

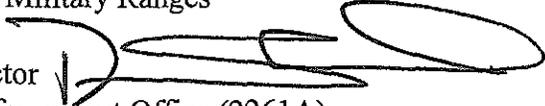


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 21 2005

MEMORANDUM

SUBJECT: U.S. Corps of Engineers (COE) Letters to California, Texas and Illinois Regarding Munitions on Closed Military Ranges

FROM: David J. Kling, Director 
Federal Facilities Enforcement Office (2261A)

TO: Regional Enforcement Managers

My office has reviewed three letters sent by U.S. Army Corps of Engineers (COE) representatives to the States of Texas, California, and Illinois involving interpretations of the Military Munitions Rule and state authority to oversee responses to munitions, munitions constituents, including unexploded ordnance (hereinafter "munitions") at Formerly Used Defense Sites (FUDS) in those states.¹ We believe, in consultation with EPA's Offices of General Counsel (OGC) and Solid Waste and Emergency Response (OSWER), that these letters incorrectly interpret the Military Munitions Rule as it applies to closed, transferring and transferred ranges, including FUDS (hereinafter "closed ranges").² Consequently, this memorandum provides our Regions with EPA's previously established views on the matters raised in these letters regarding munitions on closed ranges.

¹ See April 28, 2004 letter from Col. Richard Thompson, District Engineer, to Mr. John Scandura of the California Department of Toxic Substances Control; a May 25, 2004 letter from Mr. C. Dwayne Ford, FUDS Program Manager, Fort Worth District, to Mr. Mark Weegar of the Texas Commission on Environmental Quality; and a January 27, 2005 letter from Mr. Kevin Finley, Army Corps Assistant District Counsel, to Mr. Paul T. Lake, Federal Facility Unit, Bureau of Land, Illinois Environmental Protection Agency.

² "Closed" ranges are ranges taken out of service by the military as ranges and put to new uses incompatible with range activities. Closed ranges are distinct from inactive ranges; Sec. 266.201 of the Munitions Rule defines an "Inactive range" as: "a military range that is not currently being used, but that is still under military control and considered by the military to be a potential range area, and that has not been put to a new use that is incompatible with range activities."



In general, the Military Munitions Rule does *not* exempt munitions used for their intended purpose on closed ranges from the imminent hazard authorities of RCRA. Instead, the Military Munitions Rule provides a conditional exemption for certain munitions used for their intended purpose from RCRA's "cradle-to-grave" hazardous waste management rules under Subtitle C at "active" and "inactive" ranges (for purposes of this guidance, these ranges are referred to as "operational" ranges). It is EPA's position that DoD has an obligation at closed ranges to clean up munitions pursuant to state and federal statutory environmental cleanup authorities and that DoD's cleanup is statutorily subject to state and EPA oversight.

The Issues Raised by the COE Letters and EPA's Views

With respect to the issue of the status of munitions on a closed range, the COE's letters claim that such munitions are not a solid waste. EPA postponed final action on a proposal that would have identified munitions remaining on a closed range as RCRA statutory solid waste as part of the Military Munitions Rule. However, EPA's postponement of that action does not mean that munitions on a closed range are precluded from becoming a statutory solid waste. To the contrary, it is EPA's position that *munitions, used for their intended purpose, including UXO, would at some point become solid waste potentially subject to RCRA and also may include hazardous substances, pollutants or contaminants subject to CERCLA*. In the absence of a definitive interpretative rule, the issue of whether munitions have become a statutory solid waste depends on whether they have been left in the environment long enough to be considered "discarded" within the statutory definition of "solid waste." (See Connecticut Coastal Fisherman's Assoc. v. Remington Arms Co., 989 F.2d 1305 (2nd Cir. 1993).) We see nothing in the Military Munitions Rule or its preamble which precludes EPA or a state from determining munitions to be a statutory solid waste given the facts at a particular site.

One issue raised by the COE letters has to do with state authority over waste military munitions, including UXO. The COE letters assume that state authority over the UXO at these sites is in all cases determined by the federal Military Munitions Rule. We disagree with that position. Nothing in RCRA or in EPA's Military Munitions Rule bars a State from exercising its own solid and hazardous waste authority over waste military munitions, including UXO, regardless of whether they have adopted the Military Munitions Rule as part of their authorized RCRA program.

Another issue raised by the letters involves the concept of intended use. In all the letters, the COE concludes that its ordnance clearance activities are part of the products' intended use and, therefore, not potentially subject to RCRA Subtitle C or remedial requirements. We disagree with the COE's position for a number of reasons described further below.³ It is not clear that in

³ While we disagree with the way the COE letters appear to apply the Military Munitions Rule in these specific circumstances, we do agree with some positions taken in those letters. For example, we agree the Military Munitions Rule confirms that military munitions used for their intended purpose are not a solid waste subject to hazardous waste regulatory control, as provided in 40 CFR §266.202(a)(1). We also agree with the COE that range

the situations covered by the three letters that the munitions were left in the environment through intended use. However, even assuming they were, EPA does not consider range clearance activities on closed ranges to be part of the “intended use” exception to Subtitle C of RCRA granted by the Munitions Rule.

The Military Munitions Rule by its own terms applies only to the “recovery, collection, and on-range destruction of unexploded ordnance and munitions fragments during range clearance activities at *active or inactive ranges*.” (See 40 CFR 266.202 (a)(1)(iii); emphasis added.) With regard to closed ranges, EPA made its interpretation clear: “EPA did not generally intend to include these range clearance activities to be within the scope of this proposed section . . . such range clearance activities would not be considered within the scope of ‘intended use.’” (See 62 Fed. Reg. at 6631.)⁴

Regional Implementation

Finally, the facts at a particular site will determine what position the Agency takes. The Agency continues to maintain that military munitions in the environment are best addressed after consultation with and input from EPA Regional, state, tribal, and local authorities, as appropriate. Indeed, the law establishing DoD’s Environmental Restoration Program specifically requires that DoD afford “an adequate opportunity for timely review and comment” to EPA, state, and local officials before commencement of a response action, except in emergencies where such consultation would be impractical. (See 10 U.S.C. §2705(b)(2).) For the most part, EPA and DoD’s military services have traditionally worked together very effectively at these sites and we expect continued strong collaboration in the future.

If a Region believes that EPA should issue an order to a DoD Component under the imminent hazard provisions of any environmental law requiring that DoD Component to abate an imminent and substantial endangerment on a closed range, such an order would constitute an enforcement matter of national significance and under the appropriate delegation of authority require the concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

If you have any questions regarding this guidance or EPA’s position on these matters please contact Bill Frank or me in FFEO at (202) 564-2510.

clearance activities on active or inactive ranges, in general, are part of the munitions’ intended use pursuant to 40 CFR 266.202 (a)(1)(iii).

⁴ This interpretation was established in response to a comment made in the rulemaking process, asking if range clearance activities at closed ranges were considered to be part of a munition’s intended use.

cc: EPA Regional Superfund National Program Managers
EPA RCRA Regional Division Directors
James E. Woolford, FFRRO
Matthew Hale, Jr., OSW
Scott A. Sherman, OGC
John Michaud, OGC
Charles A. Openchowski, OGC
Doug Maddox, FFRRO/OSWER
Kenneth A. Shuster, OSW/OSWER
William H. Frank, FFEO/OECA
Office of Regional Counsel, Regions I-X
Federal Facilities Leadership Council