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State—Federal Collaboration on Environmental Remediation at Department of Defense Installations

Chairman Boxer and honorable members of the Committee, thank you for the opportunity to share Maryland's perspective on environmental remediation at existing and former Department of Defense ("DoD") installations in our State.

As many of you may know, the Department of Defense has a significant and growing presence in Maryland. By way of background, there are 24 active DoD installations located in Maryland, 9 closed facilities and 114 sites that were previously used by the military, but have been transferred to local government, the private sector, or non-DoD federal agencies for reuse or redevelopment. A number of these installations—Fort Meade, Fort Detrick, Aberdeen Proving Ground, the Patuxent River Naval Air Station and Andrews Air Force Base—are undergoing major expansions as a result of BRAC and other federal programs. Nearly all of the active and closed facilities contain at least one area (and sometimes multiple areas) with soil and/or groundwater contamination as a result of historical waste disposal, munitions and other military activities. More than three-quarters of the 100+ formerly used defense sites have not completed the CERCLA process. It is likely that a significant number of these sites will ultimately require remedial action. Reaching sound remedial decisions and response actions that are protective of both human health and the environment is an issue of great importance to us.

I would like to say at the outset that overall Maryland has enjoyed a cooperative and successful working relationship with the Department of Defense. At many of the DoD sites in Maryland, remedial activities are proceeding in a satisfactory manner. While we do not question DoD's commitment to cleaning up these contaminated sites, our generally collaborative relationship with DoD recently was uncharacteristically strained at two facilities with significant ongoing remedial actions—Fort Detrick and Fort Meade—in both cases as a result of the Army's unwillingness to enter into binding enforceable agreements that would govern remediation of these sites going forward.

Fort Detrick

Fort Detrick is an Army Medical Installation and home to the Army Medical Research and Material Command and 36 other tenant organizations. Until 1969, Fort Detrick was the nation's center for offensive and defensive biological warfare research. It consists of three non-contiguous tracts of land designated as Areas A, B and C, totaling 1,230 acres. Soil and groundwater contamination in Areas A and C have been addressed. In Area A, the Army committed to maintain the existing groundwater extraction system near the source of trichloroethane ("TCE") contamination as a mechanism to contain the plume of contaminated groundwater to the facility. Groundwater monitoring continues in Area A and institutional controls are in place at the site to limit access.

On Area C, contaminated soils and ash deposits from an old incinerator have been removed to address soil contamination. No remedial action to address groundwater was required at Area C. Land use controls are in place to limit future use of the site.

Area B, the last of the three areas at the facility to be addressed, presents some challenging and difficult groundwater contamination problems because of its karst environment and fractured rock aquifer. This site was previously used by the Army for disposal of construction and demolition debris, incinerated biological wastes, animal carcasses, excess chemicals, herbicides and other wastes. In addition to an old unlined landfill on the site, there are multiple unlined trenches that were used for the disposal of miscellaneous waste. Ground and surface water both on and off-site is contaminated with TCE and perchloroethene ("PCE"). Waste material has been excavated and removed from one of the disposal pits. Plans for capping the disposal pits and remediating groundwater contamination are under development.

The State's active involvement with site assessment and other remedial activities at Area B dates back more than 15 years. Despite our efforts to work collaboratively with DoD, neither we, nor EPA, have been able to negotiate a binding, enforceable agreement with DoD that provides for remediation of Area B on acceptable terms. In 2007, the State and DoD commenced consent decree negotiations with DoD toward this end, but it quickly became apparent that these negotiations would not be successful. These failed efforts led us to support placing Fort Detrick on the NPL, which will subject DoD to a prescribed and binding remediation process under federal superfund law. On September 3rd, EPA proposed Fort Detrick for listing on the NPL.

Fort Meade

EPA listed Fort Meade on the NPL in 1998. This facility, originally comprised of more than 13,000 acres in Anne Arundel County, served as a training facility for many years and included infantry combat training operations and a mustard agent training area. Munitions degreasing, metal plating, photographic processing, salvage yard and other operations at the facility generated hazardous waste. The facility also contained landfills, incinerators, hazardous waste storage areas, and an explosive ordnance disposal area. Nine thousand acres of the facility were closed as a result of BRAC, nearly all of which was transferred to the Department of Interior and is now the location of the Patuxent Research Refuge. Soils and groundwater at the facility are contaminated with metals, chlorinated solvents, including TCE and PCE, and other pollutants at levels above safe drinking water standards and Risk Based Concentrations. Unexploded ordnance is present at multiple locations, and there are five separate and distinct groundwater plumes at the site, two of which have migrated to the wildlife refuge.

The State and EPA have been working cooperatively with DoD on the Fort Meade site since 1993. Since then, considerable progress has been made toward assessing the nature and extent of soil and groundwater contamination. Some areas of contamination have been remediated. However, much work remains to be done to complete the assessment and implement the necessary remedial actions. Up to this point, DoD has been unwilling to enter into a Federal Facility Agreement with EPA to govern the ongoing remedial activities at the facility. As a result, in August of 2007, EPA issued a unilateral administrative order to the Army under RCRA § 7003 requiring additional investigation and interim measures to protect public health.

Overall, we are satisfied with the progress of the cleanup at Fort Meade. Our principal concern with the Fort Meade cleanup has been DoD's unwillingness to commit to a timeline for entering into a Federal Facility Agreement or other binding enforceable agreement with EPA that provides for achieving compliance with the 2007 RCRA Order and addressing the contamination problems at the facility in an acceptable time frame. At one point in discussions with DoD staff, the Department understood that DoD would commit to entering into a Federal Facility Agreement, but then for reasons that are still not clear, we were unable to get such a commitment. The Department felt we had no choice but to notify DoD of our intention to bring suit against the Army under the RCRA citizen suit provisions to force compliance with EPA's RCRA Order, which we did through issuance of a RCRA citizen suit notice letter on August 19th. We remain hopeful that an acceptable agreement will be reached promptly—one that will obviate a need for further legal action on our part.

Formerly Used Defense Sites ("FUDS")

While we are otherwise generally satisfied with the progress being made on restoration of DoD facilities in Maryland, there are a number of changes and improvements that we believe would enhance the process and the program. We are concerned about the unacceptably slow progress on assessment and remediation of the former defense sites in Maryland. There are 114 of these sites in Maryland. Funding for assessment and remediation of the former defense sites is inadequate. Under our current DSMOA, DoD has funded work on only 26 of these sites—those that DoD considers its highest priority sites. The selection of the 26 currently funded sites was made without any input from the State. Some of these unfunded sites could pose a higher risk to public health or the environment than those sites receiving funding, but without complete assessments, we simply do not know. We favor a more collaborative and cooperative approach to identifying the high priority sites, and increased funding to ensure that thorough risk assessments of these sites that fully comply with EPA requirements are performed.

Partnering

We would like to see greater utilization of the partnering approach. Partnering provides a framework for fully involving all of the regulatory agencies and working though issues to achieve consensus through a tiered process. EPA Region III has given its strong support to utilization of "partnering" as a management approach to facilitate cleanup of DoD sites. It has proven to be a very helpful tool. Both the Navy and the Air Force have successfully employed formal or informal partnering at a number of sites in Maryland. It is our perception, however, that in recent years the Army has not demonstrated the same level of commitment to partnering with the State and EPA on its sites. The failure of the State's efforts to partner at both the Fort Detrick and Fort Meade installations was very disappointing to us.

Performance Based Contracting

We have observed a negative trend by DoD to increase use of "Performance Based Contracting" for the procurement of consultants during the assessment phase prior to selection of a remedy. A Performance Based Contract is awarded for a fixed price. It is our understanding that DoD favors this approach for the reason that it provides certainty with respect to costs. However, use of Performance Based Contracting to facilitate cost containment goals undercuts the remedy selection process. It gives the contractor an incentive to keep costs down and to steer

DoD toward proposing an unrealistic remedial action based on cost considerations, without regard to compliance with applicable or relevant state and EPA regulatory requirements, EPA policy and guidance, and whether ultimately the remedy is adequately protective of public health and the environment over the long term. DoD contractors working under Performance Based Contracts at both Fort Detrick and Fort Meade have recommended Monitored Natural Attenuation to address groundwater contamination. At one facility, the necessary conditions for selection of this remedy under EPA guidelines and policy were not present. At the other, the same recommendation was made without the necessary understanding of the hydrology at the site. We believe that DoD should abandon the use of Performance Based Contracting prior to selection of the remedy at a site.

The DSMOA

As is the case in other states, Maryland's regulatory oversight of nearly all of the CERCLA cleanups is proceeding under a Memorandum of Agreement between the State and the Department of Defense (the "DSMOA"), which governs the process of developing and implementing a remedial action plan at DoD installations. The DSMOA is intended to facilitate a more efficient and cost effective environmental restoration at DoD facilities and it provides for federal funding of state oversight activities.

Several recently adopted DoD policies relating to implementation of DSMOA Cooperative Agreements threaten to undermine the viability and effectiveness of a collaborative relationship between DoD and the states. The DSMOA and the Cooperative Agreement process have historically been very successful at promoting cooperation between DoD and the states at specific cleanups, and also in the development of policy and new technology. DoD's position that all of a state's DSMOA funding will be withheld if the state takes any enforcement action, including issuance of a notice of violation, without first exhausting the dispute resolution procedures under the DSMOA, is a transparent effort to leverage its power of the purse to constrain legitimate state enforcement actions. This effort and the interpretation of the DSMOA is contrary to the letter and spirit of the Federal Facilities Compliance Act, which subject federal facilities to the same environmental requirements and enforcement processes as private entities.

Last, DoD has also eliminated DSMOA and Defense Environmental Restoration Account ("DERA") funding to support activities such as participation in national workgroups devoted to policy development, remediation development and other technology sharing forums. State participation in the development of national policy and the dialogue on technology issues as they relate to DoD sites promotes a consistent and more uniform approach to environmental restoration of DoD sites and benefits DoD, as well as the states. Adequate training, and state participation in policy development are critical to a collaborative state/federal working partnership. Unfortunately, despite vigorous objection from the states, DoD has not indicated any intention to reconsider these policies. The DSMOA agreement is almost 20 years old, and it may be time to revisit the agreement. We think DoD should open a dialogue with the states toward that end.

Thank you for your interest in these important issues and for the opportunity to share Maryland's perspective.