Order Code RL32183

CRS Report for Congress

Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004

January 5, 2004

name redacted
Analyst in Environmental Policy
Resources, Science, and Industry Division

Prepared for Members and
Committees of Congress

Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004

Summary

The Department of Defense (DOD) administers five environmental programs in response to various requirements under federal environmental laws. These programs include environmental cleanup, environmental compliance, pollution prevention, environmental technology, and conservation. In addition, the Department of Energy (DOE) is responsible for managing defense nuclear waste and cleaning up contaminated nuclear weapons sites. Some of the ongoing issues associated with these programs are the adequacy, cost, and pace of cleanup, whether DOD and DOE adequately comply with environmental laws and regulations, and the extent to which environmental requirements encroach upon military readiness.

The National Defense Authorization Act for FY2004 (P.L. 108-136, H.R. 1588) authorized $1.31 billion for cleanup at active military installations and Formerly Used Defense Sites (FUDS), about $40 million more than requested. FUDS are former military facilities that were decommissioned prior to the rounds of base closings that began in 1988. An increase was authorized for speeding up the pace of cleanup at these sites. The law also authorized $370 million for cleanup and other activities at base closure sites, the same as requested. As in past years, the law includes line-items for a few other environmental activities, but does not specify the authorization for all of DOD's other environmental programs. Rather, their funding is authorized as part of several larger accounts. For DOE's cleanup of defense nuclear waste sites, the law authorized $6.81 billion, the same as requested. It also includes numerous environmental provisions that affect military activities. Among the most controversial are those that grant exemptions from certain requirements under the Endangered Species Act and the Marine Mammal Protection Act, which DOD requested under its Readiness and Range Preservation Initiative (RRPI).

In addition to the above authorization legislation, Congress has completed the three appropriations bills that fund these activities in FY2004. The Department of Defense Appropriations Act for FY2004 (P.L. 108-87, H.R. 2658) provided nearly $1.35 billion for cleanup at active military installations and FUDS sites, $72 million more than requested, and $32 million more than authorized, with the increase going to FUDS sites. The Military Construction Appropriations Act for FY2004 (P.L. 108-132, H.R. 2559) provided $370 million for cleanup and other activities at base closure sites, the same as requested and authorized. The Energy and Water Development Appropriations Act for FY2004 (P.L. 108-137, H.R. 2754) provided $6.64 billion for DOE's cleanup of defense nuclear waste sites, nearly $168 million less than requested and authorized. The conferees indicated that funding was decreased due to concern about DOE's progress in working with EPA and the states to implement its reform initiative to increase the pace of cleanup and lower costs.

This report provides background information on defense-related environmental programs, analyzes key implementation issues, and examines final versions of legislation to authorize and appropriate funding for these activities for FY2004. It will be updated when DOD announces the funding allocations for all of its environmental activities that did not receive a specific line-item appropriation.

Contents

List of Figures

List of Tables

Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004

Introduction

In response to various requirements under federal environmental laws, the Department of Defense (DOD) administers five programs to address environmental and conservation needs on 25 million acres of land located on military installations. In addition to DOD's environmental programs, the Department of Energy (DOE) is responsible for managing defense nuclear waste, and cleaning up contaminated nuclear weapons sites.[1] The Environmental Protection Agency (EPA) and the states oversee and enforce applicable laws. Some of the ongoing issues are the adequacy, cost, and pace of efforts to clean up past contamination, whether DOD and DOE adequately comply with environmental laws and regulations, and the extent to which environmental requirements affect military readiness.

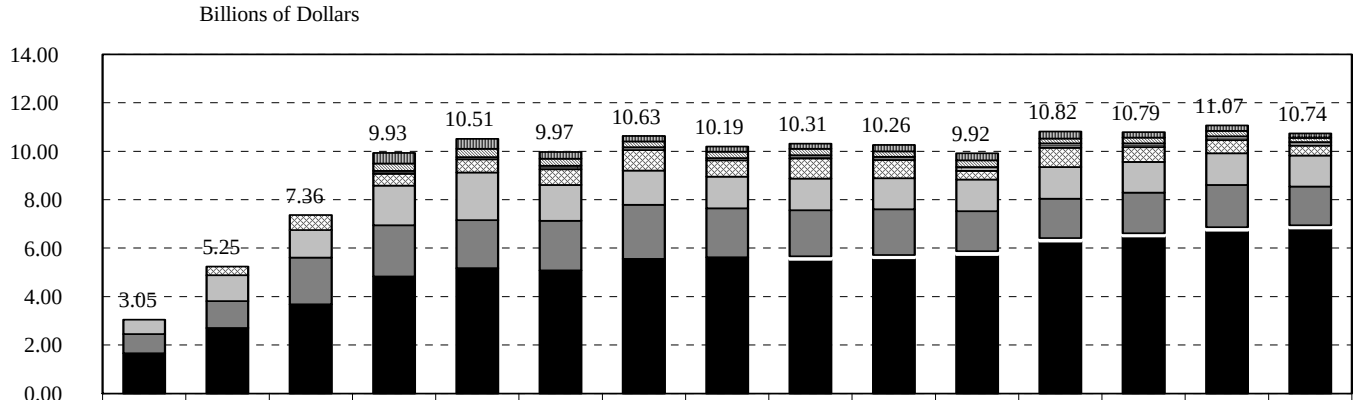
Congress authorizes defense-related environmental programs in the annual authorization bill for National Defense, but it funds these programs under three appropriations bills. Cleanup activities at active and former military installations, environmental compliance, pollution prevention, environmental technology, and conservation of natural and cultural resources primarily receive funding in the annual appropriations bill for the Department of Defense. Cleanup at bases designated for closure since 1988 is funded separately in the annual appropriations bill for Military Construction. DOE's cleanup and management of defense nuclear waste is funded in the annual appropriations bill for Energy and Water Development.

The first session of the 108th Congress enacted all of the above bills for FY2004. As indicated in **Figure 1**, the Administration had requested of total of $10.74 billion for all defense-related environmental activities. Collectively, the three appropriations bills provided $8.50 billion for environmental cleanup at DOD and DOE defense sites combined, of which $6.64 billion was allocated to DOE. As in past years, the total amount of funding for DOD's other environmental activities was not specified, for which the Administration had requested $2.12 billion. DOD will allocate funding for these activities from appropriations for the Operation and Maintenance, Procurement, and Research and Development Accounts.

---

[1] DOE, and its predecessor agencies, administered the production of the nation's stockpile of nuclear weapons. As required by the Atomic Energy Act of 1954 and federal environmental laws, the Department is responsible for the management and disposal of radioactive and other hazardous wastes generated from these activities, and for cleaning up contamination in buildings, soil, and water.

Figure 1. Funding for Defense Cleanup and Environmental Programs: FY1990 through FY2003 and FY2004 Administration Request



	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Environmental Technology	n/a	n/a	n/a	0.43	0.41	0.28	0.22	0.21	0.21	0.26	0.29	0.29	0.23	0.23	0.19
Pollution Prevention	n/a	n/a	n/a	0.30	0.34	0.29	0.25	0.26	0.26	0.23	0.28	0.21	0.23	0.22	0.17
Conservation	n/a	n/a	n/a	0.12	0.10	0.15	0.11	0.09	0.14	0.13	0.16	0.18	0.16	0.16	0.15
Base Closure Cleanup	n/a	0.37	0.62	0.49	0.54	0.64	0.85	0.68	0.83	0.76	0.36	0.79	0.61	0.54	0.41
Current and Former Site Cleanup	0.60	1.07	1.13	1.64	1.97	1.48	1.41	1.31	1.30	1.27	1.30	1.31	1.27	1.31	1.27
Environmental Compliance	0.79	1.11	1.93	2.12	1.98	2.04	2.23	2.02	1.91	1.89	1.66	1.63	1.67	1.75	1.60
Corps of Engineers FUSRAP	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	0.14	0.14	0.15	0.14	0.14	0.14	0.14
Department of Energy Cleanup	1.66	2.70	3.68	4.83	5.17	5.09	5.56	5.62	5.52	5.58	5.72	6.27	6.48	6.72	6.81

Prepared by the Congressional Research Service using data from enacted appropriations, Operation and Maintenance Overviews of the Department of Defense, and congressional budget justifications of the Department of Energy.
n/a = account or program not yet established.
FUSRAP = Formerly Utilized Sites Remedial Action Program.
While the FY2004 defense appropriations bills include line-item accounts for a few environmental activities other than cleanup, they do not specify the total amount of funding for all of DOD's other environmental programs, including environmental compliance, conservation, pollution prevention, and environmental technology. DOD will allocate funding for these activities from the Operation and Maintenance, Procurement, and Research and Development Accounts. This table will be updated to indicate final FY2004 funding levels when these allocations are announced in DOD's Operation and Maintenance Overview for FY2005.

Department of Defense

DOD administers five environmental programs to comply with various federal environmental laws.[2] In terms of funding, the two largest programs focus on cleaning up past contamination and on complying with environmental laws and regulations that apply to ongoing operations. Three other programs have smaller budgets. They focus on pollution prevention, environmental technology, and conservation of natural and cultural resources. The Administration requested a total of $3.8 billion for these activities for FY2004, about $400 million less than the FY2003 funding level of $4.2 billion. The requested decrease was primarily due to the completion of long-term environmental compliance projects, fewer cleanup projects planned at base closure sites, and the completion of numerous one-time projects that received congressionally directed funds in FY2003. Background information on each of DOD's environmental programs and an analysis of key implementation issues are discussed below. (Refer to page 15 for a discussion of authorized and appropriated funding levels for FY2004, and provisions in authorizing legislation that provide exemptions from certain requirements under the Endangered Species Act and the Marine Mammal Protection Act.)

Environmental Cleanup

In 1975, DOD established an Installation Restoration Program to investigate and clean up sites on military lands where past waste management practices had led to environmental contamination. A few years later, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) created the Superfund program to clean up hazardous waste sites that pose the greatest risk to public health and the environment in the United States, and it created the National Priorities List (NPL) to track them.[3] The law also established a formal framework for the identification, investigation, and cleanup of hazardous substances.

Initially, the extent to which DOD had to comply with these requirements was unclear. However, the Superfund Amendments and Reauthorization Act of 1986 (SARA) specified that DOD and all other federal agencies are subject to CERCLA's requirements for identifying, evaluating, and cleaning up NPL sites under their jurisdiction.[4] The Resource Conservation and Recovery Act (RCRA) also requires DOD and all other federal agencies to perform corrective actions to clean up contamination at sites with active hazardous waste management or solid waste disposal facilities operating with permits issued under RCRA.[5]

In addition to specifying the applicability of CERCLA, SARA expanded the Installation Restoration Program, and renamed it the Defense Environmental

---

[2] For additional information on each program, refer to the Defense Environmental Network and Information Exchange (DENIX) website at [http://www.denix.osd.mil].

[3] 42 U.S.C. 9601 et. seq.

[4] 42 U.S.C. 9620

[5] 42 U.S.C. 6901 et seq.

Restoration Program, to centralize DOD's efforts in cleaning up hazardous waste sites at domestic military installations where past actions led to contamination.[6] As a complement to this program, DOD established a Military Munitions Response Program to fulfill requirements under Sections 311 and 312 of the National Defense Authorization Act for FY2002 (P.L. 107-107) to identify, investigate, and clean up unexploded ordnance (UXO) and other munitions at nonoperational training ranges in the United States.

The following sections explain the role of EPA and the states in conducting oversight of DOD's cleanup activities, indicate cleanup status and costs, explain appropriations account structure, and discuss cleanup efforts at overseas military installations.

Oversight of Cleanup Activities. While DOD is responsible for funding and conducting cleanup actions at its sites, EPA and the states conduct oversight of these actions to determine whether DOD complies with the law. Generally, EPA takes the lead in performing oversight of DOD sites being cleaned up under CERCLA, and EPA delegates federal authority to the states for conducting oversight of corrective actions taken under RCRA.

Cleanup requirements under CERCLA and RCRA apply only within the United States. The cleanup of contamination at overseas military installations is subject to requirements specified in the Status of Forces Agreement with each host nation. These requirements are generally not as strict as CERCLA and RCRA, and their stringency varies widely from country to country. Unlike domestic cleanup actions, EPA does not have the authority to conduct oversight at military installations abroad. Rather, overseeing DOD's actions to ensure that the requirements of a Status of Forces Agreement are met is the responsibility of each host nation.

Cleanup Status and Costs. Until FY1994, DOD primarily concentrated its cleanup efforts on identifying and investigating contaminated sites to determine the level of remediation that would be necessary to protect human health and the environment. As the majority of sites were identified and subsequent investigations were completed, DOD began to focus the bulk of its efforts on actual cleanup. In FY1996, DOD also developed specific cleanup goals to prioritize its sites, based on threats of exposure.

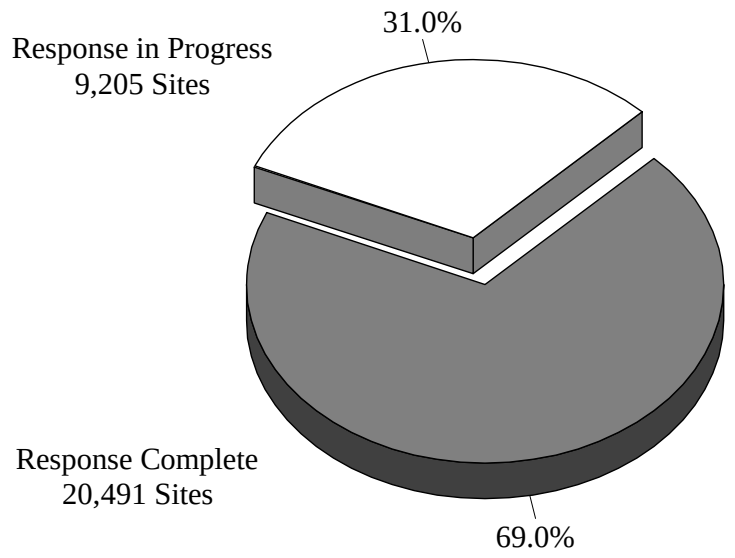
As indicated in **Figure 2**, DOD had identified a total of 29,696 contaminated sites as of the end of FY2002.[7] At that time, DOD had completed cleanup at 20,491 of those sites (69% of total sites) at a cost of $20.2 billion, and reported that almost $30.2 billion would be necessary to finish cleanup at the remaining 9,205 sites (31% of total sites) from FY2003 to site completion.

---

[6] 10 U.S.C. 2701

[7] Department of Defense. *Defense Environmental Restoration Program Annual Report to Congress for FY2002.* April 2003. p. B-6-1, p. C-5-1.

Figure 2. Cleanup Status at Current, Former, and Closing Military Installations in the United States as of September 30, 2002



Prepared by the Congressional Research Service using data from the Department of Defense, *FY2002 Defense Environmental Restoration Program Annual Report to Congress,* April 2003, p. B-6-1, p. C-5-1.

Even though less than 1/3 of contaminated sites are still in need of cleanup, the above estimates of future cleanup costs are substantially higher than has already been spent due to the severity of contamination at these remaining sites and the resources that likely will be necessary to address contamination by unexploded ordnance (UXO). DOD expects that estimates of funding needs will likely increase in future years as additional sites with UXO contamination are identified and the extent of such contamination is determined.

Funding needs for cleanup also may rise in future years as additional military bases are selected for closure. The National Defense Authorization Act for FY2002 (P.L. 107-107) authorized a new round of military base closings in 2005. The amount of funding that would be necessary to accelerate cleanup at new base closure sites in order to transfer them to other uses would depend on the type and extent of contamination present at such installations.

Appropriations Account Structure. Cleanup costs at domestic military sites are funded by several centralized accounts structured by category of installation. Funding for cleanup at current and former military installations is authorized under five Defense Environmental Restoration Accounts in the annual authorization bill for National Defense, and is appropriated to these accounts in the annual appropriations bill for the Department of Defense. Three of these accounts reserve funding for the Army, Navy, and Air Force. One devotes funding to a more general category of Defense-wide sites, and another is dedicated to cleaning up Formerly Used Defense

Sites (FUDS).[8] Typically, FUDS are properties that DOD owned or leased in the past and are now devoted to civilian uses. Many of the FUDS sites were used during the World War II era and prior years.

Cleanup at base closure sites is authorized separately under the Base Realignment and Closure (BRAC) Account in the annual authorization bill for National Defense. Appropriations for base closure activities are provided under the BRAC account in the annual appropriations bill for Military Construction. Congress authorized four rounds of base closures in 1988, 1991, 1993, and 1995, and established a separate BRAC account for each round.

Overseas Military Installations. While there are several centralized accounts to fund cleanup activities at domestic military installations, there are no line-item accounts in the President's annual budget submission, or in annual defense authorization legislation or appropriations, to conduct cleanup actions at overseas military installations. Rather, these projects are funded on an installation-by-installation basis out of the general operational budget for each foreign base. DOD does not have the authority to transfer funding from the cleanup accounts for domestic installations to address contamination abroad.

DOD is not required to report to Congress on the status of cleanup actions at overseas military installations, as the agency is required to do for domestic facilities in its annual report on the Defense Environmental Restoration Program. The only type of information that DOD is required to submit to Congress regarding overseas cleanup is a statement of the amounts expended, and anticipated to be expended, as part of its annual report to Congress on the Defense Environmental Quality Program. The most recent version of this report indicated that DOD spent a total of $19.6 million in FY2001 on overseas environmental cleanup. The report also indicated that $13.1 million was available from appropriations in FY2002, and that in FY2003, $18.2 million would be required for overseas cleanup obligations.[9]

---

[8] Congress first appropriated funding to the Defense Environmental Restoration Account in FY1984. Subsequently, the National Defense Authorization Act for FY1997 (P.L. 104-201) divided the account into four subaccounts: Army, Navy, Air Force, and Defense-wide. Since then, Congress also has specified the amount of funding reserved for cleaning up FUDS sites, and the National Defense Authorization Act for FY2001 (P.L. 106-398) established a FUDS subaccount to conform with this budgetary practice.

[9] Department of Defense. *Defense Environmental Quality Program Annual Report to Congress for FY2001*. September 2002. p. 29.

Environmental Compliance

DOD and all other federal agencies are required to comply with environmental laws and regulations to the same extent as any other entity. Typically, environmental compliance projects at military installations include routine operations such as storing and disposing of solid and hazardous waste, upgrading and monitoring waste water treatment plants, and testing and replacing underground storage tanks. The following sections provide information on environmental compliance requirements under federal law, examine funding trends for military compliance activities, and indicate the amount of fines and penalties assessed against DOD for environmental violations.

Compliance Requirements under Federal Law. The federal environmental statutes that most commonly apply to routine military operations include the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), and Safe Drinking Water Act. The Federal Facility Compliance Act of 1992 amended RCRA to clarify in detail that DOD and all other federal facilities 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.[10] The Act also authorized and directed EPA to take enforcement actions under RCRA against any federal agency to the same extent that it would against any other entity. Although the Safe Drinking Water Act includes similar language, other federal environmental laws do not include the same clarification of compliance requirements.

Funding Trends. DOD did not begin to track the amount of funding spent on environmental compliance activities until FY1990. There are no centralized accounts for these activities in annual defense authorization legislation or appropriations bills, as there are for environmental cleanup activities. Instead, funding for compliance primarily comes from the accounts for Operation and Maintenance, Military Construction, and Procurement. DOD's budget for environmental compliance peaked at $2.23 billion in FY1996, but has since declined as DOD reports that its pollution prevention efforts have reduced the generation of waste, lessening the need for treatment and disposal and other compliance actions.

Fines for Violations of Environmental Requirements. Although DOD is required to comply with environmental laws and regulations, and has a dedicated budget for such activities, the extent to which DOD fulfills these responsibilities has been a longstanding issue. As explained above, federal environmental laws require federal facilities to comply with all federal, state, interstate, and local environmental requirements, and such laws authorize EPA, the states, and local governments to assess fines against DOD for violations. However, a fine is not always paid in the same year that it is assessed, and in some cases, DOD does not make a cash payment to satisfy a fine. Instead, DOD may agree to perform a Supplemental Environmental Project (SEP) in lieu of a cash payment. Under such an agreement, DOD not only corrects its actions to comply with the environmental requirement at hand, but also performs an additional project that enhances environmental quality. Regulatory

---

[10] 42 U.S.C. 6961

agencies frequently prefer the performance of SEPs to cash payments due to the environmental benefits such projects provide.

The National Defense Authorization Act for FY2000 required DOD to include information on environmental fines in its annual report to Congress on the Defense Environmental Quality Program.[11] This information must include the amount of fines assessed and paid during the fiscal year for which the report is submitted, as well as the past four fiscal years. As indicated in **Table 1**, EPA, the states, and local governments assessed $11.8 million in fines against DOD for environmental violations from FY1997 to FY2001.[12] During this same period, DOD paid $11.6 million in cash payments and SEPs as compensation for its violations.[13]

Table 1. Fines and Penalties Assessed and Paid for Environmental Violations from FY1997 to FY2001

Fiscal Year	Fines and Penalties Assessed	Cash Paid and Cost of SEPs
FY1997	$2,627,828	$5,231,955
FY1998	$2,915,198	$157,920
FY1999	$982,224	$3,298,810
FY2000	$3,656,136	$156,100
FY2001	$1,638,688	$2,761,279
Total	**$11,820,074**	**$11,606,064**

Prepared by the Congressional Research Service with data from the Department of Defense.

Other Environmental Programs

In addition to environmental cleanup and compliance activities, DOD administers three other programs that focus on pollution prevention, environmental technology, and conservation. The purpose of the pollution prevention program is to reduce or eliminate solid or hazardous waste from being generated, as a means to eliminate potential environmental problems before they occur. The environmental technology program supports research, development, testing, and demonstration of more efficient and less costly methods to clean up and manage solid and hazardous waste. The conservation program aims to protect the natural, historical, and cultural resources of the 25 million acres of public land that DOD administers, including the protection of endangered species.

DOD began tracking the budget for these programs in FY1993. Although they are an integral part of DOD's environmental strategy, their funding is significantly smaller than the programs for environmental cleanup and compliance. Like compliance, there are no centralized accounts for pollution prevention, environmental

---

[11] P.L. 106-65, Section 322.

[12] Department of Defense. *Defense Environmental Quality Program Annual Report to Congress for FY2001*. September 2002. Appendix J. p. 19.

[13] Ibid., Appendix J. p. 23.

technology, or conservation in annual defense authorization legislation or appropriations bills. Instead, DOD allocates funding for these activities from the Operation and Maintenance, Procurement, and Research and Development Accounts.

Department of Energy

In the late 1980s, the United States ceased its production of nuclear weapons, due to military projections that the nuclear weapons stockpile was sufficient to protect national security and respond to future threats. However, environmental problems associated with storing radioactive materials involved in the production of nuclear weapons continue to pose a risk to human health and safety today. Since the beginning of the U.S. atomic energy program, DOE and its predecessors have been responsible for managing defense nuclear weapons and related waste. In later years, DOE expanded its efforts to include the environmental restoration of radioactive sites, and those with other hazardous contamination, to ensure their safety for future uses. In 1989, the Bush Administration established an Environmental Management Program within DOE to consolidate the agency's efforts in cleaning up contamination from defense nuclear waste, as well as waste from civilian nuclear energy research.[14]

The following sections discuss program oversight, cleanup status and costs, appropriations account structure, and related topics such as the selection of Yucca Mountain for an underground nuclear waste repository, and the cleanup of smaller radioactive waste sites that were transferred from DOE to the Army Corps of Engineers.

Oversight of Cleanup and Waste Management Activities

The Atomic Energy Act of 1954 is the primary authority governing the development of nuclear weapons and the management of defense nuclear waste. The law requires DOE to safely store, process, transport, and dispose of radioactive and other hazardous waste resulting from the production of defense nuclear materials.[15] Waste disposal typically involves cleanup actions, such as the decontamination of buildings and structures and the removal of contaminated soil. DOE is also subject to requirements under various federal environmental laws in carrying out its responsibilities under the Atomic Energy Act. CERCLA and RCRA are the two main federal environmental statutes that apply to cleanup activities at defense nuclear waste sites. CERCLA primarily applies to cleanup actions at inactive waste sites that present the highest risk of exposure and are listed on the NPL. RCRA requires DOE to clean up contamination at sites with active solid and hazardous waste disposal facilities for which an operating permit has been issued under RCRA.

---

[14] For additional information on the Environmental Management Program, refer to DOE's website at [http://www.em.doe.gov].

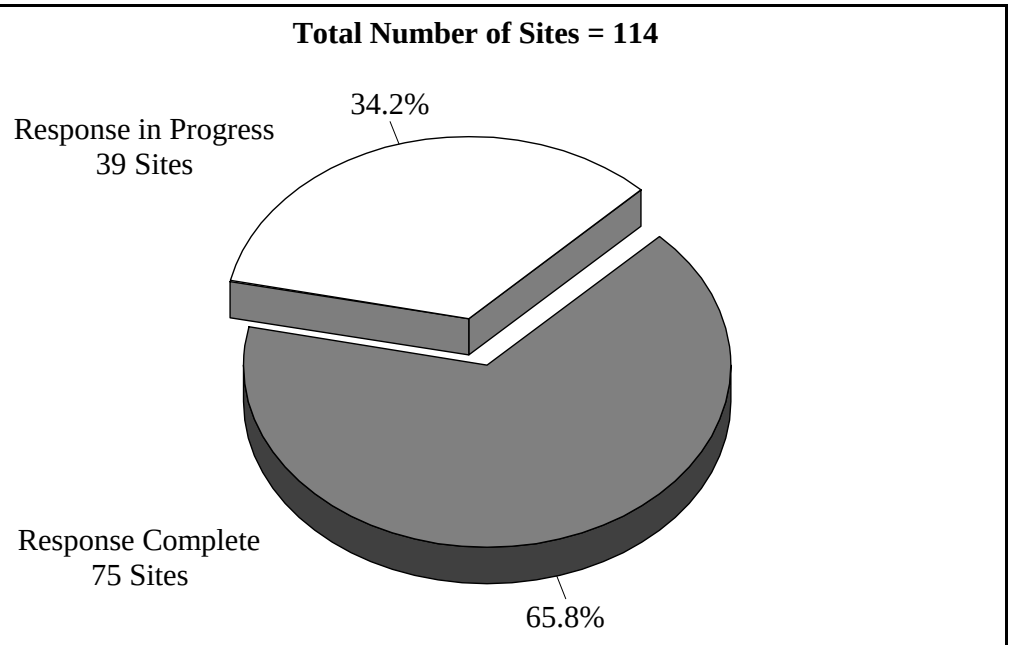
[15] 42 U.S.C. 2121

EPA and the states are responsible for conducting oversight of DOE's actions in order to determine compliance with environmental laws, and to assess fines and penalties if violations occur. Generally, EPA takes the lead in performing oversight of cleanup actions at DOE sites required under CERCLA, and EPA delegates federal authority to the states for conducting oversight of actions required under RCRA. DOE has completed compliance agreements with EPA and the states for each of its cleanup and waste management sites, which indicate legally enforceable schedules and time frames for specific response actions.

Cleanup Status and Costs

As indicated in **Figure 3**, DOE reports that there are 114 large sites where the past production of atomic materials used to construct nuclear weapons led to severe contamination.[16] These sites encompass over 2 million acres, a total area equal to the states of Rhode Island and Delaware combined. As of the end of FY2002, DOE reports that it had completed all response actions at 75 sites, at a cost of over $60 billion, and that response actions were underway at the remaining 39 sites.[17] DOE expected to complete cleanup at two additional sites by the end of FY2003.

Figure 3. Cleanup Status at DOE Nuclear Waste Management and Environmental Restoration Sites as of September 30, 2002



Prepared by the Congressional Research Service using data from the Department of Energy. Office of Management, Budget, and Evaluation. *FY2004 Congressional Budget Request.* February 2003. Volume 5. p. 36.

---

[16] Department of Energy. Office of Management, Budget, and Evaluation. *FY2004 Congressional Budget Request*. February 2003. Volume 5, p. 36.

[17] Ibid. One of the remaining sites, the Waste Isolation Pilot Plant in New Mexico, is a waste disposal facility rather than a cleanup site that requires response actions.

While response actions are complete at about 66% of total sites, these sites are relatively small, and are among the least hazardous. The sites where cleanup is underway contain some of the most severely contaminated areas. DOE estimates that cleanup at the remaining 39 sites may take 70 years to complete, and that total cleanup costs may range from $220 billion to $300 billion if program reforms are not initiated, substantially higher than the estimate of $147 billion made in 1998.[18]

The Bush Administration's Cleanup Reform Initiative

The current Administration has been working on a cleanup reform initiative that would accelerate cleanup and lower costs. DOE estimates that its initiative could save between $50 billion and $100 billion in total cleanup costs over the long term, and that the time frame for total site cleanup could be moved from 2070 to 2035. These goals would be accomplished by assessing the risk of exposure to determine which cleanup remedies are selected. Risk is currently one of many factors that DOE uses to select cleanup remedies. Altering the current process to use risk as the primary factor could result in decisions to contain waste on site as a means of preventing exposure, rather than removing it. While containment can often be accomplished more quickly and at less cost, the possibility of future exposure remains if the method of containment fails over time. States and localities have expressed concern over this approach.

The amount of time and money needed to clean up nuclear waste sites is a major issue. However, questions have been raised as to how DOE would use a risk-based approach to accomplish its goals of faster and less costly cleanups without weakening environmental protection. Some have drawn attention to the possibility that basing the selection of cleanup remedies on risk alone might result in more contamination being left on site, rather being removed. Because of the substantial amount of time often required for radioactive decay to occur, arguments have been raised that contamination left in place may migrate in unexpected ways over the long term, and result in pathways of exposure that could not have been predicted when the remedy was originally selected. Others counter that completely removing radioactive contamination from all sites to permit unrestricted future land use, and eliminate all future pathways of exposure, would not be economically feasible, and in some cases would be beyond the capabilities of current cleanup technologies.

DOE is in the early stages of implementing its cleanup reform initiative. The specific measures that would be taken to speed the pace of cleanup and reduce costs remain unclear. Thus far, DOE has completed "Performance Management Plans" to accelerate cleanup at many of its sites. These plans outline goals to reduce the amount of time required to complete individual projects, and they propose risk-based initiatives to accomplish these goals. However, many of these initiatives would entail cleanup actions that are different than those specified in existing compliance agreements that DOE has previously negotiated with EPA and the states. Because these agreements are legally binding, DOE would be required to renegotiate them to

---

[18] Department of Energy. *A Review of the Environmental Management Program*. February 2002. p. ES-1.

the satisfaction of the other parties, prior to engaging in a cleanup action that would differ from that agreed upon in the past.

If a proposed risk-based action were to result in more waste being left on site, EPA or the states may be resistant to revising existing agreements that may be perceived as offering a greater degree of environmental protection over the long-term. The successful renegotiation of the compliance agreement for each site will be a critical factor in determining whether the Administration is able to implement its proposed cleanup reforms. If mutual agreement is reached, funding for implementation would be subject to congressional approval.

Appropriations Account Structure

Congress authorizes funding for DOE's defense environmental restoration and waste management activities in the annual authorization bill for National Defense, and appropriates funding for them in the annual appropriations bill for Energy and Water Development. In recent years, Congress had provided this funding under three centralized accounts. The Defense Environmental Restoration and Waste Management Account had funded cleanup and waste management activities at nuclear weapons sites where all response actions are projected to continue *beyond* 2006. The Defense Facilities Closure Projects Account had supported cleanup and waste management activities at sites where all response actions are scheduled to be complete by the *end* of 2006. The Defense Environmental Management Privatization Account had funded cleanup projects that have been completed under "privatization" contracts.[19]

Congress approved a new account structure for FY2004, which the Administration requested as part of its cleanup reform initiative, discussed above. There now are two new accounts that replace the previous three. The new Defense Site Acceleration Completion Account provides funding for activities that are directly involved in the cleanup of contaminated sites and the acceleration of site completion. The new Defense Environmental Services Account funds activities that indirectly support the mission of accelerated cleanup and closure, such as policy development and coordination, and the integration of mission activities across the complex of sites. While Congress approved the new account structure, less funding was appropriated than requested, and numerous concerns were expressed about how DOE is proceeding with its cleanup reform initiative.

---

[19] Under a privatization contract, a private entity is responsible for financing the entire cost of a cleanup project, and is not paid by the federal government until the project is completed and performed according to contractually specified requirements. This type of contract differs from the traditional approach of paying a contractor a fixed amount up front and offering additional cash incentives to encourage the completion of a project within a certain time frame. Privatization contracts generally have the potential to provide the contractor with a greater incentive to control costs and work more efficiently, since payment is not rendered until performance is complete and the cleanup objective has been achieved.

Yucca Mountain

A prominent issue related to DOE's Environmental Management Program is the perceived need for a long-term, centralized repository for high-level defense nuclear waste. While the Waste Isolation Pilot Plant in New Mexico serves as a centralized repository for transuranic (plutonium-contaminated) defense nuclear waste, high-level waste is currently stored at individual sites. The Nuclear Waste Policy Act of 1982, as amended in 1987, required DOE to study the suitability of Yucca Mountain in Nevada for constructing a centralized underground geological repository for high-level defense nuclear waste, as well as civilian radioactive waste generated by nuclear power plants. The federal government and the nuclear power industry contribute funding to support the study and development of such a repository.

The State of Nevada has strongly opposed the selection of Yucca Mountain for an underground repository due to numerous safety concerns, such as the possibility of seismological disturbances and underground flooding, and the potential for groundwater contamination over time. DOE contends that scientific evidence indicates that the conditions at Yucca Mountain would likely be suitable for long-term underground waste storage and that efforts to study the site should continue. Environmental organizations have opposed the development of a centralized repository, due to concerns over the safety of transporting high-level radioactive waste across many states to one location and the potential for terrorist threats, along with environmental concerns about the site that are similar to those of the State of Nevada.

President Bush selected Yucca Mountain for the development of an underground nuclear waste repository in February 2002. This action cleared the way for DOE to proceed with its plans to prepare and submit a license application to the Nuclear Regulatory Commission for the construction of the facility. DOE plans to submit a license application in 2004, and to begin receiving waste shipments in 2010. However, controversy over the selection of Yucca Mountain is likely to continue, due to significant opposition from the State of Nevada and environmental organizations.[20]

Formerly Utilized Sites Remedial Action Program

In addition to the federal facilities that are being cleaned up under DOE's Environmental Management Program, there are other smaller sites contaminated with low-level radiation from the processing and storage of uranium and thorium ores during the early years of the U.S. nuclear weapons program. The majority of these sites were owned and operated by private contractors from the 1940s to the 1960s. Cleanup at these sites is performed under the Formerly Utilized Sites Remedial Action Program (FUSRAP).

The Atomic Energy Commission, DOE's predecessor agency, established the program in 1974 under authorities provided in the Atomic Energy Act. The first cleanup actions began in 1979. In response to concerns over the pace and cost of

---

[20] For further information on this issue, refer to CRS Report RL33461, *Civilian Nuclear Waste Disposal*, by (name redacted).

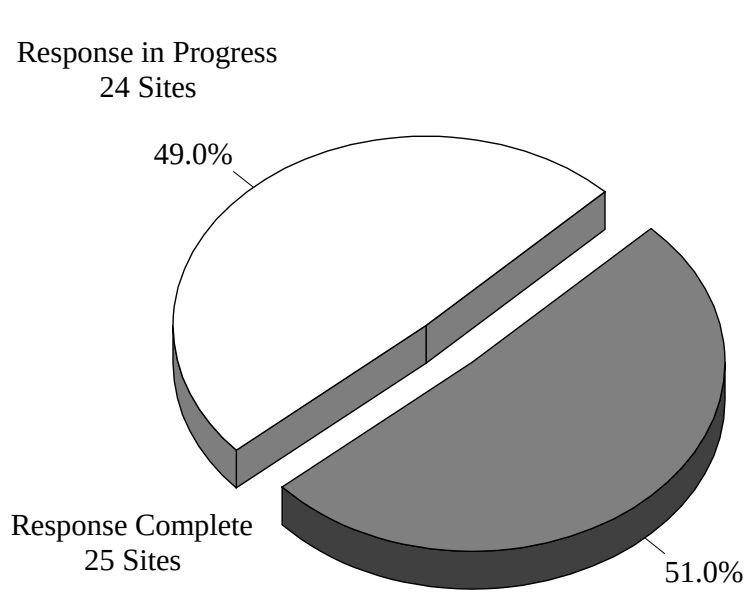
cleanup under DOE's management, Congress included provisions in the Energy and Water Development Appropriations Act for FY1998 (P.L. 105-62) to transfer the FUSRAP program to the Army Corps of Engineers. This transfer was considered potentially advantageous, since the Corps had extensive experience in cleaning up former defense sites that were in operation during this same time period.

The Energy and Water Development Appropriations Act for FY1999 (P.L. 105-245) requires the Corps to follow CERCLA's requirements in cleaning up sites under the program. DOE collaborates with the Corps to determine the eligibility of new sites, since it must perform the historical research to ascertain whether such sites were part of the early nuclear weapons program. Once all response actions at a site are complete, the Corps is responsible for monitoring and maintaining cleanup remedies for two years. After that time, the site is transferred back to DOE for continuing any necessary monitoring and maintenance.

As indicated in **Figure 4**, the Corps reports that a total of 49 sites have been identified with contamination requiring response actions. Cleanup is complete at 25 of these sites, and is underway or planned at the remaining 24 sites.[21] Before FY1998, cleanup at these sites was funded out of available funds under DOE's Defense Environmental Restoration and Waste Management Account, and the prior Atomic Energy Defense Activities Account. Since the creation of a dedicated account for FUSRAP and transfer of the program to the Corps in FY1998, Congress has provided approximately $140 million in annual funding.

[21] U.S. Army Corps of Engineers. *Formerly Utilized Sites Remedial Action Program Update*. June 2003. p. 2. For further information, refer to the Army Corps of Engineers website at [http://www.hq.usace.army.mil/cecw/fusrap].

Figure 4. Cleanup Status under the Formerly Utilized Sites Remedial Action Program as of June 2003



Prepared by the Congressional Research Service using data from theU.S. Army Corps of Engineers. *Formerly Utilized Sites Remedial Action Program Update.* June 2003. p. 2.

Authorizing Legislation for FY2004

The House passed the conference agreement on the National Defense Authorization Act for FY2004 (H.R. 1588, H.Rept. 108-354) on November 7, 2003, and the Senate passed it on November 12, 2003. The President signed the bill into law (P.L. 108-136) on November 24, 2003. The law authorizes funding for national defense programs, including defense-related environmental activities administered by DOD and DOE. It also includes provisions that address a variety of environmental issues related to military activities. Among the most controversial of these provisions are those that grant targeted exemptions from certain requirements under the Endangered Species Act and the Marine Mammal Protection Act. Further discussion is provided below.

DOD Cleanup and Other Environmental Activities

The law authorizes specific levels of funding for environmental cleanup at DOD's sites, but as in past years, it does not include line-item accounts for DOD's other environmental activities, including environmental compliance, conservation, pollution prevention, and environmental technology. Funding for these activities is authorized as part of the larger accounts for Operation and Maintenance, Procurement, and Research and Development.

The law authorizes a total of $1.31 billion for the cleanup of past contamination at active military installations and Formerly Used Defense Sites (FUDS), about $40 million more than requested. The increase would be dedicated to increasing the pace of cleanup at FUDS sites. Cleanup at these sites has been criticized for proceeding more slowly than at active installations. There has been interest among the states, local communities, and environmental organizations in accelerating the cleanup in order to ensure public safety. The law authorizes $370 million for environmental cleanup and other activities at base closure sites, the same as requested.

DOE Cleanup of Defense Nuclear Waste Sites

For DOE, the law authorizes a total of $6.81 billion for the cleanup and management of defense nuclear waste, the same as requested. The law authorizes this funding under a new account structure that DOE had proposed. As discussed earlier, DOE had requested that its prior accounts for defense cleanup activities be replaced with two new accounts that would focus funding on efforts to accelerate cleanup and lower costs. Of the total amount, $5.81 billion is authorized under the Defense Site Acceleration Completion Account, and $995 million is authorized under the Defense Environmental Services Account. The conferees expressed their overall support for DOE's cleanup reform initiative, and did not raise any concerns regarding the use of risk-based approaches to speed the cleanup process and reduce costs.

Military Readiness and Environmental Exemptions

Among the most controversial issues in the authorization debate was the adequacy of existing environmental exemptions to preserve military readiness capabilities. In submitting its FY2004 defense authorization legislative proposal to Congress, DOD proposed a Readiness and Range Preservation Initiative (RRPI) in response to its stated concern that environmental requirements have increasingly imposed restrictions on combat training exercises, a key component of military readiness.[22] The initiative proposed targeted exemptions for military readiness activities from certain requirements under five federal environmental laws, including the Clean Air Act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Endangered Species Act, Marine Mammal Protection Act, and Solid Waste Disposal Act.

While DOD provided some evidence of training restrictions at specific installations, the Department did not provide comprehensive data to indicate the extent to which environmental requirements have limited training opportunities and compromised readiness capabilities overall. DOD's request for additional exemption authority without providing that information raised questions among some Members of Congress, the states, and environmental organizations who expressed concern that environmental protection might be compromised unnecessarily.

While most federal environmental laws specify their applicability to federal facilities, Congress included exemptions in several major statutes to ensure that

---

[22] The Administration's legislative proposal and its justification is available at DOD's website: [https://www.denix.osd.mil/denix/Public/Library/Sustain/RRPI/rrpi.html].

military training needs would not be restricted to the extent that national security would be compromised. [23] These exemptions provide the President with the authority to suspend compliance requirements for actions at federal facilities on a case-by-case basis. Such exemptions may be granted if doing so would be either in the "paramount interest of the United States" or in the "interest of national security". Most of these exemptions are limited to one year, but can be renewed. The Safe Drinking Water Act does not impose a time limit on exemptions from compliance. Under the Endangered Species Act, a special committee "shall grant" an exemption if the Secretary of Defense finds it necessary for national security. This committee may place a time limit on an exemption, but it is not required to do so under the law.

DOD argues that existing exemptions are too onerous and time-consuming to obtain on a case-by-case basis due to the vast number of training exercises that it conducts on hundreds of military installations across the country. DOD also argues that the time limitations placed upon most exemptions are not compatible with many training activities, due to their ongoing or recurring nature. Instead, DOD favors modifications to numerous environmental statutes that would provide greater flexibility for conducting combat training and other readiness activities without restriction or delay. However, some states and environmental organizations have opposed such modifications and argue that existing exemptions are sufficient to accommodate combat training needs.

The cumulative effect of environmental requirements on military readiness capabilities is difficult to determine due to the lack of a system to comprehensively track individual cases in which training has been restricted or compromised. In 2002, the General Accounting Office (GAO) found that DOD's readiness reports do not indicate the extent to which environmental requirements restrict combat training activities, and that such reports indicate a high level of readiness overall.[24] However, GAO noted individual instances of environmental restrictions at numerous military installations, and in light of this fact, recommended that DOD's reporting system be improved to more accurately identify problems for training that might be attributed to restrictions imposed by environmental requirements. A more recent GAO report found that environmental restrictions are only one of several factors, including urban growth, that affect DOD's ability to carry out training activities, and that DOD continues to be unable to measure the impact of encroachment on readiness.[25]

---

[23] Specific exemptions from compliance requirements for federal facilities are included in the Clean Air Act [42 USC 7418(b)], Clean Water Act [33 USC 1323(a)], Comprehensive Environmental Response, Compensation, and Liability Act [42 USC 9620(j)], Endangered Species Act [16 USC 1536(j)], Noise Control Act [42 USC 4903], Resource Conservation and Recovery Act [42 USC 6961(a)], and Safe Drinking Water Act [42 USC 300(j)(6)]. For additional information, refer to CRS Report RS21217, *Exemptions for Military Activities in Federal Environmental Laws*, by (name redacted).

[24] General Accounting Office. *Military Training: DOD Needs a Comprehensive Plan to Manage Encroachment on Training Ranges*. GAO-02-727T. May 2002.

[25] General Accounting Office. *Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving*. GAO-03-621T. April 2003.

DOD originally submitted its RRPI to Congress in 2002, requesting a broad exemption from the Migratory Bird Treaty Act, in addition to targeted exemptions from the five other federal environmental laws mentioned above. Congress provided an interim exemption from the Migratory Bird Treaty Act in the National Defense Authorization Act for FY2003 (P.L. 107-314), but did not approve exemptions from the other statutes, which DOD had requested.[26] In enacting P.L. 108-136, Congress approved exemptions from certain requirements under the Endangered Species Act and the Marine Mammal Protection Act after considerable debate. These exemptions are similar to those DOD proposed. While the exemptions from the Marine Mammal Protection Act apply specifically to military readiness activities (and to federal scientific research), those that address the Endangered Species Act apply to military lands in general and are not restricted in their applicability to training or other readiness activities.

While Congress did not approve DOD's proposed changes to the Clean Air Act, CERCLA, or Solid Waste Disposal Act, it did require DOD to submit a report to identify the extent to which these three statutes have affected military readiness. Provisions in P.L. 108-136 that amend the Endangered Species Act and Marine Mammal Protection Act are discussed below.[27] Interest in the issue of whether environmental requirements compromise military readiness will likely continue.

Endangered Species Act. Section 318 of P.L. 108-136 amends the Endangered Species Act to allow military lands to be exempt from being designated as critical habitat, if certain conditions are met. DOD stated that it requested this exemption to clarify the statutory authority for the Fish and Wildlife Service's past practice of not designating critical habitat on military installations, if an Integrated Natural Resources Management Plan (INRMP) providing acceptable species protection is in place.[28]

This practice, which has been controversial, was introduced administratively under the Clinton Administration to allow INRMPs to serve as a substitute for critical habitat designation, when they were deemed to provide adequate protection. These plans integrate the mission needs of a military installation with the management of natural resources, including the protection of endangered and threatened species, but

---

[26] Further discussion of this provision is provided in CRS Report RL31456, *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2003*, p. 18.

[27] Further discussion of Endangered Species Act provisions is provided in CRS Report RL31415, *The Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Background and Current Law*.

[28] As amended in 1997, the Sikes Act (16 U.S.C. 670a) requires DOD to develop an INRMP for each military installation in the United States, on which "significant" natural resources are present. DOD must prepare these plans "in cooperation with" the Fish and Wildlife Service and state fish and wildlife agencies, to reach a "mutual agreement" on the conservation, protection, and management of fish and wildlife resources. However, the law also requires these plans to be consistent with the use of the military installation to ensure the preparedness of the Armed Forces, and "as appropriate and applicable," not to result in the net loss of the installation's capability to support its mission.

give the military mission primacy. Critical habitat, on the other hand, is designated after considering several factors (which can include military readiness needs), and requires consultation for any proposed federal action that might potentially harm a species or its critical habitat.[29] The Endangered Species Act contains minimum requirements a federal action must meet to protect a species and its critical habitat, beyond which the federal agency has flexibility in choosing alternatives.

From the standpoint of military readiness, DOD has argued that INRMPs are more suitable for military installations than critical habitat designations, because they provide greater flexibility to consider training needs when developing measures to protect a species. DOD asked Congress to provide explicit statutory authority to prevent legal challenges that could halt the Fish and Wildlife Service's acceptance of INRMPs *in lieu* of critical habitat designation, and possibly lead to greater restrictions on the use of certain military lands.[30] Environmental organizations opposed the exemption, arguing that sufficient justification had not been provided to warrant it, pointing out that DOD had cited few instances in which critical habitat requirements had restricted critical training exercises. They also expressed concern that INRMPs do not provide the same level of protection as critical habitat, because these plans must subordinate the conservation needs of a species to the mission objectives of a military installation.

The final language that Congress approved under Section 318(a) grants the Secretary of the Interior the authority to exclude military lands from designation as critical habitat, if the Secretary determines "in writing" that the INRMP for such lands provides a "benefit" to the species for which critical habitat is proposed for designation. However, DOD continues to be subject to all other protections provided under the Endangered Species Act. Section 318(a) explicitly states that DOD must continue to comply with consultation requirements and with prohibitions on the taking (i.e. harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to do such activities) of endangered and threatened species.[31] On the other hand, by not designating critical habitat, DOD may be exempt from consultation requirements for actions destroying or adversely

---

[29] Section 7(a)(2) of the Endangered Species Act (16 U.S.C. 1536(a)(2)) requires federal agencies, including DOD, to consult with the Secretary of the Interior or Secretary of Commerce in order to ensure that agency activities would not likely "jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat."

[30] In January 2003, a U.S. District Court in Arizona struck down the Fish and Wildlife Service's interpretation of the Endangered Species Act that had eliminated designations where other protections were provided. This ruling may have affected the analogous practice of excluding military lands from designation. (*Center for Biological Diversity v. Gale Norton, Secretary of the Department of the Interior*. 240 F. Supp. 2d 1090, (D.Az 2003).

[31] Section 9 (16 U.S.C. 1538) prohibits the taking of an endangered or threatened species. In Section 9, "take" is defined to include "harm", which in turn is defined in federal regulation to include "significant habitat modification or degradation" that "kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering" (50 C.F.R. 17.3.).

modifying habitat that would otherwise be designated. This may happen whether or not a species is present, possibly lowering the level of protection for habitat that in some cases may be essential for the recovery of a species in the future.

Lastly, Section 318(b) amends Section 4 of the Endangered Species Act to require the Secretary of the Interior or Secretary of Commerce to consider the "impact on national security," in addition to economic and other impacts, when designating critical habitat. Prior to this amendment, Section 4 already required the consideration of "any other relevant impacts."[32] The Fish and Wildlife Service has used this authority in the past to exempt military lands from designation as critical habitat, based on the impact that designation would have on an installation's functions.[33] Opponents questioned whether amending Section 4 was necessary to require the consideration of the impacts on national security, and consequently, whether doing so would provide any added benefit to help preserve DOD's readiness capabilities.

Marine Mammal Protection Act. Section 319 of P.L. 108-136 makes three changes to the Marine Mammal Protection Act. These changes include a modified definition of "harassment" of marine mammals for certain activities, broad exemption authority for actions that are necessary for "national defense," and specific direction that impacts on military readiness activities are to be considered in reviewing permits for the incidental taking of marine mammals. DOD argued that it needed these changes to prevent restrictions on critical training exercises and to ensure the deployment of the Navy's low-frequency active sonar system.[34] However,

---

[32] Section 4(b)(2) of the Endangered Species Act (16 U.S.C. 1533(b)(2)) specifies the factors that are to be considered when designating critical habitat. It also authorizes the exclusion of lands from designation if the benefits of exclusion outweigh the benefits of inclusion, and if the exclusion of such lands would not result in the extinction of the species.

[33] For example, in October 2002, the Fish and Wildlife Service excluded military lands on Fort Hunter Liggett, located near King City, California, from designation of critical habitat for the purple amole, based partly on the impacts that designation would have had on access to certain lands for training exercises. (67 FR 65414)

[34] The Navy's low frequency active sonar system is designed to detect submarines over great distances with the use of low frequency sound emitted at very high decibels. Environmental organizations have opposed the use of this type of sonar, because they argue that the generation of loud sounds traveling through expansive areas of the ocean could harm large populations of marine mammals and other aquatic species. The Natural Resources Defense Council and several other parties legally challenged the Navy's deployment of its low frequency sonar arguing that it violated the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act. A U.S. District Court issued a preliminary injunction in October 2002 [NRDC v. Evans, 232 F.Supp. 2d. 1003, 1055 (N.D. Cal. 2002)], ordering the Navy not to deploy its sonar system until the parties reach an agreement on the areas in which it could be operated without harming marine life. A final injunction has not been issued to date. Because the plaintiff's case is based on violations of multiple federal laws, it is unclear whether the exemption from the Marine Mammal Protection Act provided in P.L. 108-136 will allow the Navy to resume use of its low frequency sonar system.

these changes were opposed by those who argued that protections for marine mammals would be weakened.

First, Section 319(a) modifies the definition of "harassment" under Section 3(18) of the Marine Mammal Protection Act, as it would expressly apply to military readiness activities, as well as to scientific research activities conducted by or on behalf of the federal government. Harassment of marine mammals is prohibited under the Marine Mammal Protection Act and is among the key protections provided in that statute. The new definition focuses on activities that are thought to be more objectively assessable in terms of their biological impact. The new language defines harassment as any action that "injures" or "has the significant potential to injure" marine mammals, rather than any action that has the "potential to injure."

The new language also defines harassment as any action that "disturbs" or "is likely to disturb" a marine mammal by causing a "disruption of natural behavioral patterns" to the extent that such patterns are "abandoned or significantly altered." The existing definition under Section 3(18), which would still be applicable to activities other than military readiness or federal scientific research, includes actions that have the "potential to disturb" marine mammals by causing a "disruption of behavioral patterns." However, it does not specify that the patterns must be "natural" or result in the behavior being "abandoned or significantly altered" to be considered harassment.

Environmental organizations generally opposed the modified definition of harassment, arguing that it would raise the burden of proof that a military readiness activity would affect a marine mammal, making it more difficult to protect them. DOD countered that the new definition is needed to ensure that military readiness activities are restricted only when scientific evidence demonstrates that such protection is necessary.

Second, Section 319(b) grants the Secretary of Defense broad authority to exempt actions from compliance with any requirement of the Marine Mammal Protection Act for a period of up to two years, if such actions are necessary for "national defense." The Secretary of Defense is required to confer with the Secretary of Commerce and the Secretary of the Interior prior to issuing an exemption, and must notify the House and Senate Armed Services Committees within 30 days. An exemption granted under this authority can be renewed for an additional two years, and may be renewed every two years thereafter, indefinitely. However, the Secretary of Defense must confer with the Secretary of Commerce and the Secretary of the Interior before approving each renewal, and must notify the congressional committees each time an exemption is renewed.

The conference report indicates that the exemption for "national defense" parallels similar exemptions in other environmental laws. However, other statutes provide exemptions for activities that are in the interest of "national security" or that are in the "paramount interest of the United States."[35] Environmental organizations

---

[35] Federal environmental laws that include environmental exemption authority for activities (continued...)

contended that these terms present a higher threshold of proof to justify an exemption. They argued that using the term "national defense" would, in effect, provide broader exemption authority than is present in other statutes, if it were interpreted to mean routine military operations rather than a specific activity critical to security or other national needs. On numerous occasions, DOD has stated that it has not used existing environmental exemption authority because the threshold is too high to justify exemptions for most activities.

Third, Section 319(c) modifies how military readiness and testing activities are to be considered during Department of the Interior or Department of Commerce review of "incidental take" permits, which DOD may need to obtain for such activities. The Marine Mammal Protection Act generally prohibits the taking (i.e., harassing, hunting, capturing, killing, or attempting to engage in such activities) of marine mammals. However, the statute does allow the Secretary of the Interior or the Secretary of Commerce to issue permits that allow the taking of marine mammals under certain circumstances, if it is "incidental" to performing another lawful action and would not adversely affect the "species" or "stock."

When determining whether to issue a permit, the Secretary of the Interior or the Secretary of Commerce must consider the "least practicable adverse impacts" of incidental takings on marine mammals. Under the new requirements, the Secretary of the Interior or the Secretary of Commerce also must consider impacts on the "effectiveness of the military readiness activity," in consultation with DOD, when deciding whether to issue a permit. The new permitting requirements also exempt DOD from complying with current standards for evaluating impact based on "specified geographical regions," or "small numbers" of marine mammals for its readiness activities.

Appropriations for FY2004

In addition to authorizing funding, the first session of the 108th Congress has completed consideration of the three appropriations bills that fund the defense-related environmental activities administered by DOD and DOE. Congress increased funding for cleanup at Formerly Used Defense Sites (FUDS), but appropriated the same amount as requested for cleanup at active military installations and base closure sites. Congress provided less funding than requested for DOE's cleanup of defense nuclear waste sites, due to concern about the agency's progress in carrying out its cleanup reform initiative. Final FY2004 appropriations for defense-related environmental activities, and proposed rescissions that could reduce these appropriations, are discussed below.

---

[35] (...continued)
that are in the "paramount interest of the United States" include Clean Air Act [42 U.S.C. 7418(b)], Clean Water Act [33 U.S.C. 1323(a)], Noise Control Act [42 U.S.C. 4903], Resource Conservation and Recovery Act [42 U.S.C. 6961(a)], and Safe Drinking Water Act [42 U.S.C. 300j-6]. Those that use the term "national security"in relation to exemption authority include Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9620(j)] and Endangered Species Act [16 U.S.C. 1536(j)].

Department of Defense

The House passed the conference agreement on the Department of Defense Appropriations Act for FY2004 (H.R. 2658, H.Rept. 108-283) on September 24, 2003, and the Senate passed it on September 25, 2003. The President signed the bill into law (P.L. 108-87) on September 30, 2003. The law appropriated specific funding levels for environmental cleanup activities, but as in defense authorization legislation, there are no comprehensive line-item accounts for DOD's other environmental activities, including environmental compliance, conservation, pollution prevention, and environmental technology. As in past years, DOD will allocate funding for these activities from funds appropriated to the accounts for Operation and Maintenance, Procurement, and Research and Development. The final funding allocations for these activities will be indicated in the Department's *Operation and Maintenance Overview for FY2005*, which is expected to be released in the spring of 2004.

The law appropriated a total of $1.35 billion under the Defense Environmental Restoration Accounts for the cleanup of past contamination at active military installations and FUDS sites. The appropriation is $32 million more than authorized and $72 million more than requested. The increase was devoted to accelerating the pace of cleanup at FUDS sites. Regarding cleanup in general, the law limits the use of "indefinite delivery/indefinite quantity" contracts to no more than 35% of the total funding obligated for environmental cleanup projects in FY2004. Under this type of contract, funds are awarded for an indefinite number of services for an indefinite period of time. They are generally more suitable for complex cleanup projects addressing extensive contamination that may present unforseen needs and require more time to complete than originally estimated. There have been ongoing concerns in Congress that the cost and scope of these contracts have become so large that they are difficult to manage. In recent years, Congress has included provisions in DOD's appropriations bill to limit their use.

The law provided another $10 million for the mitigation of environmental impacts resulting from military activities on Indian lands. Regarding specific Indian lands, conference report language directs the Secretary of the Navy to submit a report to Congress on the impact of naval aircraft live ordnance training on the lands of the Walker River Tribe in Nevada. The Navy has established a training area on these lands in support of the Fallon Naval Air Station. The Navy is directed to estimate the fair market value of the land, and the costs necessary to clean up contamination resulting from military training exercises.

In addition to the above funding, the law appropriated approximately $18 million for federal payment to the Kaho'olawe Island Conveyance, Remediation, and Environmental Restoration Trust Fund. DOD ceased its use of Kaho'olawe Island as a training range in 1995, and subsequently returned the land to the State of Hawaii. Congress established the trust fund primarily to support the removal of unexploded ordnance and the cleanup of munitions-related contamination, in order to allow safe reuse of the land by state. The FY2003 funding level was $75 million. The Administration had not planned any new activities at the site for FY2004, and therefore had not requested an appropriation. The appropriation of $18 million enacted for FY2004 originated in the Senate, but neither bill nor report language

commented on how the funding was to be used. Congress did not provide a specific authorization for this appropriation in enacting the National Defense Authorization Act for FY2004.

Military Construction

The House passed the conference agreement on the Military Construction Appropriations Act for FY2004 (H.R. 2559, H.Rept. 108-342) on November 5, 2003, and the Senate passed it on November 12, 2003. The President signed the bill into law (P.L. 108-132) on November 22, 2003. The law appropriated approximately $370 million for the Base Realignment and Closure Account, the same as authorized and as requested. This account funds all activities at military bases that have been designed for closure, including the cleanup of environmental contamination in order to prepare these properties for transfer to other uses. While neither the law nor conference report language specified how much of this funding would be reserved for cleanup, DOD had planned a program level of $412 million for FY2004. The amount of funds beyond that provided in the FY2004 appropriation to support this program level would come from unobligated balances from prior years.

In addition to addressing cleanup at base closure sites, Section 125 of the law provides greater flexibility for the payment of environmental cleanup costs associated with the upkeep of certain types of military housing. A similar provision was included in the FY2003 appropriations bill. The provision limits the cost of maintaining and repairing general and flag officer quarters to $35,000 per unit annually, unless Congress is notified 30 days in advance that costs will exceed this amount. However, if the additional costs are solely for environmental cleanup activities that could not be reasonably anticipated at the time of the budget submission, the law authorizes DOD to notify Congress of the additional costs "after-the-fact." Providing an exception from early notification requirements for unforseen environmental costs could help to ensure that cost limitations do not prevent DOD from taking timely action to comply with requirements to remove hazardous materials or reduce the threat of exposure.

Energy and Water Development

The House and Senate passed the conference agreement on the Energy and Water Development Appropriations Act for FY2004 (H.R. 2754, H.Rept. 108-357) on November 18, 2003. The President signed the bill into law (P.L. 108-137) on December 1, 2003. The law appropriated a total of $6.64 billion for DOE's cleanup and management of defense nuclear waste, nearly $168 million less than authorized and requested. The law also included a rescission of $15 million in unobligated funds that were appropriated under the former Defense Environmental Management Privatization Account in prior years.

The law provided the above funding for FY2004 under two new accounts. Of the total appropriation, $5.65 billion was allocated to the Defense Site Acceleration Completion Account, and $991 million was allocated to the Defense Environmental Services Account. As discussed earlier, these two accounts were authorized in P.L. 108-87 at the request of DOE, as part of its cleanup reform initiative to speed cleanup

and lower costs. While the conferees expressed their overall support for this initiative, they indicated that funding was reduced below the request and the authorized amount, due to concern that DOE has not reached agreement with EPA and the states on its plans to implement cleanup reforms at all of its sites.

The conference report also reiterated concerns expressed by the House and Senate about inaccurate estimates of cleanup costs and scheduling of certain projects, particularly the Hanford Waste Treatment and Immobilization Plant.[36] DOE had recently understated the estimated cost of this project by 33%. The House and Senate had expressed concerns that this sharp increase may be an indicator that cost estimates of cleanup acceleration projects at other sites also could be understated. In response, the conference agreement directed DOE to transfer $2.5 million of its Environmental Management funds to the Department's Office of Management, Budget, and Evaluation for increased oversight of accelerated cleanup projects. The Senate had recommended $5 million for this purpose.

Another issue noted in the conference agreement is the possible need for amendments to existing law to allow certain cleanup acceleration projects to proceed. To examine this need, DOE is directed to prepare a report to Congress within 60 days of enactment on potential statutory restrictions that may delay or prohibit cleanup acceleration projects that are currently planned. The conference agreement also directs DOE to submit a legislative proposal requesting these changes as part of the Administration's FY2005 budget submission to Congress.

The law appropriated another $47 million for a new Office of Legacy Management to administer DOE's long-term stewardship responsibilities, once cleanup actions are complete. Of this amount, $19 million was allocated to defense sites, and the remaining $28 million to non-defense sites. The new office will consolidate DOE's long-term stewardship activities that it previously conducted under multiple program elements. The FY2004 appropriation is the same as requested and is slightly more than the FY2003 funding level for these activities. The primary function of the new office will be to continue DOE's assessment of the actions and funding that will be necessary to ensure that its planned cleanup remedies continue to be effective in the future. These planning assumptions are based on a time frame of 150 years. The House had raised questions about long-term stewardship needs, and directed DOE to consider these needs when implementing

---

[36] Hanford, located near Richland, Washington, is the largest of the original nuclear weapons production sites in the United States. The site encompasses a large area of 586 square miles, a portion of which borders the Columbia River. Substantial quantities of radioactive and other hazardous wastes are present on the site, including over 50 million gallons of high-level radioactive and chemical liquid wastes stored in 177 underground tanks. DOE reports that 67 of these tanks are known or suspected to have leaked. Among the most pressing cleanup issues is whether planned response actions will prevent this waste from migrating into the Columbia River. If this were to occur, it could pose a threat to drinking water supplies, agricultural irrigation, and fish and wildlife populations downstream in the states of Washington and Oregon, depending on the concentration of contaminants. For further background information and the status of cleanup activities at Hanford, refer to DOE's website at [http://www.hanford.gov].

accelerated cleanup plans "to ensure that long-term stewardship is not used as a substitute for complete and effective site cleanup."

As discussed earlier, some have expressed concern that DOE's cleanup acceleration strategy may result in more waste being left on site than would be allowed under original cleanup agreements. If more waste were permitted to remain, rather than being removed, the stewardship costs at such sites would likely rise as a result of the need for additional measures to ensure that the waste continues to be safely contained in future years to prevent exposure. In response to this issue, the House report indicated that the Performance Management Plan for each cleanup site should identify the resources that would be necessary for fulfilling DOE's responsibilities to manage the legacy of contained waste that is left behind after cleanup response actions are complete.

In addition to cleanup at DOE's defense sites, the law provided $140 million for the Formerly Utilized Sites Remedial Action Program (FUSRAP), the same as requested and about the same as enacted for FY2003. This program cleans up sites contaminated with low-level radiation from the processing and storage of uranium and thorium ores during the early years of the U.S. nuclear weapons program. As discussed earlier, this program was administered by DOE as part of its cleanup of the former defense nuclear weapons complex, but was transferred to the Army Corps of Engineers in FY1998 due to congressional concern that DOE was proceeding too slowly in addressing contamination at these sites.

Rescissions

As passed by the House, the conference agreement on the Consolidated Appropriations Act for FY2004 (H.R. 2673, H.Rept. 108-401) includes a rescission of DOD appropriations that could reduce the funding levels that have been enacted for cleanup and other environmental activities at military installations.[37] Section 168(a) of Division H of the conference agreement would rescind $1.8 billion in FY2004 appropriations for DOD, and in unobligated balances from two prior year defense appropriations acts. The bill would direct the Office of Management and Budget (OMB) to consult with the House and Senate Appropriations Committees and the Secretary of Defense, in order to determine the amounts that would be rescinded from each account that would be reduced. At this time, it is uncertain whether this rescission would affect the accounts that fund cleanup and other environmental activities on military installations. The rescission would take effect no later than September 30, 2004.

The conference agreement also would require an across-the-board rescission that could reduce funding for DOE's cleanup of defense nuclear waste sites. Section 168(b) of Division H would require an across-the-board rescission of 0.59% in all appropriations for FY2004 that were not provided under the Department of Defense Appropriations Act, the Military Construction Appropriations Act, or any supplemental appropriations act. Section 168(c) would direct OMB to apply the

---

[37] Further discussion of the proposed rescission is provided in CRS Report RS21684, *FY2004 Consolidated Appropriations Act: Reference Guide*.

0.59% rescission proportionately to each discretionary account and to each activity funded within each account. If enacted, this rescission could reduce the appropriation of $6.64 billion for DOE's cleanup of defense nuclear waste sites by almost $40 million.

Selected References

Department of Defense. *Defense Environmental Quality Program Annual Report to Congress for FY2001*. September 2002.

Department of Defense. *Defense Environmental Restoration Program Annual Report to Congress for FY2002.* April 2003.

Department of Defense. *Operation and Maintenance Overview for FY2004*. April 2003.

Department of Energy. *A Review of the Environmental Management Program.* February 2002.

General Accounting Office. *Waste Cleanup: Status and Implications of DOE's Compliance Agreements*. GAO-02-567. May 2002.

General Accounting Office. *Military Training: DOD Needs a Comprehensive Plan to Manage Encroachment on Training Ranges*. GAO-02-727T. May 2002.