

**Alaska Community Action on Toxics • Community In Power and Development, Inc. •
Citizens for Clean Air • Earthjustice • Gustavus PFAS Action Coalition • Kentucky
Environmental Foundation • Kentucky Resources Council • Sierra Club • United
Congregations of Metro-East • Wake Up Alaskans to the Toxic Environmental Reality**

January 10, 2020

The Honorable Mark T. Esper
Secretary of Defense
United States Department of Defense
1000 Defense Pentagon
Washington, DC, 20301-1000

Dear Secretary Esper:

On December 20, 2019, President Trump signed the National Defense Authorization Act (“NDAA”) for Fiscal Year 2020. In addition to authorizing funding for the U.S. Department of Defense, section 330 of the NDAA enacts new requirements governing the DOD’s disposal and incineration of materials containing per- and poly-fluoroalkyl substances (“PFAS”).¹ We write to inform you that the Department of Defense (“DOD”) is in violation of those requirements, which went into effect December 20, 2019, and must immediately cease all PFAS incineration until it has come into compliance.

PFAS are a class of toxic chemicals associated with cancer, liver damage, infertility, and other serious health effects. Once released, they spread rapidly, can persist in the environment for centuries or longer, and accumulate in humans and other living organisms. For decades, DOD has used PFAS-containing Aqueous Film Forming Foam (“AFFF”) for training and fire-fighting purposes, contaminating the soil and water at military bases, airports, and other DOD facilities as well as the surrounding communities. More than 200 military facilities have unsafe PFAS levels in drinking water or groundwater, and many others have yet to be tested.²

DOD is now putting even more communities at risk by sending vast stockpiles of AFFF and other PFAS-containing materials offsite for incineration. PFAS resist incineration and do not break down under temperatures and conditions that are sufficient to destroy other toxic chemicals; those properties are precisely why PFAS are widely used as a fire suppressant. Incomplete incineration may result in air emissions of PFAS as well as other toxic chemicals like hydrogen fluoride, threatening those who live and work around the incinerators.

¹ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198, § 330 (enacted Dec. 20, 2019).

² See *The Federal Role in the Toxic PFAS Chemical Crisis: Hearing Before the Subcomm. on Federal Spending Oversight & Emergency Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. 70–81 (2018) (statement of Brian J. Lepore, Director, Defense Capabilities and Management, U.S. Government Accountability Office).

Despite those risks, a senior DOD official has testified that “[f]or the most part, the excess supplies of PFAS and those things are going for incineration.”³ DOD is in the midst of incinerating millions of gallons of PFAS-containing AFFF pursuant to three contracts entered by the Defense Logistics Agency.⁴ In Moose Creek, Alaska, DOD is also incinerating PFAS-contaminated soils from the nearby Eilson Air Force Base.⁵ Where DOD has installed on-site water treatment systems for PFAS and other contaminants, the Navy recommends that “PFAS-contaminated materials, including aqueous waste and treatment media ... be disposed of through incineration.”⁶

In the NDAA, Congress imposed new restrictions to reduce the impacts of DOD’s PFAS incineration. In particular, Section 330 of the NDAA states that:

The Secretary of Defense shall ensure that when materials containing per- and polyfluoroalkyl substances (“PFAS”) or aqueous film forming foam (“AFFF”) are disposed—

(1) all incineration is conducted at a temperature range adequate to break down PFAS chemicals while also ensuring the maximum degree of reduction in emission of PFAS, including elimination of such emissions where achievable;

(2) all incineration is conducted in accordance with the requirements of the Clean Air Act (42 USC 7401 et seq.), including controlling hydrogen fluoride;

(3) any materials containing PFAS that are designated for disposal are stored in accordance with the requirement under part 264 of title 40, Code of Federal Regulations; and

(4) all incineration is conducted at a facility that has been permitted to receive waste regulated under subtitle C of the Solid Waste Disposal Act (42 USC 6921 et seq.).

These new restrictions apply to: (1) “legacy AFFF formulations containing PFAS,” (2) “materials contaminated by AFFF release,” and (3) “spent filters or other PFAS contaminated

³ *The Federal Role in the Toxic PFAS Chemical Crisis: Hearing Before the Subcomm. on Federal Spending Oversight & Emergency Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. 25 (2018) (testimony of Maureen Sullivan, Deputy Assistant Secretary of Defense for Environment).

⁴ Sharon Lerner, *The U.S. Military Plans to Keep Incinerating Toxic Firefighting Foam, Despite Health Risks*, The Intercept (Jan. 27, 2019), <https://theintercept.com/2019/01/27/toxic-firefighting-foam-pfas-pfoa/>.

⁵ Sara Tewksbury, *Moose Creek Residents Raise Concerns About Contaminated Soil Incineration*, KTUU News (Nov. 27, 2019), <https://www.ktuu.com/content/news/Moose-Creek-residents-raise-concerns-about-contaminated-soil-incineration-565540661.html>.

⁶ Naval Facilities Eng’g Command, *Engineering Evaluation and Cost Analysis for Drinking Water: Naval Auxiliary Landing Field Fentress 3-3* (Sept. 2018), https://www.cnic.navy.mil/content/dam/cnic/cnrma/pdfs/Environmental/Drinking_Water_and_Testing_Information/Installation_Scheduling_and_Results/Oceana/Fentress/Final%20NALF%20Fentress%20EE_CA_redacted_v2.pdf.

materials resulting from site remediation or water filtration that (i) have been used by the Department of Defense or a military department; or (ii) are being discarded for disposal by means of incineration by the Department of Defense or a military department; or (iii) are being removed from sites or facilities owned or operated by the Department of Defense.”⁷

DOD’s ongoing PFAS incineration violates these requirements. DOD has not “ensure[d] that ... all incineration is conducted at a temperature range adequate to break down PFAS chemicals.” Rather, DOD has acknowledged “there is no precedent to predict ... temperatures at which [PFAS destruction] will occur,”⁸ and its AFFF incineration contracts impose no temperature requirements for its PFAS incineration. Nor has DOD “ensure[d] ... the maximum degree of reduction in emission of PFAS, including elimination of such emissions where achievable.” To date, DOD has not even required incinerators to demonstrate that they are capable of breaking down PFAS, much less eliminating PFAS emissions to the maximum extent achievable. DOD does not store all PFAS-containing materials designated for disposal pursuant to 40 C.F.R. Part 264, which, among other requirements, demands a detailed waste analysis, restricts the locations on which waste may be stored, and requires the tracking of waste through a manifest system.

The NDAA also requires any DOD PFAS incineration to be “conducted in accordance with the requirements of the Clean Air Act.” In its AFFF incineration contracts, however, DOD expressly authorizes the use of incinerators that routinely violate the Clean Air Act and other environmental laws. For instance, the Heritage-WTI incinerator in East Liverpool, Ohio has violated the Clean Air Act in 11 of the last 12 quarters and has violated the Resource Conservation and Recovery Act (“RCRA”) in three quarters;⁹ the U.S. Department of Justice recently filed suit to address the incinerator’s “systemic failures to comply with the Clean Air Act.”¹⁰ Clean Harbors’ Kimball, Nebraska incinerator has violated both the Clean Air Act and the RCRA every quarter for at least the last three years, resulting in more than a dozen enforcement actions.¹¹ Veolia’s Sauget, Illinois incinerator has had Clean Air Act violations in every quarter for at least the last three years and has RCRA in five of the last 12 quarters.¹²

⁷ § 330, 133 Stat. at 1312–13.

⁸ Dep’t of Defense, Solicitation No. DoD 2017.B STTR, Topic No. AG17B-T001: AFFF Disposal (Apr. 2017), <https://www.sbir.gov/sbirsearch/detail/1254657>.

⁹ EPA, *Detailed Facility Report: Heritage-WTI Inc., 1250 St George St, East Liverpool, OH 43920*, Enforcement and Compliance History Online, <https://echo.epa.gov/detailed-facility-report?fid=110027242320> (last updated Dec. 16, 2019).

¹⁰ Press Release, EPA, Department of Justice, EPA Reach Clean Air Act Settlement with Ohio Based Hazardous Waste Company (Oct. 18, 2018), <https://www.epa.gov/newsreleases/departments-justice-epa-reach-clean-air-act-settlement-ohio-based-hazardous-waste>.

¹¹ EPA, *Detailed Facility Report: Clean Harbors Environmental Services Inc. 2247 S Hwy 71, Kimball, NE 69145*, Enforcement and Compliance History Online, <https://echo.epa.gov/detailed-facility-report?fid=110041638458> (last updated Dec. 16, 2019).

¹² EPA, *Detailed Facility Report: Veolia ES Technical Solutions LLLC, 7 Mobile Avenue, Sauget, IL 62201*, Enforcement and Compliance History Online, <https://echo.epa.gov/detailed-facility-report?fid=110000438893> (last updated Dec. 16, 2019).

Clean Harbors' La Porte, Texas incinerator has violated RCRA in each of the last 12 quarters,¹³ and Veolia's Port Arthur, Texas incinerator has violated RCRA in two of them.¹⁴

The incineration of chemicals that are designed to not combust at facilities known to violate environmental laws places the public at risk. Several of the signatories to this letter represent members who live and work in the communities surrounding the incinerators that DOD has chosen for the incineration of AFFF. Congress enacted Section 330 of the NDAA to protect those communities from PFAS contamination.

We trust that DOD will comply with its NDAA requirements and thus immediately halt all PFAS incineration until it has demonstrated that all requirements of Section 330 have been satisfied. To the extent that DOD is incinerating any soils, water treatment filters, or other material, it also must conduct testing to determine whether such wastes contain PFAS, and, if so, regulate them accordingly. In light of the immediate and serious threat posed by PFAS exposures, we request written confirmation of DOD's cessation of incineration within 14 days of the receipt of this letter.

Respectfully submitted,

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Chair, National Clean Air Team
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¹³ EPA, *Detailed Facility Report: Clean Harbors Deer Park LLC, 2027 Independence Pkwy S, La Porte, TX 77571*, Enforcement and Compliance History Online, <https://echo.epa.gov/detailed-facility-report?fid=110000463365> (last updated Dec. 16, 2019).

¹⁴ EPA, *Detailed Facility Report: Veolia ES Technical Solutions LLC Port Arthur Facility, 7665 Highway 73, Port Arthur, TX 77640*, Enforcement and Compliance History Online, <https://echo.epa.gov/detailed-facility-report?fid=110035783658> (last updated Dec. 16, 2019).

cc: Lieutenant General Darrell K. Williams, Director, Defense Logistics Agency
Thomas Modly, Acting Secretary of the Navy
Ryan McCarthy, Secretary of the Army
Barbara Barrett, Secretary of the Air Force
Maureen Sullivan, Deputy Assistant Secretary of Defense for Environment