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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

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TO: Sylvia K. Lowrance, Representing National Environmental Trust,
The Natural Resources Defense Council, and the League of Conservation Voters

FR: David Baron, Attorney, Earthjustice

RE: Defense Department proposals to relax Clean Air Act requirements and allow removal of state clean air enforcement actions to federal court

This memo provides an analysis of the Department of Defense's proposal to exempt a variety of DOD activities and the communities in which they are located from timely compliance with specified requirements of the Clean Air Act. I am very familiar with the Clean Air Act, having specialized in enforcement of that statute for more than twenty years at the local, state, and national levels. In 1996-97, I served on the Subcommittee for Development of Ozone, Particulate Matter and Regional Haze Implementation Programs, a Federal Advisory Committee to the U.S. Environmental Protection Agency (EPA). I have also taught environmental law courses as an adjunct professor at the University of Arizona College of Law and Tulane Law School.

The DOD proposal would needlessly place millions of Americans at risk – including members of our armed forces - by delaying anti-pollution measures that would otherwise be required to meet clean air health standards. There is no evidence that the Clean Air Act has ever impaired military readiness or training for combat. Moreover, the law already has ample provisions to exempt readiness activities should the need to do so ever arise.

Background

According to the U.S. Environmental Protection Agency (EPA), air pollution today threatens the health of more than 150 million Americans. Just last week, EPA identified 480 counties throughout the nation that violate health standards for ground level ozone, a severe lung irritant that is the principal component of urban smog. This contaminant can cause shortness of breath, chest pains, increased risk of infection, aggravation of asthma, and significant decreases in lung function.¹ Elevated ozone levels have been linked to increased hospital admissions and emergency room visits for respiratory causes.² Ozone presents a special health risk to small children, the elderly, persons with lung ailments, and adults who are active outdoors. When ozone levels exceed alert thresholds-- something that happens all too often in cities throughout the nation – children are warned to limit outdoor play, and people with respiratory disease are warned to stay indoors.

Many communities also suffer from dangerous levels of airborne particle pollution (referred to by EPA as “PM”), consisting of soot, soil, smoke, metals, and other material. Small PM particles can pass through the natural filters in the nose, mouth, and throat, penetrate the upper airways, and travel deep into the lungs.³ PM pollution has been linked to very severe health impacts, including premature deaths, reduced lung function, aggravation of heart and lung disease, aggravated coughing, difficult or painful breathing, and decreased lung function.⁴ Scientific studies have found that tens of thousands of premature deaths each year are associated with elevated levels of PM pollution in the United States. Another pollutant regulated by EPA – carbon monoxide - poses a special threat to persons with heart disease.

¹ 66 Fed. Reg. 5002, 5012/3 (2001)

² 65 Fed. Reg. 6698, 6707/1 (2000)

³ H.R. Rep. No. 490, 101st Cong., 2d Sess. 207-08 (1990).

⁴ Id. 210-11

The 1970 Clean Air Act, as amended in 1977 and 1990, was enacted specifically to attack the kinds of health threats presented by ozone, PM, and carbon monoxide pollution. Pursuant to the Act, EPA has adopted national health standards for allowable levels of each of these pollutants in the ambient air.⁵ EPA designates communities as “attainment” or “nonattainment” areas based on whether they meet the standards.⁶ Nonattainment areas are further given classifications, such as “moderate” or “serious,”⁷ depending on the severity and persistence of the pollution problem. For each nonattainment area, states must submit to EPA a state implementation plan (“SIP” or “plan”) containing enough pollution control measures to assure attainment of the standards by deadlines set forth in the Act.⁸ The statute details a number of specific emission reduction measures that must be included in ozone SIPs, with additional and more protective measures required for more severe classifications. If a nonattainment area fails to meet its attainment deadline, it must be reclassified (“bumped up”) to a higher classification.⁹ Areas with higher classifications are given more time to attain the standard, but must implement stronger pollution control measures. Congress adopted this graduated system of pollution control to ensure the air would finally be cleaned up in areas with chronic air pollution problems.

The Clean Air Act also requires federal agencies to play their part in fighting dirty air. They must comply with all federal, state and local air pollution laws to the same extent as private industries.¹⁰ Federal agencies must also take steps to ensure that their actions “conform” to state anti-pollution SIPs in areas that violate standards, so federal actions don’t thwart or delay state

⁵ 42 U.S.C. §7409; 40 C.F.R. Part 50

⁶ 42 U.S.C. §7407(d)

⁷ The possible classifications for ozone nonattainment areas are marginal, moderate, serious, severe, and extreme. 42 U.S.C. § 7511. For PM-10 and carbon monoxide nonattainment areas, the possible classifications are moderate and serious. Id. §§ 7512, 7513.

⁸ Id. §§ 7410, 7502, 7511a, 7512a, 7513a

⁹ Id. §§7511(b)(2), 7512(b)(2), 7513(b)(2)

¹⁰ 42 U.S.C. § 7418(a)

efforts to clean up the air.¹¹ To implement this requirement, EPA’s “conformity” rules require federal agencies to evaluate the air quality impacts of proposed actions, and to mitigate impacts that would conflict with state plans for timely attainment of standards.¹² However, these requirements apply only to federal actions that would result in significant air pollution emissions.¹³ Moreover – and significantly for present purposes – actions responding to emergencies, including specifically “military mobilizations” and responses to “terrorist acts,” are exempt from the conformity requirement for up to six months, with the exemption renewable for successive six month periods where properly justified .¹⁴ Also exempt are actions that implement a foreign affairs function of the United States, and the routine movement of ships and aircraft or transportation of materiel and personnel.¹⁵

Even where an action is not otherwise exempt from clean air requirements, the Clean Air Act gives the President authority to grant an exemption for any federal emission source “if he determines it to be in the paramount interest of the United States to do so.”¹⁶ As far as we can determine, the President has only exercised this exemption authority in two instances, and neither situation involved a military readiness activity. In addition, the President may, if he determines it to be in the paramount interest of the United States to do so, adopt rules exempting “any weaponry, equipment, aircraft, vehicles, or classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature.”¹⁷ As far we can determine, the President has never adopted such rules, nor has he even proposed to do so.

¹¹ 42 U.S.C. §7506

¹² 40 C.F.R. §§ 93.150 to 160

¹³ Id. §93.153(b)

¹⁴ 40 C.F.R. §§93.152, 93,153(d)(2), (e)

¹⁵ Id. §93.153(c)(2)(vii), (viii), (xviii)

¹⁶ 42 U.S.C. §7418(b)

¹⁷ Id. 42 U.S.C. §7418(b)

The DOD Proposal Would Needlessly Threaten Public Health

As indicated above, the Defense Department has yet to identify a single instance in which military readiness has in any way been compromised by Clean Air Act requirements. Nor has DOD cited a single instance in which it has even sought a Presidential exemption from Clean Air Act requirements based on military readiness concerns. Nevertheless, the bill most recently proposed by the Defense Department would grant a blanket exemption for all military readiness activities from timely compliance with the Clean Air Act's conformity requirements. Under the DOD proposal, such activities could cause or contribute to unhealthful levels of air pollution in a community for up to three years before having to conform with state clean air plans. This delay would be allowed even if DOD could readily avoid it by providing offsetting emission cuts from other DOD facilities in the area. The bill would further allow affected communities to delay compliance with clean air standards for up to three years where emissions from the exempted readiness activities preclude timely attainment. And the bill would also allow those same communities to delay stronger anti-pollution measures that would otherwise be required to protect public health. DOD's proposal would produce that result by delaying bump ups to higher classifications that would otherwise be triggered by failure of the community to timely attain health standards.

These exemptions could end up threatening the lungs of millions of Americans. The DOD bill defines readiness activities as including "all training and operations that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use." It further defines "combat" and "combat use" as including "all forms of armed conflict and operational employment as well as those support functions necessary for armed conflict and operational employment...." Thus,

readiness activities exempted from timely clean air conformity under the bill would encompass actions at literally dozens of military facilities throughout the nation, ranging from testing complexes to large military bases.

A three year delay in compliance with clean air standards is a matter of profound public health concern. It means three more years of added suffering for people with asthma, bronchitis, and other respiratory ailments, and of recurrent days when children are warned not to play outside because the air is not safe to breathe. In PM nonattainment areas, it can literally mean additional premature deaths due to continued violation of health standards. Dangerously polluted air threatens not only the civilian population but also members of our armed forces and their families as well. Furthermore, since a separate exemption applies to each readiness activity, some non-attainment areas may be subject to a series of exemptions causing delays in attaining healthful air well beyond a single three year period.

No one doubts the importance of ensuring military readiness, but there is no evidence that we have to sacrifice public health in the name of readiness. The Clean Air Act has been around for more than 30 years, yet in all that time there has never been a serious conflict between clean air requirements and military readiness – at least none that have been identified by DOD . Moreover, the DOD bill grants an automatic delay in clean air compliance for readiness activities *even where no clean air delay is actually needed* to accommodate the particular readiness activity at issue. Thus, the bill will only encourage poor environmental planning while needlessly threatening public health. As further discussed below, there are already carefully crafted provisions in the law to exempt readiness activities from clean air requirements should there truly be a need to do so.

Current Law Has Ample Provisions to Exempt Readiness Activities If the Need Arises

DOD has yet explain why the exemption provisions already on the books are insufficient to protect readiness activities from any possible conflict with clean air requirements. As noted above, EPA rules already exempt emergency situations like military mobilizations and responses to terrorist acts from compliance with the Clean Air Act's general conformity requirements. Routine movement of materiel and transportation of troops is also exempt. Also as noted above, the Clean Air Act allows the President to exempt specific emission sources, and to adopt rules exempting entire classes or categories of military property (including weaponry, aircraft, equipment and vehicles) from clean air requirements, when he finds it in the paramount interest of the nation.

DOD has asserted that the "paramount interest" standard for a presidential exemption is high, but does not claim it is unduly so, or that it could not be met where truly necessary. Moreover, DOD can hardly claim that these exemptions are too hard to get, when – as far as we can determine – the Department has never even tried to get one for readiness activities. DOD has also suggested that it is "bad policy" to seek a presidential exemption for activities that are part of a day-to-day training regimen, but does not explain why this is so. If DOD is seeking to prolong exposure of the public to unhealthful air – thereby increasing the risk of premature deaths and other serious health impacts -- that is a decision of extraordinary import plainly worthy of Presidential attention. If anything, the matter is even more deserving of Presidential attention if it involves authorizing a pollution generating activity that will be ongoing for an extended period and will therefore have long term air quality impacts.

In addition to the above-cited exemption provisions, the Secretary of Defense has authority under 10 U.S.C. §2014 to temporarily suspend an EPA action that he finds, in consultation with the Joint Chiefs, "affects training or any other readiness activity in a manner

that has or would have a significant adverse effect on the military readiness of any of the armed forces or a critical component thereof.” The suspension remains in effect for up to five days, unless EPA finds it would pose an actual threat of imminent and substantial endangerment to public health or the environment. During the suspension, EPA and the Secretary must attempt to mitigate or eliminate the adverse impact of the EPA action on readiness, consistent with the purpose of that action.

The Presidential exemption provision in the Clean Air Act and the DOD Secretary’s authority under 10 U.S.C. §2014 allow legitimate readiness concerns to be addressed while maximizing protection of public health. Rather than granting a blanket delay in clean air conformity by all readiness activities – as DOD now proposes – existing law properly requires DOD to make the case that a specific readiness activity (or class of such activities) cannot be accommodated with clean air requirements, and is important enough to justify the increased risk to public health from allowing the activity to proceed without complying with the law. The DOD proposal would irresponsibly allow DOD to proceed with any readiness activity – no matter how injurious to public health – without even attempting to ensure conformity with state clean air plans until three years later.

The Proposed Removal Provisions are Unnecessary and Counterproductive

The DOD proposal would also allow state clean air enforcement actions against federal agencies to be “removed” from state court and moved to federal court – even where they only involve enforcement of state (not federal) environmental laws. This proposal has absolutely nothing to do with preserving military readiness – indeed, the bill’s language would extend this “removal” right to all federal agencies, not just DOD. Rather, the proposal is an attempt to give federal agencies accused of violating state and local anti-pollution laws the right to circumvent

state courts and state procedures when they think they can gain a procedural or other advantage in federal court.

Congress should not be in the business of authorizing federal agencies to play procedural games to delay or impair enforcement of state and local laws designed to protect the public from dirty air. The federal facility and enforcement provisions of the Clean Air Act were designed to ensure that federal agencies would follow the same anti-pollution laws and procedures as private entities, and those procedures include being subject to suit in state court for noncompliance.