

**COMMUNITY RIGHTS COUNSEL  
EARTHJUSTICE**

July 10, 2006

The Honorable Arlen Specter  
Chairman, Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Ranking Member, Senate Committee on the Judiciary  
United States Senate  
Washington, DC 20510

**Re: Nomination of William J. Haynes II to a Lifetime Position on the U.S. Court of Appeals for the Fourth Circuit.**

Dear Chairman Specter and Ranking Member Leahy:

We are writing to express our serious concerns about the nomination of Department of Defense General Counsel William James Haynes II to a lifetime position on the U.S. Court of Appeals for the Fourth Circuit.

As General Counsel of the Department of Defense, one of Mr. Haynes' primary responsibilities is to "[d]evelop the DoD Legislative Program and coordinate DoD positions on legislation."<sup>1</sup> As the Department's "final legal authority,"<sup>2</sup> Mr. Haynes has apparently been a leader of an effort by the Department to systematically remove the military from compliance with our nation's most critical environmental and public health laws through legislative actions.<sup>3</sup> We are concerned that if confirmed to the Fourth Circuit, Mr. Haynes would bring to the bench a one-sided viewpoint on these issues that would seriously undermine decades of established environmental law.

Everyone wants our troops to be ready for battle. For this reason every major environmental law contains a provision allowing either the President or, in the case of the Endangered Species Act (ESA), the Secretary of Defense, to exempt the military from compliance for reasons of "national security."<sup>4</sup> But battle-readiness can be achieved without poisoning the nation's air, land, and water. As a result, the military has virtually

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<sup>1</sup> <http://www.defenselink.mil/dodgc/>

<sup>2</sup> William J. Haynes, II, Responses to Senate Judiciary Committee Questionnaire (Oct. 2, 2003) at p.14

<sup>3</sup> House Armed Services Committee, Committee Hearing, May 1, 2003, Comment of Ranking Member Congressman Ike Skelton (D-MO).

<sup>4</sup> RCRA Sec. 6001; CERCLA Sec. 120j; Clean Air Act Sec. 118; ESA Sec. 7(j).

never used these exemptions and both the Defense Department and the EPA<sup>5</sup> testified that there has not been one single instance in which compliance with environmental laws have hurt military readiness nor are there any examples of actual adverse effects on military readiness from these laws.

With Mr. Haynes as its General Counsel from 2001 through 2006, the Defense Department has repeatedly attempted to fundamentally alter this careful balance between military readiness and environmental protection. The Department has waged an aggressive lobbying campaign to exempt the military from compliance with our most fundamental environmental laws. The Department manages approximately 25 million acres of land, making the Department one of the nation's most significant land managers. The scope of the exemptions sought, even under the narrowest reading, would exempt a land area equal to the size of six states: New Jersey, Massachusetts, Hawaii, Connecticut, New Hampshire, and Delaware.<sup>6</sup> The lobbying campaign sought to circumvent traditional legislative processes by using unrelated legislation, such as the 2003 Defense Reauthorization Act, and alternative congressional committees of jurisdiction.<sup>7</sup>

For five successive years, the Department has promoted the Range Readiness and Preservation Initiative (the Initiative), which would provide the military with sweeping exemptions from compliance with our nation's most critical environmental laws including the Clean Air Act (CAA), Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA).

The exemptions sought under RCRA and CERCLA would even include actions necessary to protect public health from contamination that posed an imminent and substantial endangerment to human health. The Department sought to exempt more than 20 chemical compounds of military munitions, many of which are classified as possible human carcinogens. The most prevalent chemical constituent of explosive ammunition constituents is perchlorate, which impairs fetal development, creates thyroid gland tumors, and can cause tremors, vomiting, diarrhea and increased blood pressure.<sup>8</sup> The Initiative would also preempt State and local enforcement and has consequently been opposed by many State and local organizations.<sup>9</sup>

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<sup>5</sup> Andrew Bridges, "Whitman: EPA 'comfortable' with military environmental exceptions," Associated Press, March 26, 2003. Whitman testified that she had "been working very closely with the Department of Defense, and [she didn't] believe that there [was] a training mission anywhere in the county that [was] being held up or not taking place because of environmental protection regulation."

<sup>6</sup> [http://www.house.gov/commerce\\_democrats/DODexemptions/Fact%20Sheet%20RCRA-CERCLA.pdf](http://www.house.gov/commerce_democrats/DODexemptions/Fact%20Sheet%20RCRA-CERCLA.pdf)

<sup>7</sup> "Pentagon cites pending litigation as force for law changes," *Environment & Energy Daily*, March 14, 2003. See also John Heilprin, "Pentagon considers environment exemptions," *Associated Press*, March 20, 2003.

<sup>8</sup> Fact Sheet on Defense Department Exemptions From RCRA and CERCLA available at [http://www.house.gov/commerce\\_democrats/DODexemptions/dod.shtml](http://www.house.gov/commerce_democrats/DODexemptions/dod.shtml)

<sup>9</sup> Fact Sheet on Defense Department Exemptions From RCRA and CERCLA available at [http://www.house.gov/commerce\\_democrats/DODexemptions/dod.shtml](http://www.house.gov/commerce_democrats/DODexemptions/dod.shtml) State and local authorities

The broad exemptions sought under the CAA would have allowed the Department to emit unlimited amounts of pollution over a three-year period regardless of its impact on air quality or public health. The only recourse to reduce the threat to public health for such high emissions would be to seek reductions from other non-military sources.

The Department sought exemptions under the MMPA that constituted an “open-ended blanket exemption authority that could be applied to virtually any military activity or technology at any time.”<sup>10</sup> The requested legislative changes in the MMPA would weaken the Act’s definitions to introduce a “loophole that would allow numerous activities to fall outside any review.”<sup>11</sup> The Department has sought an “indirect and even broader legislative fix rather than to allow the matter to be addressed within the traditional context of MMPA reauthorization and before the legitimate Congressional committees of jurisdiction” in a “process that circumvents the normal legislative order and shuts out the views and concerns from all other stakeholders.”<sup>12</sup>

The legislative changes sought under the ESA would exempt the Defense Department from complying with ESA’s critical habitat requirement. More than 300 threatened or endangered species live on lands managed by the Department. The Department’s proposal would replace mandatory protections of the ESA with unenforceable and undefined standards. The Inspector General of the Department examined 10 military installations and found, of that sample, none had methods in place to adequately ensure any lands designated as critical habitat would even be monitored.<sup>13</sup>

The Department has created and is responsible for cleaning up the largest number of toxic waste sites of any person or entity in the United States. The Department has 131 facilities on the Superfund National Priorities List, constituting 72% of all the federal sites on the list.<sup>14</sup> The Department is responsible for addressing over 28,500 potentially contaminated sites across the country, not including thousands of potentially contaminated formerly used sites.<sup>15</sup> These sites have already caused the contamination of many groundwater drinking sources and many sites are located over sole drinking water sources for communities. As Congressman John Dingell has said, the Department of Defense has “left a lethal legacy of contamination throughout our country and has

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opposed include: The National Conference of State Legislators, The National Association of Attorneys General, and The National League of Cities.

<sup>10</sup> The Pentagon’s 2003 Sustainable Ranges Agenda and its Effect on Public Health and Environmental Laws and Regulations, available at [http://www.house.gov/commerce\\_democrats/DODexemptions/DODExemptionJointPaper4703.pdf](http://www.house.gov/commerce_democrats/DODexemptions/DODExemptionJointPaper4703.pdf) at 13.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> In 2003, the Department secured certain exemptions under the ESA and the MMPA as part of the Defense Reauthorization Act of 2003. In 2004, the Department renewed the exemption request with a much grander scope of exempt actions in 2004.

<sup>14</sup> The Pentagon’s 2003 Sustainable Ranges Agenda and its Effect on Public Health and Environmental Laws and Regulations, available at [http://www.house.gov/commerce\\_democrats/DODexemptions/DODExemptionJointPaper4703.pdf](http://www.house.gov/commerce_democrats/DODexemptions/DODExemptionJointPaper4703.pdf).

<sup>15</sup> Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress, page 19.

refused to clean it up, but now it has the audacity to ask for immunity from state and federal laws that protect the environment and public health.”<sup>16</sup>

The environmental record of the Department of Defense under Mr. Haynes’ watch is a fundamental concern that should be fully explored by the Senate as part of its Constitutional advise and consent responsibility.

We appreciate your consideration of our views on this important nomination.

Sincerely yours,

Doug Kendall  
Executive Director  
Community Rights Counsel

Glenn Sugameli  
Senior Judicial Counsel  
Earthjustice

cc: Members, Senate Committee on the Judiciary

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<sup>16</sup> Congressman John Dingell, News Release, April 7, 2004 available at [http://www.house.gov/commerce\\_democrats/press/108nr16.shtml](http://www.house.gov/commerce_democrats/press/108nr16.shtml)