Analysis of "The Defense Transformation for the 21st Century Act"

April 24, 2003

Title I. Personnel Transformation

National Security Personnel System (Sec. 101)
This subtitle would authorize the creation of a new, separate system within the Department of Defense (DoD) for governing employee rights, labor management relations and personal service contracting.

Section 9902. Establishment of Human Resources Management System
This section directs the Office of Personnel Management (OPM) to work jointly with the Secretary of Defense to prescribe, by regulation, a new personnel system. Even the role of OPM could be waived for national security reasons.

The only principles guiding this new system are that it "be flexible" and "be contemporary."

The preliminary sections cite several provisions of law that would not be waived or modified, including

- merit principles;
- prohibited personnel practices;
- discrimination on the basis of race, sex, age, political affiliation, marital status, handicapping condition, protected speech (whistleblowing) and testifying, filing a grievance or otherwise cooperating with investigative authorities; and
- Veteran preferences in hiring and promotions.

The bill would also safeguard general employment provisions governing travel reimbursement, part-time benefit calculations, access to criminal history and incentive awards.

<u>All other provisions of federal employment law would be waived. Thus, while DoD employees would have enumerated rights, they would lack remedies to enforce those rights because the provisions of law guaranteeing due process, the right to appeal and standards of review would not apply</u>. Instead, the ability of an employee to right a wrong or vindicate a right would depend upon whatever new "flexible" and "contemporary" system the Defense Secretary would design.

In determining what employee rights would remain, the Secretary is enjoined to consult with the Merit Systems Protection Board (an administrative tribunal) to design procedures that are "fair, efficient and expeditious." Given the complete absence of any factual case for these changes or identification of what particular provisions of current law trouble the DoD, it is difficult to say how the new system will ultimately differ from the old.

Moreover, since many of the procedural due process provisions have been created as a result of judicial decisions turning on employee constitutional protections, it is likely that any appreciable new system will be litigated to determine if they meet constitutional minimum due process requirements.

Other waived provisions govern conflict of interest rules, ethics guidelines and financial disclosures. In addition, the bill would waive provisions governing pay, performance appraisals and much of the law governing federal employee collective bargaining rights.

Section 9903. Contracting for Personal Services
This section grants the Secretary of Defense the ability to negotiate personal service contracts under any conditions he deems necessary for the performance of work overseas or work carrying out a "national security mission." These contracts would be negotiated "without regard to" any current law on any terms, for any amount (from any funds "available' to DoD) and for whatever duration the Secretary deems necessary.

In addition, the Secretary would be able to select and retain "experts" on a non-competitive basis without regard to current ethics rules, security requirements or procurement rules.

Section 9904. Attracting Highly Qualified Experts
The Secretary would also be able to appoint, on a non-competitive basis, "highly qualified experts…from outside the civil service and uniformed services" to serve for terms of up to five years.

Establishment of Auxiliaries Within the Military Services (Sec. 104)
This new chapter would authorize the creation of a voluntary organization to perform any "non-combat function, power, duty, role or mission, or operation authorized by law" in each of the military services.

It is implied that these volunteers would be able to displace civilian as well as non-combat uniformed positions. The selection process for auxiliary members would be at the discretion of the service secretary.

Title III. Installation Management Transformation

Section 301. Readiness and Range Preservation Initiative
After facing defeat last year in Congress, the Pentagon last week unveiled another legislative proposal—the "Readiness and Range Preservation Initiative" (RRPI)—that would grant the DoD immunity from an array of public health and natural resource protections provided by five fundamental federal laws: the Resource Conservation and Recovery Act; Comprehensive Environmental Response, Compensation, and Liability Act (Superfund law); Clean Air Act; Endangered Species Act; and Marine Mammal Protection Act.

The Pentagon claims that laws regulating hazardous waste, toxic cleanup, air and water quality, as well as those protecting wildlife habitat, migratory birds, whales and other marine mammals

hinder military readiness. While no one questions the importance of combat readiness for our fighting forces, sweeping exemptions from environmental laws are not necessary to ensure America's military might.

The statutes now at issue already provide the flexibility needed to balance environmental protection and military readiness by allowing exemptions on a case-by-case basis in the interest of national security. According to a briefing presented to the Deputy Secretary of Defense by the Department's "Senior Readiness Oversight Council" last December: "national security clauses exist in many of this nation's environmental statutes that would allow senior officials…to excluded DoD from certain provisions…under certain conditions. To date DoD has not used such exemptions to any extent to address encroachment concerns…" [See "*Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Service Chiefs. Subject: Senior Readiness Oversight Council Approval of 2003 Sustainable Ranges Action Agenda*" at p. 9 (December 10, 2002)]

Additionally, success stories abound to show how the military, time and time again, has found reasonable solutions to pursue necessary training in compliance with environmental laws. Last June the General Accounting Office (GAO) said the DoD had failed to produce any evidence showing that environmental laws or other "encroachments" have significantly affected military readiness [See GAO, *Military Training: DoD Lacks a Comprehensive Plan To Manage Encroachment on Training Ranges*, GAO-02-614 (June 2, 2002)]. Christine Whitman, head of the U.S. Environmental Protection Agency, recently testified before the Senate that she has "been working very closely with the Department of Defense and I don't believe that there is a training mission anywhere in the county that is being held up or not taking place because of an environmental protection regulation." [See Whitman's testimony regarding DoD exemptions from environmental laws, U.S. Senate Environment and Public Works Committee Hearing, February 26, 2003]

Moreover, the Pentagon's proposal directly contradicts the principle of the Federal Facilities Compliance Act—passed nearly unanimously in 1992—by unnecessarily exempting the DoD from federal laws at the expense of public health, public lands, air, water and wildlife. Moreover, if the exemptions were granted, American taxpayers and state governments would bear the burden of cleanup costs and face public health risks from toxic contamination resulting from military operations.

What follows is a section-by-section analysis of the laws at risk from the Pentagon's proposal.

Marine Mammal Protection Act (Section 2015)

The heart of the Marine Mammal Protection Act (MMPA)—our nation's leading instrument for the conservation of whales, dolphins, sea otters, manatees and other marine mammals—is its moratorium on the "taking" of these species. Under the moratorium, wildlife agencies are required to review government activities that have the potential to harass or kill these animals in the wild. The Pentagon's proposal would exempt the military from the MMPA by

- introducing a major loophole into the statutory definition of "harassment," thereby allowing a range of Pentagon activities that potentially harm marine mammals (that cause them physical

injury or impair their ability to breed, nurse, feed, or migrate) to escape review;

- eliminating the requirement that takes be limited to "small numbers" of animals in a "specified geographic region," which would open the door to activities that could take hundreds of thousands of marine mammals across the world's oceans, without any finer grain of analysis; and

- creating broad exemptions that allow the Pentagon to bypass the review process entirely. Unlike military exemptions written into other statutes, the ones proposed for the MMPA are not triggered by war or national emergency and are not conditioned on completion of an initial stage of environmental review, but can be applied to virtually any military activity or technology at any time.

The likely result of these dramatic changes would be far less protection for marine mammals, less mitigation and monitoring of impacts, less transparency and even more public controversy and debate. The DoD has not made the case that any such steps are warranted. Under the MMPA, the Pentagon may receive authorization to "harass" marine mammals through a streamlined process that, by law, can take no longer than 120 days. Furthermore, under the Armed Forces Code, it can obtain special accommodations to meet the needs of military readiness and can appeal adverse decisions to the President. This last provision has never been invoked with regard to the MMPA presumably because—as the director of the National Marine Fisheries Service testified last year—not one of the Pentagon's requests for authorization under the Act has ever been denied.

Endangered Species Act (Section 2017)
The Endangered Species Act (ESA) is the country's chief vehicle for conserving our endangered wildlife. The ESA is a critically important law because it requires developers, politicians, biologists, industrialists—all citizens—to consider how their actions affect imperiled species and the habitat on which they depend. The Pentagon proposal would exempt the military from ESA protections by

- exempting the military from "critical habitat" designations on all military lands that have an Integrated Natural Resources Management Plan. These management plans have not provided adequate protection for endangered species and, therefore, cannot substitute for critical habitat designations. Moreover, Section 7(j) already provides the Secretary of Defense with ample authority to secure an automatic exemption from the critical habitat protections (or any other provision of ESA) whenever necessary for reasons of national security; and

- broadly wording provisions so that they might be interpreted to apply not solely to military readiness activities but to "any lands...owned or controlled by the Department, or designated for its use". For many of the over 300 endangered species, military lands provide the last chance for survival because surrounding lands have been lost to development.

Clean Air Act (Section 2018)
Under the Clean Air Act all federal agencies, including DoD, must conform to any applicable federal or state implementation plan for attaining public health air quality standards—otherwise

known as National Ambient Air Quality Standards (NAAQS). This means that DoD activities cannot cause or contribute to a violation of NAAQS, increase the frequency or severity of NAAQS violations, or delay attainment of a particular standard. The Pentagon's proposal would exempt the military from NAAQS by

- broadening the definition of "training" to exclude even non-military activities, such as driving vehicles on military bases or from one training site to another, or even spraying pesticides on a right-of-way;

- eliminating timelines for the military to estimate the quantity of military emissions in non-attainment areas; and

- lifting the mandate for ensuring that military activities do not worsen air quality.

The Clean Air Act already provides ample mechanisms for exempting DoD activities from where there is a national security need. Last year, two organizations representing state air pollution control administrators (the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials) opposed DoD's proposed changes to federal air protections on the grounds that they would exclude routine non-emergency activities from basic environmental requirements.

The case of Fort Wainwright in Alaska illustrates the effects of exempting DoD from Clean Air Act regulations. The outdated coal-fired plant at Fort Wainwright has been fined $16 million by the EPA over ten years for clean air violations. The State of Alaska cited the Army base for over 450 environmental violations in one month alone.

Exempting DoD from the Clean Air Act's standards would require states to obtain deeper emissions cuts from other in-state sources to meet clean air standards. These exemptions may also create unacceptable public health and environmental risks to neighboring communities.

Resource Conservation and Recovery Act (Section 2019)
The Resources Conservation and Recovery Act (RCRA) is the nation's premier law for regulating hazardous wastes, through a cradle-to-grave management system that is meant to prevent toxic pollution and ensure that the responsible parties for such wastes pay for their cleanup. DoD has a long history of flaunting RCRA requirements. The number of RCRA enforcement actions by EPA against DoD facilities outnumbers those for other agencies by a three-to-one margin. The Pentagon's proposal would largely remove hazardous wastes on military ranges from RCRA regulation by

- changing the definition of "solid waste" to exclude explosives, munitions, munitions fragments, and other toxic material;

- allowing toxic substances to be left lying exposed on the range, where they could leach into groundwater, surface waters, or the air;

- weakening the authority of the Environmental Protection Agency and state officials to protect

communities from toxic waste; and

- preventing state authorities from collecting damages from DoD when its contamination injures sensitive public resources, including wildlife, fisheries and recreational areas.

Not surprisingly, state level opposition was fierce when DoD proposed similar legislation in Congress last year. For instance, those opposed to exempting the military from RCRA/Superfund laws in particular included the Environmental Council of States, National Governors' Association, National Association of Attorneys General, National Conference of State Legislatures, and the Association of State and Territorial Solid Waste Management Officials.

Superfund Law (Section 2019)
The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund statute) enables cleanups at the nation's worst toxic waste sites by holding polluters responsible for the release of hazardous materials and by requiring polluters to pay into a trust fund that pays for cleanup when no responsible party can be identified. The Superfund's cleanup provisions are triggered by a "release" of a toxic substance. The Pentagon's proposal would exempt the military from Superfund by

- exempting from the term "release" any explosives, munitions, munitions fragments, or other toxic material (unless the military closed the range or if the substances migrated off the range and required a cleanup); and

- delaying cleanup until contamination has spread beyond range boundaries, thereby adding years and potentially billions of dollars to cleanup efforts.

DoD is unquestionably the nation's biggest polluter—its cleanup program includes almost 28,000 currently or formerly contaminated sites in every state, territory, and even other countries. California alone has 3,912 contaminated sites on 441 current and former DoD properties. Many of DoD's facilities have groundwater contamination plumes that threaten drinking water sources. Otis Air Base on Cape Cod, Massachusetts, for example, is a notorious Superfund site where contaminants have leached into the groundwater aquifer that provides the sole source of drinking water for the entire region.

Given these problems, it is surprising that DoD is seeking a $400 million decrease in its FY04 request for environmental cleanup. DoD's request for $3.8 billion is significantly less than the $4.1 billion it requested last year—and less than the $4.2 billion Congress approved in the FY03 DoD spending bill. When Senators questioned Raymond Dubois Jr., a deputy undersecretary of Defense, about the discrepancy, Dubois said that the military has "less environmental remediation to do." He also claimed that the Pentagon proposal would "combine military readiness with environmental stewardship." [Suzanne Struglinski, "Low funding request shows DoD environmental progress, official says," *Environment and Energy Daily*, March 5, 2003]

Title IV. Administrative Transformation

Section 405. Conversions of Commercial Activities
The bill authorizes its outsourcing competitions to include elements of quality ("best value") instead of merely relying on a cost comparison. This amendment would inject a subjective element into what is now a largely objective comparison between the contract bid and the cost of performing the function with civil servants.

Repeal of Environmental Reports
The bill would repeal an array of congressional reporting requirements for the DoD. Included among the repealed provisions are mandatory reports concerning

- Environmental Restoration Accounts: Facility Relocation Costs (page 159);
- Contracts for certain Environmental Restoration Activities (page 185);
- Overseas Environmental Restoration (page 187); and
- Partnerships for Investment in Innovative Environmental Technologies.

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