

FILED

JUL 17 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION AT DAYTON, OHIO

Clifford W. Rice, Clerk
222 West Third Street
Dayton, OH 45402

CITIZENS FOR THE RESPONSIBLE :
DESTRUCTION OF CHEMICAL WEAPONS :
OF THE MIAMI VALLEY :
7624 McLin Drive :
Dayton, OH 45418, :

Case No. **C-3-03-258**
Judge **WALTER HERBERT RICE**

ESTHER R. MILLER :
136 West End Avenue :
Dayton, OH 45427, and, :

BARBARA FISHER :
43 West End Avenue :
Dayton, OH 45427 :

Plaintiffs, :

vs. :

DONALD RUMSFELD, in his official :
capacity as Secretary of the United States :
Department of Defense :
Office of the Secretary :
1000 Defense Pentagon :
Washington, D.C. 20301-1000, :

R.L. BROWNLEE, in his official capacity as acting :
Secretary of the Department of the U. S. Army :
1500 Army Pentagon :
Washington, D.C. 20310-1500, and, :

MICHAEL A. PARKER, in his official :
capacity as Director, U. S. Army, :
Chemical Materials Agency :
5183 Blackhawk Road :
Aberdeen Proving Ground, MD 21010-5424 :

Defendants. :

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This Complaint challenges Defendants' unlawful decision to treat partially treated VX nerve agent at the Perma-Fix of Dayton, Inc. ("Perma-Fix of Dayton") facility, located in Drexel, Jefferson Township, Ohio. Defendants have failed to comply with the National Environmental Policy Act ("NEPA") in that the final Environmental Impact Statement ("FEIS") prepared by the federal Defendants did not fully and adequately consider the environmental impacts of this project, specifically, it did not examine any of the environmental impacts on the Montgomery County, Ohio area, and did not seek input and comment from officials and the public in Ohio. Accordingly, this Court should enjoin and remand Defendants' action until such time as a new or supplemental environmental impact statement that conforms to NEPA and its implementing regulations is completed.
2. The U. S. Army presently stores 1,690 ton containers containing 1,265 tons of VX nerve agent at the Newport Chemical Depot ("NCD") outside of Newport, Indiana. This nerve agent is among the most lethal chemical weapons in the U.S. chemical weapons arsenal. The agent was manufactured at the Newport weapons facility in the 1960's and has been stored safely at that facility ever since. The Newport facility is a highly secure, 7,000 acre compound located in rural Indiana, near the Illinois border. The closest population concentration is 2.6 miles away at Newport, Indiana, where 578 people live. The NCD is approximately 200 miles from Montgomery County, Ohio.
3. Pursuant to P.L. 99-145, P.L. 102-484 and the Chemical Weapons Convention Treaty, the U. S. Army is undertaking a program to destroy this stockpile of VX. The initial plan for this action involved complete destruction of the agent using chemical neutralization followed by super critical water oxidation ("SCWO"), at the Newport Chemical Depot. In December,

2002, however, a decision was made to subcontract what was to be the SCWO part of this action to Perma-Fix of Dayton to be performed at its facility in Drexel, Jefferson Township, Montgomery County, Ohio, using a different process. This process and the impact on the community and environment surrounding Perma-Fix of Dayton have never been assessed as part of any NEPA process related to this action.

JURISDICTION AND VENUE

4. This action arises under the National Environmental Policy Act of 1969, as amended (“NEPA”), 42 U.S.C. § 4321 et seq., its implementing regulations, adopted by the Council on Environmental Quality (“CEQ”) and applicable to all agencies (“CEQ NEPA Regulations”), 40 C.F.R. Parts 1500-1508, the Rules for Environmental Analysis of Army Actions, 32 C.F.R. Part 651, and Public Law 99-145 (Nov. 8, 1985), Public Law 102-484 (Oct. 23, 1992), and the Equal Access to Justice Act, 28 U.S.C. § 2412. Judicial review is sought pursuant to §10 of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, authorizing judicial review of all agency actions. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and § 1361, and may grant declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.
5. Venue is proper in this Court under 28 U.S.C. § 1391(e).

DESCRIPTION OF PARTIES

6. Plaintiff, Citizens for the Responsible Destruction of Chemical Weapons (“CRDCW”) is a non-profit, unincorporated, citizens organization, formed in late 2002 by residents of the community which surrounds Perma-Fix of Dayton. The group’s regular meeting place has been at the Radcliff Middle School located at 120 Knox Avenue, in Drexel. CRDCW was formed in order to protect public health and the environment by opposing the Army’s plan

to ship partially treated VX nerve agent to Perma-Fix of Dayton and by working to reduce the environmental and human health impacts which the existing operations of Perma-Fix of Dayton have on the surrounding community.

7. Members of CRDCW live in the community which surrounds Perma-Fix of Dayton. Many of them own homes there. Many are raising children there. Many are able to smell emissions from Perma-Fix of Dayton's existing operations. They will be injured by air emissions from the processing of partially treated VX nerve agent at Perma Fix, and subject to the danger of accidents involving the transportation of this material near their homes and the treatment of it near their homes.
8. Plaintiff, Esther R. Miller, lives at 136 West End Avenue, Dayton, Ohio 45427, immediately adjacent to the Perma-Fix of Dayton facility. She routinely smells chemical emissions from Perma-Fix of Dayton and has repeatedly complained about those emissions to regulatory authorities. She will be injured by air emissions from the processing of partially treated VX nerve agent at Perma Fix, and subject to the danger of accidents involving the transportation of this material near her home and the treatment of it near her home. She is a member of CRDCW.
9. Plaintiff, Barbara Fisher lives at 43 West End Avenue, Dayton, Ohio 45427 one block from the Perma-Fix of Dayton facility. She has lived there for 24 years. She also routinely smells chemical emissions from the Perma-Fix of Dayton facility and has repeatedly complained to regulatory authorities. She will be injured by air emissions from the processing of partially treated VX nerve agent at Perma Fix, and subject to the danger of accidents involving the transportation of this material near her home and the treatment of it near her home. She is a member of CRDCW.

10. Defendant, Donald Rumsfeld is Secretary of the United States Department of Defense. He is sued in his official capacity as the Chief Officer of the Department charged with overseeing the proper administration of Public Law 99-145, Public Law 102-484 and NEPA.
11. Defendant, R.L. Brownlee, is acting Secretary of the United States Army. He is sued in his official capacity as the Chief Officer of the Department of Defense department, the Army, which has responsibility for the chemical weapons stockpile at Newport, Indiana, the plan for the destruction of which is the subject of this complaint. The U.S. Army has adopted rules, 32 C.F.R. Part 651, which, in conjunction with the CEQ Rules, govern the Army's compliance with NEPA.
12. Defendant, Michael A. Parker, is sued in his official capacity as Director of the U.S. Army Chemical Materials Agency, the agency which has direct responsibility for the destruction of the chemical weapons material stockpile at Newport Indiana. This agency is the successor to the Program Manager for Chemical Demilitarization ("PMCD") and has responsibility for compliance with NEPA with regard to that action.

STATEMENT OF FACTS

13. The Department of Defense Authorization Act of 1986, P.L. 99-145, Section 1412 (Nov. 8, 1985), 50 U.S.C. § 1521, committed the U.S. Government to the destruction of its stockpile of lethal chemical agents and munitions. The Secretary of Defense was required, by the Law, to carry out that destruction with "maximum protection for the environment, [and] the general public" and to do so at "facilities designed solely" for that purpose. 50 U.S.C. § 1521(c).

14. Pursuant to this law, the Department of Defense set out to develop a plan for the destruction of these materials, which are stored at nine (9) facilities throughout the country. The Newport Chemical Depot is one of those facilities. During the development of those plans concerns surfaced that the Army was going to rely exclusively on incineration to destroy the material. In response, Congress included in the National Defense Authorization Act of 1993, P.L. 102-484, Section 174 (Oct. 23, 1992), 50 U.S.C. § 1521, the requirement that the Secretary of the Army evaluate and, if appropriate, use alternative technologies to destroy the material at certain facilities, including Newport. The law specified that the environmental protection and dedicated facility requirements of the earlier law would apply. P.L. 102-484, Sec. 174(b).
15. Soon thereafter, the United States signed the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the Chemical Weapons Convention Treaty - "CWC"), www.defenselink.mil/acq/acic/treaties/cwc, which went into effect on April 29, 1997. The CWC requires the destruction of "chemical weapons," defined as certain listed toxic chemicals and their precursors. The list includes VX nerve agent and three (3) VX precursors, Thiol amine, EMPA, and MPA, which are found in VX hydrolysate. Together these three (3) precursors make up 30-50% of the weight of VX hydrolysate:
16. Pursuant to the above laws and treaty, the Army formulated a plan to destroy the VX nerve agent stored at the Chemical Depot in Newport, Indiana using a chemical neutralization process at the Newport facility. Chemical neutralization of VX nerve agent is a two-step process. The first step changes the VX nerve agent to VX hydrolysate, a highly dangerous substance which contains the listed chemical precursors of VX nerve agent. The second step uses further chemical processes to destroy the listed chemicals in the VX hydrolysate and

to reduce the toxicity of that substance so that it can be disposed of in a public treatment facility.

17. On June 3, 1997, the Army began the process of preparing a Final Environmental Impact Statement (“FEIS”) to assess the potential environmental impacts of construction and operation of a facility at the Newport Chemical Depot (“NECD”) to “pilot test” chemical neutralization followed by supercritical water oxidation (“SCWO”) as a potential disposal technology for the bulk VX stored at that site (FEIS p. 1-1).
18. The “pilot test” which was assessed in the FEIS involved the impacts which might result from the destruction of 615 ton containers of VX, almost one-third (1/3) of the total amount of VX stored at the facility (FEIS p. 2-9). According to the FEIS, “any use of the proposed NECDF [Newport Chemical Disposal Facility] beyond pilot testing is beyond the scope of this EIS and would be addressed in future NEPA review and documentation.” (FEIS p.1-7).
19. The FEIS for this action was issued in December, 1998. (**Attached hereto as Exhibit 1**).
20. On February 3, 1999, the Army issued a Record of Decision (“ROD”) based on this FEIS to proceed with the proposal “to demonstrate the feasibility of using the neutralization/SCWO disposal technology to destroy agent VX at NECD”. (ROD p. 3) (**Attached hereto as Exhibit 2**).
21. In July, 2002, the Army issued a Final Environmental Assessment (“EA”) purporting to supplement the FEIS previously prepared. The EA compares the process evaluated in the FEIS with an accelerated process for the destruction of the entire stockpile at Newport and looks at the possible transport of the VX hydrolysate off-site to a commercial Treatment, Storage and Disposal Facility (‘TSDF’). The EA does not evaluate any of the technologies which could be used at a commercial off-site TSDF to treat the VX hydrolysate, nor does

it evaluate any particular TSDF or the impacts on any community surrounding a particular TSDF. (EA p. 1-2) The EA recognizes that some impacts that would be avoided or reduced at NECD could be transferred to a receiving TSDF. (EA p. 1-3) None-the-less, the analysis did not extend to the TSDF. (**Attached hereto as Exhibit 3**).

22. On October 28, 2002, the Army issued a Final Finding of No Significant Impact (“FONSI”) based on the EA, finding that, compared to the project as originally assessed in the FEIS, the project with the proposed changes would have no significant adverse impacts on the area, land, ecological resources, water, archaeological and historic resources, socioeconomic resources, and people “living near the project site” in Indiana. (FONSI p. 2) (**Attached hereto as Exhibit 4**).
23. At the time the EA was conducted, Perma-Fix of Dayton had not been chosen as the TSDF that would conduct the second step in the Army’s VX destruction project.
24. The EIS prepared for this action provides a detailed description of the environment in the area surrounding the Newport facility. It contains no description of the area surrounding the Perma-Fix of Dayton facility in Montgomery County, Ohio.
25. The EIS prepared for this action includes an assessment of impacts on the environment surrounding the Newport facility. It includes no assessment of the impacts on the area surrounding Perma-Fix of Dayton in Montgomery County, Ohio.
26. The EIS makes an assessment of the likely environmental effects of using the SCWO process for the second step in VX destruction. It makes no assessment of the likely environmental effects using bio-remediation for the second step in VX destruction.

27. The EIS makes an assessment of the likely environmental effects of using a new custom built facility in Newport for this action. It makes no assessment of the likely environmental effects of using an existing facility, Perma-Fix of Dayton, with a particular environmental history for this action.
28. The EIS prepared for this action assesses whether it will have a disproportionate impact on minority or low- income populations at the Newport site, it contains no such assessment of the Perma-fix of Dayton site.
29. The process of preparing the EIS for this action included, in the Indiana and Illinois area surrounding the Newport facility, publicizing the EIS process, seeking public and official input and incorporating and responding to that input. No such efforts were made in the community surrounding Perma-Fix of Dayton. Public meetings were held in Indiana as part of the EIS process, no such meetings have been held in Ohio.
30. The EIS considered and included mitigating measures related to the Newport facility in Indiana, the process to be used there, and the community surrounding that facility. No consideration was made of mitigation measures for the Perma-Fix of Dayton facility in Ohio, the different process to be used there, or the community surrounding that facility.
31. The EA prepared for this action is a much shorter document than the EIS. It includes a brief description of the environment in the area surrounding the Newport facility. It contains no description of the area surrounding the Perma-Fix of Dayton facility.
32. The EA makes a cursory assessment of the likely environmental effects of this action on the Newport area. It makes no assessment of the likely environmental effects in Montgomery County, Ohio nor of the effects from using an existing facility, Perma-Fix of Dayton, with a particular environmental history for this action.

33. The EA makes no assessment of the likely environmental effects of using bio-remediation for the second step in VX destruction.
34. The EA contains no consideration of mitigation measures for the Perma-Fix of Dayton facility, the process to be used there, or the community surrounding that facility.
35. The EA prepared for this action briefly assesses whether the proposed action will have a disproportionate impact on minority and low-income populations in the area surrounding the Newport Depot. It contains no such assessment of the area surrounding Perma-Fix of Dayton in Montgomery County, Ohio.
36. The EA assesses the State Route in Indiana (SR 63) which connects NECD to interstate highways. It discusses the width of the road and shoulders, the design of the road, and the intersection with the local road leading into NECD. Traffic counts and traffic capacity are discussed. No such analysis is performed for any of the roads in Ohio which the VX Hydrolysate will need to travel on in order to be trucked to Perma-Fix of Dayton. Those roads include West Third Street in Jefferson Township and the narrow residential streets which lead from West Third Street to Perma-Fix of Dayton.
37. The process of preparing the EA and FONSI for this action included, in the Indiana and Illinois area surrounding the Newport facility, publicizing the EA process, actively seeking public and official input and incorporating and responding to that input. No such efforts were made in the community surrounding Perma-Fix of Dayton. At least two (2) public meetings were held in Newport Indiana as part of that process. No similar meetings were held in the community near Perma-Fix of Dayton.
38. The Army has contracted with a private firm Parsons, to carry out parts of the project to destroy the VX nerve agent stored at NECD. Effective December 21, 2002, Parsons contracted with Perma-Fix of Dayton to perform the second step in VX destruction at its

facility in Drexel, Jefferson Township, Montgomery County, Ohio. All of the funds for this subcontract come from the Army, the subcontract is comprised largely of a U.S. Army endorsed statement of work, and the Army participated in the selection of Perma-Fix of Dayton as the subcontractor. Perma-Fix of Dayton is an existing facility, which was designed for the treatment of various waste materials. Its existing bioreactors will be used to treat the VX Hydrolysate. Pursuant to this subcontract, the VX Hydrolysate will be trucked approximately 200 miles from NECD to Perma-Fix of Dayton.

39. This subcontract, between Parsons and Perma-Fix of Dayton provides that the work may be contingent upon the establishment and maintenance of public acceptance throughout the period of performance.
40. Perma-Fix of Dayton, however, has not established nor maintained public acceptance. The community in the area surrounding Perma-Fix of Dayton is united in its opposition to the plan to bring VX hydrolysate to that facility. The trustees for the governing jurisdiction, Jefferson Township, unanimously passed a resolution opposing those plans on April 1, 2002. Montgomery County Commissioners passed a similar resolution on June 10, 2003. Thirteen (13) other surrounding jurisdictions - Bellbrook, Clayton, Dayton, German Township, Harrison Township, Jackson Township, Miami Township, Miamisburg, Moraine, New Lebanon, Perry Township, Trotwood, and West Carrollton - have also passed resolutions opposing the plan to treat VX hydrolysate at Perma-Fix of Dayton. This is in stark contrast to the community surrounding the Newport Chemical Depot which supports conducting both steps of VX destruction on site in Newport. The FEIS reflects the support in Indiana and county commissioners from that area have recently reconfirmed that support.

41. Neither the FEIS or EA engage in a detailed assessment of the dangers associated with exposure to VX hydrolysate during routine processing or from an accidental spill. Nonetheless, the EA firmly establishes that such dangers do exist. The EA finds that:
- (A) A fire associated with a tank of VX hydrolysate could result in toxic material being carried off of the 7,000 acre (10.934 square miles) Newport Depot. In the situation evaluated at Newport, the EA found that risk to the general population from such a fire would be limited since the distance to the nearest concentration of population was 2 to 3 miles, and because trained response forces were present. (EA p. 3-27, 4-31).
 - (B) The chance of accidents increases during processing as the material is handled. Response teams, trained and equipped for these events, will need to be able to respond promptly to minimize the adverse impact of any release. (EA p. 3-27).
 - (C) Because of caustic and toxic properties of hydrolysate, an accidental spill during transport could cause disruption and possibly require an evacuation. (EA p. 3-20).
 - (D) A fire involving hydrolysate would create a difficult situation requiring firefighters to be protected against any toxic hazards as well as the fire. (EA p. 3-26).
 - (E) A transportation accident involving the release of VX hydrolysate into a body of water could result in significant impacts. (EA p. 3-9).
 - (F) To store VX hydrolysate safely weather and temperature changes must be tracked. (EA p. 3-5).
 - (G) Hydrolysate storage and treatment leads to emissions of toxic air pollutants

but no estimates are available on the specific types and quantities of toxic organic compounds that would be released. (EA p. 3-5).

42. In addition, the Material Safety Data Sheet (“MSDS”) for VX hydrolysate February 25, 2003, establishes the dangers of exposure. For instance, the MSDS states that inhalation can lead to “possible coma”. (**Attached hereto as Exhibit 5**).
43. While it is recognized that VX hydrolysate is a substance which poses a significant danger to human health and the environment, much of the information needed to fully evaluate possible adverse effects is incomplete or unavailable. For example, according to the February 25, 2003, MSDS for VX hydrolysate, this mixture is “military unique” and there is no established toxicity threshold limit value nor is there a permissible exposure limit for it. VX hydrolysate contains a number of hazardous organic constituents for which there are also no known threshold limit values. In addition, even much of the basic physical data about VX hydrolysate, needed to respond to spills, fires, and other accidents, is not available.
44. This incomplete information is relevant to reasonably foreseeable significant impacts and is essential to a reasoned choice among alternatives yet the information was not included in the EIS, the agency did not make the required effort to obtain it, nor did the EIS contain a statement of its incompleteness, a statement of relevance, or a summary and evaluation of other alternative evidence as required by 40 C.F.R. § 1502.22.
45. The area in Ohio, which will be affected by this project, could not be more different from the area in Indiana, which was examined in this NEPA process to date. The area in Indiana is rural, with the closest population center 2.6 miles away at Newport, where 578 people live. Newport is 97.6% white and has no African American residents. Vermillion County, which contains Newport is 98.4% white. The poverty rate for Newport is 9.1% and for

Vermillion County it is 9.5%. The community where the Perma-Fix of Dayton facility is located is known as Drexel. Drexel is in Jefferson Township, Montgomery County, on the western boundary of the City of Dayton, and is an urban neighborhood. The Perma-Fix of Dayton facility is located in the middle of the Drexel neighborhood. Houses line the streets, which directly abut the facility. Truck traffic to this facility must travel through this neighborhood on narrow residential streets, which have no curbs or sidewalks. The area is served by a volunteer fire department. Drexel contains day care centers, nursing homes, churches, and schools, including a school for people with multiple disabilities. It has an extremely high rate of poverty and a large percentage of African American households. According to the 2000 census, 2,057 people live in Drexel. 33.5% of the families in Drexel have incomes at or below poverty. This compares to 7.8% for the State of Ohio, 35.1% of the population in Drexel is African American, compared to 11.5% in the State. The area surrounding Drexel is densely populated and has an even higher percentage of African American households, than does Drexel.

46. The Perma-Fix of Dayton facility itself has a history of environmental problems, including numerous instances when emissions and strong odors from the facility have made normal life in the neighborhood impossible and have caused burning eyes, nausea and headaches. The Regional Air Pollution Control Agency (“RAPCA”), which is responsible for air pollution control in the Dayton area, has documented over 150 instances of emissions between July, 2001, and the present and has attributed many of them to the facility’s bioreactors which are to be used to process the VX hydrolysate. Neighbors of the facility have made dozens of written and verbal complaints against this facility.

47. On January 10, 2002 RAPCA issued a Notice of Violation (“NOV”) to Perma-Fix of Dayton for failure to comply with Administrative Findings and Orders related to nuisance violations and the need for air pollution permits for its air emissions sources, including the bioreactors. That NOV remains pending and unresolved.
48. In 2002 the Ohio EPA found that Perma-Fix of Dayton was in violation of hazardous waste storage requirements and had failed to pay certain treatment fees. In responding to the Ohio EPA in May and June 2002, the company maintained that it did not have the financial resources to fully pay the penalties and fees assessed.
49. There are presently no state or federal air pollutant permits for the bioreactors which will process the VX hydrolysate. The air emissions from them are not subject to any enforceable limits on the amount or type of air emission which can come from them.
50. There are presently no federal or state hazardous waste (Resource Conservation and Recovery Act) permits which govern the Perma-Fix of Dayton waste processing operation which will be used to process the VX hydrolysate. The Ohio EPA has stated that Perma-Fix of Dayton needs no such permits now or once it begins to process the VX hydrolysate because this process at the Perma-Fix of Dayton facility is exempt from such requirement due to the waste water exemption. (Ohio Administrative Code 3745-54-01(C)(5)).
51. The permit which governs the liquid effluent which Perma-Fix of Dayton releases to the Montgomery County Public Treatment Works is issued by Montgomery County. The permit sets limitations on only 18 substances. VX hydrolysate and its constituents, Thiol amine, EMPA, MPA, and EA2192, are not among the substances which are controlled by this permit. The public treatment works discharges to the Great Miami River.

52. Each of the Army's chemical weapons facilities has a different schedule for its operations to destroy chemical agents. For example, at the Blue Grass Army Depot in Kentucky, the Army, in June, 2003, signed a contract which provides for the destruction of the chemical weapons stored there over a 12 to 15 year period.

APPLICABLE LAWS

53. The National Environmental Policy Act §102(2)(C) 42 U.S.C. § 4322(2)(C), requires "responsible [federal] officials" to prepare environmental impact statements ("EIS") on proposals for legislation and other "major Federal actions significantly affecting the quality of the human environment." It is this section and this requirement which are the heart of this case. As described here in, implementation by the Army of its plan to carry out both steps in the destruction of the VX chemical warfare agent stored at the Newport Chemical Depot, is a "major Federal action" subject to the EIS requirement. Under NEPA, an agency must prepare an EIS when an "action" *may* have a significant environmental effect. 40 C.F.R. § 1508.3. In this instance the Army did prepare an EIS for its proposed action to do both steps of VX destruction in Newport, Indiana, but that EIS is legally inadequate for the action which the Army now plans to undertake. The action which the Army now proposes to undertake, which uses Perma-Fix of Dayton for the second step in VX destruction, was never assessed in the EIS.
54. The National Environmental Policy Act establishes a national policy to "prevent or eliminate damage to the environment and biosphere." NEPA § 2, 42 U.S.C. § 4321. The Act recognizes "the critical importance of restoring and maintaining environmental quality," declares that the federal government has a continuing responsibility to use "all practicable means" to minimize environmental degradation, and directs that "to the fullest extent

possible . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act.” NEPA §§101(a), 102(1), 42 U.S.C. §§ 4331(a), 4332(1). The Act further recognizes the right of each person to enjoy a healthful environment. NEPA § 101(c), 42 U.S.C. § 4331(c).

55. P.L. 99-145, Section 1412, 50 U.S.C. § 1521, the law which mandated the destruction of the United States’ stockpile of chemical weapons agents requires that, in doing so, the Secretary shall provide for -

“(A) maximum protection for the environment, the general public, and the personnel who are involved in the destruction of the lethal chemical agents and munitions referred to in subsection (a); and

(B) adequate and safe facilities designed solely for the destruction of lethal chemical agents and munitions”. P.L. 99-145, Sec. 1412(c), 50 U.S.C. § 1521(c).

56. P.L. 102-484, 50 U.S.C. § 1521, provides that the Secretary of Defense shall evaluate and implement, where appropriate, alternative plans for destruction of chemical agents and munitions subject to P.L. 99-145, Section 1412(c).

57. Under Executive Order No. 11514 (March 5, 1970), as amended by Executive Order No. 11991 (May 24, 1977), § 2(g) and 3(h), the CEQ has issued regulations binding on all federal agencies for the implementation of the procedural provisions of NEPA. Those regulations (fully entitled “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act” became effective in 1979 and binding upon the Army as of that date. 43 Fed. Reg. 55978-56007 (1978), 40 C.F.R. Parts 1500-1508. Each agency was required by the CEQ NEPA Regulations to adopt “procedures” to supplement those

regulations. 40 C.F.R. § 1507.3. CEQ regulations applicable to this case include those which follow.

58. 40 C.F.R. § 1501.4 requires that an EIS be performed where the proposal is one for which federal agency rules normally require an EIS. An EA may not be substituted for an EIS in this circumstance.
59. 40 C.F.R. § 1502.15 requires that the EIS describe the environment of the areas to be affected by the alternatives under consideration.
60. 40 C.F.R. § 1502.16 requires that the environmental impacts of each alternative be assessed. These include direct and indirect effects.
61. 40 C.F.R. § 1502.9 provides that agencies “shall prepare supplements to either draft or final environmental impact statements if: (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”
62. 40 C.F.R. § 1502.22 requires that in evaluating reasonably foreseeable human environment effects in an EIS, if there is incomplete or unavailable information, the lack of such information must always be made clear and under enumerated circumstances the agency must obtain and include that information in the EIS or provide specific alternative information.
63. 40 C.F.R. § 1503.1 requires that, after preparing a draft EIS, but before the final EIS, the agency must request the comments of appropriate State and local agencies authorized to develop and enforce environmental standards and comments from the public, “affirmatively soliciting comments from persons or organizations who may be interested or affected.”

64. 40 C.F.R. § 1506.6 requires agencies to provide notice of NEPA related hearings, meetings and the availability of documents so as to inform those persons or agencies who may be interested or affected. Methods for such notice include publication in local newspapers, use of other local media, notices to community organizations and businesses, direct mailings and posting notices on and off the site where the action is to be located. The agency is also required to hold public hearings or meetings under certain circumstances and to solicit appropriate information from the public.
65. 40 C.F.R. § 1502.4 requires that a single course of action be evaluated on a single EIS.
66. 40 C.F.R. § 1508.25 requires that cumulative actions should be discussed in the same EIS.
67. 40 C.F.R. § 1508.27(7) provides that “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”
68. Pursuant to the CEQ’s directive in 40 C.F.R. § 1507.3, the Army adopted Army rule 200-2; 32 C.F.R. Part 651. The Army rules which are applicable to the case include those which follow.
69. 32 C.F.R. § 651.5(g) requires supplemental NEPA documentation when there are substantial changes to a proposed action or there are significant new circumstances or information.
70. 32 C.F.R. § 651.11(d) requires that any EA conducted by the Army take a “hard look” at the magnitude of potential impacts and evaluate their significance.
71. 32 C.F.R. § 651.14(e) encourages the Army to integrate into its NEPA analysis other environmental laws, ensuring that such requirements are met.
72. 32 C.F.R. § 651.14 requires the Army, where appropriate, to determine if local, state, or regional governments or agencies have an interest in becoming a cooperating agency for purpose of preparing NEPA documents.

73. 32 C.F.R. § 651.15 requires the Army to consider mitigation measures to avoid environmental harm as part of any EA or EIS. Mitigation measures may avoid, minimize, rectify or compensate for impacts to affected areas. Mitigation measures which were discussed but rejected must be discussed in the EA or EIS.
74. 32 C.F.R. § 651.16 requires the Army to assess cumulative impacts in all NEPA analysis.
75. 32 C.F.R. § 651.17 requires the Army to determine whether the proposed action will have a disproportionate impact on minority or low-income communities both off post and on post.
76. 32 C.F.R. § 651.20 specifies that in those instances where an EA is appropriate it “requires sufficient detail to identify and ascertain the significance of expected impacts associated with the proposed action and its alternatives.”
77. 32 C.F.R. § 651.24 requires a supplemental EA or EIS when required by 40 C.F.R. § 1502.9(c).
78. 32 C.F.R. § 651.32 provides that an EA may be used only when no EIS is necessary.
79. 32 C.F.R. § 651.42 provides that disposal of military chemicals that has the potential to cause significant environmental impact is an action which normally requires an EIS.
80. 32 C.F.R. § 651.45(f) requires public meetings or hearings on the draft EIS with news releases going out at least 15 days before the hearing.
81. 32 C.F.R. § 651.47 states the Army policy of requiring public involvement for all EIS’s and provides requirements which are detailed and specific and focus on outreach to the affected community.
82. For the reasons stated above, Defendants’ proposals may and in some cases will significantly affect the quality of the human environment.
83. For the reasons stated above and below, Defendants’ proposals will cause irreparable injury.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:

84. The Plaintiffs incorporate herein paragraphs 1 to 83 as if fully stated herein.
85. NEPA requires an adequate assessment and disclosure of the environmental impacts of a major federal action and official public input and involvement in that assessment. The EIS which exists for this major federal action is legally inadequate for the action which is now planned in that it:
- (A) Fails to fully describe the environment of the areas to be affected, specifically it fails to describe the area surrounding Perma-Fix of Dayton, as required by 42 U.S.C. 4332 (2)(C) and 40 C.F.R. § 1502.15.
 - (B) Fails to include environmental impacts and effects on the community surrounding Perma-Fix of Dayton as required by 42 U.S.C. § 4332 (2)(C) and 40 C.F.R. § 1502.16.
 - (C) Fails to assess the impacts and effects which will or may result from bioremediation, the type of treatment technology which will be used at Perma-Fix of Dayton. As required by 42 U.S.C. § 4332 (2)(C) and 40 C.F.R. § 1502.16.
 - (D) Fails to assess impacts and effects which will or may result from using a facility to process VX hydrolysate, Perma-Fix of Dayton, which is currently a frequent environmental nuisance to its neighbors, as required by 42 U.S.C. 4332 (2)(C) and 40 C.F.R. § 1502.16.
 - (E) Failed to seek comments from appropriate state and local agencies and the public in Ohio and the area surrounding Perma-Fix of Dayton as required by 40 C.F.R. § 1503.1, 32 C.F.R. § 651.45(f), and 32 C.F.R. § 651.47.

- (F) Failed to hold meetings and provide notice of NEPA related meetings, hearings, and the availability of documents so as to inform persons and agencies who may have been interested and effected in the area surrounding Perma-Fix of Dayton as required by 40 C.F.R. 1506.6, 32 C.F.R. § 651.45(f), and 32 C.F.R. § 651.47.
- (G) Fails to consider mitigation measures to avoid, minimize, rectify and/or compensate for impacts to the affected area surrounding Perma-Fix of Dayton as required by 40 C.F.R. § 1502.14 (f) and 32 C.F.R. § 651.15.
- (H) Fails to determine whether the proposed action will have disproportionate impact on minority or low income communities, given the composition of the community surrounding Perma-Fix of Dayton, as required by 32 C.F.R. § 651.17.
- (I) With regard to the incomplete or unavailable information on the characteristics of VX hydrolysate and the dangers of exposure to it, the EIS fails to make the lack of such information clear, fails to make the required efforts to obtain the information, and fails to provide alternative evidence, as required by 40 C.F.R. § 1502.22; and/or
- (J) Fails to integrate a determination of whether the action will be carried out in compliance with other environmental related laws as encouraged by 32 C.F.R. § 651.14. Specifically, the EIS does not address whether using Perma-Fix of Dayton as part of this action complies with the requirements of P.L.99-145, Section 1412(c), 50 U.S.C. § 1521(c), that the destruction of VX be done with maximum protection of the environment and the public at facilities designed solely for that purpose.

86. The EA prepared by the Army to supplement the EIS for the action cannot legally supplement this EIS in that this is an action normally requiring an EIS, 32 C.F.R. § 651.42, and in fact, an EIS was prepared for this action. Where an EIS has been prepared, it can only be supplemented by a supplemental EIS, 40 C.F.R. § 1502.9(C), and 32 C.F.R. § 651.24.
87. By taking action on the basis of an inadequate EIS, the Army is in violation of NEPA and is engaged in an arbitrary and capricious action that is contrary to law in violation of the APA.
88. The violation of NEPA and the APA described in this claim threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

SECOND CLAIM FOR RELIEF:

89. The Plaintiffs incorporate herein paragraphs 1 to 88 as if fully stated herein.
90. The EIS which exists for this project, even if deemed supplemented by the EA, is legally inadequate for the action now planned in that it:
 - (A) Fails to fully describe the environment of the areas to be affected, specifically it fails to describe the area surrounding Perma-Fix of Dayton, as required by 42 U.S.C. § 4332(2)(c) and 40 C.F.R. § 1502.15.
 - (B) Fails to include environmental impacts and effects community surrounding Perma-Fix of Dayton as required by 42 U.S.C. § 4332 (2)(C) and 40 C.F.R. § 1502.16.
 - (C) Fails to assess the impacts and effects which will or may result from bioremediation, the type of treatment technology which will be used at Perma-Fix of Dayton. As required by 42 U.S.C. § 4332 (2)(C) and 40 C.F.R. § 1502.16.

- (D) Fails to assess impacts and effects which will or may result from using a facility to process VX hydrolysate, Perma-Fix of Dayton, which is currently a frequent environmental nuisance to its neighbors, as required by 42 U.S.C. 4332 (2)(C) and 40 C.F.R. § 1502.16.
- (E) Failed to seek comments from appropriate state and local agencies and the public in Ohio and the area surrounding Perma-Fix of Dayton as required by 40 C.F.R. § 1503.1, 32 C.F.R. § 651.45(f), and 32 C.F.R. § 651.47.
- (F) Failed to hold meetings and provide notice of NEPA related meetings, hearings, and the availability of documents so as to inform persons and agencies who may have been interested and effected in the area surrounding Perma-Fix of Dayton as required by 40 C.F.R. 1506.6, 32 C.F.R. § 45(f), and 32 C.F.R. § 651.47.
- (G) Fails to consider mitigation measures to avoid, minimize, rectify and/or compensate for impacts to the affected area surrounding Perma-Fix of Dayton as required by 40 C.F.R. § 1502.14(F) and 32C.F.R. § 651.15.
- (H) Fails to determine whether the proposed action will have disproportionate impact on minority or low income communities, given the composition of the community surrounding Perma-Fix of Dayton, as required by 32 C.F.R. § 651.17.
- (I) With regard to the incomplete or unavailable information on the characteristics of VX hydrolysate and the dangers of exposure to it, the EIS fails to make the lack of such information clear, fails to make the required efforts to obtain the information, and fails to provide alternative evidence, as required by 40 C.F.R. § 1502.22.

- (J) Fails to integrate a determination of whether the action will be carried out in compliance with other environmental related laws as encouraged by 32 C.F.R. § 651.14. Specifically the EIS does not address whether using Perma-Fix of Dayton as part of this action complies with the requirements of P.L.99-145, Section 1412(c), 50 U.S.C. § 1521(c), that the destruction of VX be done with maximum protection of the environment and the public at facilities designed solely for that purpose; and/or
- (K) This EA fails to take a hard look at the magnitude of potential impacts as required by 32 C.F.R. § 651.11(d), and fails to contain sufficient detail to identify and determine the significance of expected impacts as required by 32 C.F.R. § 651.24.

91. By taking action on the basis of an EIS which remains inadequate, the Army is in violation of NEPA and is engaged in an arbitrary and capricious action that is contrary to law in violation of the APA.
92. The violation of NEPA and the APA described in this claim threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

THIRD CLAIM FOR RELIEF:

93. The Plaintiffs incorporate herein paragraphs 1 to 92 as if fully stated herein.
94. Since the issuance of the final EIS for this action, the Army has made substantial changes in the proposed action that are relevant to environmental concerns and there are significant new circumstances and information relevant to environmental concerns and bearing on the proposed action and its impacts which requires the preparation of a supplemental EIS pursuant to 40 C.F.R. § 1502.9(c) and 32 C.F.R. § 651.24. Such substantial changes in the proposed action include:

- (A) The decision not to treat the VX hydrolysate at the Newport Chemical Depot, but instead to treat it at Perma-Fix of Dayton in Drexel, Jefferson Township, Montgomery County, Ohio.
- (1) The Indiana site is in an isolated rural area, with very few people living near by. Perma-Fix of Dayton is located in the middle of a residential neighborhood, Drexel, where thousands of people live. Routine emission or accidents at the Newport site are unlikely to impact significant numbers of people. In Drexel, thousands of people will be impacted.
 - (2) Environmental impacts at the Indiana site will not have a disparate impact on minority or low-income neighborhoods because that area has very few minorities and poor people. The impacts from this action in Drexel will have a disproportionate impact on minority and low-income population because of the composition of the Drexel neighborhood.
 - (3) The site in Newport Chemical Depot has a highly trained emergency response team on site that has many years of experience dealing with chemical weapons stockpiles. (FEIS p. 1-6). At Perma-Fix of Dayton, the first responder is the Jefferson Township volunteer Fire Department.

- (4) The topography, surface water, ecological resources, geohydrology, solid waste disposal options, cultural, archaeological, and historic resources of the two sites are vastly different.
 - (5) The existing air quality at the two locations is significantly different. Vermillion County, Indiana, which contains the NECD is in attainment of all state and National Ambient Air Quality Standards. Montgomery County, Ohio does not meet the 8 hour ozone standard and the PM 2.5 particulate standard. Montgomery County also has significant toxic releases, ranking 8th among Ohio's counties.
 - (6) Perma-Fix of Dayton has a history of environmental problems. The facility and/or its personnel have had difficulty handling existing waste in a way which keeps emissions from affecting the surrounding neighborhood. VX hydrolysate, in addition to being toxic and corrosive, has a very strong odor and must be handled with great care and precision.
- (B) The decision to transport the VX hydrolysate approximately 200 miles from the Newport Depot to Drexel for treatment, rather than transporting it by a short pipe from one building to another for treatment on the Newport Chemical Depot site. The routine emissions and the risk of accident are substantially changed by this change in this action.

- (1) There are large population concentrations along the truck route from Newport to Drexel. Those populations will be subject to toxic emissions in the event of an accident.
 - (2) The changed action will result in the VX hydrolysate being trucked past numerous bodies of water, an accident resulting in a spill into any of those bodies of water will have significant negative impacts.
 - (3) The roads in the vicinity of Perma-Fix of Dayton are narrow. There are no curbs or sidewalks, putting pedestrians at risk.
- (C) The decision to not use super critical water oxidation (“SCWO”) to treat the VX hydrolysate but instead to use bioremediation to treat it. SCWO is a high pressure, high temperature process. Bioremediation uses neither high pressure nor temperature but instead uses a reactor with biological agents. On information and belief, the emissions from treatment will be substantially changed by this change in the action. Air emissions from bioremediation will be different in content and amount from SCWO emissions, liquid effluent will also be different, as will the solid waste produced by the process. Risks of accident during treatment will also be different because the material will be handled differently.
95. Significant new information which has become available since the completion of the EIS for this action includes the publishing of the February 25, 2003, MSDS on VX hydrolysate, which identifies the current known and unknown information, related to VX hydrolysate exposure.

96. By taking action in the absence of a supplemental EIS, the Army is in violation of NEPA and is engaged in an arbitrary and capricious action that is contrary to law in violation of the APA.
97. The violation of NEPA and the APA described in this claim threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

FOURTH CLAIM FOR RELIEF:

98. The Plaintiffs incorporate herein paragraphs 1 to 97 as if fully stated herein.
99. Since the issuance of the final EA for this action, the Army has made substantial changes in the proposed action that are relevant to environmental concerns and there are significant new circumstances and information relevant to environmental concerns and bearing on the proposed action and its impacts which requires the preparation of a supplemental EIS pursuant to 40 C.F.R. § 1502.9(C) and 32 C.F.R. § 651.24. Such substantial changes in the proposed action include:

(A) The decision not to treat the VX hydrolysate at the Newport Chemical Depot, but instead to treat it at Perma-Fix of Dayton in Drexel, Jefferson Township, Montgomery County, Ohio.

- (1) The Indiana site is in an isolated rural area, with very few people living near by. Perma-Fix of Dayton is located in the middle of a residential neighborhood, Drexel, where thousands of people live. Routine emission or accidents at the Newport site are unlikely to impact significant numbers of people. In Drexel, thousands of people will be impacted.

- (2) Environmental impacts at the Indiana site will not have a disparate impact on minority or low-income neighborhoods because that area has very few minorities and poor people. The impacts from this action in Drexel will have a disproportionate impact on minority and low-income population because of the composition of the Drexel neighborhood.
- (3) The site in Newport Chemical Depot has a highly trained emergency response team on site that has many years of experience dealing with chemical weapons stockpiles. (FEIS p. 1-6). At Perma-Fix of Dayton, the first responder is the Jefferson Township volunteer Fire Department.
- (4) The topography, surface water, ecological resources, geohydrology, solid waste disposal options, cultural, archaeological, and historic resources of the two sites are vastly different.
- (5) The existing air quality at the two locations is significantly different. Vermillion County, Indiana, which contains the NECD is in attainment of all state and National Ambient Air Quality Standards. Montgomery County, Ohio is in non-attainment of such standards. Montgomery County also has significant toxic releases, ranking 8th among Ohio's counties.

- (6) Perma-Fix of Dayton has a history of environmental problems. The facility and/or its personnel have had difficulty handling existing waste in a way which keeps emissions from affecting the surrounding neighborhood. VX hydrolysate, in addition to being toxic and corrosive, has a very strong odor and must be handled with great care and precision.
- (B) The decision to transport the VX hydrolysate approximately 200 miles from the Newport Depot to Drexel for treatment, rather than transporting it by a short pipe from one building to another for treatment on the Newport Chemical Depot site. The routine emissions and the risk of accident are substantially changed by this change in this action.
- (1) There are large population concentrations along the truck route from Newport to Drexel. Those populations will be subject to toxic emissions in the event of an accident.
 - (2) The changed action will result in the VX hydrolysate being trucked past numerous bodies of water, an accident resulting in a spill into any of those bodies of water will have significant negative impacts.
 - (3) The roads in the vicinity of Perma-Fix of Dayton are narrow. There are no curbs or sidewalks, putting pedestrians at risk.

- (C) The decision to not use super critical water oxidation (“SCWO”) to treat the VX hydrolysate but instead to use bioremediation to treat it. SCWO is a high pressure, high temperature process while bioremediation uses neither high pressure nor temperature but instead uses a reactor with biological agents. On information and belief the emissions from treatment will be substantially changed by this change in the action. Air emissions from bioremediation will be different in content and amount from SCWO emissions, liquid effluent will also be different, as will the solid waste produced by the process. Risks of accident during treatment will also be different.
100. Significant new information which has become available since the completion of the EIS for this action includes the publishing of the February 25, 2003, MSDS on VX hydrolysate, which identifies the current known and unknown information, related to VX hydrolysate exposure.
101. The EA cites technical problems with use of the SCWO technology as one reason to explore off site treatment of VX hydrolysate. (EA 2-1) Those technical problems have now been solved. The Army signed a contract in June 2003 to use SCWO at its Blue Grass Army Depot chemical weapons site in Kentucky.
102. By taking action in the absence of a supplemental EIS, the Army is in violation of NEPA and is engaged in an arbitrary and capricious action that is contrary to law in violation of the APA.
103. The violation of NEPA and the APA described in this claim threaten plaintiffs’ with irreparable injury for which they have no adequate remedy at law.

FIFTH CLAIM FOR RELIEF:

104. The Plaintiffs incorporate herein paragraphs 1 to 103 as if fully stated herein.
105. The EIS prepared for this project is inadequate in that it improperly segments the project into a “pilot” portion, and assesses only the impacts from that portion of the project. The “pilot” project is for almost 1/3 of the material to be destroyed. 40 C.F.R. § 1502.4 requires that a single course of action be assessed in a single EIS. 40 C.F.R. § 1508.25 and 32 C.F.R. § 651.16 require that cumulative effects be assessed together. 40 C.F.R. § 1508.27(7) bars breaking a project down into component parts to avoid significance. The project, as it is now planned, involves the destruction of the entire VX stockpile at Newport.
106. An EA may not be used to supplement this EIS with regard to the impacts of destroying the complete stockpile of VX. Having done an EIS for this action, a supplemental EIS must be used.
107. By taking action on the basis of an inadequate EIS, the Army is in violation of NEPA and is engaged in an arbitrary and capricious action that is contrary to law in violation of the APA.
108. The violation of NEPA and the APA described in this claim threaten plaintiffs’ with irreparable injury for which they have no adequate remedy at law.

SIXTH CLAIM FOR RELIEF:

109. The Plaintiffs incorporate herein paragraphs 1 to 108 as if fully stated herein.
110. To the extent the EA in this matter can be used to supplement the EIS, the EA’s consideration of the impacts of destroying the entire Newport VX stockpile is inadequate in that it is superficial, fails to take a “hard look” at the impacts, as required by 32 C.F.R. § 651.11(d) and lacks sufficient detail to identify and ascertain the significance of expected impacts as required by 32 C.F.R. § 651.20.

111. By taking action on the basis of an inadequate EIS and EA, the Army is in violation of NEPA and is engaged in an arbitrary and capricious action that is contrary to law in violation of the APA.
112. The violation of NEPA and the APA described in this claim threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

PRAYER FOR RELIEF


WHEREFORE, Plaintiffs respectfully request that this Court:


1. Declare that Defendants' action, to send VX hydrolysate to Perma-Fix of Dayton for treatment, without first having prepared an adequate environmental impact statement regarding the impacts and alternatives to this action constitute violations of NEPA and of the APA;
2. Issue a mandatory injunction requiring Defendants to stop such action and prohibiting any activities to be conducted in furtherance of such action until such time as Defendants have complied with NEPA and have prepared an adequate environmental impact statement and have come to a decision in light of the statement;
3. Issue an injunction prohibiting the Defendants from providing any funds or taking any other action toward the transport and treatment of VX hydrolysate to Perma-Fix of Dayton until they have complied with the requirements of NEPA;
4. Declare that Defendants' action to process the VX nerve agent stored at the NCD at Newport, in the absence of an adequate environmental impact statement which adequately examines the impacts from processing the entire stockpile stored there, constitutes a violation of NEPA and the APA;

5. Issue an injunction prohibiting Defendants from providing any funds or taking any other action toward the processing of the VX nerve agent stored at NCD at Newport until they have complied with the requirements of NEPA;
6. Allow Plaintiffs to recover the costs of this action, including attorneys fees;
7. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: 7/17/23


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