

● **Board of Directors**
Executive Committee

April 13, 2004 Board Meeting

8-8

Subject

Oppose U.S. Department of Defense's proposal to modify federal environmental laws as they currently apply to operations and management of military ranges

Description

In recent years, perchlorate has been detected in various locations throughout Southern California, threatening more than 300 wells. A substantial portion of the perchlorate identified in the region originated with activities, programs, or contractors related to the Department of Defense (DOD). In November 2002, Senator Dianne Feinstein requested the Department of Defense to take responsibility for this problem, and to date they have not done so. Instead, DOD is now proposing legislation that effectively exempts them, and possibly their contractors, from liability under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). The exemption would effectively prevent litigation against parties responsible for perchlorate and other possible contaminants of public drinking water supplies.

The DOD, as part of its Readiness and Range Preservation Initiative, has proposed to modify federal environmental laws in a manner to exempt military munitions, "including unexploded ordnance, and the constituents thereof," that are deposited and remain on an "operational range" from regulation as solid waste under RCRA and as a release CERCLA. If enacted by Congress, perchlorate contamination on an operational range would be exempted from regulation under these key environmental laws. A consequence of these exemptions is that they could preclude investigation of parties involved in defense activities that have contaminated critical water resources.

DOD urged Congress to authorize these exemptions last year as part of the Defense Authorization Bill, but was unsuccessful. The proposal met strong opposition during the previous Session of Congress, and was consequently referred to the House and Senate Committees with jurisdiction over environmental laws. Currently, the DOD is expected to propose another version of the Readiness and Range Preservation Initiative and has publicly acknowledged that they hope to move the measure quickly through the House and Senate. This effort has not generated widespread support, but it causes a great concern to water agencies throughout the west and the nation.

While the exemptions sought by DOD would not apply to contamination from military munitions that migrate from an operational range, the public's interests are at risk by the time that migration occurs. This concern stems from the unalterable fact that once released into the environment, perchlorate is impossible to recapture and expensive to treat.

Further, operational ranges can include a buffer zone, requiring the contamination to move beyond the buffer zone before the protections under CERCLA and RCRA would pertain. Given the persistence of perchlorate in the environment and its mobility in groundwater, perchlorate contamination needs to be appropriately addressed as soon as its presence is known.

At the present time, there continues to be uncertainty as to exactly what constitutes an "operational range" and whether that definition would also include defense contractor sites such as the Kerr McGee Facility in Henderson, Nevada. Likewise, the term "buffer zone" is not defined within the context of current federal environmental law.

The proposed initiative would not diminish the President's authorities under CERCLA to take action if there is an imminent and significant threat to public health or the environment because of an actual or threatened release of a hazardous substance. However, this authority, which has been delegated to the EPA Administrator, could only be exercised with the concurrence of the Attorney General.

The DOD has argued that the proposed exemptions are necessary to maintain military readiness, but has provided no compelling evidence of how these laws have hindered preparedness in the past or would do so in the future. This proposed amendment has not been demonstrated to be related in any way to national security, but rather only to financial liability. The effect would be to shift a national financial liability onto local ratepayers and residents. The DOD's proposed policy offers no appreciation for the important environmental, economic, and potential health consequences associated with this volatile material that has been dispersed irretrievably into the aquatic environment. Organizations such as the Association of California Water Agencies, the Association of Metropolitan Water Agencies, and the American Water Works Association oppose the exemptions. The DOD should be urged to work cooperatively with health and water officials to identify an equitable and comprehensive strategy to address perchlorate contamination throughout the country.

Policy

Metropolitan believes that the Department of Defense should accept responsibility for perchlorate contamination remediation and cleanup. Exemptions from liability should not be granted to the United States Military or affiliated contractors for purposes of avoiding financial responsibility for the environmental consequences of activities on a military range, including the migration of perchlorate into public drinking water systems.

Opposition to the exemptions is consistent with Metropolitan's source water quality protection policy principles M.I. 39929, Nov. 10, 1992; M.I. 40878, June 14, 1994; M.I. 41222, Jan. 10, 1995.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options/Fiscal Impacts

Option #1

Adopt the CEQA determination and oppose the exemptions.

Fiscal Impact: None

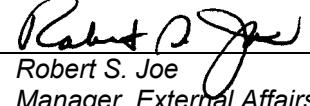
Option #2

Do not oppose the exemptions.

Fiscal Impact: Fiscal impact depends on whether perchlorate or other constituents of munitions deposited on an operational range contaminate a drinking water supply in Metropolitan's service area and the contamination could have been avoided had the exemptions not been enacted.

Staff Recommendation

Option #1



Robert S. Joe
Manager, External Affairs

3/17/2004
Date



Ronald R. Gasterum
Chief Executive Officer

3/17/2004
Date

BLA #2843