA, stating: "In this respect an off-range landing

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is like an accidental spill; in either event, the failure to respond properly can trigger a suit to compel action pursuant to Subtitle G." [FN70] The court further added that EPA only had to make rules under Subtitle C. [FN71]

In addressing petitioner's argument that the Rule allows the DOD to regulate itself and render itself exempt from cleaning up off-range munitions if "infeasible," the court again sided with EPA. [FN72] The court stated that "with or without this provision, the courts (in the judicial context), or EPA (in the administrative context) will determine the level of any cleanup required under the relevant enforcement or corrective action authorities, including whether or not remediation is infeasible." [FN73] A similar finding transpired when petitioner argued that EPA was required to include language to regulate the cleanup of closed or transferred military bases and ranges. The court disagreed with the assessment, stating that RCRA Section 3004(y) merely required EPA to promulgate regulations to identify when munitions become a hazardous waste under Subtitle C. [FN74]

Finally, the court addressed the issue of transportation of spent munitions. [FN75] Petitioner had argued that the conditional exemption of non-chemical military munitions from regulation under Subtitle C was barred by FFCA. [FN76] The court said that EPA was required first to identify when munitions become waste and then make regulations to ensure the safe transportation of that waste. [FN77] But because EPA had conditionally exempted spent munitions from Subtitle C classification, the court found there was no need for EPA to make rules and regulations to ensure the safe transportation of those wastes. [FN78]

*227 PART III--PERSONAL ANALYSIS

In concluding that the Rule was developed and written using a correct and "rational" interpretation of RCRA, the court relied heavily on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* [FN79] *Chevron* held that an agency may base regulations on its own interpretation of a statute, provided that: (1) the rules are not "arbitrary, capricious, or manifestly contrary to the statute," and, (2) Congress has not "directly spoken to the precise question at issue." [FN80]

The court correctly applied the arbitrary and capricious standard. Generally, courts show great deference to EPA in its rulemaking capacity, and it is rare that the Agency is found to have promulgated a rule that is later determined arbitrary and capricious. [FN81] However, the Military Munitions Rule stands in direct conflict to FFCA, and therefore fails the second prong of the *Chevron* test. An examination of both the plain meaning of FFCA and the legislative history of the Act reveals that Congress clearly intended all federal facilities and agencies to adhere to federal environmental laws.

Specifically, FFCA requires the Administrator of EPA to "promulgate regulations identifying when military munitions become hazardous waste and providing for the safe transportation and storage of such waste." [FN82] In crafting the Rule, EPA's decision to exempt military munitions from hazardous waste classification, despite the clear threat to human health and the environment posed by such waste, represents an abdication of the duties assigned to the Agency under the statute. [FN83] At Aberdeen Proving Ground in Maryland, where *228 neighbors initiated this case, 16 million projectiles and 4 million unexploded shells are lodged in adjacent surface waters, including the environmentally sensitive Upper Chesapeake Bay. Another one million shells are scattered on impact ranges as a result of firing range and weapons testing activities. Additionally, in deferring to existing DOD transportation and storage plans, EPA failed to provide for the safe transportation and storage of such waste. Moreover, because EPA has delegated implementation of RCRA to most states [FN84], the Rule deprives states of the right to set transportation, storage, treatment and disposal standards which are more stringent and exceed present federal regulations. [FN85]

The legislative history reveals that the authors of FFCA were specifically concerned with the DOD in deciding to apply RCRA to all federal facilities. [FN86] Moreover, EPA's decision to allow DOD to be exempt from RCRA scrutiny is contrary to Congressional intent because Congress expressly considered and rejected legislation that would have allowed DOD to write its own rules regarding disposal of spent munitions, when crafting FFCA. [FN87]

*229 And while Congress explicitly provided for the exemption of certain materials from classification as wastes to be regulated under FFCA, munitions were not among the group designated for exemption. [FN88] This lack of exemption further suggests that Congress fully intended for munitions to be subject to RCRA's requirements. [FN89] The legislative history further confirms that state political leaders who participated in the drafting of FFCA fully intended

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for EPA to draft munitions regulations for DOD, so that DOD facilities would be required to comply with RCRA's stringent Subtitle C requirements. [FN90] In fact, even before passage of FFCA, Congress had long-recognized the environmental threat of conventional munitions, and believed they should be covered by RCRA. [FN91] Based on this extensive legislative evidence, the court erred in concluding that DOD should be exempt from Subtitle C scrutiny.

The court also ignored the practical effect of its decision on the future of transferred or closed military bases. Since 1988, Congress and DOD, through the creation of the Base Realignment and Closure Commission ("BRAC"), have targeted more than 250 bases throughout the nation for closure. [FN92] *230 many instances, these base closings have a tremendous economic impact on local communities, which can only be eased by the future prospect of redeveloping the closed installations. [FN93] But before these bases can be transferred back to local communities for economic development purposes, they must be remediated. [FN94] In 1999 alone, the government spent an estimated \$10.14 [FN95] billion for DOD's defense-related environmental activities. [FN96] But even as the government spends billions of dollars to remediate these defunct bases, DOD and its conventional munitions will remain exempt from the reach of RCRA. [FN97] By allowing DOD to use its own internal mechanisms instead of RCRA, the court here jeopardizes the future transfer and productive use of military bases which could ultimately close. [FN98] Moreover, communities which presently are thriving on the sites of former military ranges could be haunted by future munitions contamination not disposed of in accordance with RCRA. [FN99] There are also potent *231 ramifications for the reuse of munitions-contaminated soil, in projects wholly separate from base redevelopment. [FN100]

The military, apparently recognizing the potential harm caused by munitions, has adopted environmentally sensitive technology to minimize environmental impact on its firing ranges. [FN101] The military also evidently recognizes that it faces a tremendous burden in addressing existing ordinance pollution throughout the United States, thus calling its contingent management system as sanctioned by the court into further question. [FN102] The geographical diversity of these sites containing ordinance pollution is certainly noteworthy, ranging from the Cape Cod National Seashore to Indian reservations. [FN103] The costs associated with improperly disposed ordinance puts further pressure on the need for the military's contingent management system to succeed. [FN104]

CONCLUSION

The court's decision in Military Toxics Project to exempt spent munitions from RCRA scrutiny is a significant setback for environmental protection and efforts to redevelop former military installations. Additionally, the decision was a blow to communities living in the shadow of both active and closed military ranges, the very communities which Congress sought to protect in passing the FFCA. The court's decision allowing the Rule to stand has created a poor framework for future decisions regarding the classification of spent munitions, and allows the military to exempt itself from federal environmental laws, a result *232 which Congress never intended in waiving the government's sovereign immunity.

[FN1]. David M. Bearden, Environmental Protection: Defense-Related Programs, 97-790 CONG. RES. SERV. REP. FOR CONGRESS, CRS-5, (1998).

[FN2]. 42 U.S.C. §§ 6901-6987, 9001-9010 (1994).

[FN3]. 33 U.S.C. §§ 1251-1387 (1994).

[FN4]. 42 U.S.C. §§ 7401-7671 (1994).

[FN5]. 42 U.S.C. § 300 g-3 (1994).

[FN6]. 97-790 CONG. RES. SERV. REP, CRS-5.

[FN7]. Federal Facility Compliance Act of 1992, Pub. L. No. 102-386 § 107, 106 Stat. 1505, 1513-14 (codified at 42 U.S.C. § 6924(y) (1994)).

[FN8]. See *id.*

[FN9]. Id.

[FN10]. 146 F.3d 948 (D.C. Cir. 1998).

[FN11]. Id. at 956.

[FN12]. Id. at 955.

[FN13]. Id. at 952. "The Department of Defense has issued comprehensive design and operating standards for the safe storage of all military munitions. The DOD has also made the standards for the transportation of hazardous materials promulgated by the Department of Transportation applicable to the transportation of military munitions. The EPA reviewed those standards 'in detail' and determined that although DOD storage standards 'have safety as their primary concern,' they 'meet or exceed RCRA standards in virtually all respects." Id.

[FN14]. Id. at 959.

[FN15]. See 102 CONG. REC. S26693 (Daily ed. Oct. 17, 1991) (statement of Sen. Baucus) ("Mr. President, we need to make sure that all courts interpret congressional intent as it was meant to be; as the U.S. District court in Maine has done. We need to clarify the law so that RCRA clearly and unambiguously waives sovereign immunity with respect to civil penalties. That is the purpose of S. 956, the Federal Facilities Compliance Act.").

[FN16]. See United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992) (holding United States facilities have sovereign immunity from liability for civil fines imposed by states for past violations of the Clean Water Act and RCRA). See also Melinda R. Kassen, *The Inadequacies of Congressional Attempts to Legislate Federal Facility Compliance with Environmental Requirements*, 54 MD. L. REV. 1475 (1995).

[FN17]. See Kassen, *supra* note 16, at 1490.

[FN18]. Id.

[FN19]. Id. at 1499.

[FN20]. "We need to make sure that the neighbors and friends who find themselves perhaps working at, but nonetheless living near, a Federal facility, will know that it will be operated as safely and cleanly and in an environmentally sound way as any other facility or business in their backyard." 102 CONG. REC. H27163 (Daily ed. September 23, 1992) (statement of Rep. Eckart).

[FN21]. Harold G. Bailey, Jr. and Richard A. Wegman, *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 *ECOLOGY L.Q.* 865 (1994).

[FN22]. Id. at 882.

[FN23]. 42 U.S.C § 6924(y) (1994) ("... the Administrator shall propose, after consulting with the Secretary of Defense and appropriate State officials, regulations identifying when military munitions become hazardous waste for purposes of this subchapter and providing for the safe transportation of such waste ... Any such regulations shall assure protection of human health and the environment.").

[FN24]. *Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties*, 62 Fed. Reg. 6622 (1997) (to be codified at 40 C.F.R. § 260).

[FN25]. See *Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties; Final Rule*, 62 Fed. Reg. 6622 (1997) (codified at 30 C.F.R. § 260).

[FN26]. See *id.* at 6624.

[FN27]. See *Old Ordinance May Need Superfund-Scale Cleanup*, DEF. WEEK, Apr. 20, 1998. Reports on the need to clear more than 900 U.S. military bases at home and abroad of fired and unexploded munitions interred in the ground. Unexploded munitions are commonly referred to as "UXO" or "unexploded ordnance."

[FN28]. *Closed, Transferred, and Transferring Ranges Containing Military Munitions*; Proposed Rule, 62 Fed. Reg. 50796 (1997) (to be codified at 32 C.F.R. pt. 178) (proposed Sept. 26, 1997).

[FN29]. *Id.*

[FN30]. See Lt. Col. Bell, *Final Military Munitions Rule: An Overview*, 1997- Jun ARMY LAW. 49 (1997).

[FN31]. *Id.* at 51. "This conditional exemption will greatly reduce the administrative burdens of storing waste military munitions, while providing regulators with the oversight and accountability they sought."

[FN32]. See *Closed, Transferred, and Transferring Ranges Containing Military Munitions*; Proposed Rule, 62 Fed. Reg. 50796 (1997) (to be codified at 32 C.F.R. pt. 178) (proposed Sept. 26, 1997).

[FN33]. See 40 C.F.R. §266.202.

[FN34]. *Id.* at § 262.20(f).

[FN35]. See Bell, *supra* note 30 at 51-2.

[FN36]. *Id.* "For example, emergency response personnel need not obtain a generator identification number, make a hazardous waste determination, complete a RCRA manifest, mark or label the item, or obtain a regular treatment permit." *Id.*

[FN37]. *Id.* "A RCRA emergency permit is required, however, in those cases where the emergency response specialist determines that time will allow." *Id.*

[FN38]. Aberdeen Proving Ground is home to the U.S. Army Ordnance Center and School, where ammunition and missiles are sustained and supported through testing during peace and war to provide combat power for the U.S. Army. LTC LAWRENCE P. CROCKER, USA (RET.) ARMY OFFICER'S GUIDE 523-524 (46th ed. 1993).

[FN39]. Lisa Respers, *Suit Asks EPA To Treat Waste Shells As Hazardous; APG Neighbors Sue Over Munitions*, BALT. SUN, Apr. 3, 1998, at 2B.

[FN40]. Military Toxics Project, Bylaws <<http://www.miltoxproj.org/>>.

[FN41]. See *Military Toxics Project*, 146 F.3d at 953.

[FN42]. *Id.*

[FN43]. *Id.*

[FN44]. Conventional munitions are those which do not contain chemical or nuclear agents. Examples of conventional munitions and ordnance include bombs, hand grenades, missiles, artillery shells, impact range duds and propellants. See Michael Orey, *Danger at Former Military Sites*. WALL ST. J. EUR., Jan. 25, 1999.

[FN45]. See *Military Toxics Project*, 146 F.3d at 953.

[FN46]. *Id.* at 952. See also Respondent's Brief: "Given EPA's longstanding interpretation of the regulatory definition

of 'solid waste' to exclude products whose use involves application to the land, the EPA's view that the fired military munitions are not 'discarded materials' (and thus not regulatory solid waste) under RCRA Subtitle C is entitled to great deference."

[FN47]. Id. at 955.

[FN48]. Id. (emphasis added).

[FN49]. Id. at 956-57.

[FN50]. Id.

[FN51]. Id. at 958-59.

[FN52]. Id. at 959.

[FN53]. Id.

[FN54]. See *United Technologies v. EPA*, 821 F.2d 714, 716 (D.C. Cir.1987) ("Subtitle C of RCRA established a 'cradle-to-grave' regulatory structure overseeing the safe treatment, storage, and disposal of hazardous waste. Under the Act, the EPA is required to identify those solid wastes that are subject to the regulation as hazardous waste, and promulgate regulations establishing performance standards applicable to owners and operators of new and existing facilities engaged in the treatment, storage, and disposal of hazardous waste."). See also WILLIAM MURRAY TABB & LINDA A. MALONE, *ENVIRONMENTAL LAW: CASES AND MATERIALS 701-02* (1997) ("This is carried out by classifying waste materials, requiring written manifests to track waste shipments from generation until disposal, and certification through a permit system that performance standards are met for safe treatment, storage and disposal. Enforcement of the Act centers on ensuring compliance with the documentation § 3002 of RCRA, 42 U.S.C. § 6922 (1994) and permitting § 3005 of RCRA, 42 U.S.C. § 6925 (1994) obligations imposed on certain parties dealing with covered wastes.").

[FN55]. *Military Toxics Project*, 146 F.3d at 950.

[FN56]. See 42 U.S.C. § 6976(a)(1) (1994) (petitions for review of EPA rules and regulations implementing the Resource Conservation and Recovery Act (RCRA) must be filed directly in the D.C. Circuit).

[FN57]. *Military Toxics Project*, 146 F.3d at 948.

[FN58]. Id.

[FN59]. Id. at 957-58.

[FN60]. Id. at 956 ("In this respect, an off-range landing is like an accidental spill; in either event the failure to respond properly can trigger a suit to compel action pursuant to Subtitle G ... because EPA's interpretation of its own regulation is neither plainly erroneous nor inconsistent with the regulation, we accept it as controlling.").

[FN61]. Id. at 959.

[FN62]. Id.

[FN63]. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) (creating a two-step analysis to determine if a regulation is "in accordance with law"). First, if Congress has directly spoken to the precise question at issue, then courts must give effect to the unambiguously expressed intent of Congress. Second, if intent is ambiguous, courts should defer to an agency's reasonable interpretation of a statute it administers. Id.

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[FN64]. See *Stinson v. United States*, 508 U.S. 36 (1993) (holding an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation"); see also *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983) (holding where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (holding an agency's factual findings are entitled to substantial deference). Additionally, as long as they are supported by the administrative record, they should be upheld, even if there are alternative findings that could also be supported by the record. *Arkansas*, 503 U.S. at 91, 113. But see *American Mining Congress v. EPA*, 824 F.2d 1177, 1184 (D.C. Cir. 1987) (rejecting EPA's decision that byproduct materials immediately reclaimed and returned to an ongoing production process constitute "discarded" solid waste; court further held that even where language is clear, courts generally explore the intended purpose of a law because "a matter may be within the letter of a statute but not within its spirit").

[FN65]. *Military Toxics Project*, 146 F.3d at 955. Petitioner had argued that the use of the word "when" as opposed to the word "if" shows an assumption by Congress that there are circumstances in which military munitions are discarded, become solid waste and are subject to RCRA waste regulations. *Id.*

[FN66]. *Id.* The court noted that the Rule already identified circumstances in which munitions will be deemed regulatory solid waste and therefore subject to RCRA. This includes fired munitions or those that are transported off-range (or from the site of use) "for the purpose of storage, reclamation, treatment, disposal, or treatment prior to disposal," or if the munition is "recovered, collected, and then disposed of by burial or land filling either on or off a range." 40 C.F.R. § 266.202(c)(1)-(2). But see 40 C.F.R. § 266.202(a)(1)-(2), stating that "munitions are not waste when used for their intended purpose such as: (1) munitions used in training military personnel or emergency response personnel including training in the destruction of unused propellant; munitions used in research, development, testing, and evaluation activities; munitions destroyed during range clearance activities on active and inactive ranges; and unused munitions that are repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subject to materials recovery activities."

[FN67]. *Military Toxics Project*, 146 F.3d at 955.

[FN68]. See also *Mobil Oil Corp. v. EPA*, 871 F.2d 149 (D.C. Cir. 1989) (upholding different constructions of the same statutory term in different RCRA provisions where opposing constructions each reasonably furthered statutory goals and purposes); *Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993) (holding that dual definitions of solid waste are suggested by the language and structure of RCRA. Specifically, RCRA's regulatory definitions are narrow, while the statutory definitions are significantly broader).

[FN69]. See *Military Toxics Project*, 146 F.3d at 951. "As a result of this distinction between the statutory and regulatory definitions, while any discarded material that poses an imminent and substantial hazard may be the subject of a lawsuit brought pursuant to Subtitle G, only discarded material that has been 'disposed of' can constitute hazardous waste that is subject to the 'cradle-to-grave' regulatory scheme of Subtitle C." *Id.* See also *U.S. v. Price*, 688 F.2d 204 (3d Cir. 1982) (discussing Subtitle G's "expansive" provisions, as opposed to the narrower regulatory definitions of Subtitle C).

[FN70]. *Military Toxics Project*, 146 F.3d at 956.

[FN71]. See *id.*

[FN72]. See *id.* at 956-57.

[FN73]. *Id.* at 956.

[FN74]. See *id.* at 957. "EPA satisfied the requirements of § 3004(y) when it determined that military munitions used as intended do not fall within the regulatory definition of solid waste for purposes of Subtitle C--a determination that applies regardless of whether the range at which the munition is used be active, inactive, closed or transferred from military use." *Id.*

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[FN75]. See id. at 957-58.

[FN76]. See id.

[FN77]. See id. at 957-58.

[FN78]. See id.

[FN79]. 467 U.S. 837 (1984).

[FN80]. Id. at 843.

[FN81]. See Kristina Hauenstein, Comment, RCRA Immunity From NEPA: The EPA Has Exceeded The Scope of Its Authority, 24 SAN DIEGO L. REV. 149, 1270 (1987) ("But under RCRA regulations, even instances of arbitrary and capricious disregard of the environmental results of a particular action can escape review."). See also Ameilia Susan Magee. Note and Comment. Challenging the National Priorities List, 10 GA. ST. U. L. REV. 725, 733 (1994) ("Under the arbitrary and capricious standard, the court will determine if EPA has a rational explanation to support placement of a particular site on the National Priorities List. Application of this standard has demonstrated the court's leniency towards EPA's decisions ..."). But see Diothiocarbamate Task Force v. EPA, 98 F.3d 1394 (D.C. Cir. 1996) (holding that EPA failed to comply with its own regulations in listing a number of compounds as hazardous under RCRA finding EPA's action to have been "arbitrary and capricious").

[FN82]. 42 U.S.C. § 6924(y) (1994).

[FN83]. See Military Toxics Project, Smoking Guns: The Environmental, Economic and Cultural Impacts from Conventional Munitions. (Jan. 3, 1999) < <http://www.miltoxproj.org>>. Munitions pose significant threats to both human health and the environment. Some examples include: Heavy metal contamination in streambeds and fish tissue found near firing ranges in Aberdeen. Maryland, and Camp Grayling, in Michigan. Id. In 1983, two boys were killed in a San Diego subdivision when an old artillery shell blew up in a neighbor's back yard. The area, formerly part of Camp Elliot, had been "swept" twice for munitions. Id. A similar incident occurred in 1990 in the Philippines which resulted in the death of an eight year old boy near Subic Bay. Id. On the Hawaiian Island of Kaho 'Olawe, used by the Navy as a target range for decades, sacred Native Hawaiian cultural sites remain off-limits because of the threat of unexploded munitions. Id.

Additionally, The U.S. Military routinely disposes of excess propellant, impact range duds, munitions factory waste, and other conventional munitions through open burning and open detonation. Id. The military estimates that there are roughly 800,000 acres of ranges that contain unexploded munitions. Id. Also, The military possesses 500,000 tons of obsolete and excess munitions. Id. The Department of Defense has recently stated "open burning and open detonation" those munitions to be the "fastest, safest, most reliable, and least expensive method" of disposal. Id. Army and National Guard troops routinely ignite artillery propellant as part of their training. Id. Moreover, Impact ranges for artillery, bombs, and conventional armed rockets are located in every section of the country. These ranges are littered with potentially explosive device, and exploded and unexploded munitions which are contaminating groundwater sources. Id.

[FN84]. See 42 U.S.C. §§ 6927, 6928 (1994).

[FN85]. See Major Egan, Management of Unexploded Ordnance, Munitions Fragments, and Other Constituents on Military Ranges, ARMY LAW., Feb. 1999. "These states can impose more stringent regulations than the federal program." Id.

[FN86]. 137 CONG. REC. S26693-4 (Daily ed. October 17, 1991 (statement of Sen. Baucus). Senator Max Baucus (D-MT), then Chairman of the Senate Committee on the Environment and Public Works, and manager of the Federal Facility Compliance Act in the Senate stated:

Mr. President, without this legislation, recalcitrant Federal facilities will continue to violate the law. S. 596 will change that. It will ensure that the Federal Government must play by the same rules as everyone else. It does so in three

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fundamental ways. First, according to some courts, RCRA is the only major Federal environmental statute that does not waive sovereign immunity. S. 596 specifically states that it does. Specifically, it provides that administrative orders and all civil and administrative fines and penalties may be imposed for violations by federal agencies. Second, the bill rejects the Department of Justice position. It specifies that EPA may take enforcement actions against other federal agencies. Finally, the pace of cleanup at federal facilities has been too slow. To speed it, this bill will require each federal facility to conduct an environmental assessment and annual inspection. The track record at the Department of Defense is not much better. DOD has 94 Superfund sites and over 17,000 contaminated sites in every State in the Nation. All told some 63 percent of Federal facilities have serious RCRA violations for failing to protect ground water. But only 38 percent of private facilities have similar violations. That is wrong. The Federal Government should be the leader in compliance with our Nations environmental laws. But the fact is we are laggards, not leaders When three courts rule that RCRA fines and penalties do not apply to Federal facilities, there is little to force compliance. That is why this legislation is absolutely necessary. It will ensure greater compliance by Federal facilities with our solid and hazardous waste laws.

[FN87]. 137 CONG. REC. S148186 (Daily ed. Oct. 17, 1991). On October 17, 1991, Senator Baucus presented a series of "managers' amendments" that were adopted on the Senate floor, including the provision that §came 3004(y):

The Secretary of Defense shall have the responsibility for carrying out any requirement of Subtitle C of this Act with respect to regulations promulgated relating to the safe development, handling, use, transportation and disposal of military munitions. The Secretary, shall, with the concurrence of the Administrator, promulgate such regulations as may be necessary to carry out the purpose of this subsection.

[FN88]. See U.S.C. § 6903 (1999). "The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid; or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) 42 U.S.C. § 2011 et seq." (emphasis added).

[FN89]. See *id.* In addition, if Congress had intended to exclude spent munitions from RCRA scrutiny, it would have so specified the exclusion in the statute as it did, for example, materials in domestic sewage. Thus the rule of statutory construction, "expressio unius est exclusio alterius" may be logically invoked here. See *United States v. Robinson*, 359 F. Supp. 52 (S.D. Fla. 1973) ("It is a long-recognized rule of statutory construction that the enumeration of specific items implies the exclusion of all others, expressio unius est exclusio alterius). *Id.* at 58-59.

[FN90]. On October 17, 1991, the National Association of Attorneys General wrote a letter to Senator Baucus explaining its preference that EPA draft regulations "in consultation" with DOD. See 137 CONG. REC. S14969 (Daily, ed. June 17, 1991)("We also have concerns about the amendment to section 1006 of the Solid Waste Disposal Act concerning munitions. We would prefer, among other things, to have EPA draft the regulations in consultation with DOD.") *Id.*

[FN91]. See Petitioner's Brief (citing H.R. No. 1491(I), at 2 (1976), reprinted in 1976 U.S.S.C.A.N. 6238, 6240-6257)). The Brief states that calling unregulated land disposal the last loophole in environmental law, the House Committee on Interstate and Foreign Commerce which had primary jurisdiction over the legislation, stressed its intention to give the term 'solid waste' a broad interpretation: "[i]t is not only the waste by products of the nation's manufacturing process with which the committee is concerned: but also the products themselves once they have served their intended purpose and are no longer warned by the consumer." The committee specifically mentioned an incident involving munitions wastes at the Bangor Naval Annex as justification for establishing a federal hazardous waste management system: "the munitions waste contaminated the soil and aquifer underlying the area with RDX and TNT." H.R. No. 1491(I), at 2 (1976), reprinted in 1976 U.S.S.C.A.N. 6238, 6245- 6257.

[FN92]. See Deb Kollars & Cynthia Hubera Pain Profit in Base Rebirth. SACRAMENTO BEE, June 26, 1995 at A-1.

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[FN93]. See Lisa Hoffman, Base Closings Not an Economic Bomb: GAO Report Probably Will Give More Ammunition to Those Who Want More Shutdowns, *ORANGE COUNTY REGISTER*, Dec. 16, 1998. Author discusses loss of small businesses such as "mom and pop" retail outlets and the "less tangible" impacts that base closings can have on local economies including the absence of military personnel's involvement in churches, schools, and other local institutions. *Id.*

[FN94]. See *The Challenge of Cleaning Up Military Bases*, 21 *ECOLOGY L.Q.*, 867 (1994).

Before military bases can be converted to productive local reuse, however, the Department of Defense faces the formidable task of cleaning up the contamination of land and water resources that exists at many of these facilities. More than 500 contaminated sites have been identified at the domestic included in the first two base closure rounds. *Id.* See also James Connel & Rebecca Hall, *What's Happening At Your Local Military Base?*, 79 *PUBLIC MGMT.* 10 (Oct. 1, 1997).

[t]he levels to which the military cleans up its bases will dictate how the sites can be used in the future if the community wishes to put the property to use that requires a higher level of cleanup than already has been conducted, that community will have to pay for additional cleanup. Though this possibility sounds like a nightmare of the distant future, it could come to pass sooner than managers think.

[FN95]. This figure pales in comparison to the estimated \$314 billion the government will need to eventually spend to cleanup government-owned nuclear weapons and chemical plants presently located throughout the country. See *Pentagon Faces Battles Over Waste: End of Cold War, Increased Scrutiny Complicate Process*, *CHARLESTON DAILY MAIL*, Apr. 17, 1998. The author, however, contends "[b]ut across the nation, dozens of military bases are wrestling with smaller-scale waste disposal issues that often embroil their neighboring communities." *Id.*

[FN96]. See *Environmental Protection: Defense-related Programs*, CRS-5, *supra* note 1.

[FN97]. Failure to properly remediate former military properties can result in disastrous consequences. See Laurence v. Dep't of the Navy, 59 F.3d 112 (9th Cir. 1995) (holding that the independent contractor exception to the Federal Tort Claims Act ("FTCA") immunized the U.S. government from liability for injuries resulting from the construction of public housing units on a contaminated landfill, formerly a military facility, in Northern California). Plaintiffs, 250 current and former residents of the Midway Village complex in Daly City, California, alleged that they were suffering from disease and illness directly attributable to toxic contamination. Plaintiffs accused government officials of being negligent in allowing the military complex to be converted to public housing without properly remediating existing contamination. *Id.*

[FN98]. See *Military Toxics Project*, 146 F.3d at 959. "Comparing DOD regulations at issue here with the regulation under Subtitle C, the EPA does not deny that there are 'gaps in certain procedural requirements and in areas unrelated to risks from explosives.'" *Id.*

[FN99]. See Peter J. Howe, *EPA Official Asks Guard To Check Cape Site For Buried Munitions*, *BOSTON GLOBE*, February 10, 1999. Author discusses letter from EPA regional administrator to military officials urging an investigation of possible live artillery shells on the site of a former Massachusetts military reservation, now a 16 home subdivision near Sandwich, Massachusetts. See also Yvonne Abraham *Buried Bomb Talk Jolts Town*, *BOSTON GLOBE*, February 11, 1999. Author quotes one subdivision resident as stating "there are so many children here ... I didn't sleep all night thinking 'what's in the ground?'" *Id.* See also, *News Update*, *BIOCYCLE*, April 1, 1999.

[FN100]. See *Massachusetts Military Reservation To Turn Contaminated Soil into Asphalt*, *HAZARDOUS WASTE NEWS*, May 31, 1999. The Air Force and EPA signed an agreement last year to clean up contaminated soil from a former sewage treatment and industrial discharge site and recycle the soil into asphalt. The \$2.5 million dollar project, currently in the design phase, will include excavating 9,788 cubic yards of surface soil contaminated by chlorinated solvents, nitrates, phosphorus and heavy metals at the Massachusetts Military Reservation (MMR) on Cape Cod. This soil will then be recycled at asphalt plants and reused for road construction projects. Composting contaminated soil at military bases is apparently an emerging trend. For example, at the U.S. Naval Submarine Base in Bangor, Washington, the Navy has composted contaminated soil with a mixture of straw and chicken manure. Once EPA approved cleanup goals are met, the remediated soil is returned to excavated pits. Since April, 1998, 10,000 cubic yards have been

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remediated at the base's \$3 million composting site.

[FN101]. See Andrea Stone, Army Shoots For Cleaner Environment, CHICAGO SUN- TIMES, Feb. 28, 1999. Discussing the Army's decision to issue an environmentally friendly "green bullet" that contains no lead. The copper-jacketed round contains a non-polluting tungsten core instead of lead, which contaminates the soil and air around firing ranges. The armed forces use between 300 million and 400 million rounds of small-caliber ammunition each year. The first 1 million green 5.56-mm, bullets will be used in the Army's M- 16 infantry rifles. Officials hope to get the lead out of bullets in all the services by 2003.

[FN102]. See Michael Orey, At Former Military Sites, A Hidden Peril, WALL ST. J., Jan. 22, 1999. Author cites DOD task force estimating that more than 15 million acres in the U.S. need to be surveyed for munitions contamination. The task force further concluded that if only 5% of that total acreage is remediated, the cost could exceed \$15 billion "and take decades to complete."

[FN103]. See id.

[FN104]. See id. See also Mary Buckner Powers, Cleaning Up Buried Bombs May Bust Environmental Budget, ENGINEERING NEWS RECORD, Mar. 6, 1995, at 50.

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