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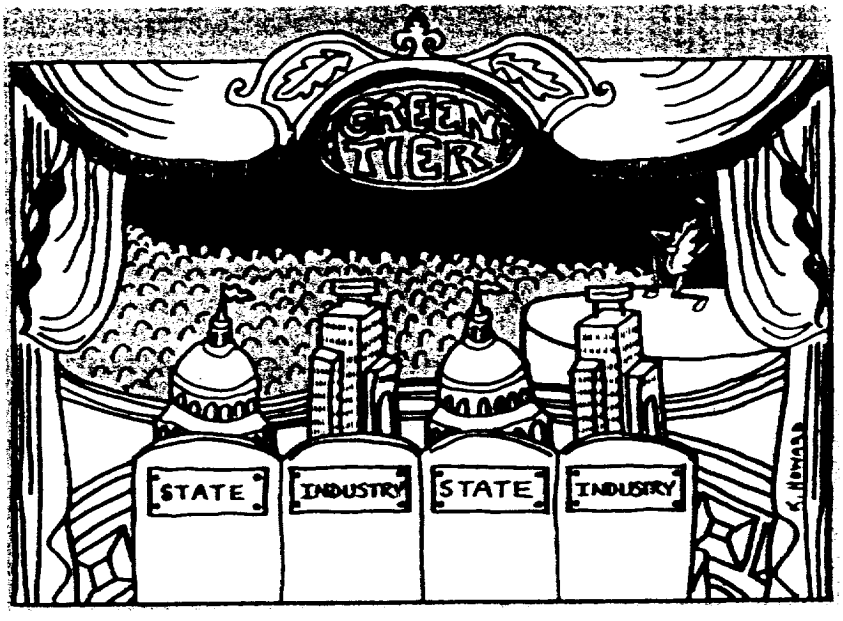
A Green Tier for greater environmental protection

by George E. Meyer, Secretary, Wisconsin Dept. of Natural Resources

It is time for public policy-makers to unleash America's potential to solve its remaining and emerging environmental problems. Respected studies make compelling cases for new approaches to advance beyond entry level regulatory policies that, even if fully enforced, fail to address 21st century ecological challenges.

Comparatively few individuals have used these studies to test new ideas. Fear of criticism in an uncivil, uncompromising and unforgiving public square deters good people in government, business and the public interest community from questioning and improving upon the status quo. Nevertheless, our national and ecological interests require courageous individuals in all sectors to boldly create a new ecological performance opportunity system to complement the old, minimalist environmental control structure.

The foundation and motivation for moving forward exists in our culture, law and history and can give courage to reformers, especially in the states:



- Culturally, America's founding values give citizens the right to improve their standing and earn the rewards of that improvement.
- Legally, the Constitution balances power between the federal level and states.
- Historically, a heralded principle of American governance holds that the states are the laboratories of democracy.

Greater flexibility for improved performance

Wisconsin's experiment with innovative environmental law began in 1997, when we created a pilot program designed to "evaluate innovative environmental regulatory methods" to achieve greater environmental performance "both with respect to the effects that are regulated . . . and (those) that are unregulated." Businesses in the

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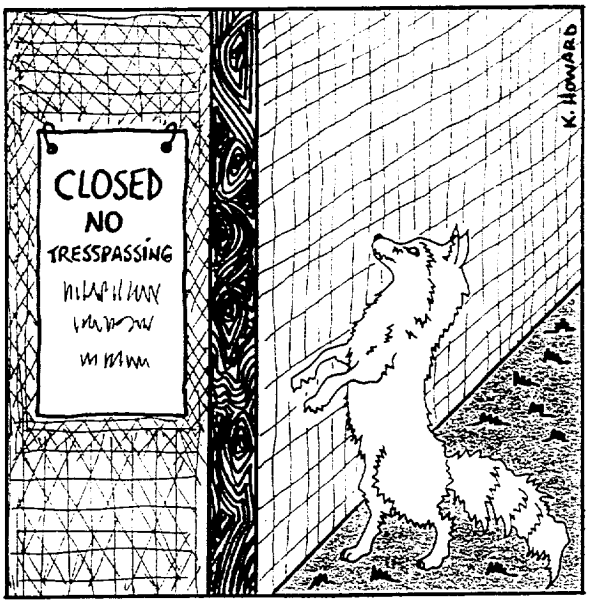
Protecting states from the unfunded mandate of cleaning up military base contamination

by Harry H. Kelso

Since the advent of the 1980s, states have strenuously resisted "unfunded mandates" from the federal government. These were federal statutory and regulatory requirements imposed on States and local governments with little or no federal funding and which often conditioned other federal funds on compliance with these new legal requirements. In response to these new mandates, most states' officials were forced to severely pare their own state programs in order to spend their limited state budgets to comply with an almost never-ending plethora of federal requirements. One of the most costly categories was environmental regulation. What is ironic is that, as the federal government has imposed these new obligations on States, local governments and the private sector, the federal government continues to ignore them for its own polluting industries. Among the many polluting federal agencies, the Departments of Defense and Energy—with their ultra-hazardous activity, including explosives and toxic chemicals—possess the lion's share of expensive, long-term cleanup responsibilities. The victims of this environmental and health threat, catastrophically injured and left "holding the bag," are the states: they are now being forced to expend scarce state tax funds to clean up part of the military's land and water contamination that dates to World War I and II. This is certain to continue since the Secretary of Defense is seeking more base closures and is spending less money for cleanup of already closed DOD facilities. This article shows how states can benefit from the state of Virginia's success in protecting itself from such a military cleanup liability, estimated at $600 million.



Background

The Department of Defense (DOD) has built up a 20th Century empire that includes approximately 25 million acres of land, equivalent in size to the State of Tennessee. Nearly every state has a DOD presence. DOD conservatively estimates that 15 million of those acres contain unexploded ordnance (known in the military community as "UXO"), the discarded explosive weapons which are very expensive to clean up in order for the land to be safe for human use.

Closing military installations number over 10,000, most of which contain serious environmental contamination. The Base Realignment and Closure program includes roughly 130 bases, and the less-well-known Formerly Used Defense Sites program includes approximately 10,000 installations closed before as well as during the current downsizing of the Defense Department. These two programs present an inventory of closed ranges, fields, ports, yards, bases, forts, and camps, of which the government estimates that around 3000 contain buried UXO. However, many of these closing facilities—actually, industrial properties—are strategically located to potentially become valuable industrial sites that could be reused commercially—provided they are cleaned up at least to industrial standards.

The Federal Government generally and the Defense Department specifically do not make environmental cleanup at its own facilities a priority mission. The federal government is not structured or operated to respond expeditiously to problems. The environmental cleanup mission simply doesn't exist in a military institution whose corporate culture is known for secrecy, security, self-regulation and singular mission.

Budget and appropriation numbers reveal that DOD has not been provided with funding necessary to even seriously begin to address its massive contamination problem. This fact is underscored when DOD annually makes budget requests with a steadily declining pattern of paltry DOD cleanup budgets, and has customarily diverted DOD cleanup appropriations for use in other, non-environmental programs in the last decade. The $1.3 billion average annual DOD environmental budget—out of a $261 billion DOD budget — tells the real story: the Defense Secretary's Environmental Office is almost irrelevant, with little power and money.

In contrast to its aggressive record against the private sector and state and local government, US EPA's enforcement record demonstrates that it is nearly powerless in confrontations with DOD. This is because of a Justice Department policy known as the "Unitary Executive Theory" which prohibits EPA from suing sister federal agencies in federal court. US EPA's enforcement record with DOD documents the futile enforcement effort "within the federal family."

The Pentagon's potent political

muscle almost always trumps that of any other agency. The clearest evidence of this was the Clinton Administration's approval of 1998 legislation that allows the Secretary of Defense to unilaterally impose a temporary moratorium on federal agency administrative orders issued to DOD when the Secretary of Defense claims that defense readiness is an issue. This explicitly illustrates the "double standard" that no other institution—government or private—enjoys.

Congress is overwhelmed by the complexity of the US EPA and DOD and does not appreciate the extent nor the toxic gravity of DOD contamination. Thus, the "checks and balances" oversight Congress is expected to exercise over the Executive Branch has been virtually neutered. Furthermore, Congress has knowingly relegated DOD cleanup to its current, orphan status: legislative priorities are targeted on job-creating military-industrial contracts, benefiting constituent companies, while its support for EPA enforcement at military sites is virtually non-existent or approaches hostility.

To place this challenge into stark financial terms, the cleanup costs for DOD's environmental damage during its $19 trillion military buildup since 1940 is measured in hundreds of billions of dollars. This dwarfs the challenge of private sector industrial contamination and even the savings and loan bailout. In fact, according to US EPA, one of the FUDS sites alone—the Badlands Bombing Range in South Dakota—contains more contaminated acreage than that of all the Superfund sites combined.

At DOD's internally planned and budgeted rate of cleanup—about $1.3 billion (but reduced by the Pentagon's significant overhead costs) per year, no one in Washington really believes that the Pentagon will clean up its own contamination. DOD will simply close down, fence off, and virtually abandon the contaminated properties, as it has done regularly.

But it does not have to be this way. In two cases, the Commonwealth of Virginia demonstrated that DOD could be held accountable, serving as an example that pro-active state leadership yields real results.

Virginia vs. the Pentagon

In two key cases in late 1997, the Commonwealth of Virginia successfully prevented DOD from shifting some $600 million in environmental cleanup cost liability from DOD to the Commonwealth. Only 7 months after filing its *Avtex Fibers* Superfund suit against DOD and others, the federal government settled on Virginia's terms: Virginia recovered its previously expended Superfund costs incurred over 10 years and insulated itself from at least 30-40 years of future cleanup liability, conservatively estimated at $100 million. Around the same time, Virginia completed a base closure agreement with DOD and the Army regarding the closing of *Fort Pickett*, again on Virginia's terms. The agreement provides that DOD and the Army shall be responsible for all past and future environmental costs, estimated by DOD at $500 million—with Virginia having no environmental cost exposure, unless the state commits gross negligence or criminal conduct in managing the properties.

Virginia recognized that its long-term agenda—redevelopment and economic growth—was categorically opposite to DOD's short-term agenda—spending no more money to clean up the property and to abandon its responsibilities at the two sites.

States possess the requisite authority and can ensure a level playing field that requires the federal government to comply with its own environmental laws.

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