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NATIONAL SECURITY EXEMPTIONS IN FEDERAL POLLUTION LAWS

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I. INTRODUCTION

National security has been a principle highly regarded by lawmakers and judges. When Congress toughens pollution laws, it almost invariably creates an escape hatch for certain federal facilities and activities which is triggered in the event that national security or the paramount interests of the United States are threatened. This article addresses the national security exemptions in federal pollution laws. Part II discusses sovereign immunity and the trend toward waiving sovereign immunity for many federal facilities. Part III addresses exemptions in seven federal pollution statutes. Part IV analyzes the only application of an exemption clause, which was for a Haitian and Cuban refugee center at a Puerto Rican Army base. Part V explores several cases where the government claimed it was entitled to a national security defense even where it had not requested an exemption. Finally, Part VI concludes by examining recent trends in national security exemptions and the possibility of future exemptions.

II. SOVEREIGN IMMUNITY

For years the federal government was allowed to pollute its own facilities without any danger of being sued. The doctrine of sovereign immunity was a durable shield against liability for environmental law violations. As set forth in Block v. North Dakota,1 the doctrine of sovereign immunity protects the United States from being sued without the consent of Congress.2 The longstanding policy supporting the doctrine is that the government should be free to operate without interference.3

To sue the government for violating an environmental statute, a plaintiff must show that the government has waived sovereign immunity. Only Congress

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2. Id. at 287.
has this authority. The waiver must be clear and unambiguous because courts strictly construe waivers in the government's favor.

All major federal environmental statutes now waive sovereign immunity, at least to some degree. For example, some statutes require federal departments and agencies to comply with federal, state, local and interstate regulatory requirements.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provides that federal departments and agencies shall be liable to the same degree as nongovernmental entities. CERCLA also requires compliance with state laws concerning removal and remedial action when the federal facility is not included on the National Priorities List. These provisions ensure equal liability for both governmental and nongovernmental entities. Accordingly, states must apply their laws evenly and cannot place more stringent standards on federal facilities than on nonfederal sites.

Court decisions have clarified the scope of CERCLA's waiver. In Maine v. Navy, the court held that CERCLA's waiver of immunity as to state laws does not waive immunity from civil punitive penalties. In Rospatch Jessco Corp. v. Chrysler Corp., the court held that CERCLA's waiver applies only to facilities currently owned or operated by the United States. Thus, the government was immune from state liability for the Air Force's past ownership of a polluting facility when it no longer owned the facility. In Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co., the court held that CERCLA clearly waived sovereign immunity from the imposition of attorney's fees and costs.

In addition to the statutorily enacted waivers in CERCLA, both the Safe Drinking Water Act ("SDWA") and the Clean Air Act ("CAA") require federal agencies to comply with all substantive and procedural federal, state and local requirements, including any processes and/or sanctions. Although these generally worded waivers appear extremely broad, their extent is questionable.

8. Id. § 9620(a)(4).
9. 973 F.2d 1007, 1010 (1st Cir. 1992).
11. Id.
Whether they include waivers from civil penalties is not clear from the face of the statutes. Furthermore, a federal facility's obligation to pay air pollution regulatory fees pursuant to a local air pollution district's rules is not waived.\textsuperscript{14} Regulatory fees are different in nature from civil penalties, and it remains to be seen whether a court will interpret "sanction" to include penalties.

Pursuant to the Clean Water Act ("CWA"), the United States is expressly liable for civil penalties, but only for those "arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."\textsuperscript{15} Thus, the federal government is not liable for civil penalties arising under municipal water pollution law.\textsuperscript{16} However, federal agencies are liable for violations of federally sanctioned state water pollution laws.\textsuperscript{17}

The sovereign immunity provision in the Noise Control Act ("NCA") is generous to the government. It directs federal agencies to carry out the programs within their control in such a manner as to further the policy of the NCA, but only "to the fullest extent consistent with their authority under Federal laws."\textsuperscript{18}

The waiver provision of the Resource Conservation and Recovery Act ("RCRA") states that the government has no immunity for "substantive and procedural" requirements.\textsuperscript{19} Prior to the 1992 amendments to RCRA, then entitled the "Federal Facilities Compliance Act", the term "requirements" did not include civil penalties.\textsuperscript{20} In 1992, however, Congress made it clear that federal agencies are subject to penalties and fines under RCRA. The 1992 amendments defined "substantive and procedural requirements" to include "all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."\textsuperscript{21}

III. E X E M P T I O N S F O R F E D E R A L F A C I L I T I E S

Despite waivers of sovereign immunity in the federal pollution statutes, federal facilities can be exempted from compliance with such laws. Each statute contains a provision whereby the President can sign an executive order declaring a facility exempt if he finds the exemption to be of paramount interest to the

\textsuperscript{15} Metropolitan Sanitary Dist. of Greater Chicago v. United States, 737 F. Supp. 51 (N.D. Ill. 1990).
\textsuperscript{17} NCA § 4(a), 42 U.S.C. § 4903(a) (1988).
\textsuperscript{19} See Ohio v. Department of Energy, 904 F.2d 1058, 1062 (6th Cir. 1990).
\textsuperscript{20} Pub. L. No. 102-386 (codified at 42 U.S.C. §§ 6961 et seq. (Supp. IV 1992)).
United States or in the interests of national security. The language and scope of
the exemptions vary.

A. CERCLA

CERCLA allows for an exemption regarding a response action at a
specified facility of the Department of Energy ("DOE") or the Department of
Defense ("DOD") when the exemption is necessary to protect the national security
interests of the United States.22 When an exemption is granted, the response
action can proceed, but certain statutory requirements are lifted.23 An exemption
must be for a specified period not to exceed one year.24 An additional exemption
can be granted if the President issues a new order, again with a duration limit of
one year.25 The statute does not prohibit granting perpetual extensions, provided
the President issues a new order when each old order expires.26

CERCLA does not spell out any criteria of "national security" which the
President must consider before granting an exemption. The President has broad
discretion to determine what actions are in the interest of national security.
Congress provided a check on the President's exemption authority, however, by
requiring the President to notify Congress within thirty days of the issuance of an
exemption order.27 The notification must contain a statement of the reasons for
granting the exemption.28 There is no provision, though, for a Congressional
override of the President's exemption authority. By requiring the disclosure of
all exemptions, Congress apparently believed the President would wield his
authority carefully.

When an exemption from certain CERCLA requirements is issued, the
response action must proceed "as expeditiously as practicable."29 This wording
allows for significant delay tactics. For example, the manager of the facility can
stall the response action by telling the Environmental Protection Agency ("EPA")
that the action is not "practicable." Although the statute has no mechanism to
speed up an exempted response action, there is one check. Congress must be
notified periodically of the progress of any response action subject to a national
security exemption.30 In addition, the President cannot grant a CERCLA

23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
exemption due to lack of appropriation unless he specifically requested such appropriation as a part of the budgetary process and Congress failed to grant it.\(^31\)

CERCLA as enacted in 1980 did not contain any reference to federal facility compliance.\(^32\) The Superfund Amendments and Reauthorization Act of 1986 ("SARA") added section 120 requiring federal facility compliance.\(^33\) The change was motivated by a 1984 General Accounting Office report which identified approximately 340 potential federal civilian hazardous waste sites and 473 DOD bases with potential hazardous waste sites.\(^34\) Congress required federal facilities to comply with CERCLA to the same extent as nongovernmental entities, and it recognized the need for case-by-case exemptions.\(^35\) The legislative history is silent on the reasons for the precise wording of this exemption.

B. **RCRA**

The exemption provision in RCRA is considerably broader than that in CERCLA. The President may exempt any solid waste management facility of any department, agency or instrumentality in the executive branch from a RCRA requirement if he determines the exemption to be in the paramount interest of the United States.\(^36\) "Paramount" interest is certainly broader than "national security" interest. The President is given the discretion to determine what is in the paramount interest of the United States.\(^37\) This discretion is dangerously broad. Arguably, the President could determine that reducing federal spending is of paramount interest and exempt all solid waste management facilities at all federal facilities. Of course, this decision would be politically unpopular, but no statutory mechanism bars the irresponsible granting of exemptions.

The procedures for granting and renewing a RCRA exemption are similar to those in CERCLA. The duration limit is one year, and additional exemptions can be granted for up to one year each.\(^38\) Each January the President is required to report to Congress on all RCRA exemptions granted during the preceding year, along with the reasons for granting each exemption.\(^39\) No exemption can be granted on the basis of lack of appropriation unless the President requested appropriation and Congress refused it.\(^40\)

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31. *Id.*
35. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
When RCRA was enacted in 1976, Congress looked to the federal facilities provisions of the CAA and the CWA in formulating its opinion of how RCRA should treat such facilities. The resulting scheme was set forth in section 6001. The EPA Administrator was required to promulgate regulations applying to federal facilities that mandated compliance with certain guidelines. The regulations would preempt state and local law. The statute gave the President, or his designee, the authority to grant an exemption to any facility or activity of the federal government if he determined that national security interests required such.

The 1992 Federal Facilities Compliance Act changed the scheme of the 1976 Act by eliminating the special regulations and requiring federal facilities to follow federal, state, and local law. An exemption provision for paramount interests was implemented replacing the 1976 national security exemption. The legislative history provides no rationale for the change in terms.

C. CAA

The exemption provision in the CAA is also broad in scope. The President can exempt "any emission source of any department, agency, or instrumentality in the executive branch from compliance" with CAA requirements if he determines it to be of paramount interest to the United States. Despite this broad language, Congress has placed a restriction on the President's exemption power for two provisions of the CAA. First, no exemption can be granted from section 111, which sets forth new stationary source performance standards. Second, exemptions from section 112 standards for hazardous air pollutants can only be granted in accordance with section 112(i)(4). An exemption from section 112 can be for up to two years, subject to unlimited extensions of up to two years each. Exemptions from all other provisions are limited to one year,

43. Id.
44. Id.
45. See 42 U.S.C. §§ 6961 et seq.; see also supra note 22.
49. Id.; see 42 U.S.C. § 7411(a)-(j).
50. 42 U.S.C. § 7418(b). Section 7412(i)(4) states that an exemption for a stationary source can be granted if the President determines that the necessary technology is unavailable and that it is in the national security interest of the United States to do so.
51. Id.
with extensions of up to one year. Each January, the President must report all
exemptions, along with the reasons for granting them, to Congress.

Under the CAA, the President has the unusual authority to issue
regulations exempting "any weaponry, equipment, aircraft, vehicles, or other
classes or categories of property" owned or operated by the Armed Forces or by
the National Guard of any state if the property is uniquely military in nature.

Again, to issue these regulations, the President must determine that doing so is
of paramount interest to the United States. Every three years, the President
must reconsider the need for such regulations. To date, no regulations have
been issued. The authority to issue regulations is a tremendous power, but the
CAA does not spell out the issuing procedures. At a minimum, the President is
constrained by the Administrative Procedure Act (“APA”) and thus cannot act
arbitrarily.

The first CAA provision for federal facility compliance appeared in the
1963 Clean Air Act. Federal facilities were ordered to cooperate with the
Department of Health, Education, and Welfare (“HEW”) in preventing and
controlling air pollution, to the extent practicable and consistent with the interests
of the United States and within any available appropriation. The Act created a
federal air permit system whereby the Secretary of HEW could establish classes
of potential pollution sources for federal facilities and require facilities to get a
permit. The Secretary could revoke the permits if he found pollution was
endangering the health and welfare of any person. The loose language of the
federal facilities compliance provision and the Secretary’s discretion in
establishing classes of sources were large loopholes. The President could
unofficially exempt a facility by finding compliance inconsistent with national
interests or by appointing an obedient HEW Secretary.

Section 118 of the 1970 CAA amendments created the first explicit
exemption provision. The language has not been changed. Unfortunately, the
legislative history gives no guidance on the reasons for the language. Shortly
before the 1990 CAA amendments were enacted, the Pentagon sought a broad
executive order that would exempt the military from the pending clean air bill as

52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
59. Id.
60. Id. § 7(b).
61. Id.
well as state and local regulations. DOD General Counsel Terance O’Donnell asked President Bush to sign an order “to exempt all aircraft, spacecraft, wheeled and tracked vehicles, vessels, and weapons as well as the burning or detonating of munitions and emissions from paints or other chemicals used to repair or refurbish military vehicles, planes, ships, or equipment.” Under the Pentagon’s proposal, the EPA would establish standards for the DOD and oversee the military exemption.

The DOD was worried about how the cost of compliance with standards under the proposed CAA amendments would impact national security. The military wanted to ensure a single national standard for all military items. Senator Timothy Wirth (D-Colo.) was “deeply suspicious” of the Pentagon’s request. Wirth argued that the Pentagon’s concerns about state standards were unfounded and that there would be no conflict between various state and federal standards. Bush did not sign the proposed executive order, but Congress included a provision in the amended CAA authorizing the President to issue regulations exempting military property.

D. CWA

The exemption provision in the CWA is nearly identical to that in the CAA. The President may exempt any effluent source of any department, agency or instrumentality in the executive branch from compliance with the CWA if he determines such exemption to be of paramount interest to the United States. Exemptions from the requirements of section 306 (national standards of performance) and of section 307 (toxic and pretreatment effluent standards) cannot be granted. Exemptions are granted for one year, with extensions of no more than one year each. In January, the President must report exemptions and the reasons to Congress. Lack of appropriation is not a valid reason for an exemption unless the President requested an appropriation and Congress refused it.

Similar to the provision in the CAA, the President has the authority under the CWA to issue regulations exempting classes of military equipment if he

64. 20 Env’t Rep. (BNA) 1932 (Apr. 6, 1990).
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. 33 U.S.C. § 1323(a).
71. Id.
72. Id.
73. Id.
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determines that the regulations are of paramount interest to the United States—a broader standard than national security interest. Because military matters necessarily relate to national security, the low threshold of paramount interest is too easy to satisfy. Congress should have used national security as the prerequisite for issuing regulations. To date, however, no regulations have been issued under the military equipment provision.

The CWA was enacted in 1948 as the Water Pollution Control Act ("WPCA"). Originally, the statute did not address federal facilities. An implied national security exemption was included in the 1956 amendments by way of section 9 entitled, "Cooperation to control pollution from federal installations." Federal facilities were required to comply with the WPCA "insofar as practicable and consistent with the interests of the United States and within any available appropriations." The loose wording would allow nearly any federal facility to evade the law under the auspices of practicality.

In 1972, amendments to the CWA created an explicit limited exemption. Congress wanted each federal agency to provide national leadership in the control of water pollution. As a result, federal facilities must now meet all pollution control requirements as if they were private citizens. Congress recognized, however, that case-by-case exemptions may be necessary, such as when it is in the paramount interest of the United States that a plant or facility not achieve full water pollution control within the time required. Like the legislative history of nearly all pollution control statutes, the history of the CWA is silent on which criteria the President should apply to define the nation’s paramount interest.

E. NCA

The exemption provision in the NCA is similar to those in the CAA and the CWA. The President can exempt any single activity or facility, including noise emission sources or classes thereof, of any department, agency, or instrumentality in the executive branch from compliance with any NCA requirement. The President must determine that the exemption is of paramount

74. Id. (allowing exemptions for “weaponry, equipment, aircraft, vessels, vehicles or other classes”).
75. See supra notes 36-37 and accompanying text.
78. Id.
80. Id. at 3733-34 (discussing § 313 of the 1972 CWA).
81. Id.
82. Id.
83. 42 U.S.C. § 4903(b).
interest to the United States. No exemption, other than for products referred to in section 4902(3)(B) of the NCA, may be granted from the requirements of sections 4905, 4916, and 4917. The NCA exemption has the standard one year time limit as well as the requirement to report exemptions and reasons to Congress. Lack of appropriation is not a basis for an exemption.

The legislative history of the NCA provides little insight into the reasons for the specific provision. The original language of the statute contained no exemption. Section 406 in the original act merely stated that federal facilities must comply with the Act in a manner consistent with the standards and policies of the Act. Thus, federal agencies could have excused their noncompliance by arguing that compliance was inconsistent with the policy of the Act due to national security concerns.

F. SDWA

The SDWA, enacted in 1974, contains a national security provision that differs from those previously discussed. Under the SDWA, the Secretary of Defense must request an exemption, which is called a waiver in this statute. After the Secretary makes a request, the President must determine that the waiver is necessary in the interest of national security. The Administrator of the EPA then grants the waiver. The Administrator must keep a written record of the basis upon which the waiver was granted and make the record available for in camera examination in a judicial proceeding when relevant. Apparently, Congress intended this exemption to be reviewable, unlike exemptions committed solely to the discretion of the President. When the waiver is issued, the

84. Id.
85. Id. The term "product" does not include:
   (i) any military weapons or equipment which are designed for combat use; (ii)
   any rockets or equipment which are designed for research, experimental or
devotional work to be performed by [NASA]; or (iii) to the extent provided
by regulations of the [EPA] Administrator, any other machinery or equipment
designed for use in experimental work done by or for the Federal Government.

Id. Section 4905 contains noise emission standards for products distributed in commerce. Section 4916 contains railroad noise emission standards. Section 4917 contains motor carrier noise emission standards.
86. Id.
87. Id.
91. Id. § 300(j)(6)(b).
92. Id.
93. Id.
94. Id.
Administrator must publish a notice in the Federal Register.95 The Secretary of Defense may ask the Administrator to refrain from publishing the notice if publication itself would endanger national security interests.96 If the Administrator withholds publication, notice must be given to the Armed Services Committee of the Senate and the House of Representatives.97 There is no statutory time limit for exemptions from the SDWA, nor is there any procedure for an extension. Clearly, this national security provision provides much more public notice and a more balanced decisionmaking structure than similar provisions in other statutes. Importantly, the SDWA does not vest unbridled authority in the President.

The present language of the national security waiver is exactly the same as that in the original 1974 Act, the only change being that the sections were renumbered.98 In the 1974 Act, the exemption was listed in section 1447(b). In the amended Act, it is found in section 300(j)(6)(b). Interestingly, the legislative history of the 1974 Act indicates that there can be no waiver of compliance with national primary drinking water regulations.99 The statute as enacted contained no such language. The SDWA was last amended in 1977.100 The legislative history to the amendments reasserts Congress' intent that federal facilities comply with the SDWA, but it is silent as to the national security exemption.101

G. NEPA

Unlike other federal pollution control statutes, the National Environmental Protection Act102 ("NEPA") does not expressly provide an exemption for purposes of national security. A careful reading of section 102 of NEPA, however, indicates that Congress intended to incorporate the national security exemption of the Freedom of Information Act ("FOIA").103 Section 102 requires that copies of a prepared environmental impact statement ("EIS") be made available to the President, the Council on Environmental Quality ("CEQ") and the public as provided by section 552 of FOIA.104 Section 552 of FOIA exempts from public disclosure any matter that is specifically authorized, under criteria established by an executive order, to be kept secret in the interest of national defense or foreign

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95. Id.
96. Id.
97. Id.
101. See supra note 99.
104. Id. § 102(c).
policy and that is in fact properly classified pursuant to an executive order. Thus, NEPA provides an exemption from disclosing a prepared EIS on the grounds of national defense. Importantly, NEPA does not exempt the preparation of an EIS under any circumstances. Once a proposal is made for a major federal action, an EIS must be prepared.

Soon after NEPA's enactment, the statute's application to military exercises was questioned. In *McQueary v. Laird*, plaintiffs sought to enjoin the government's storage of chemical and biological warfare agents at Rocky Flats. While the court did not directly address the issue of whether NEPA provided an exemption on the grounds of national security, the United States Court of Appeals for the Tenth Circuit did state that the government had wide latitude to handle military facilities and that courts should not interfere by forcing the military to comply with NEPA. The plaintiffs alleged a violation of procedural requirements, however they failed to support this allegation with specific facts. The court held that the military had broad discretion in making its decisions and that the substantive provisions of NEPA were not violated. In *Nielson v. Seaborg*, residents of Utah sought to enjoin the government from testing nuclear weapons because doing so was inconsistent with NEPA. The plaintiffs alleged a violation of procedural requirements, however they failed to support this allegation with specific facts. The court held that the military had broad discretion in making its decisions and that the substantive provisions of NEPA were not violated. In *Concerned about Trident v. Rumsfeld*, the United States Court of Appeals for the D.C. Circuit struck a blow to the government by holding that NEPA did not contain a military or national security exemption because there was no statutory or judicial foundation for such.

An important Supreme Court decision clarified the demands NEPA places on the government. In *Weinberger v. Catholic Action Hawaii/Peace Education Project*, the Court found that the Navy's top secret plan to construct a facility capable of storing nuclear weapons was not a "proposal" and therefore no EIS was needed. Navy regulations forbid either admitting or denying that nuclear weapons are actually stored at the facility. An executive order specifically classified all information relating to the storage of nuclear weapons. Because the project was merely contemplated and the Navy could not comment on it, the plaintiffs could not prove that a "proposal" existed.

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107. 449 F.2d 608 (10th Cir. 1971).
108. *Id.* at 612.
110. *Id.* at 1373.
111. *Id.* at 1372.
112. 555 F.2d 817, 823 (D.C. Cir. 1977).
114. *Id.* at 141.
115. *Id.* at 144.
116. *Id.* at 146.
NEPA provides that, "to the fullest extent possible," federal agencies should comply with EIS preparation requirements.\textsuperscript{117} The Court found that the EIS decisionmaking requirements of NEPA were not the same as the NEPA public disclosure provisions.\textsuperscript{118} An agency might have to include environmental considerations in its decisionmaking process yet withhold public disclosure of any NEPA documents based on a FOIA exemption.\textsuperscript{119} The Court focused on the language in NEPA regarding disclosure of information, holding that if the Navy proposed to build a nuclear weapons storage facility, it must prepare NEPA documents but need not disclose them if the matter falls within a FOIA exemption.\textsuperscript{120}

In a concurring opinion, Justice Blackmun, joined by Justice Brennan, wrote that the majority's emphasis on FOIA was misplaced.\textsuperscript{121} They stressed that neither the language of NEPA nor the CEQ regulations provide an exemption for classified or confidential proposals.\textsuperscript{122} In fact, NEPA and DOD regulations required the drafting of an EIS regardless of whether some material would be classified and thus exempt from disclosure under FOIA.\textsuperscript{123} Justice Blackmun wrote that the need for an EIS was even greater when classified information was involved because the public has no access to the military decisionmaking process.\textsuperscript{124}

In \textit{Weinberger}, the Supreme Court essentially created a NEPA national security exemption. Federal facilities, especially military operations, can escape EIS requirements by keeping projects top secret so they never become a "proposal."\textsuperscript{125} If an EIS must be written, it can remain private if it falls within a FOIA exemption. Therefore, major federal actions undertaken under the veil of national security can remain safe from public scrutiny and judicial attack.

**IV. EXEMPTION IN FORT ALLEN**

To date, the exemptions in the federal pollution laws have been exercised only once. On October 3, 1980, President Carter signed Executive Order 12,244 exempting Fort Allen in Puerto Rico from compliance with the CWA, CAA, NCA and RCRA.\textsuperscript{126} The exemption was for a one year period beginning October 2, 1980, and ending October 1, 1981.

\textsuperscript{117} 42 U.S.C. § 4332.
\textsuperscript{118} \textit{Weinberger}, 454 U.S. at 145-46.
\textsuperscript{119} \textit{Id.} at 143.
\textsuperscript{120} \textit{Id.} at 146.
\textsuperscript{121} \textit{Id.} at 149.
\textsuperscript{122} \textit{Id.} at 148.
\textsuperscript{123} \textit{Id.} at 147-48.
\textsuperscript{124} \textit{Id.} at 149.
\textsuperscript{125} \textit{Id.} at 146.
Fort Allen was a United States Naval Communications Center on its last stages of dismantling before transfer to the Puerto Rican National Guard. It became a relocation and temporary housing site for Haitian and Cuban refugees. The President declared that granting the exemption was in the “paramount interest of the United States.” Each effluent source was exempt from compliance with the CWA except for sections 306 and 307. Each emission source was exempted from compliance with the CAA except for sections 111 and 112. Each activity or facility was exempted from compliance with the NCA except for sections 6, 17 and 18, which the President had no authority to exempt. Finally, each solid waste management facility was exempted from compliance with RCRA.

On October 1, 1981, President Reagan signed Executive Order 12,327 extending the Fort Allen exemption for one year. Reagan’s Order preserved the language and scope of Carter’s previous order.

A. Political Climate

When President Carter signed Executive Order 12,244 on October 3, 1980, he was at a critical stage in his reelection campaign. The Executive Order indicated that the President “determined it to be in the paramount interest of the United States” to exempt Fort Allen from federal pollution laws. Near the end of September 1980, the White House held a closed meeting in which the Administration decided to send Cuban and Haitian refugees to Puerto Rico. Refugees were arriving by the boatload in Miami, and many were detained in Florida. In the spring and summer of 1980, approximately 122,000 Cuban and 9,500 Haitian refugees entered the United States. President Carter created a Cuban-Haitian Task Force to oversee government efforts to resettle the refugees. One week after Carter signed Executive Order 12,244 (and while he was on a campaign swing through Florida), Congress passed the Refugee Education and Assistance Act of 1980 (“REAA”), and Carter signed Executive

127. Id.
128. 33 U.S.C. § 1323. These sections deal with national standards of performance and toxic and pretreatment effluent standards. The President is not authorized to grant an exemption from these sections.
129. 42 U.S.C. § 7418. The President is not authorized to grant an exemption from § 111 (standards of performance for new stationary sources), and an exemption from § 112 (hazardous air pollutants) must be in accordance with § 112(i)(4) (allowing a two year exemption for technology reasons so long as such exemption is in the national security interests of the United States).
133. Id. at 1041.
Order 12,246 delegating his authority under the REAA to the Secretary of State.\textsuperscript{136}

Florida residents complained that refugees living in Florida were overburdening the welfare capacities of the state.\textsuperscript{137} The Task Force selected Fort Allen in Puerto Rico, a military installation due for deactivation, as a refugee facility. Critics accused Carter of attempting to pick up Florida votes by shipping the refugees off to nonvoting Puerto Rico.\textsuperscript{138} Puerto Rico's Governor Carlos Romero Barcelo, facing a tough reelection campaign, strongly opposed the plan to send refugees to Puerto Rico.\textsuperscript{139}

Puerto Ricans were concerned that their serious unemployment problem would worsen with the influx of refugees.\textsuperscript{140} They worried that the United States would send criminals or the mentally ill.\textsuperscript{141} They were anxious about the environmental problems that would likely be created by the rapid construction of holding facilities.\textsuperscript{142} Puerto Rican officials feared that the transfers would force construction that would burden sewage facilities, pollute rivers and create health hazards.\textsuperscript{143} In addition, immense heat and abundant malaria-bearing Anopheles mosquitoes near Fort Allen would create public health problems.\textsuperscript{144}

B. Attacks on the President's Authority

Due to concerns regarding public health and the environment, the Puerto Rican government and several private citizens filed suit to block the construction of temporary housing at Fort Allen as well as the transfer of refugees from Florida to Fort Allen.\textsuperscript{145} Three cases formed one rule of law. Following is a brief outline of the procedural maelstrom caused by the case, in addition to an examination of the case at each stage.

Plaintiffs sought and won a preliminary injunction to block the move of refugees to Fort Allen.\textsuperscript{146} United States Judge Torruella worried that potential health and environmental hazards might affect the refugees and the adjacent communities.\textsuperscript{147}

\textsuperscript{137} U.S. To Appeal Ruling Blocking Refugee Move, BOSTON GLOBE, Oct. 9, 1980 [hereinafter U.S. to Appeal].
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Untitled, BOSTON GLOBE, Oct. 24, 1980.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Colon, 507 F. Supp. 1026.
\textsuperscript{146} Id. at 1032. See also U.S. To Appeal, supra note 138.
\textsuperscript{147} Colon, 507 F. Supp. at 1030.
The United States Court of Appeals for the First Circuit vacated the preliminary injunction, giving the United States government permission to transfer refugees.\textsuperscript{148} The court reasoned that Puerto Rico had not demonstrated a reasonable likelihood of success on the issue of whether the President had legal authority to transfer the refugees.\textsuperscript{149} In response, the Puerto Rican government submitted an emergency request to Supreme Court Justice Brennan. Brennan temporarily blocked the transfer of refugees until the full Court could consider the issue.\textsuperscript{150} The Supreme Court lifted the blockade, and the case returned to the trial court.\textsuperscript{151} The United States District Court for the District of Puerto Rico again banned the use of Fort Allen for refugees and denied a request to stay the order pending appeal.\textsuperscript{152} The United States government, citing a “crisis of grave dimension,” submitted a motion to the Court of Appeals requesting permission to transfer refugees immediately.\textsuperscript{153} The government argued that the effective operation of the Immigration and Naturalization Service required immediate relief from overcrowding in Florida.\textsuperscript{154} The United States government sought to transfer nearly 2,000 refugees to Fort Allen and promised not to send identified criminals or mentally disabled people.\textsuperscript{155} The court approved the move. Finally on August 8, 1991, Justice Brennan cleared the way for the transfer of approximately 800 Haitian refugees by turning down an emergency stay request from city officials and residents of Juana Diaz, the Puerto Rican community in which Fort Allen is located.\textsuperscript{156}

In the first of the consolidated cases, plaintiffs alleged that the transfer of refugees would violate the United States Constitution, NEPA, CWA, RCRA and the Disaster Relief Act (“DRA”).\textsuperscript{157} In its defense, the government cited executive order exemptions. The United States District Judge for the District of Puerto Rico made the following findings of fact:

- President Carter declared an emergency pursuant to the DRA and formed the Cuban-Haitian Task Force.\textsuperscript{158}
- In the summer of 1980, refugees coming into Florida were temporarily housed at processing centers in Krome, Florida.\textsuperscript{159}

\textsuperscript{148} Colon v. Carter, 633 F.2d 964, 967 (1st Cir. 1980).
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Transfer of Refugees OK’d, \textit{BOSTON GLOBE}, Aug. 8, 1981.
\textsuperscript{157} Colon, 507 F. Supp. at 1027.
\textsuperscript{158} Id. at 1028.
\textsuperscript{159} Id.
Improper sewage, overcrowding and the lack of soap and towels at the temporary facilities caused serious health and sanitation hazards.\textsuperscript{160}

The government looked for alternative facilities by making an inventory of available DOD facilities. The inventory listed thirty-six sites in the Continental United States and none in Puerto Rico. By mid-September 1980, the search inexplicably focused on two sites in Puerto Rico, Ramey Field and Fort Allen. Fort Allen was chosen on September 23, 1980.\textsuperscript{161}

Fort Allen’s population averaged 500 to 800 persons and never exceeded 1,500.\textsuperscript{162}

The capacity of the camp under construction was 5,000. The government submitted conflicting figures regarding the number of refugees expected to transfer to Fort Allen. The refugees housed at Krome facilities were sent to Fort Allen along with all new entrants.\textsuperscript{163}

The anticipated construction consisted of twelve living tents, each capable of holding thirty people, in each of the fourteen compounds.\textsuperscript{164}

The existing water treatment facility handled a maximum of 1,500 persons. Excess population created a danger to public health.\textsuperscript{165}

The court made these conclusions of law:

- Plaintiffs had standing to sue the government. The citizens alleged an actual or threatened injury to themselves. Puerto Rico alleged an injury to its natural resources and can sue in its capacity as \textit{parens patriae} to its people’s health and welfare.\textsuperscript{166}
- The government’s actions constituted a “major federal action” within the meaning of NEPA. The failure to create an EIS was in violation of NEPA.\textsuperscript{167}
- Under the DRA, the President’s declaration of emergency, while entitled to some deference, is subject to review.\textsuperscript{168}

\begin{footnotes}
\item[160.] Id.
\item[161.] Id. at 1028-29.
\item[162.] Id. at 1029.
\item[163.] Id.
\item[164.] Id.
\item[165.] Id.
\item[166.] Id. at 1030.
\item[167.] Id. at 1030-31.
\item[168.] Id. at 1031.
\end{footnotes}
• An "emergency" under the DRA is exempt from NEPA.\textsuperscript{169}
• "Emergency" means only a natural disaster. The plain language of the DRA indicates that "emergency" cannot apply to the refugee situation. Because no emergency existed, the NEPA exemption did not apply.\textsuperscript{170}
• The Executive Order granting exemptions from various pollution laws was a valid exercise of Presidential authority.\textsuperscript{171}

The court found grounds for granting plaintiffs the preliminary injunction: plaintiffs would suffer irreparable harm, no adequate remedy existed at law, the balance of equities did not favor defendants and finally plaintiffs would likely succeed on the merits.\textsuperscript{172} The court enjoined the government from transferring refugees to Fort Allen until it complied with NEPA.\textsuperscript{173} While ruling that the Presidential exemption grant was a valid exercise of power, the court did not address the validity of the language in the Executive Order, such as whether the President exceeded the authority granted to him by the various pollution statutes.\textsuperscript{174}

Shortly after the court granted the preliminary injunction, Congress passed REAA creating a NEPA exemption to provide assistance to Cuban and Haitian refugees.\textsuperscript{175} The government quickly filed a motion for reconsideration of the preliminary injunction.\textsuperscript{176} Upon reconsideration, the court set aside the preliminary injunction halting construction at Fort Allen. Furthermore, the court preserved the injunction impeding the transfer of people, requiring the government to prepare an EIS on the transfer issue.\textsuperscript{177} The court also found that an executive order delegating the President's authority under the REAA to the Secretary of State was reviewable under the APA.\textsuperscript{178}

Both parties appealed the partial grant of the preliminary injunction.\textsuperscript{179} The Court of Appeals vacated the injunction against the transfer of people and refused to reinstate the injunction against construction.\textsuperscript{180} The court conditioned its ruling on the promise that the government would transfer no more than 2,000

\textsuperscript{169} Id. at 1031-32.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 1032.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 1032-33.
\textsuperscript{174} Id.
\textsuperscript{175} See Pub. L. No. 96-422, 94 Stat. 1799 (1980).
\textsuperscript{176} Colon, 507 F. Supp. at 1033.
\textsuperscript{177} Id.
\textsuperscript{179} Colon, 633 F.2d at 964.
\textsuperscript{180} Id. at 967.
refugees and would provide adequate security to ensure the safety of nearby residents.\textsuperscript{181}

On appeal, the court found that the Executive Order regarding the REAA, which designated Fort Allen a relocation site, was not subject to judicial review under the APA.\textsuperscript{182} The court presumed that the President was an agency within the meaning of the APA.\textsuperscript{183} It reasoned that the President’s decision was discretionary by law and therefore unreviewable. In deciding the issue of reviewability, the court presumed that the decision was reviewable but allowed the government to rebut this presumption by clear and convincing evidence that Congress intended to cut off review.\textsuperscript{184} Where Congress has not made a clear declaration of its intent, the court should consider three factors: (1) the appropriateness of the issues raised for review, (2) the need for judicial supervision to safeguard plaintiff’s interests, and (3) the impact of review on the effectiveness of the agency in carrying out its assigned role.\textsuperscript{185}

Here, the court found that the REAA expressly gave the President discretion to determine the terms and conditions of refugee assistance.\textsuperscript{186} Therefore, his decision was not reviewable even by the arbitrary and capricious standard.\textsuperscript{187} The court did not rule on the reviewability of the Executive Order granting the pollution law exemptions. Considering that the pollution statutes gave the President discretion to grant exemptions if he determined them to be of paramount interest to the United States, however, the court would have most likely concluded that the issue was unreviewable. Furthermore, the test for reviewability gives the court great flexibility in finding an action unreviewable.

On October 24, 1980, Justice Brennan stayed the court’s decision.\textsuperscript{188} The full Court vacated the stay on November 3, 1980.\textsuperscript{189}

Next, the district court considered arguments for a permanent injunction.\textsuperscript{190} Finding that the government violated RCRA, NEPA and other federal and state laws, the district court issued a permanent injunction against the transfer of refugees.\textsuperscript{191} The remaining issue was whether to allow construction.

In ordering the permanent injunction, the court heavily relied on the facts of the situation. It described an array of horrible conditions wrought by the influx of thousands of refugees.\textsuperscript{192} The court did not want to allow the creation

\begin{itemize}
\item 181. \textit{Id.}
\item 183. \textit{Colon, 633 F.2d at 966 n.5.}
\item 184. \textit{Id. at 967 (citing Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970)).}
\item 185. \textit{Id.}
\item 186. \textit{Id.}
\item 187. \textit{Id.}
\item 188. \textit{Muskie, 507 F. Supp. at 1040.}
\item 189. \textit{Id.}
\item 190. \textit{Id. at 1039.}
\item 191. \textit{Id. at 1063.}
\item 192. \textit{Id. at 1043-44.}
\end{itemize}
of a "Haitian ghetto" in Puerto Rico. The two largest concerns were the generation of waste water and solid waste. The waste water treatment facility could not accommodate the refuse of 1,500 persons and the excess would flow through an open ditch into the Caribbean. Furthermore, authorities anticipated the disposal of 15,000 pounds of solid waste per day at the Juana Diaz Municipal Landfill, an already overloaded dump with flooding problems.

Beyond the grotesque factual scenario it envisioned, the court found sufficient legal reasons for halting the refugee transfer. NEPA was the primary sword for the plaintiffs. The court reaffirmed the government’s inability to rely on the NEPA exemption in the DRA because no “emergency” existed.

The court carefully scrutinized the pollution exemptions pursuant to Executive Order 12,244. It echoed the appellate court’s ruling that a discretionary decision by the President is unreviewable under the APA. In a footnote, the court lamented that it could not review the order. The court suggested that, rather than being in the “paramount interest of the United States,” the order granting exemptions was in the political interest of the President. It noted the overall injustice in allowing this exemption, reasoning that while Puerto Rico did not have the right to vote for the presidency, the result affected the citizens and government of Puerto Rico without affording them the right to seek redress.

The court considered the language of the Executive Order and the relevant pollution statutes, noting that the limited scope of the RCRA exemption did not cover all consequences of the refugee activities. Thus, by law the President could not exempt certain activities; any portion of the order granting an unlawful exemption would be deemed invalid. Fort Allen had no solid waste management facility, and RCRA allowed only for an exemption from such a facility. RCRA contrasted solid waste management facilities or disposal sites which could be exempted with activities resulting, or which might have resulted, in the disposal of solid or hazardous waste which could not be exempted. The type of activity at Fort Allen could not be exempted; therefore, the government, left unprotected by the Executive Order, violated RCRA.

This analysis demonstrates that the way to argue against an executive order exemption is not to contend that the President had no authority to grant the

193. Id. at 1043 n.8.
194. Id. at 1044.
195. Id.
196. Id.
197. Id.
198. Id. at 1047.
199. Id. at 1048 n.14.
200. Id. at 1047.
201. Id.
202. Id. at 1048.
203. Id. See also 42 U.S.C. § 6961(b)(1), (2).
exemption at all, but rather that he exceeded the statutory scope of his authority to exempt. While discretionary acts of the President may be unreviewable, the President has no discretion to act beyond the scope of his authority.

The court noted that, whether the President's action is reviewable under the APA, it may be subject to NEPA.\textsuperscript{205} Under section 102 of NEPA, an agency must consider the environmental impacts of an action before making a decision.\textsuperscript{206} It must comply with this mandate to the fullest extent possible, unless there is a clear conflict of statutory authority.\textsuperscript{207} An agency must adhere to a careful and informed decisionmaking process. A court cannot reverse a substantive decision of an agency unless: (1) the balance of costs and benefits is arbitrary and capricious, or (2) the agency clearly gave insufficient weight to environmental values.\textsuperscript{208} Here, the court found no conflict of statutory authority between sections 102 of NEPA and 501 of REAA.\textsuperscript{209} REAA section 501(c)(3) only exempts compliance with NEPA's EIS requirements and section (D); other NEPA requirements must be satisfied regardless of whether an action is considered a "major federal action."\textsuperscript{210} The court found a clear violation of NEPA in selecting Fort Allen because the President did not carefully consider environmental factors.\textsuperscript{211}

The government argued that the President is not subject to NEPA because he is not an "agency" pursuant to CEQ regulations.\textsuperscript{212} The court determined that the regulations were without statutory authority and contrary to case law. NEPA does not define "agency," so the meaning under the APA controls.\textsuperscript{213} The court stated that since most commentators favor including the President in the term "agency," he would be considered an agency in this case.\textsuperscript{214} The court ordered a permanent injunction against the transfer of refugees until the government complied with its duties under NEPA.\textsuperscript{215}

The government appealed this ruling. The Court of Appeals vacated the injunction with the understanding that the government would comply with the conditions of a consent agreement reached with the Puerto Rican government.\textsuperscript{216}

The partial contents of the consent decree were:

\begin{footnotes}
\footnote{205. Id. at 1051.}
\footnote{206. Id. at 1049. See also NEPA § 102(2)(c).}
\footnote{207. Muskie, 507 F. Supp. at 1055.}
\footnote{208. Id.}
\footnote{209. Id. at 1056.}
\footnote{210. Id.}
\footnote{211. Id.}
\footnote{212. Id. at 1057.}
\footnote{213. Id.}
\footnote{214. Id.}
\footnote{215. Id.}
\footnote{216. Colon v. Reagan, 668 F.2d 611, 616 (1st Cir. 1981).}
\end{footnotes}
• The total number of aliens and permanent employees at Fort Allen shall not exceed 1,500 persons, and the total number of aliens cannot exceed 800 persons.\textsuperscript{217}
• No solid waste will be disposed in Juana Diaz. Disposal elsewhere will be in accordance with Puerto Rico statutes and regulations.\textsuperscript{218}
• The United States will perform medical screening and take additional measures to prevent the outbreak of contagious disease.\textsuperscript{219}
• Fort Allen will not be used for longer than one year, beginning August 12, 1981.\textsuperscript{220}

The court held that this agreement mooted issues regarding compliance with RCRA. It held that the REAA appears to exempt the government from all NEPA duties but that the consent decree moots the issue.\textsuperscript{221} Furthermore, an injunction would not be appropriate even if there were a NEPA violation because the balance of equities favored the government.\textsuperscript{222} The factor weighing heavily in favor of the government was the President’s declaration that the Fort Allen pollution exemptions\textsuperscript{223} were of paramount interest to the United States.\textsuperscript{224} Interestingly, the court did not address the validity and scope of Executive Order 12,244.

V. DE FACTO NATIONAL SECURITY EXEMPTION

By expressly including pollution law exemptions for certain federal facilities based on “national security” or “paramount” interests, Congress expected the United States government to request an exemption when it believed complying with the law would be contrary to national interests. The government took the exemption one step further by arguing before a court that an alleged violation of pollution law must continue, even without an exemption, because national security and the paramount interest of the United States warranted such action. Thus, the government sought to create a defense claiming national security where it had not requested nor received a presidential exemption.

In Weinberger v. Romero-Barcelo,\textsuperscript{225} plaintiff sued the Navy for violating the CWA. Navy training exercises caused ordnance to fall into the water

\textsuperscript{217} Id. at 614.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 615.
\textsuperscript{222} Id. at 616.
\textsuperscript{223} These pollution exemptions are not addressed in this opinion.
\textsuperscript{224} Colon, 668 F.2d at 617.
\textsuperscript{225} 456 U.S. 305 (1982).
surrounding Puerto Rico. The Navy neither requested nor received a presidential exemption. The district court denied plaintiff's request for an injunction, stating that the court had the discretion to grant an injunction or to order other appropriate relief to ensure compliance with the CWA. The Court of Appeals vacated the district court order and remanded the case with instructions that the court order the Navy to cease the CWA violation until it obtained a permit. It reasoned that the Navy could request an exemption if it were necessary for national security.

The Supreme Court reversed the appellate court, holding that a district court had complete discretion to fashion any appropriate remedy to cure a violation of the CWA. The Court stated that the availability of an exemption did not limit the district court’s discretion. In other words, the grant of an exemption was not the only way for the federal government to continue activities which violate the law. The Court construed the purpose of the exemption provision to allow noncompliance in extraordinary circumstances. It determined that the exemption provision and the court’s discretion in fashioning a remedy for a violation were complementary concepts.

Allowing judicial discretion to deny an injunction eviscerated the need for an exemption. If the military believed that the President would not grant an exemption, it may carry on its activities regardless. When the military is sued, it may admit a violation of law and argue that the court should issue a fine instead of granting an injunction because national interests require the activity to continue.

Dissenting Justice Stevens recognized exactly what the majority had created—a judicially-issued national security exemption. Justice Stevens argued that exemptions were nonreviewable and best left to the President. Where the President did not grant an exemption, the courts should not artificially create one.

In Legal Environmental Assistance Foundation v. Hodel, the DOE excused its violation of RCRA on national security grounds and contended that it could not comply with both RCRA and the Atomic Energy Act (“AEA”).

226. Id. at 307.
228. Id. at 862-63.
229. Id. at 862.
231. Id.
232. Id. at 318.
233. Id.
234. Id. at 324.
235. Id.
236. Id.
Plaintiff filed suit because the Y-12 nuclear plant at DOE's Oak Ridge, Tennessee, facility produced large amounts of hazardous wastes containing chromium, mercury, PCBs, and cadmium. The DOE admitted that, over a twenty year period, about 2.4 million pounds of mercury were released into the environment. The DOE argued that RCRA and the AEA imposed conflicting requirements and that therefore the RCRA violation was excused.

The court, however, found no inconsistency in the two statutes. The burden was on the DOE to show that RCRA would require disclosure of restricted nuclear materials data protected by the AEA, and the government failed its burden. Furthermore, the court reasoned that, if there is inconsistency, the government should apply for a presidential exemption for the nuclear project. The DOE had not applied for an exemption, and the court was not willing to consider national security as a defense to the RCRA violation.

In *National Resources Defense Council v. Watkins*, plaintiffs sued the DOE to block the reopening of a nuclear reactor at the Savannah River Site until the completion of a cooling tower. The DOE, allegedly in violation of the CWA, had not requested an exemption. The reactor was cooled by drawing water from the Savannah River, circulating it once through the reactor cooling system, then discharging the water into Indian Grave Branch, a tributary of the Savannah River.

The district court entered summary judgment against plaintiffs on the issue of standing. The appellate court held that although plaintiffs had standing, remaining questions of fact precluded summary judgment. The DOE argued that, although it was not eligible for an exemption because compliance with the CWA was feasible, national security concerns excused any violation of the CWA. The court did not agree with the DOE's argument. It held that impossibility of compliance with a pollution statute was not a prerequisite for a Presidential exemption and, thus, that the DOE was eligible to apply for an exemption.

The holding in *NRDC v. Watkins* makes perfect sense. If Congress had intended for the President to grant an exemption only when compliance was...

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238. LEAF, 586 F. Supp. at 1166.
239. Id. at 1167.
240. Id.
241. Id.
242. Id.
243. Id.
244. 954 F.2d 974 (4th Cir. 1992).
245. Id. at 977.
246. Id.
247. Id. at 976.
248. Id. at 981.
249. Id. at 982.
250. Id.
impossible, Congress would have spoken thus. Limiting an exemption to those circumstances would severely limit the availability and thwart the purpose of the exemptions. Arguably, if compliance were impossible because of national security, a court might find a de facto exemption. The cases analyzed above found no such inconsistency; therefore, the question remains open.

VI. RECENT DEVELOPMENTS AND POTENTIAL FOR FUTURE EXEMPTIONS

President Clinton has not made an explicit statement regarding his policy on granting pollution law exemptions for reasons of national security. In piecing together fragments of Clinton's actions related to the issue, it appears Clinton is hesitant to give the federal government broad exemptions from its own laws. Where Clinton has granted national security exemptions from minor pollution laws, such as alternative fuel vehicles, the controls over federal facilities are drafted so loosely that the military could probably excuse noncompliance even without an express exemption.

In late 1991, the Department of Transportation ("DOT") proposed a rule exempting escorted national security shipments of hazardous materials from federal hazardous materials transportation regulations.\(^{251}\) At the time, only radioactive materials shipped by the DOE or DOD escorted by certain personnel were exempt.\(^{252}\) The DOT proposal would have exempted shipments escorted by personnel in transportation vehicles, other than those carrying hazardous materials, with a document certifying the shipment was for national security.\(^{253}\) The proposal was not adopted, and to date the only exemption is for the transportation of radioactive materials.

Statutory exemptions do not allow a lack of funding to serve as the basis for granting an exemption unless the President asked for funding and Congress denied it. Lack of funding may cause a serious problem as the government attempts to clean up contaminated facilities. As more money is needed, Congress may hesitate to allocate larger sums of money if there is little evidence of progress in the cleanups. If Congress denies the needed funding, the President has a basis for granting exemptions.

During the Bush Administration, funding for cleaning up wastes at federal facilities tripled.\(^{254}\) For example, DOE environmental programs grew from $1.7 billion in 1989 to nearly $5.5 billion for 1993.\(^{255}\) Funding for DOD

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255. Id.
environmental programs, including restoration efforts at operating and closing bases, jumped from $500 million in 1989 to $2.2 billion in 1993.256 Critics argue that the government has under-funded cleanup programs. The NRDC has stated that the DOE's $5.5 billion budget was insufficient because much of the money was for "non-environmental or non-essential environmental activities."257 The group accused the DOE of siphoning money from environmental accounts to pay for ongoing nuclear production activities, such as the operation of a PUREX facility at Hanford, Washington. The NRDC estimated that only $1.38 billion of the $5.5 billion budget went to the restoration of previously contaminated sites.258

The DOD has 17,000 contaminated sites in its cleanup inventory.259 It has "closed out" 6,736, but only 372 are completed. The rest were assessed and determined not to pose a significant threat to public health and the environment.260 The most expensive cleanup is at the former Army Rocky Mountain Arsenal near Denver. The cleanup will take years and will cost over $2 billion. Interestingly, this arsenal is the first Superfund site slated to become a wildlife refuge. Other costly cleanups include McClellan Air Force Base in California ($1.6 billion) and El Toro Marine Corps Air Station, also in California ($300 million).261 One commentator suggests that, because of the way environmental activities at DOD facilities are funded, it is unlikely that the President could grant an exemption on the basis of a lack of funds.262 Funding for environmental compliance and cleanup at Army bases comes from three sources: (1) the Defense Environmental Restoration Account ("DERA"), (2) the military construction account, and (3) the operation and maintenance account.263 The DOD has not identified funds required to meet environmental compliance requirements, with the exception of DERA funds which are limited to CERCLA response and remedial activities under the Defense Environmental Restoration Program ("DERP").264 Lack of appropriation is a basis for an exemption only if the President specifically requested such. The commentator suggests that this requirement may never be satisfied because there is little specific allocation for environmental matters at the DOD.265

Another commentator ignores the specific appropriation issue and sees the potential for many future exemptions at DOD facilities in the mobilization of

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256. Id.
257. Id.
258. Id.
259. Id.
260. Id.
261. Id.
263. Id. at 48-49.
264. Id.
265. Id.
presently inactive munitions facilities. If world events thrust the United States into large-scale war, the military would need more supplies quickly. Old DOD facilities which have not been active or at full capacity in many years may need to be reactivated. Most such facilities probably lack pollution control equipment that would satisfy modern standards. This would inevitably result in discharges in violation of many pollution laws. Because of time and budget constraints, these old facilities might not be retrofitted to comply with environmental standards. The President could exempt a mobilized facility on the grounds of "national security" or "paramount interest."

While the DOD's problems are broad in scope, the DOE's problems are deep. The DOE owns fourteen facilities in thirteen states which make weapons considered vital to national security. All sites are heavily contaminated due to manufacturing and research activities at the sites involving highly dangerous chemicals and radioactive materials. The estimated cost of cleaning up all DOE sites is $100 billion to $200 billion over the next thirty years. This figure could soar much higher because costs are difficult to predict. Secretary Hazel O'Leary recently stated that the DOE has established a value of respect for the environment. O'Leary asserted that the DOE has taken a hard look at how much the Department has spent cleaning up facilities and has found that it was spending 30% more than other organizations doing the same work. The DOE set a goal for the next three years to reduce its cleanup cost by 10% each year. One assumes that O'Leary meant that the DOE would become more efficient in spending money, not just that they would spend less. If the DOE does not become more adept at conducting cleanups but continues to reduce its budget, cleanups at some facilities may grind to a halt. Of course, this would open the door for the grant of a presidential exemption.

Clearly, cleaning up federal facilities is enormously expensive. Taxpayers may not be willing to pay the tab and instead may settle for merely fencing off and exempting some facilities. Presidential exemptions may become less

267. Id. at 106.
268. Id.
269. Id.
270. Id.
271. Id.
273. Id. at 106.
275. Id.
276. Id.
controversial as costs rise and the public becomes skeptical about the actual health risks presented by old military bases and nuclear weapons plants.

In April 1993, Clinton issued an Executive Order on Alternative Fuel Vehicles.\(^{277}\) This order requires every federal agency to adopt aggressive plans to exceed the alternative fueled vehicle purchase requirements established by the Energy Policy Act of 1992.\(^{278}\) Clinton showed his hand on exemptions in section 8 where he gave a broad national security exemption.\(^{279}\) The President authorized the Secretary of Defense, Secretary of the Treasury and Attorney General to determine the extent to which the requirements of this order apply to the national security, protection and law enforcement activities of their respective agencies.\(^{280}\) This is carte blanche authority for Cabinet members to exempt completely activities under their control. Arguably, the military would not be forced to comply with this order even without the exemption because the mandates of the order are loosely drafted with several escape hatches. Clearly, this order is less stringent than pollution statutes. There are no meaningful standards or forceful requirements, so the exemption may not give the military any additional protection.

An executive order signed in August 1993 made federal facilities subject to right-to-know laws.\(^{281}\) In the interest of national security, the head of a federal agency can request an exemption from complying with the provisions of any aspect of this order, provided the procedures set forth in CERCLA section 120(j)(1) are followed. This exemption provision provides little insight into Clinton’s policy because it is a boilerplate clause which even cites an exemption provision in another statute. Clinton’s selection of “national security” rather than “paramount interest” as the prerequisite may indicate that Clinton will only grant exemptions in crisis situations, because paramount interest may be interpreted much more expansively than national security. Significantly, this order does not create any right enforceable by a party against the United States.\(^{282}\) Thus, the military may have little incentive to comply with the order since there are no legal repercussions for noncompliance. As discussed earlier, executive orders are nonreviewable as long as the President does not exceed his authority.

The CWA is up for reauthorization. A review of proposed amendments to the Act shows that the exemption provision will probably remain unchanged.\(^{283}\) The House CWA reauthorization bill introduced by Representative Norman Mineta preserves the present language. A substitute House CWA reauthorization bill also keeps the entire language of the CWA exemption in substance. The only


\(^{278}\) Id.

\(^{279}\) Id.

\(^{280}\) Id.


\(^{282}\) Id. § 7-701.

change is that section 313(a) is divided into more readable subsections.\textsuperscript{284} Since the CWA’s exemption provision is untouched so far, it is likely that the exemptions in most federal pollution laws will remain the same, at least for the near future.

VII. CONCLUSION

National security exemptions in federal pollution laws have mostly lain dormant for the past two decades. The only official exemption via executive order to date prompted a rash of litigation. The subject of the exemption was highly controversial in Puerto Rico but politically favorable to the President among his Florida voters. Current political issues such as the turbulent crisis in Haiti, the potential need to reactivate dormant munitions facilities and the exorbitant cost of cleaning up numerous contaminated federal facilities may lead to a number of exemptions in the near future.

Executive orders are by nature discretionary and unreviewable. Aggrieved citizens can attack the President’s exemption collaterally by arguing that the President exceeded his statutory authority by granting too broad an exemption. In addition, alleging a violation of NEPA is an excellent means to delay or halt an unwise action. NEPA does not have an explicit national security exemption, and courts disfavor creating one.

Even without an exemption, the military may always argue that it cannot comply with certain pollution statutes because doing so would be inconsistent with another statutory mandate and would threaten national security. Courts have not definitively determined whether there is a de facto national security exemption in the case of inconsistent obligations. With the trend toward expanding the waivers of sovereign immunity in pollution law, it is unlikely that the Supreme Court would allow the government to escape its own laws, without an exemption, under the cloak of national security.

\textsuperscript{284} Env’t Rep. (BNA) No. 79, at d33 (Apr. 26, 1994).