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Exemptions for Military Activities in Federal Environmental Laws

name redacted
Legislative Attorney
American Law Division

Summary

Under several federal pollution-control statutes, activities of the U.S. military are subject to federal, state, and local environmental requirements, both substantive and procedural, along with activities of federal agencies generally. Each of these statutes. however, authorizes the President to grant exemptions (generally, up to one year and extendable by one year at a time) when he determines it to be in the "paramount interest" or "national security interest" of the United States. In addition, the Clean Air Act and Clean Water Act provide the President with further exemption authority for property of the military of a "uniquely military" nature.

Among other federal environmental statutes relevant to military operations, the National Environmental Policy Act has been construed to contain no general exemption for federal actions in the interest of national defense or security, but such purposes may affect the judicial remedy and the need for public disclosure of the environmental impact statement. Also, Council on Environmental Quality regulations relax NEPA requirements for "emergency circumstances." Under the Endangered Species Act, exemptions from the Act's species protections are authorized by opinion of the appropriate Secretary and by action of an "Endangered Species Committee." That Committee must grant an exemption if the Secretary of Defense finds it necessary for reasons of national security.

Under several federal pollution-control statutes, the military branches (along with other federal agencies) must comply with federal, state, and local environmental requirements to the same extent as non-federal entities. These mandates include requirements both substantive and procedural. Of special relevance to the military, however, each of these pollution-control statutes contains a provision authorizing the President to exempt executive-branch sites from pertinent environmental requirements when in the "paramount interest" or "national security interest"of the United States.

Certain federal environmental statutes *not* specially directed toward pollution control – for example, the National Environmental Policy Act and the Endangered Species Act – also apply to the military along with other federal agencies, and also allow military-relevant exemptions.

The scope of these exemptions from otherwise applicable environmental mandates is currently of congressional interest due to pending legislation that would expand certain of the exemptions for Department of Defense functions. This report briefly summarizes (1) the statutory provisions making the military subject to the foregoing laws, and (2) the provisions authorizing exemptions. Note that the provisions in the pollution-control statutes, of which those in the Clean Air Act were the first enacted, are highly similar and obviously patterned after one another. In contrast, the approaches taken in the non-pollution-control statutes are quite different, both from the pollution control statutes and from each other.

Clean Air Act

Section 118 of this statute (42 U.S.C. § 7418) says that each federal agency shall comply with "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent, as any nongovernmental entity." This mandate is made applicable to "any requirement whether substantive or procedural," including any requirement respecting permits.

The President may exempt any executive-branch emission source if he determines it to be "in the paramount interest of the United States," except that no exemption may be granted from the standards for *new* stationary sources (section 111). Also, an exemption from the hazardous emissions section of the act (section 112) may be granted only if the President determines that the technology to implement the standard is not available and that it is "in the national security interest of the United States." An exemption may not exceed one year (two years in the case of hazardous-emissions exemptions), but may be extended for up to one year at a time (two years at a time for hazardous-emissions exceptions) upon the President's making a new determination.

In addition, the President may, if he determines it to be in the "paramount interest of the United States," exempt any weaponry, equipment, aircraft, vehicles or other classes or categories of property of the military that are uniquely military in nature. He shall reconsider the need for such regulations at three-year intervals.

"Military tactical vehicles" need not comply with vehicle emission inspection and maintenance programs.

Clean Water Act

Section 313 of this statute (33 U.S.C. § 1323) says that each federal agency shall comply with "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent, as any nongovernmental entity ...." This mandate is made applicable to "any requirement whether substantive or procedural," including any requirement respecting permits.

The President may exempt any executive-branch effluent source if he determines it to be "in the paramount interest of the United States," except that no exemption may be

granted from the national standards for *new* sources (section 306) and toxic and pretreatment effluent standards (section 307). An exemption may not exceed one year, but may be extended for up to one year at a time upon the President's making a new determination.

In addition, the President may, if he determines it to be "in the paramount interest of the United States," exempt any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property of the military that are uniquely military in nature. He shall reconsider the need for such regulations at three-year intervals.

Safe Drinking Water Act

Section 1447 of this statute (42 U.S.C. § 300j-6) says that each federal agency shall comply with "all Federal, State, interstate, and local requirements, both substantive and procedural ... , respecting the protection of ... wellhead areas, ... public water systems, and ... underground injection in the same manner and to the same extent as any person is subject to such requirements ...."

The President may exempt any executive-branch facility if he determines it to be "in the paramount interest of the United States." An exemption may not exceed one year, but may be extended for up to one year at a time upon the President's making a new determination.

Resource Conservation and Recovery Act

Section 6001 of this statute (42 U.S.C. § 6961) says that each federal agency shall comply with "all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits ...) respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements ...." This mandate is made applicable to all administrative orders "any requirement whether substantive or procedural," including any requirement respecting permits.

The President may exempt any executive-branch solid waste management facility if he determines it to be "in the paramount interest of the United States." An exemption may not exceed one year, but may be extended for up to one year at a time upon the President's making a new determination.

Section 9008 of this statute (42 U.S.C. § 6991f) says that every federal agency shall comply with "all Federal, State, interstate, and local requirements, applicable to [underground storage tanks], both substantive and procedural in the same manner, and to the same extent, as any other person is subject to such requirements ...."

The President may exempt any executive-branch underground storage tank if he determines it to be "in the paramount interest of the United States." An exemption may not exceed one year, but may be extended for up to one year at a time upon the President's making a new determination.

Comprehensive Environmental Response, Compensation and Liability Act

Section 120(a) of this act (42 U.S.C. § 9620(a)) says that each federal agency shall comply with "this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act."

The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense "as may be necessary to protect the national security interests of the United States ...." CERCLA § 120(j), 42 U.S.C. § 9620(j). An exemption may not exceed one year, but may be extended for up to one year at a time upon the President's issuance of a new order. "It is the intention of Congress that whenever an exemption is issued under this paragraph the response action shall proceed as expeditiously as practicable." Id.

Noise Control Act

Section 4 of this act (42 U.S.C. § 4903) says that each federal agency shall comply with "all Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements."

The President may exempt any single activity or facility, including noise emission sources or classes thereof, of any executive-branch agency if he determines it to be "in the paramount interest of the United States." No exemption may be granted from noise emission standards mandated under specified sections of the act, but this does not apply to aircraft and "any military weapons or equipment which are designed for combat use." An exemption may not exceed one year, but additional exemptions may be granted for not to exceed one year upon the President's making a new determination.

Other, Non-pollution Control Statutes

Non-pollution-control statutes often mentioned in the debate over broadening the available military exemptions in environmental statutes include the National Environmental Policy Act and the Endangered Species Act. The Migratory Bird Treaty Act, addressed in several pending military-exemption bills, is not listed here because it neither explicitly addresses its applicability to federal activities, nor has generated a consistent body of case law on the issue.[1]

The National Environmental Policy Act (NEPA) requires each federal agency to, among other things, prepare an environmental impact statement (EIS) on "major Federal actions significantly affecting the quality of the human environment." NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C). The case law rejects any broad, general exemption

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[1] For more extended discussion of the military applicability of certain non-pollution-control statutes, see (name redacted), *The Endangered Species Act, Migratory Bird Treaty Act, and Department of Defense Readiness Activities: Current Law and Legislative Proposals*, CRS Report RL31415 (updated May 17, 2002).

from this or other NEPA requirement simply because an action is taken in the interest of national defense or security. See, e.g., *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) (rejected implicitly).

Case law does recognize, however, that the importance of national defense and security needs may affect the *remedy* granted by a court should a NEPA violation be found. Thus, while holding that a proposed underground nuclear test was subject to NEPA, the D.C. Circuit declined in the interest of national security and foreign policy to grant an injunction despite serious questions as to the adequacy of the EIS. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971).

Case law also recognizes that the Freedom of Information Act (FOIA, 5 U.S.C. § 552), stated by NEPA to govern the public disclosure of EISs, may in some instances shield national defense activities from judicial review for NEPA compliance when FOIA's national security exemption applies. *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981). (FOIA's national security exemption, 5 U.S.C. § 552(b)(1), makes the Act's public disclosure mandate inapplicable to "matters that are ... specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and ... are in fact properly classified pursuant to such Executive order ...."). Of similar import are regulations of the Council on Environmental Quality stating that environmental assessments and EISs addressing classified proposals (defined as in the FOIA national security exemption) may be restricted from public dissemination. 40 C.F.R. § 1507.3(c).

Finally, Council on Environmental Quality regulations relax NEPA requirements for "emergency circumstances." Where such circumstances necessitate taking a federal agency action having significant environmental impact without following the Council's regulations, the agency "should consult with the Council about alternative arrangements." 40 C.F.R. § 1506.11.

The Endangered Species Act makes it unlawful for any "person" – defined to include federal agencies – to "take" any fish or wildlife species listed as endangered. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1) (prohibition); ESA § 3(13), 16 U.S.C. § 1532(13) (definition of "person"). "Take," says the Act, means to harass, harm, wound, kill, or the like. ESA § 3(19), 16 U.S.C. § 1532(19).

In addition, each federal agency must insure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat ...." ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

Two exemption processes are set out in the Act. First, if, after consultation with the Secretary of Interior or Commerce (as appropriate), that Secretary concludes that the taking of an endangered or threatened species incidental to the agency action will not violate section the 7(a)(2) strictures against jeopardizing listed species, the action may proceed. (The Secretary's favorable opinion constitutes as well compliance by the agency with the "incidental take" exception to the ESA section 9 prohibitions above.)

If, however, the Secretary's opinion indicates that the proposed agency action *would* violate section 7(a)(2), then a second exemption process comes into play. In this circumstance, the federal agency may apply to the appropriate Secretary to exempt its proposed action. ESA § 7(g), 16 U.S.C. § 1536(g). The Secretary then must submit a report to an "Endangered Species Committee" (popularly known as the "God Squad") discussing the availability of alternatives to the agency action, its benefits compared with alternative courses of action consistent with section 7(a)(2), whether the action is in the public interest and of regional or national significance, etc. Within 30 days after receiving the report, the Committee must decide whether to grant the exemption. Important here, "the Committee *shall* grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." ESA § 7(j), 16 U.S.C. § 1536(j) (emphasis added).