

**TESTIMONY OF ELLIS JACOBS
TO THE HOUSE SUBCOMMITTEE
ON NATIONAL SECURITY, EMERGENCY THREATS
AND INTERNATIONAL RELATIONS, COMMITTEE ON
GOVERNMENT REFORM**

**HEARING ON, “ARMY CONTRACT MANAGEMENT:
COMPLIANCE WITH OUTREACH & PUBLIC
ACCEPTANCE AGREEMENTS”**

SINCLAIR COMMUNITY COLLEGE

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Introduction

Thank you for asking me to testify at this subcommittee hearing. I want to thank the subcommittee chairman Congressman Christopher Shays and our Congressman Michael Turner for convening this hearing and providing the opportunity to explore the issues related to the Army's decision to bring VX hydrolysate to Dayton for processing and the Army's insistence on that plan despite the unanimous rejection of that plan by all political jurisdictions in this area.

I want to particularly thank Representative Turner for the role he played in pursuing this matter and his willingness to insist that the Army honor the rejection of this plan by our community.

I have been legal counsel to the citizens' group, the Citizens for the Responsible Destruction of Chemical Weapons of the Miami Valley, which formed in late 2002 to oppose the Army's VX hydrolysate plans.

In that capacity, I have focused on the legal issues involved. My testimony here today will explore some of those issues.

From the very beginning, the Army's decision to truck VX hydrolysate to Perma-Fix in Jefferson Township Ohio flew in the face of established Federal law. Had the Army followed its legal obligations and its own policies, I believe it would never have made the decision to ship VX hydrolysate here and the ensuing controversy would have been avoided.

As I will discuss in this testimony, the Army's plan was plainly in violation of the Department of Defense Authorization Act of 1986, P.L. 99-145, Section 1412 (Nov. 8, 1985), 50 U.S.C. § 1521 and the National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4322(2)(C).

In addition, once the inappropriate decision was made to use Perma-Fix as a

subcontractor on this project, the “public acceptance” provision of that contract provided yet another opportunity for the Army to reverse course.

The Background

The U. S. Army presently stores 1,690 ton containers containing 1,265 tons of VX nerve agents 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 150 miles from Montgomery County, Ohio.

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).

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).

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) chemicals, Thiols amine, EMPA, and MPA, which are found in VX hydrolysate. Together these three (3) chemicals make up 30-50% of the weight of VX hydrolysate.

VX Neutralization at the Newport Chemical Depot

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.

The Army recognized that this plan was a “major Federal action significantly affecting the quality of the human environment”, that the National Environmental Policy Act (NEPA) applied, and that an Environmental Impact Statement would have to be prepared. NEPA, 42 U.S.C. §4321.

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).

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).

The FEIS for this action was issued in December, 1998. 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).

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.

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).

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.

As required by NEPA, the CEQ rules which implement NEPA, 43 Fed. Reg. 55978-56007 (1978), 40 C.F.R. 1500-1508, **and the Army’s own NEPA rules, Army rule 200-2, 32 C.F.R. Part 51**, the EIS and EA prepared for this action provide a detailed description of the environment in the area surrounding the Newport facility. However, neither the EIS nor EA contain a description of the area surrounding the Perma-Fix of Dayton facility in Montgomery County, Ohio.

As required by law, the EIS and EA prepared for this action include an assessment of impacts on the environment surrounding the Newport facility but they include no assessment of the impacts on the area surrounding Perma-Fix of Dayton in Montgomery County, Ohio.

As required, the EIS and EA also make an assessment of the likely environmental effects of using the SCWO process for the second step in VX destruction. They make no assessment of the likely environmental effects using bio-remediation for the second step in VX destruction.

As required, the EIS and EA make an assessment of the likely environmental effects of using a new custom built facility in Newport for this action. They make no assessment of the likely environmental effects of using an existing facility, Perma-Fix of Dayton, with a particular environmental history for this action.

As required, the EIS and EA prepared for this action assess whether the action will have a disproportionate impact on minority or low- income populations at the Newport site, but they contains no such assessment of the Perma-fix of Dayton site.

The process of preparing the EIS and EA for this action included, as required, in the Indiana and Illinois area surrounding the Newport facility, publicizing the EIS and EA 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 and EA process, no such meetings were held in Ohio.

As required, the EIS and EA 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.

The Army had no reason to dismiss the dangers of VX hydrolysate. While 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 found 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).

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 1**).

Further, while it is recognized that VX hydrolysate 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.

The dangers of VX hydrolysate and the lack of critical information about it were recently

confirmed in a report prepared by Dr. Bruce Rittman for Montgomery County

The Perma-Fix Subcontract

The Army 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 150 miles from NECD to Perma-Fix of Dayton.

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.

Perma-Fix of Dayton, however, did not established nor maintained public acceptance. The community in the area surrounding Perma-Fix of Dayton was 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. Twenty-One (21) other surrounding jurisdictions – including Dayton, Harrison Township, Miami Township, Miamisburg, Moraine, New Lebanon, Trotwood, Kettering, Centerville, and Montgomery County - 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.

The Community of Jefferson Township

The area in Ohio where Perma-Fix is located could not be more different from the area in Indiana, which was examined in the NEPA process. 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.

The Perma-Fix Facility

The Perma-Fix of Dayton facility 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. In recent months, RAPCA has found odor problems on 70% of its random surveillance visits. Neighbors of the facility have made dozens of written and verbal complaints against this facility.

The record of Perma-Fix’s environmental problems was available to the Army before it allowed Perma-Fix received the VX hydrolysate contract. 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. **(Attached as Exhibit 2).**

Also, 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.

This facility also operates without many of the expected permits and with little environmental oversight. This information would also have been available to the Army before Perma-Fix received this contract. There are 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.

There are no federal or state hazardous waste (Resource Conservation and Recovery Act)

permits which govern the Perma-Fix of Dayton waste processing operation which would have been used to process the VX hydrolysate. The Ohio EPA found that Perma-Fix of Dayton needs no such permits now or once it began 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)).

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.

The Army could have avoided this controversy by following the law and its own rules

First, if the Army had followed National Environmental Policy Act (NEPA), and its own rules implementing NEPA, it unlikely that it would have chosen such an unappropriate site to treat VX hydrolysate.

The law requires the preparation of a supplemental EIS whenever there are substantial changes in a plan that has been evaluated in an EIS. The Army plan to use Perma-Fix clearly was a substantial change from the plan evaluated in the Newport EIS. It should have triggered the preparation of a supplemental EIS pursuant to 40 C.F.R. § 1502.9(c) and 32 C.F.R. § 651.24.

The 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. must be handled with great care and precision.

(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 environment 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 150 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. 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.

Had the Army followed the law and prepared a supplemental EIS, it would have uncovered all of this new information. It is unlikely that armed with a complete picture, the Army would have contracted with such a problematic facility using an untested technique in such an inappropriate location.

Second, if the Army had followed P.L. Section 1412, 50 U.S.C. §1521, the law which mandated the destruction of the U.S. Stockpile of Chemical Weapons, it would not have chosen a private contractor using existing facilities, like Perma-Fix, for this sensitive task.

P.L. 99-145, Section 1412, 50 U.S.C. § 1521, requires that, in destroying chemical weapons agents 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).

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), while preserving the requirements for environmental protection and dedicated facilities.

Finally, the “public acceptance” provision of the Perma-Fix subcontract provided one more opportunity for the Army to take note of the inappropriateness of the Perma-Fix subcontract. This subcontract provision is clear, as was the resounding lack of public acceptance in the community surrounding Perma-Fix.

Thank you very much for this opportunity to provide testimony on this important issue.