

Top 5 NDAA Provisions On Energy And The Environment

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President Donald Trump is scheduled to sign the National Defense Authorization Act for Fiscal Year 2019 on Aug. 13 at a ceremony at Fort Drum, New York.[1] Named for Sen. John McCain, R-Ariz., the bill authorizes a total national defense budget of \$717 billion, including \$616.9 billion for the base Pentagon budget and \$21.9 billion for the U.S. Department of Energy's nuclear weapons programs. The NDAA also authorizes \$69 billion to fund U.S. war efforts, called Overseas Contingency Operations. The 2019 NDAA was the product of a rapid bipartisan effort — the final version passed the House of Representatives on July 26 and the Senate on Aug. 1. Signing of this bill in August will mark one of the rare times that a defense authorization bill has become law before the start of the new fiscal year on Oct. 1.[2] The policy decisions Congress makes through the NDAA — the substantial funds it authorizes and the direction it gives to the U.S. Department of Defense — have a global impact.



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As we wrote in connection with the 2018 NDAA,[3] buried deep in the mammoth national defense authorization acts are often-overlooked provisions that have a major impact on energy, environment and natural resources policy. As the single largest energy consumer in the world, with industrial-scale operations at military bases, and with millions of acres of habitat under its purview, the DOD has a vested interest in these issues. Here is a look at some of the key provisions of the 2019 NDAA that address energy, environment and natural resources issues.

1. Section 315: Funding of Study and Assessment of Health Implications of Per- and Polyfluoroalkyl Substances Contamination in Drinking Water by Agency for Toxic Substances and Disease Registry

Per- and polyfluoroalkyl substances — perfluorooctanoic acid and perfluorooctane sulfonic acid — were once ubiquitous in commercial products and were used frequently by the military, especially in a foam commonly deployed to extinguish fires. Studies suggest that exposure may be injurious to human health among certain sensitive populations, including by potentially causing birth defects, certain cancers, and liver and thyroid damage.[4] Assessing safe PFOA and PFOS exposure levels has attracted considerable attention from the environmental community and other concerned parties, including members of Congress, some states and the public at large. While the chemicals have largely been phased out of consumer products, they have more recently been detected in groundwater near industrial facilities. In December 2016, the DOD identified 393 DOD installations with known or suspected areas of PFOA/PFOS release.[5]

The 2018 NDAA provided \$7 million for a study of the human health effects of PFOA and PFOS in drinking water and groundwater to be conducted by the Centers for Disease Control and Prevention, and it authorized the Navy and Air Force to remediate PFOA and PFOS with over \$72 million combined.[6]

The 2019 NDAA goes even further.

First, it authorizes increased funding to \$10 million total for the PFOA/PFOS health study.

Second, it directs the secretary of defense to submit to Congress an “assessment and remediation plan” six months after the administrator of the U.S. Environmental Protection Agency establishes a maximum contaminant level for PFAS contamination in drinking water.[7] The DOD report is to contain a plan to assess any contamination at DOD installations and surrounding communities that may have occurred from PFAS usage by the DOD; identify remediation actions the DOD plans to undertake; provide an estimate of the cost of such remediation; and provide an assessment of past expenditures by local water authorities to address contamination before the EPA established a maximum containment level and an estimated cost to reimburse those communities for such expenditures.

Third, the 2019 NDAA directs the secretary of defense to conduct an assessment of the human health implications of PFAS exposure. This report shall contain a “meta-analysis” that considers the current scientific evidence linking the health effects of PFAS to Armed Forces members who were exposed to PFAS at military installations; an estimate of the number of Armed Forces members who may have been exposed to PFAS during their service; the development of a process to facilitate the transfer of health information on impacted individuals between the DOD and the U.S. Department of Veterans Affairs; and a description of the amount of funding that would be required to administer a potential registry of individuals who may have been exposed to PFAS while serving in the Armed Forces.

Finally, the NDAA continues to authorize the services to address chemicals like PFAS and prevent them from entering the local water supplies. Clearly, Congress is responding to pressure to take action against PFAS without waiting for the results of the mandated studies or the formal establishment by EPA of a maximum contaminant level for drinking water.

2. Section 313: Use of Proceeds from Sales of Electrical Energy Derived from Geothermal Resources for Projects at Military Installations Where Resources Are Located

There exists on some military bases alternative energy resources that produce electrical energy that the base then sells to a utility company. Traditionally, federal law (10 U.S.C. § 2916) has required that proceeds from those sales be credited not to the base itself where the energy originated but to the military department overseeing the base.

But due to a provision in the NDAA backed by Reps. Kevin McCarthy, R-Calif., and Paul Cook, R-Calif., if the alternative energy that the military base uses to produce the electric energy is a geothermal energy resource, the military installation will be able to retain 50 percent of the proceeds to support “energy or water security projects directly coordinated with local area energy or groundwater governing authorities, for the military installation in which the geothermal energy resource is located.”

Press reports indicate that this provision was inserted specifically to benefit Naval Air Weapons Station China Lake in California, which uses geothermal resources on base to produce electricity that it sells to Southern California Edison.[8] Now, under the NDAA, the proceeds from these sales will support infrastructure projects on the base. Furthermore, those proceeds will not be “appropriated” by Congress, meaning they will not be subject to sequestration or continuing

resolution acts in the normal course of federal funding. In essence, the revenue itself represents a renewable resource that will benefit the bases from which the energy is derived and sold.

These benefits may incentivize other military bases to develop geothermal electric resources that can generate a stable stream of revenue for the construction of energy- and water- related infrastructure projects.

3. Section 337: Report on Wildfire Suppression Capabilities of Active and Reserve Components

The wildfires burning in the United States in 2018 are proving to be more destructive than those in 2017. At the time of this writing, in California, 17 wildfires have burned nearly 600,000 acres, destroyed thousands of homes, and killed more than 40 people, over the past 10 months.[9] Wildfires in Oregon and Colorado have also laid waste to more than 250,000 acres collectively.[10] Recently, the White House approved California’s request for a presidential major disaster declaration to cope with the fires.[11] Human activity — from starting fires, to living close to wilderness, to forest management practices, to contributing to climate change that leads to rising average temperatures and drier forests — contributes to increased wildfire risk and to more fires that burn hotter and longer.[12]

The NDAA takes the newsworthy step of expressing the sense of Congress that “wildfires endanger national security.” It directs the secretary of defense to submit to Congress within three months of enactment “a report on the wildfire suppression capabilities within the active and reserve components of the Armed Forces, including the Modular Airborne Fire Fighting System Program, and interagency cooperation with the Forest Service and the Department of the Interior.” Clearly, Congress is recognizing that wildfires require a whole-of-government approach, regardless of the politics surrounding climate change.

4. Section 316: Extension of Authorized Periods of Permitted Incidental Takings of Marine Mammals in the Course of Specified Activities by Department of Defense

Pursuant to the Marine Mammal Protection Act of 1972, the DOD must obtain permission from the National Marine Fisheries Service, an agency under the auspices of the National Oceanic and Atmospheric Administration, for the incidental taking of marine mammals during military operations. The NDAA extends the length of time that the military can be authorized for incidental takings of marine mammals from five years to seven years if the secretary finds that such takings will have a negligible impact on any marine mammal species. The seven-year extension is a reduction from the version of the NDAA that passed the House, which had called for extending the period to a decade. At least one environmental group has expressed disappointment that the period was extended at all.[13]

5. Section 1052: Authority to Transfer Funds for Bien Hoa Dioxin Cleanup

During the Vietnam War, the U.S. military sprayed an herbicide mixture known as Agent Orange across Vietnam. Agent Orange contained a chemical called dioxin, a highly toxic and persistent organic pollutant linked to cancers, diabetes, birth

defects and other disabilities that persists in parts of Vietnam and continues to affect Vietnamese people and American veterans who were exposed to these chemicals.[14]

The largest remaining dioxin-contaminated hot spot in Vietnam is at Bien Hoa Airbase near Ho Chi Minh City, a former U.S. Air Force Base that witnessed four major herbicide spills from December 1969 to March 1970.[15] The NDAA authorizes the secretary of defense to transfer up to \$15 million in each of fiscal years 2019 through 2027 to the secretary of state to support a partially U.S. government-funded cleanup of dioxin at the Bien Hoa Airbase.

The cleanup is notable for a few reasons. First, it is rare for the U.S. government to fund environmental cleanup in a foreign country that was the site of U.S. military activities. This provision represents a remarkable exception. Second, the effort to assist Vietnam with the cleanup of dioxin is both a sign of and a contributor to the growing Vietnamese-American rapprochement that has seen in recent years a presidential visit to Vietnam,[16] the visit of a U.S. aircraft carrier for the first time in the decades since the war, and growing military ties between the two nations, driven in part by Chinese revanchism in the South China Sea.[17] Third, it should not escape notice that the dioxin cleanup provision is included in the defense policy bill named for Sen. McCain, a former Vietnam War prisoner of war, who has long advocated for normalized and improving relations with the country.[18]

Finally, we note two provisions that were not adopted in the NDAA's final text. First, Section 315 of the original House bill sought to narrow the conditions under which resources could be used to treat PFOS and PFOA in drinking water. It listed five conditions that would need to be met to receive assistance, including that local water authorities would have to have requested assistance or developed a plan to treat these chemicals prior to March 1, 2018, and they would have to waive all claims against the U.S. and the National Guard for treatment expenses incurred before Jan. 1, 2018. The omission of this section suggests that Congress is willing to consider opening the public purse to support PFAS remediation and has not, at least not yet, sought to shield the government from legal liability.

Second, the original House bill contained a provision (originally Section 314) that would have prohibited listing the Greater Sage-Grouse and the Lesser Prairie-Chicken under the Endangered Species Act for a 10-year period. This section would also provide that the previous such listing of the American Burying Beetle may not be enforced or reinstated. Such a provision is part of a longstanding effort by opponents of the ESA to modify and weaken it through the NDAA process. Here, such efforts were once again unsuccessful.

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[1] John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/5515/text/>; Seung Min Kim, Trump to Make New York Trip to Sign Defense Bill Named for John McCain, Washington Post, Aug. 7, 2018, <https://wilmerhalecommunications.com/e/wl0qjkwrtqycrvq/8b3a4932-9125-45a8-b19d-776f69734137>

[2] John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018) <https://wilmerhalecommunications.com/e/pv0aslql8hyp9za/8b3a4932-9125-45a8-b19d-776f69734137>; Seung Min Kim, Trump to Make New York Trip to Sign Defense Bill Named for John McCain, Washington Post, Aug. 7, 2018, <https://wilmerhalecommunications.com/e/wl0qjkwrtqycrvq/8b3a4932-9125-45a8-b19d-776f69734137>

[3] Rachel Jacobson, Matthew F. Ferraro, and Mark L. Hanin, Congress' Overlooked Environmental Legislation, *Law 360*, June 11, 2018, <https://www.law360.com/aerospace/articles/1052324>

[4] Agency for Toxic Substances and Disease Registry, Toxicological Profile for Perfluoroalkyls, U.S. Department of Health and Human Services, June 2018, <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>.

[5] See Rachel Jacobson, Matthew F. Ferraro, and Mark L. Hanin, Environmental Deconfliction: The National Defense Authorization Act For Fiscal Year 2018 and Its Implications for Energy, Environment, and Natural Resources, 18 *Pratt's Energy Law Report* 223, 227-228 (2018), available at <https://www.wilmerhale.com/en/insights/publications/20180720-environmental-deconfliction-the-national-defense-authorization-act-for-fiscal-year-2018-and-its-implications-for-energy-environment-and-natural-resources>.

[6] *Id.* at 228.

[7] EPA uses a multi-step process for establishing maximum contaminant levels for drinking water culminating in a rulemaking. The process could take years.

[8] Jack Barnwell, NDAA Includes Provision to Benefit China Lake Water, Energy Security, *The Daily Independent*, Aug. 3, 2018, <http://www.ridgecrestca.com/news/20180803/ndaa-includes-provision-to-benefit-china-lake-water-energy-security>.

[9] Tim Arango & Jennifer Medina, California Fire Now the Largest in State History: 'People Are on Edge', *New York Times*, Aug. 7, 2018, <https://wilmerhalecommunications.com/e/al0uw5crqvs7jaa/8b3a4932-9125-45a8-b19d-776f69734137>.

[10] Anastasia Selby, I'm a Woman Who Fought Wildfires for 7 Years. Climate Change is Absolutely Making Them Worse, *Vox*, July 30, 2018, <https://www.vox.com/science-and-health/2017/9/14/16301876/colorado-california-wildfires-2018-climate-change-carr>.

[11] Governor Brown Announces Federal Approval of Presidential Major Disaster Declaration for Shasta County, Aug. 4, 2018, <https://www.gov.ca.gov/2018/08/04/governor-brown-announces-federal-approval-of-presidential-major-disaster-declaration-for-shasta-county/>.

[12] Umair Irfan, The West is on Fire...Again, *Vox*, Aug. 2, 2018, <https://www.vox.com/2018/7/20/17582890/wildfires-2018-carr-fire-california-cranston-ferguson-colorado>.

[13] Courtney Columbus, Policy Bill with Marine Mammal Rider on its Way to President, *E&E News*, Aug. 1, 2018, <https://www.eenews.net/eenewspm/2018/08/01/stories/1060091889>.

[14] What is Agent Orange?, Aspen Institute, <https://www.aspeninstitute.org/programs/agent-orange-in-vietnam-program/what-is-agent-orange/>.

[15] Biên Hoà Airbase Dioxin Remediation to Start, *Viet Nam News*, Jan. 24, 2018, <http://vietnamnews.vn/society/421773/bien-hoa-airbase-dioxin-remediation-to-start.html#3iHvvvAsuPp5Kvll.99>

[16] Daniel Malloy, U.S. Helping Defuse Vietnam's Dioxin Hot Spots Blamed on Agent Orange, *Washington Post*, Apr. 8, 2016, https://www.washingtonpost.com/world/asia_pacific/us-helping-defuse-vietnams-dioxin-hot-spots-blamed-on-agent-orange/2016/04/07/3be16152-fb65-11e5-80e4-c381214de1a3_story.html?utm_term=.fa350f70cee7.

[17] J.D. Simkins, Carl Vinson First Carrier to Visit Vietnam Since War, *Navy Times*, Mar. 5, 2018, <https://www.navytimes.com/news/your-navy/2018/03/05/carl-vinson-first-carrier-to-visit-vietnam-since-war/>.

[18] John S. McCain, Statement on Restoration of Diplomatic Relations with Vietnam, July 11, 1995, <https://www.mccain.senate.gov/public/index.cfm/press-releases?ID=a7591ed4-a6be-42c1-b052-9608391f21ef>.