

Congress' Overlooked Environmental Legislation

By **Rachel Jacobson, Matthew Ferraro and Mark Hanin** (June 11, 2018)

On May 24, 2018, the House passed — and now the Senate is considering — the most important piece of energy and environmental legislation it will consider all year. It isn't a revision to the Endangered Species Act or the Clean Water Act: It is the defense authorization bill, known as the National Defense Authorization Act.

The U.S. Department of Defense is a major environmental player and, unbeknownst to many, the defense authorization bills are significant pieces of environmental policymaking. Moreover, in terms of sheer dollars, DOD appropriations for environmental, energy and natural resource activities dwarf those of other federal agencies that are typically associated with these issues.

As the single largest energy consumer in the world, with massive energy requirements across its worldwide operations, with legacy pollution and ongoing industrial scale operations at many military bases, and with millions of acres of habitat supporting endangered species as well as other natural resources, the DOD is acutely focused on matters related to energy, environment and natural resources. The decisions Congress makes on how the DOD uses energy, protects the environment and addresses natural resources have significant consequences for environmental impact, renewable energy development, and litigation risk far beyond the defense sector.

Indeed, the NDAA for 2018, which Congress funded through an omnibus appropriations bill in March, is an important case in point.

In a thorough analysis forthcoming in Pratt's Energy Law Report, we reviewed these often overlooked provisions in the NDAA to help readers navigate the DOD's environmental priorities in the coming year and to preview new areas of environmental risk for the DOD. The 2018 NDAA also highlights areas of inter-agency engagement, and it offers clues about future litigation risks for the DOD.

For example, first, the 2018 NDAA increased funding allocated to DOD's Siting Clearinghouse, which evaluates the potential impact on national security of energy projects (especially wind energy) near military installations. Considering this allocation, developers should aim to engage in early consultation with the DOD to improve chances for timely project review.

Second, the NDAA writes into law new definitions of "energy resilience" and "energy security." The introduction of these concepts into key passages of the bill signals a strategic focus on anticipating and mitigating disruptions in DOD energy supplies. This strategic posture may benefit certain suppliers of energy-efficient equipment and alternative energy sources to the DOD.

Third, echoing the Trump administration's priorities to complement government action with private sector involvement, the NDAA emphasizes private sector partnerships and third-party project funding, providing new opportunities to establish business relationships with



Rachel Jacobson



Matthew Ferraro



Mark Hanin

the DOD.

Fourth, a congressionally ordered study to be performed by the DOD on chemicals known as perfluorooctanoic acid and perfluorooctanoic acid (PFOA and PFOS) may generate data that will contribute to the plethora of studies, articles, assessments, regulatory activity and litigation surrounding these chemicals. Furthermore, the 2018 NDAA also authorizes over \$70 million for the DOD to take action on PFOA/PFOS found at military bases, without waiting for the results of the study. (These chemicals have been in the news lately after the U.S. Environmental Protection Agency barred certain reporters from a PFOA/PFOS summit in May 2018. Afterward, the EPA announced new steps to evaluate the need for containment and regulatory designation of the chemicals, but — as the 2018 NDAA shows — the DOD has already moved to address them.)

Fifth, the NDAA authorizes new and ongoing environmental cleanup activities while bringing to a close some long-standing interagency disputes.

Sixth, the DOD has taken important steps to study, anticipate, and mitigate risks to its core mission associated with climate change. The 2018 NDAA mandates further efforts to improve DOD climate preparedness. In particular, it requires the DOD to submit a report that assesses climate risks, informs Congress of key challenges, and develops plans to address them. The NDAA also solicits a report on food system vulnerabilities that may affect U.S. interests and military operations. Such initiatives are likely to continue as the DOD improves its understanding of climate and food security risks and U.S. strategic and national security interests.

And, seventh, the NDAA renews and memorializes key conservation projects. These include the Sentinel Landscape Partnership, which protects areas that contain a military installation as well as agriculture, wildlife habitat, or outdoor recreation, and the Readiness and Environmental Protection Integration Program, which works with the military services, private conservation groups, and state and local governments to help remove or avoid land-use conflicts near military bases. The NDAA also imposes stringent new environmental protections for the Castner Range in El Paso, Texas, which has been a focus of environmental groups since the 1970s.

The stealth environmental and energy lawmaking in the NDAA will have substantial effects on the DOD, its partners, and its contractors. During a period of congressional gridlock and controversy surrounding environmental policy, the 2018 NDAA already on the books and the 2019 NDAA now being written represent significant, if often overlooked, policymaking efforts in this critical area.

Rachel Jacobson is a special counsel at WilmerHale and former deputy general counsel of environment, energy and installations at the U.S. Department of Defense.

Matthew F. Ferraro is a senior associate at the firm.

Mark L. Hanin was, until June 2018, an associate at the firm (not admitted).

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, Inc., or any of its or their respective affiliates. This article is for general informational purposes and is not intended to be and should not be taken as legal advice.