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GENERAL COUNSEL

JUL 1 1 2001

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

The Department of Defense proposes the enclosed legislation relating to transportation and environmental matters as they affect the Department. These proposals are part of the departmental legislative program for the First Session of the 107th Congress and we urge their enactment. The purpose of each proposal is stated more fully in its accompanying sectional analysis.

The Department proposes an indemnification program for commercial air carriers that support NATO missions. The provision would authorize the United States to insure foreign commercial aircraft that are used in contingency operations. We propose authorizing war risk insurance for commercial vessels in support of our operations against losses for confiscation, nationalization, expropriation, and deprivation by hostile forces. We also propose clarification that Reserve and National Guard aircraft of the United States are public aircraft for all purposes.

The Department proposes clarification that civil actions and criminal prosecutions brought against Federal agencies and officers under the Clean Air Act and the Safe Drinking Water Act may be removed to an appropriate Federal district court. We request authority for reimbursing the Environmental Protection Agency, pursuant to an agreement with the Navy, for environmental damage at the Hooper Sands Site in South Berwick, Maine. The Department also requests authority for periodic instead of annual audits of payments, obligations, reimbursements, and other uses of the Superfund to insure the fund is properly administered. Other Inspector General audits perform the same function.

The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these initiatives for your consideration and the consideration of the Congress.

Sincerely,

William J. Haynes II

Enclosures
As Stated

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WASHINGTON, D. C. 20301-1600

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JUL 1 1 2001

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

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SEC. ___ . AVIATION INSURANCE PROGRAM FOR COMBINED OPERATIONS.

Section 44305 of title 49, United States Code, is amended—

(1) by amending subsection (a)(2)(B) to read as follows:

"(B) to transport military forces or material on the behalf of the United States or another party under an agreement between the United States and the government of a foreign country, NATO, or an international organization."; and

(2) by adding at the end the following new subsection:

"(c) RECEIPT OF CONTRIBUTIONS.—Any contribution received from another party under an agreement described in subsection (a)(1)(B) of this section to share the cost of a loss covered by insurance obtained under this section shall be deposited in the fund established under section 44307 of this title. The obligation of the Secretary of Defense or a designated head to indemnify the Secretary of Transportation under subsection (b) of this section shall not change. However, the amount of any such contribution received shall, at the discretion of the Secretary of Defense or a designated head, be refunded to or credited against any future obligations of that Department.".

Sectional Analysis

The proposed changes in subsection (a) would enable the Department of Defense to engage in shared logistics operations with the North Atlantic Treaty Organization or similar international organizations. All NATO countries, including the United States, must rely on commercial air carriers to transport troops and supplies during a contingency. The Department of Transportation, as the lead agency for the United States Government, has been working with the NATO Civil Aviation Planning Commission for many years to produce an insurance or indemnification scheme to cover losses by commercial air carriers supporting NATO missions. The current indemnification scheme, due to the length of time necessary to receive reimbursements, was identified as insufficient to meet the needs of US commercial air carriers should they be requested to support NATO missions. All commercial air carriers from NATO countries would face the same difficulty as US commercial air carriers. The current NATO

indemnification scheme provides for all NATO nations to share the expense of a loss in proportion to their contributions to the NATO civil budget. The United States contributes approximately 24 per cent of the annual budget. Federal Aviation Administration and Department of Defense personnel supporting the Civil Reserve Air Fleet (CRAF) program have been unable to find a legal method, absent statutory change, to provide United States Government payment to any foreign air carriers flying logistical support missions for NATO. United States commercial air carriers flying for NATO would have to operate under contracts with the Department of Defense to obtain United States Government insurance coverage.

The ability to issue United States Government insurance for foreign commercial aircraft pursuant to an agreement with NATO or similar international organization would provide the necessary insurance protection to the air carrier while spreading the risk of loss between multiple countries. Such a provision would permit greater use of foreign air carriers and distribute the risk of loss of aircraft during a contingency if the Secretary of Transportation and the Secretary of Defense agreed the use of such insurance was appropriate. Because no other country currently has a system that meets the insurance needs of commercial air carriers during a contingency, there will be a disproportionately large reliance upon, and thus an increased risk of loss to, United States commercial air carriers during any NATO operations without such an insurance provision. In addition to subjecting the United States to bearing the full cost of any losses, as a practical matter the loss of a commercial airframe will have significant adverse effects on the commercial business of a United States air carrier due to the long lead times required for obtaining replacement aircraft.

Subsection (c) would allow the receipt of contributions from other countries within the North Atlantic Treaty Organization or other international organizations to offset losses sustained by the United States through insurance policies issued to United States or foreign commercial air carriers participating in shared logistics operations pursuant to this program. These contributions would be deposited in the aviation insurance fund and would relieve the indemnifying United States Government agency of the obligation to reimburse the fund to the extent of any contributions received.

If enacted, this proposal will not increase the budgetary requirements of the Department of Defense or the Federal Aviation Administration.

SEC. ___ . DEFINE "WAR RISKS" TO VESSELS TO INCLUDE CONFISCATION, EXPROPRIATION, NATIONALIZATION, AND DEPRIVATION OF THE VESSELS.

Section 1201(c) of the Merchant Marine Act, 1936 (46 App U.S.C. 1281(c)) is amended to read as follows:

"(c) The term 'war risk' includes to such extent as the Secretary may determine—

(1) all or any part of those losses which are excluded from marine insurance coverage under a 'free of capture or seizure' clause, or under analogous clauses; or

(2) risks from hostile acts, including confiscation, expropriation, nationalization, or deprivation.".

Sectional Analysis

This provision would clarify and, to the extent necessary, extend the authority to the Secretary of Transportation to issue war risk insurance coverage to include losses resulting from other hostile acts including confiscation, expropriation, nationalization, and deprivation. Losses from such risks occur when hostile forces seize vessels to further hostilities or for other political purposes.

The sole provider of salvage services to the Navy Supervisor of Salvage and Diving in the Middle East and Western Pacific will not provide those services without insurance coverage for such losses. Due to two recent incidents, commercially available insurance has become unreasonably expensive and may be withdrawn by the insurer upon seven days notice. Subchapter XII of Title 46 provides authority to the Secretary of Transportation, with the approval of the President, and after consultation with interested agencies, to provide war risk insurance and reinsurance against loss or damage when adequate insurance cannot be obtained on reasonable terms and conditions from commercial companies. Addition of this proposed language will ensure the availability of contractors to perform salvage services for the Navy when and where needed in sensitive areas of the globe.

Under chapter 637 of title 10, United States Code, the Secretary of the Navy is authorized to obtain salvage services on a world-wide basis. Navy contracts, among other things, for salvage services in the Western Pacific region and in the Middle East, including the Persian Gulf, from an international contractor. For the past 18 years, SMIT International has been the sole

bidder on Naval Sea Systems Command competitions for these services. Notably, this contractor served the Department of Defense admirably during the Persian Gulf War.

In recent years there have been two incidents in which ships owned by this salvage contractor were seized by hostile Governments: one in Iran and one in Venezuela. The Iranian Government seized three of the contractor's ships following completion of the recovery of a Navy helicopter in disputed waters in the Persian Gulf and held two of them for a period of nine months. Another SMIT ship was seized in Venezuela for a few days and then released.

Commercial companies provide political risk insurance known as CEND Insurance, which stands for Confiscation, Expropriation, Nationalization, and Deprivation. However, since SMIT has suffered two incidents in recent years, the cost for obtaining this coverage has become unreasonable. Additionally, the insurers retain the right to cancel the CEND insurance with seven days notice which, if exercised, would result in the contractor's refusal to provide the salvage services in sensitive areas of the world. The Navy operates in the Middle East, which has been declared a war zone, as well as areas adjacent to both Korea and Taiwan, which are potential hotspots today. The availability of the contractor's on-call services is mandatory.

The legislative proposal would clarify the Maritime Administration's (MARAD) authority to include such risks in its war risk insurance coverage and also would make it clear that MARAD could offer such coverage even in instances where such an insured-against event takes place under circumstances that might arguably not fall within the context of a traditionally defined "war risk." MARAD would be able to provide CEND insurance coverage when the Secretary of Transportation, with the approval of the President, and after consultation with interested agencies of the Government, determines that such insurance cannot be obtained on reasonable terms; whether as part of conventional war risk coverage or as separate coverage.

SEC. ___ . CLARIFICATION OF TREATMENT OF MILITARY AND NATIONAL GUARD AIRCRAFT AS PUBLIC AIRCRAFT.

Section 40125 of title 49, United States Code, is amended—

(1) in subsection (a)(1), by striking ", in effect on November 1, 1999,";

(2) in subsection (a)(3)(A), by striking "the armed forces or"

(3) in subsection (c)(1)(B), by striking "and the aircraft is not used for commercial purposes".

Sectional Analysis

The purpose of this legislation is to amend the existing statute to make it clear that military aircraft, including those aircraft of the Reserves and National Guard of the States, territories, Puerto Rico, and the District of Columbia when operating under the direction of the Department of Defense are public aircraft, regardless of purpose for which the aircraft are flown and regardless of whether reimbursement is received by the military service, Reserve, or National Guard from other sources.

The amendment of section 40102(a)(37) contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181 significantly revised the definition of public aircraft to include those public aircraft assigned to the military. The proposed changes would clarify the definition of public aircraft to always include military aircraft operated by the Department of Defense, regardless of the purpose of the flight.

The "commercial purposes" definition contained in section 40125(a)(1) is not workable in the context of a military aircraft. The "commercial purposes" definition is too vague to allow the Department of Defense to operate its cargo and passenger aircraft effectively and it jeopardizes the sovereign immunity of military aircraft conducting international operations.

The Department currently transports its cargo and passengers interchangeably on both military organic aircraft and chartered commercial air carriers. The Department also transports cargo and passengers on a reimbursable basis for other agencies, international organizations, other nations, and sometimes individuals on this same mix of military and commercial aircraft. All transportation activities are in accordance with existing laws and international agreements and subject to the oversight of both the Senate and House Armed Services Committees. The effort to limit transportation of cargo and passengers for others by the Department to only those circumstances required by a regulation in existence prior to November 1,1999 effectively prohibits the Department from updating those regulations. That limitation also presumes that new situations will not arise requiring the use of military aircraft to support other agencies, other

nations, or our citizens.

The "commercial purposes" application to the international arena jeopardizes the sovereign immunity from foreign search and inspection currently afforded all military aircraft. Under international law, military aircraft include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the military forces, and manned by a crew subject to regular armed forces discipline. Pursuant to the Convention on International Civil Aviation of 1944 (the "Chicago Convention"), military aircraft are "state aircraft" as defined in that convention. The "commercial purposes" definition blurs the distinction between military aircraft and commercial aircraft that do not enjoy sovereign immunity. Under the definition, there would be no difference between a state owned airline (British Airways prior to their privatization) and Department of Defense aircraft transporting cargo for "commercial purposes". To have the sovereign status hinge on the ownership of cargo that may be on board would make international operations impossible.

This amendment would also avoid duplications, conflicts, and inefficiencies that would result from dual regulation of armed forces, Reserve, and National Guard aircraft by the Service Secretaries and the Secretary of Transportation. The amendments would avoid the need for FAA pilot ratings, aircraft certifications, and aircraft equipment certification for military aircraft belonging to the armed forces, including Reserve and National Guard of the States, territories, Puerto Rico, and the District of Columbia. Military procedures already exist to regulate pilot competency and maintenance procedures, and are essential to assure military readiness. The proposed amendments are not intended to affect the jurisdiction of the National Transportation Safety Board to investigate accidents pursuant to title 49, United States Code, section 1131, and the rules it adopted to implement Public Law 103-411 (60 FR 40111, August 7, 1995).

SEC. ___ . RIGHT OF REMOVAL TO FEDERAL DISTRICT COURT IN CLEAN AIR ACT AND SAFE DRINKING WATER ACT CASES FILED AGAINST THE FEDERAL GOVERNMENT.

(a) CLARIFICATION OF RIGHT TO REMOVE.—Section 118(a) of the Clean Air Act (42 U.S.C. 7418(a)) is amended by adding at the end the following:

"Nothing in this chapter shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding in State court to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this chapter, and any such proceeding may be removed in accordance with section 1441 et seq. of title 28.".

(b) REMOVAL OF ACTIONS UNDER THE SAFE DRINKING WATER ACT.—Section 1447 of the Safe Drinking Water Act (42 U.S.C. 300j-6) is amended by adding at the end the following new subsection:

"(f) REMOVAL.—"Nothing in this part shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding in State court to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this part, and any such proceeding may be removed in accordance with section 1441 et seq. of title 28."

(c)APPLICATION.—The amendments made by this section shall apply to all State enforcement actions under the Clean Air Act (42 U.S.C. 7401 *et seq.*) and Safe Drinking Water

Act (42 U.S.C. 300f *et seq.*) filed in a state court after the effective date of this section.

Sectional Analysis

The two amendments to title 42, United States Code, included in this proposal would make it clear that civil actions and criminal prosecutions brought under the Clean Air Act and Safe Drinking Water Act against Federal agencies as well as those against Federal officers brought in either an individual or official capacity may be removed to Federal district court. A Federal forum in such cases is vital because State court actions against Federal agencies and officers often involve complex Federal issues and Federal-State conflicts. Therefore, it is essential to ensure a proper balance is struck between competing local and national interests.

The amendment in subsection (a) would incorporate into the Federal facilities provision of the Clean Air Act (42 U.S.C. 7418) language from section 313 of the Clean Water Act (33 U.S.C. 1323) regarding the ability of Federal agencies to remove actions to Federal district court. This amendment would fulfill the clearly expressed congressional intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court. It also would clarify that suits against Federal agencies, as well as those against Federal officers sued in either an individual or official capacity, may be removed to Federal district court. This proposal would not alter the requirement that a Federal law defense be alleged for a suit to be removable pursuant to 28 U.S.C. 1442(a)(1).

This clarification is necessitated due to a recent Ninth Circuit decision, *People of the State of California v. United States*, 215 F.3d 1005 (9th Cir., 2000), which held that section 304(e) of the Clean Air Act is not superceded by the later enactment of the 1996 amendment to the Federal Removal Statute (28 U.S.C. 1441 *et seq.*). Pursuant to this ruling, Federal activities could be enjoined by state courts, and penalties assessed, if they allegedly violate provisions of state or local air pollution control laws. Under the Court's holding, the Federal government would not be able to obtain a Federal forum for the consideration of the national equitable interest involved, or timely access to a Federal forum for resolution of matters involving the interpretation or application of federal law.

This holding will have severe consequences. While state and local courts are capable of applying Federal law, State and local judges (who may be untenured, appointed, or elected) may face pressures not present in the Federal courts when adjudicating matters and fashioning remedies involving Federal agencies, especially if the litigation generates significant local public interest. Furthermore, subjecting Federal agencies to State and local court jurisdiction without reasonable recourse to the Federal system could provide local governing bodies the ability to tailor ordinances specifically designed to frustrate Federal activities, while not similarly burdening private, State or local activities with a similar or greater impact on environmental resources. Without allowing removal of such cases to Federal district court, the United States would be forced to challenge such discriminatory regulation in the local jurisdiction.

Subsection (b) of this proposal would amend the Federal agencies provision of the Safe Drinking Water Act (42 U.S.C. 300j-6) in a manner consistent with the above discussion to make it clear that actions brought under this law are also subject to removal to Federal district court. Such an amendment is necessary because the Safe Drinking Water Act contains language similar to that found in section 304(e) of the Clean Air Act, which was relied upon by the 9th Circuit in denying the Federal defendant a Federal forum. *See* Safe Drinking Water Act, 42 U.S.C. § 300j-8(e).

SEC. ___. REIMBURSE EPA FOR CERTAIN COSTS IN CONNECTION WITH HOOPER SANDS SITE IN SOUTH BERWICK, MAINE.

(a) AUTHORITY TO REIMBURSE EPA.—Using funds described in subsection (b), the Secretary of the Navy may pay $1,005,478.00 to the Hooper Sands Special Account within the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986 (26 U.S.C. 9507) to reimburse the Environmental Protection Agency in full for the Remaining Past Response Costs incurred by the agency for actions taken pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601, et seq.) at the Hooper Sands site in South Berwick, Maine, pursuant to an Interagency Agreement entered into by the Department of the Navy and the Environmental Protection Agency in January 2001.

(b) SOURCE OF FUNDS.—Any payment under subsection (a) shall be made using the amounts authorized to be appropriated to the Environmental Restoration Account, Navy, by section 301(15) of the National Defense Authorization Act for Fiscal Year 2002, which account is established by section 2703(a)(3) of title 10, United States Code.

Sectional Analysis

The Navy and the U.S. Environmental Protection Agency (EPA) entered into an agreement in January 2001 for payment of EPA response costs at the Hooper Sands Site, South Berwick, Maine for EPA's remaining past response costs incurred by the agency for the period from May 12, 1992 through July 31, 2000. Activities of the Navy are liable under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as generators who arranged for disposal of the hazardous substances that ended up at the site, and there are no other viable responsible parties. Under the agreement, the Navy would pay for EPA's final response actions that were undertaken to protect human health and the environment at this site. The agreement also stipulated that the Navy would seek authorization from Congress in the FY02 legislative program for payment of costs previously incurred by EPA at the site. Should Congress approve this

legislative proposal, the Navy would pay EPA with funds from the Navy's "Environmental Restoration Account, Navy" in an amount equal to the principle ($809,078.00) and interest ($196,400.00), or a total of $1,005,478.00.

SEC. ___ . AUDIT REQUIREMENTS FOR INSPECTOR GENERAL; CHANGE FROM ANNUAL TO PERIODIC REQUIREMENT.

Section 111(k) of the Comprehensive Environmental Responses, Compensation, and Liability Act of 1980 (42 U.S.C. 9611(k)) is amended to read as follows:

"(k) The Inspector General of each department or agency, to which responsibility to obligate money in the Fund is delegated, shall conduct a periodic audit of all payments, obligations, reimbursements, or other uses of the Fund, to assure that the Fund is properly administered and managed and that claims are considered in a timely fashion and in accordance with the Act. Each Inspector General shall submit a report of such audit to the President of the Senate and the Speaker of the House of Representatives. Each Inspector General shall provide such auditing of the Fund as is appropriate to minimize the risk of mismanagement. Each Federal department or agency shall cooperate with the Inspector General in carrying out this subsection.".

Sectional Analysis

Section 111(k) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended (42 U.S.C. 9601 et seq.), currently imposes a separate requirement on all Inspectors General to conduct annual audits of all payments, obligations, reimbursements, and other uses of the Superfund, to ensure that the Fund is being properly administered.

This requirement in CERCLA substantially duplicates current audits performed by or under the auspices of the Inspector General, Department of Defense, of the Department's financial statements as required by the Chief Financial Officers (CFO) Act of 1990 (Public Law 101-576; 104 Stat. 2838), as amended. The Office of Management and Budget has additionally imposed a specific requirement on the Corps of Engineers (Civil Works) to provide a separate financial statement, which is audited annually pursuant to the CFO Act. The CFO Act audit generally would include a review of some Superfund transactions and the systems used to process those transactions. Therefore, the separate requirement in CERCLA for performing and reporting Superfund audits should be revised.

The Inspector General's recent annual audits have concluded that the Corps of Engineers has properly administered its portion of the Superfund and that management controls over Superfund monies for which DoD is responsible are adequate. The Superfund financial transactions were 99.94 percent accurate in FY 2000 (Report No. 2000-184) and 99.8 percent accurate in FY 1999 (Report No. 99-257). To continue the mandatory statutory requirement for conducting and reporting annual audits of these highly controlled transactions, in which no material or systemic problems have been discovered, is unnecessary and not cost efficient at this time. This revision would allow Inspectors General the discretion to audit Superfund financial transactions on a periodic basis, using their professional judgement of risk and other factors considered in audit planning.