DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 9
937 N. Harbor Drive, Box 81
San Diego, California 92132-0058

5090
Ser N40JRR.cs/0039
December 14, 2010

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

SUBJECT: DOD COMMENTS TO PROPOSED GREENHOUSE GAS (GHG) CAP AND TRADE (C&T) RULE

On behalf of the Department of Defense (DoD) Regional Environmental Coordinator (REC) in California, we appreciate the opportunity to comment on your landmark effort to create a GHG C&T system for California. For the reasons set forth in this letter, we request an exemption from this regulation for military facilities that qualify as a "covered entity" pursuant to Section 95811 and that generate greater than 25,000 MTCO2e per year.

BACKGROUND: Energy conservation has been a federal agency priority since the enactment of the National Energy Conservation Policy Act of 1978. The Energy Policy Act of 2005 (EPACT 05) subsequently established goals and requirements for renewable energy (RE), alternative fuel use and reductions in energy use. Specifically EPACT 05 required that RE purchases exceed 3% for FY2007-2009, 5% for FY 2010-2012, and 7.5% for FY 2013 and every year thereafter. The Energy Independence and Security Act of 2007 and E.O. 13423 of 2007 provided for further improvements to the energy performance of federal buildings, and specifically required a 3% annual reduction in energy intensity in federal buildings with a total of 30% by 2015 from a FY 2003 baseline. E.O. 13423 went further than EPACT 05 on RE requiring greater than 50% RE purchases from new sources.

On October 5, 2009, President Obama signed Presidential Executive Order (E.O.) 13514, "Federal Leadership in Environmental, Energy, and Economic Activity." This E.O. emphasizes the assumption of a leadership role by DoD and other federal agencies in implementing GHG emission reductions and other sustainability initiatives specifically requiring a 30% reduction in energy intensity between 2006 and 2015, a 20%

reduction in fleet use of petroleum fuels, and a 10% increase in alternative fuel use. In part, it provides for the quantification, reporting and reduction of GHG emissions by federal agencies including DoD. DoD goals under this EO are memorialized in a ten year Strategic Sustainability Performance Plan (SSPP), reviewed and approved by the White House's Council on Environmental Quality (CEQ) and the Office of Management and Budget, and finalized August 2010. DoD's SSPP mandates aggressive reductions in nearly every contributing factor to Global Climate Change (GCC) defined as three levels or "scopes" as follows:

- Scope 1: direct greenhouse gas emissions from sources that are owned or controlled by the Federal agency;
- Scope 2: direct greenhouse gas emissions resulting from the generation of electricity, heat, or steam purchased by a Federal agency; and
- Scope 3: greenhouse gas emissions from sources not owned or directly controlled by a Federal agency but related to agency activities such as vendor supply chains, delivery services, and employee travel and commuting.

In the SSPP, DOD commits to a 34% reduction of scope 1 and 2 and a 14.5% reduction of scope 3 GHG emissions by FY 2020 using a FY 2008 baseline. The SSPP consolidates requirements from executive orders, statutes and other regulatory sources. Implementing the SSPP guarantees that DoD will be a warrior in the fight to mitigate GCC and will result in far greater GHG reductions than imposing a market based commodity exchange of GHG pollution.

Turning to some specific quantification of GHG reductions at military facilities in California for the period until 2006, which is the ARB proposed baseline year for GHG emission offsets, the Navy/Marine Corps in California reduced its electrical use by 25% from 1990 levels. The Air Force similarly reduced its use during the same time by 34%. Army reductions were 31%. These reductions were the result of the use of alternative energy and energy conservation technologies. Thus, by its demonstrated performance, DoD has shown a commitment to reduce its energy use and GHG emissions.

GHG CAP AND TRADE & THE MILITARY: The proposed cap and trade regulation will initially apply to at least one California military facility, Marine Corps Air-Ground Training Center at Twentynine Palms, California (Twentynine Palms), which exceed the 25,000 ton MTCO2E annual emissions. To the extent that the

threshold is lowered in subsequent years, additional military facilities will exceed the new threshold. Twentynine Palms is the premier, service level training center for United States Marine Corps. The military mission of Twentynine Palms is to conduct relevant combined arms training, urban operations, and Joint/Coalition level integration training that promotes operational force readiness. The SSPP and EO 13514 impose GHG reduction mandates on that facility. The federal nature of those programs, however, provides the Commander on the ground at Twentynine Palms with the flexibility to achieve those GHG reductions by implementing cost effective, energy efficiencies in a manner that does not impede or conflict with its military training mission, which includes "Train as we Fight". Under AB 32 and the draft C&T program regulation, Twentynine Palms would be subject to a strictly imposed emission cap as well as the SSPP and EO 13514. This cap ratchets down periodically and does not provide the flexibility needed to accommodate the unpredictable nature of the operational tempo of military readiness training.

Twentynine Palms is home to a facility that generates about 57% of the base's electricity through the use of waste heat energy and natural gas. If the draft program were implemented, that facility might have to choose to generate less electricity in order to meet a compliance obligation. This choice results from the fact that allowance credits are not available for the DoD to purchase (discussion in legal framework below) and demonstrate compliance. In this case, Twentynine Palms is not treated "in the same manner and to the same extent as a nonfederal entity."

Capping the emissions of military electrical generating units, in war time and peace time, to the extent envisioned in the draft C&T regulation, threatens readiness. Reliable independent sources of electrical power are critical to military readiness. Recently, a panel of retired senior military officers studied the connection between GCC and national security. Their work contains many findings and recommendations. Those findings include the following discussion about energy reliability and sustainability:

> One approach to securing power to DoD installations for critical missions involves a combination of aggressively applying energy efficiency technologies to reduce the critical load (more mission, less energy); deploying renewable energy sources; and "islanding" the installation from the national grid. Islanding allows power generated on the installations to flow two ways—onto the grid when there is excess production and from

> the grid when the load exceeds local generation. By pursuing these actions to improve resiliency of mission, DoD would become an early adopter of technologies that would help transform the grid, reduce our load, and expand the use of renewable energy."[1]

A military installation which is islanded, and which generates power from renewable sources with lower carbon emissions than power generated by the grid, perfectly illustrates a carbon reduction project. Note that the Military Advisory Board suggests the mission alone justifies projects in renewable energy sources, irrespective of collateral state pollution initiatives.

To translate this discussion into terms outlined in the C&T regulation, the military's "production" is a direct response to the national/international priorities set by the President and Congress. DoD does not produce GHG except as a byproduct of its national security mission, and the urgency of the mission is often determined by events beyond our borders. DoD must be able to respond quickly to a changing global security threat. We must be able to ramp up our operations when requested by the Commander in Chief. Application of the cap and trade rule may unnecessarily harm the military's ability to perform its mission in response to currently unknown events.

ARB previously recognized the uniqueness of military installations in the mandatory GHG reporting regulation as well as the C&T regulations, by allowing the classification of a military installation as more than a single facility based on distinct and independent functional groupings. *See* 17 C.C.R. §95102(2)(72). This regulation recognizes that military installations are a blend of municipal, industrial, commercial, residential and other function. ARB should continue with its recognition of unique role of the military as requested below.

LEGAL FRAMEWORK: DoD actions are governed by federal law and Congressional mandates. DoD can only spend Congressionally appropriated funds to comply with state law when expressly authorized by Congress in federal statute to do so. According to the Anti-Deficiency Act (ADA), "An officer or employee of the United States [Government] may not (A) make or authorize an expenditure or obligation exceeding an amount available in an

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[1] Military Advisory Board, The CNA Corporation, National Security and the Threat of Climate Change, (2007), p. 37. *Available at* http://securityandclimate.cna.org/report/SecurityandClimate Final.pdf.

appropriation or fund for the expenditure or obligation or (B) involve (the Government) in (an) obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S. Code § 1341(a)(1)(underscore added). Any requirement by ARB that California military installations comply with the GHG emission requirements must clearly fall within the scope of an explicit Congressional waiver of sovereign immunity. *See, e.g.*, federal Clean Air Act §118, 42 U.S.C. §7418. The military cannot voluntarily spend Congressional funds to comply with a state environmental program in the absence of a clear and unequivocal waiver of sovereign immunity.

FEDERAL FISCAL LAW CONTRAINTS: A significant means to comply with mandatory GHG emissions is to participate in the "trading" portion of the C&T program, and to obtain Compliance Instruments at auction or in the anticipated market. These innovative and precedential compliance mandates raise issues not previously addressed. An initial analysis, based on the information provided to date, indicates that federal fiscal law constraints may prohibit federal agencies from obtaining the Instruments in those ways.

The Supremacy Clause of the U.S. Constitution also prohibits states taxing the federal government. Further, the federal agencies can only pay a state "fee," if the charge is in accord with well established U.S. Supreme Court precedent (see U.S. V Massachusetts, 435 US 444 (1978)), and U.S. Government Accountability Office (GAO) opinions. Federal agency acquisition of goods and services must also comply with the Federal Acquisition Regulation (FAR). The application of these authorities to the purchase of Compliance Instruments in the GHG cap and trade program presents a number of concerns. DoD will require additional time to review the proposed program, especially since the ARB staff report states that additional modifications are anticipated. Nevertheless, our initial concerns follow.

1. State revenues generated must approximate costs of the GHG program. The ARB staff report discusses that Compliance Instrument auctions may result in revenues to the state and that revenues may be expended by providing rebates to electricity rate payers or by investing in the "green" economy to stimulate research and jobs. If revenues in excess of program costs are generated, federal agencies may be barred

by federal law from participation in the purchase of Compliance Instruments at auction.

2. Federal government must receive benefits commensurate with the amounts paid. The revenue generated in an auction also may be reinvested for the "public benefit." The benefits to the public at large are usually paid for by taxes, and the State cannot tax the federal government. If the distribution of the amounts paid by federal agencies for Compliance Instruments does not result in commensurate benefits, then they may be barred from participation in the auctions.

3. Federal government must comply with acquisition requirements. The FAR provides an expansive set of controls governing the federal government's purchase of goods and service in the open market. There are mandates on ensuring open and fair competition. These regulations may limit the federal government's ability to participate in the auction to purchase Compliance Instruments. Since this is the primary mechanism to comply with a mandatory GHG emissions cap, federal agencies may be significantly disadvantaged in their compliance efforts. In the absence of specific Congressional authorization federal agencies may be barred from participating in the program outside of the FAR mandates. The timing and likelihood of Congressional approval is currently unknown.

Supreme Court Justice Steven Breyer has noted, "The concerns that led to the development of this case law, such as fears of unjustified raids on the federal treasury by states or attempts by states to discourage federal activity within their borders, would seem applicable in the present context." Maine v. Navy, 973 F.2d 1007, (1st Cir. 1992)(Breyer, C.J.)(citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426-27, 4 L.Ed. 579 (1819); Public Util. Comm'n v. United States, 355 U.S. 534, 543-44, 78 S.Ct. 446, 452-53, 2 L.Ed.2d 470 (1958). The DoD applauds the portions of the proposed C&T rulemaking that require the use of revenues generated by the program to be used in ways similar in purpose to the program's goals. However, we would be remiss if

we did not take note of anecdotes of similar programs where funds have been spent in ways inconsistent with the general welfare of the federal taxpayer.

For example, "In just over two years, the (Regional Greenhouse Gas Initiative (RGGI)) has generated more than $729 million for the 10 states that have participated. Each state is supposed to use its share of the money raised to invest in renewable energy and to promote energy efficiency and consumer benefits, like programs that help low-income electricity customers pay their utility bills. But the money is proving too much of a temptation for states not to use [as] a convenient pool of money that can be drawn on to help balance state budgets. Critics say that diverting money from the fund for general spending, instead of using it on emissions control and energy savings, makes the initiative little more than a hidden tax on electricity." Mireya Navvaro, States Diverting Money From Climate Initiative, N.Y. Times, November 28, 2010, available at: http://www.nytimes.com/2010/11/29/nyregion/29greenhouse.html."

AB 1405: The DoD concerns reflect the discussions around AB 1405 (2010), which would have earmarked a substantial portion of cap and trade revenues to fund a wide range of social-based programs provided by non-governmental organizations (NGOs). Although Governor Schwarzenegger vetoed this bill, a public discussion of the ARB 2010 Legislative Report, revealed that both NGOs and ARB board members thought that despite the fate of the legislation, ARB had the authority and willingness to implement these social programs. While these publicly funded NGO programs may not be a part of the current proposal, DoD must view this proposal through that history. If revenues from the auction of Compliance Instrument are earmarked for these social programs, then federal agencies may be barred on constitutional grounds from participating in a primary method of compliance.

Augmentation: There is yet another fiscal law issue in that to the extent the military is put in a position of selling instruments on the open market, and receives a surplus from the sale of that trading allowance, the military may be illegally augmenting its federal budget. The DoD may not accept allowances from the ARB as that term is defined in the proposed regulation due to the augmentation rule. "The (augmentation) rule is that a government agency may not accept for its own use (*i.e.*, for retention by the agency or credit to its own appropriations) gifts of money or other property in the absence of specific statutory authority. 16

Comp. Gen. 911 (1937)." U.S. Government Accountability Office, Office of General Counsel, *Principles of Federal Appropriations Law*, (The Red Book) 3d ed., Vol. II, p. 6-222. "As the Comptroller General (has) said, '[w]hen the Congress has considered desirable the receipt of donations. .. it has generally made specific provision therefore ....' *Id.* at 6-223 (*citing* 16 Comp. Gen. 911, 912; *See also* B-286182, Jan. 11, 2001; B-289903, Mar. 4, 2002 (nondecision letter)). Thus, acceptance of a gift of money or other property by an agency lacking statutory authority to do so is an improper augmentation.

The following discussion from the Comptroller General summarizes the illegal augmentation theory:

> Although there is no express statutory prohibition against augmentation of appropriated funds, the theory, propounded by the accounting officers of the Government since the earliest days of our Nation, is designed to implement the Constitutional prerogative of the Congress to exercise the power of the purse; that is, to restrict executive spending to the amounts appropriated by the Congress. *See e.g.* 9 COMP.DEC. 174(1902).
>
> Several implementing statutes further assure that agencies do not accept additional monies from sources other than the Congress itself. For example, 18 U.S.C. 209 prohibits acceptance of any salary payment or other compensation for a Government employee from any source outside the Government. Funds may not even be transferred between separate Government appropriations without specific statutory authority. 31 U.S.C. 1532. Contributions or donations from outside sources are made to Government agencies, in the absence of statutory authority to retain them, they must be deposited promptly in the general fund of the Treasury. 31 U.S.C. 3302. Violations of any of the above statutes constitutes an illegal "augmentation" of the agency's appropriation and the funds must be disgorged and returned to the Treasury so that they can be appropriated as the Congress sees fit.

Matter of: FCC *Acceptance of Rent Free Space and Services at Expositions and Trade Shows*, June 28, 1984, B-210620, 63 COMP.GEN. 459.

Determining whether C&T revenues make the program subject to the illegal augmentation rule requires consideration of several factors. Among those factors include the purpose of the appropriation, the amount of discretion in the uses of the funds and the nature of the augmentation itself, whether cash or value in-kind.

Applying those factors to the proposed C&T rulemaking, ARB Staff Report: ISOR PROPOSED REGULATION TO IMPLEMENT THE CALIFORNIA CAP-AND-TRADE PROGRAM, Volume II, Appendix D, states: "The value of the allowances is represented by the money paid to the State, which would then have the opportunity to use the revenue for public benefit."(D-20) "Allowance value can be used in many ways, including use for the public benefit or to ease the cost of regulation."(D-22) "Regulating greenhouse gas emissions will probably stimulate economic growth in some sectors and may slow growth in others. Worker training programs funded with allowance value can help Californians shift jobs if necessary."(D-22) The allowances were clearly designed in consideration of both economic value to the position holder and accomplishment of the regulatory goal, GHG reduction. The economics of the program distinguish C&T from a traditional air pollution control or abatement program. Considered in tandem with the legislative histories of AB 1405, Proposition 26 and the 3 parts of the *Massachusetts* test outlined above, the problems of DoD participation are evident.

LIMITED NATURE OF OFFSETS: Currently the offset market is narrowly limited to the four following protocols: 1. Urban Forest Projects, 2. U.S. Ozone Depleting Substances Projects, 3. Livestock Manure (Digester) Projects, and 4. U. S. Forest Projects. The military is concerned that its inability to purchase Compliance Instruments requires us to generate our own offsets to comply with this regulation. As explained above, the federal government has for years taken actions to reduce its energy use and GHG footprint. These reductions are regularly monitored with executive level oversight at CEQ and OMB, both agencies independent of DoD, charged with implementing these initiatives. To the extent that the military is subject to the C&T program, we recommend that the Executive Officer, in his authority within Sub article 13, Sections 95970-95973, approve federally mandated protocols for offsets. These federal reductions will meet regulatory criteria for offsets outlined in Section 95972 for protocols, i.e. accurate accounting, data collection and monitoring, project baseline, and ensuring the reductions are permanent. The proposed capture of offsets is

overly restrictive in this current draft, and should be expanded to recognize federal reduction offset protocols.

PROPOSED RULE IGNORES FEDERAL SECTOR ECONOMIC IMPACTS. California Government Code §11346.5(6) requires the notice of proposed adoption to include "an estimate [of] the cost or savings to any state agency, [other] nondiscretionary costs imposed on local agencies, and the cost or savings in federal funding to the state." The term 'federal funding' is interpreted broadly and it includes the addition or subtraction of federal programs within the state. According to California Government Code §11349.1, "The (Office of Administrative Law) shall return any regulation (where) the adopting agency has not prepared the estimate required by (§11346.5(6)) and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking." (For rules governing the preparation of this statement, *See* California Code §§13000 et seq. (Dept. of Finance).) There is no analysis in the Initial Statement of Reasons on the economic impact of this regulation upon the agencies of the federal government. Absent this analysis, OAL must return this regulation to ARB under state law.

FUEL SUPPLIERS: Inclusion of a major new sector of Fuel Suppliers in 2015, in this latest draft, requires additional analysis that we have not completed. It goes without saying that the ability to supply fuel to our major installations in CA, much of which is transported and combusted outside of CA, is and instrumental part of DoD's world-wide operational mission. We ask that you work with us to ensure that this aspect of our mission is not covered by this regulation. This matter is more fully discussed in our Jan 20, 2010 comments on the preliminary draft regulation (Enclosure(1)).

Request for Military Exception. Given the unique nature of the military mission, the potential disruption of military operations, the fiscal law restraints on federal agency purchases of Compliance Instruments, the limited availability of offsets, and the failure to analyze the impact on federal funding, DOD requests that the proposed regulations be modified to add the following exception:

SUBARTICLE 3: APPLICABILITY

NEW Section 95815. Military Facilities

Military facilities that qualify as a "covered entity" pursuant to Section 95811 and that generate greater than 25,000 MTCO2e per year are exempt from this regulation until such time as the U.S. Congress authorizes federal expenditures to participate in a state greenhouse gas cap and trade program.

We thank you for your consideration of these very important issues. Feel free to direct any questions or comments you may have to our governmental affairs representatives, Randal Friedman, at 619-572-5037, or Ned McKinley, at 916-930-5606.

Sincerely,

C.L. STATHOS
By Direction

Encl: (1)DoD REC 9 ltr 5090 Ser N40JRR.cs/0002 of 20 Jan 10

DEPARTMENT OF DEFENSE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 9
937 N. Harbor Drive, Box 81
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5090
Ser N40JRR.cs/0002
January 20, 2010

Lucille Van Ommering
California Air Resources Board
1001 "I" Street
Sacramento, CA 95825

Dear Ms. Van Ommering,

SUBJ: DEPARTMENT OF DEFENSE COMMENTS TO PRELIMINARY DRAFT CAP AND TRADE REGULATION

On behalf of the Department of Defense (DoD) military installations in California, and in addition to comments made at the 14 December 2009 workshop, we would like to submit these initial comments to the Preliminary Draft Cap and Trade Regulation (PDR). These comments were compiled by the DoD Regional Environmental Coordinator's office for Region 9 (DoD REC 9), which represents the Departments of the Navy, Army and Air Force for environmental matters in California. Considering the complexity of these regulations, and the complexity of a typical military installation, we are continuing to review the proposed regulations. We are also reviewing the proposal with our respective headquarters given the precedential nature of this subject and the ongoing consideration of cap and trade legislation in the US Congress.

1990-2005 DoD Green House Gas (GHG) Reduction Efforts:
DoD REC 9 staff has had extensive discussions with the California Air Resources Board (ARB) staff over the years regarding the breadth of post-1990 energy reductions in the federal sector. Energy conservation has been a federal agency priority since the passage of the National Energy Conservation Policy Act of 1978. The Energy Policy Act of 2005 subsequently established renewable energy use, building performance standards, energy reduction goals, and alternative fuel requirements. The Energy Independence and Security Act of 2007 and Executive Order (E.O.) 13423 of 2007 provided for further improvements to the energy performance of federal buildings, a 30% reduction in energy intensity between 2006 and 2015, a 20% reduction in fleet fuel use, and a 10% increase in alternate fuel use.

DoD's long-term commitment to these initiatives is evidenced by significant across–the-board reductions in electricity use. ARB currently proposes to use 2006 as the baseline for offsets in the cap and trade regulation. In the years prior to 2006, the Navy/USMC reduced its electricity use by 25% from 1990 levels.[1] The Air Force reduced its use during this time period by 34%,

[1] This figure only includes bases that were not subject to the Federal Base Closure legislation and also reflect a 5% increase in building footprint.

ENCLOSURES (1)

while Army reductions were 31%. These reductions were achieved by alternative energy installation combined with various conservation technologies.[2]

Most recently, on 5 October 2009, President Obama signed E.O. 13514, "Federal Leadership in Environmental, Energy, and Economic Performance," which expands upon E.O. 13423. The new E.O. requires federal agencies, by June 2010, to prepare and submit to the Council on Environmental Quality and the Office of Management and Budget for review and approval a 10-year Strategic Sustainability Performance Plan (SSPP). One portion of the SSPP is dedicated to achieving sustainability goals and targets, including GHG reduction targets. The E.O. specifically requires annual reporting of both direct and indirect GHG emissions relative to a 2008 baseline. The new E.O. emphasizes the assumption of a leadership role by the DoD and other federal agencies in implementing GHG reductions and other sustainability initiatives.

Credit for Pre -2006 Offsets:
Many of the DoD's energy reduction initiatives emanating from the federal requirements referenced above will meet the formal "offsets" criteria and will be an important part of the DoD compliance strategy. Consider, for example, the Navy installation of San Clemente Island, which is not on the power grid; therefore, all power generated comes from liquid fossil fuels barged from the mainland. There is no other way to access "green power." In recognition of the impacts from this energy transfer, the Navy implemented an alternative energy project on San Clemente Island in 1998 comprising 675 KW of wind power, which supplies up to 15% of the island's power. We have asked for recognition of these efforts throughout the AB 32 implementation process and continue to do so today. Given the variability of the DoD mission and changing national security needs, we are particularly concerned about requirements for offsets should a "surge" occur due to training/mission needs. For this reason, we seek to ensure recognition of our past efforts.

In accordance with ARB's approved "Policy Statement on Voluntary Early Actions to Reduce Greenhouse Gas Emissions," we recommend that ARB consider moving the date for Offset Project Eligibility (page 64 of the PDR) from 31 December, 2006 back in time, to allow for recognition of significant projects such as the Navy's 1998 installation of wind turbines on San Clemente Island. As we understand ARB's rationale for the 31 December 2006 cut off, it corresponds to the date of implementation of AB 32. DoD installations in California have implemented many high quality projects that could be considered as offset credits in the California Cap and Trade market. Setting a date at 31 December 1997 will allow some of these projects to be eligible for offset credit generation and will reward the early actors in accordance with ARB's policy. An earlier offset project eligibility date is more in line with the legislatively mandated baseline year of 1990 and will allow consideration of renewable energy projects which take many years to implement.

Surge Operations:
In case of conflict or national security operations, DoD installations may experience rapid changes in activity levels, including increased energy and fuel use. These changes in activity level would be beyond the control of the individual installations or groups and may be sustained for significant periods of time. We would like to discuss options for special consideration for these periods, including linking surge with DoD's ability to reach back before 31 December.

[2] Attached is a briefing provided by DoD REC 9 to ARB staff detailing these efforts (Enclosure (1)).

2006 for military-generated offsets, as discussed above. Another option is providing a temporary exemption for these surge periods from compliance with the cap and trade program. Our goal is to avoid a situation where the cap and trade mandates conflict with mission requirements.

Definition of Facility:
We have had meaningful discussion regarding the unique, world-wide reach of California's DoD installations, as well as the breadth of the services provided to the service members on base, analogous to municipal jurisdictions. Consistent with this viewpoint, ARB discussed an exception for military base operations in the preamble to the California mandatory GHG reporting regulation:

> Another exception to the traditional facility definition is military bases. Some military bases are spread over many thousands of acres and encompass a wide variety of activities such as employee housing, medical facilities, airfield operations, aircraft repair, ship construction and repair, and other operations. Each of these operations could also be under the operational control of different branches of the military or military contractors within the confines of a base. ARB staff has thus provided the option for a military base to subdivide the base for reporting purposes into independent functional groupings, based on the types of operations performed on the bases. Through this mechanism, each base would not necessarily have to report as a single facility, but could subdivide based on "operational control" (defined in the regulation), and on major functional groupings such as aircraft repair and overhaul, or ship construction and repair operations. As with traditional "facilities," only those GHG sources specified within the proposed regulation would be reported, while unspecified sources such as residential heating and cooling would not be included.

Based on this rationale, ARB's mandatory reporting regulation definition of "facility" states:

> Operators of military installations may classify such installations as more than a single facility based on distinct and independent functional groupings within contiguous military properties.

We would therefore request consistent treatment of DoD's military installations in the California cap and trade regulation. This avoids a scenario where a single power plant on a city-sized military installation results in the entire operations of the installation being subject to cap and trade requirements. We do not believe such an outcome would be consistent with how municipalities are being treated under ARB's final GHG reporting rule and under the preliminary draft cap and trade rule, and as such may be outside of the federal waiver of sovereign immunity.

Transportation Fuels:
The treatment of transportation fuels raises an issue for DoD in California. While the current proposal only includes gasoline and diesel,[3] placeholders exist for other transportation fuels. Given DoD's worldwide mission and the unpredictability of those missions, we sometimes move fuel between facilities. We are concerned that routine movement of fuel from a ship to shore, or

[3] At least one DoD installation has a production facility creating biodiesel fuel from waste cooking oil and others are being considered. DoD would like to know if/how such production would be treated. DoD would not believe it appropriate to "penalize" a facility that produces biofuel from non-foodstocks.

from shore to ship or one of our island facilities could trigger cap and trade requirements. Our interpretation of this PDR is that the proper application is when fuel is purchased within California from a supplier who would be subject to compliance. Other movement of fuels, as part of the military mission function, should not be subject to regulation that could impact on mission needs and flexibility. Therefore, we would ask that fuel movements on behalf of the United States military or for military purposes be exempted from these requirements. Further, other specialized fuels, which are moved on behalf of the United States military or for military purposes, are not part of the transportation sector and we request that the regulation provide a similar exemption to avoid ambiguity. We note that addressing the DoD fuel movements in this manner would be consistent with the EPA's Mandatory Greenhouse Gas Reporting Rule (MRR) in Title 40 of the Code of Federal Regulations Part 98 at §98.6.

From the MRR §98.6:

Exporter means any person, company or organization of record that transfers for sale or for other benefit, domestic products from the United States to another country or to an affiliate in another country, excluding any such transfers on behalf of the United States military or military purposes including foreign military sales under the Arms Export Control Act. An exporter is not the entity merely transporting the domestic products, rather an exporter is the entity deriving the principal benefit from the transaction.

Import means, to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States, with the following exemptions:
(1) Off-loading used or excess fluorinated GHGs or nitrous oxide of U.S. origin from a ship during servicing.
(2) Bringing fluorinated GHGs or nitrous oxide into the U.S. from Mexico where the fluorinated GHGs or nitrous oxide had been admitted into Mexico in bond and were of U.S. origin.
(3) Bringing fluorinated GHGs or nitrous oxide into the U.S. when transported in a consignment of personal or household effects or in a similar non-commercial situation normally exempted from U.S. Customs attention.
(4) Bringing fluorinated GHGs or nitrous into U.S. jurisdiction exclusively for U. S. military purposes.

Importer means any person, company, or organization of record that for any reason brings a product into the United States from a foreign country, excluding introduction into U.S. jurisdiction exclusively for United States military purposes. An importer is the person, company, or organization primarily liable for the payment of any duties 680 on the merchandise or an authorized agent acting on their behalf. The term includes, as appropriate:
(1) The consignee.
(2) The importer of record.
(3) The actual owner.
(4) The transferee, if the right to draw merchandise in a bonded warehouse has been transferred.

Supplier means a producer, importer, or exporter of a fossil fuel or an industrial greenhouse gas.

Geographic Coverage of Offsets:
DoD has facilities through the country and the world and must manage these in a constantly changing environment. For this reason, we request that CA's cap and trade offsets include the widest geographic coverage. For example, if we seek to bring a new mission to California that would increase a cap we would want to have the opportunity to use reductions from elsewhere, e.g. the facility where the mission is coming from or other offset projects.

Verification of Offsets:
As we have discussed in our comments on the mandatory reporting rule, DoD is subject to unique requirements that pose issues for verification through third parties. We appreciate the inclusion of local air districts in the verification and support continued utilization of local air districts in the verification process of offsets.

Three-Year Compliance Periods:
We wish to express our support for the three-year compliance periods to enhance compliance options and flexibility with this very new program. Facilities will need to develop complex compliance strategies to comply with this regulation and the three-year window in which to implement the strategy will provide facilities the flexibility needed to do so while still meeting national security demands. As pointed out earlier, DoD's mission requirements can quickly change in response to world events. It is imperative that we retain the maximum flexibility for compliance.

Destruction of Ozone Depleting Substances (ODSs):
Page 63 of the PDR includes "Discussion of Concept--Ozone Depleting Substances (ODSs)." ARB is considering allowing offset projects not called out by AB32 "(such as destruction of ODSs that are no longer in production)." Overall, DoD supports this approach; however, we would note that some ODSs, though no longer produced, still serve a crucial role for critical applications, both commercial and military, as users continue to transition to non-ODSs. This is especially true for halon fire suppressants, such as Halon 1211 (bromochlorodifluoromethane, CF_2ClBr) and Halon 1301 (bromotrifluoromethane, $CBrF_3$), for which there are no viable alternatives. Military mission-critical applications on aircraft, ships, and ground tactical vehicles utilize these ODS's, as do civil aviation to protect the safety of the flying public and the oil and gas industry for production in cold climates. We would also note that federal policy requires federal agencies to offer any excess Class I ODS to the DoD ODS Reserve for continued use in military mission-critical applications before they can offer for sale or destruction, in recognition of these ongoing critical uses. Given these critical military mission and civil aviation applications, we recommend that halons not be considered for the ODS offset program until such time that it can be determined that adequate global supplies are available.

Economic Considerations:
We wish to express support for the importance of the fair economic incentive component to valuation of the market trading commodities of offsets and allowances. We understand that ARB has appointed a 17-member Economic and Allocation Advisory Committee (EAAC) to analyze and prepare a report, due January 2011, on the following:

- Allocation of allowances and use of their value
- Implications of different allowance allocation strategies (i.e., free allocation, auction, both).

We look forward to reviewing this report when it is released. We appreciate that ARB recognizes that course corrections may be necessary throughout this program to ensure there is equity in the financial distribution of these compliance options.

Federal Fiscal Law:
This letter serves as a place-holder to identify potentially unique federal fiscal law issues with respect to buying and selling market commodities to achieve compliance with this regulation. DoD is bound by strict congressional mandates as to authorization to spend money and then accompanying appropriations to accomplish Congress's goals. There is very little discretion within this process and as such, DoD will be evaluating this first of its kind regulation as to how it reconciles with federal fiscal law. We have engaged our fiscal lawyers, and expect to have additional comments as these requirements are more fully fleshed out in subsequent drafts.

Harmonization of EPA and ARB Reporting Rules:
The rapid proliferation of GHG regulations at both the state and federal level could cause significant administrative burdens as inventory calculation and reporting standards have not been harmonized. Consequently, reporting facilities will be required to track several different parameters and calculate various values for GHG emissions, often for the same sources. We note that ARB representatives have publicly stated the intention to harmonize the mandatory reporting under AB 32, which serves as the basis for the ARB's cap and trade program, with other GHG reporting rules, such as the US EPA Mandatory GHG Reporting Rule. We support such efforts and request that you consider harmonizing the PDR with Executive Order 13514 and the US EPA's plans for the Prevention of Significant Differences/Title V programs as well.

We appreciate the complexity of the effort you have undertaken and look forward to working with ARB as we continue our efforts to reduce our carbon footprint through the many programs already in place on our installations. We hope you continue to recognize our unique needs where we must have the flexibility to meet the ever-changing national defense needs of our country. My points of contact on this subject are Randal Friedman (619) 572-5037 and Mary Kay Faryan (619) 532-4301.

Sincerely,

C. L. STATHOS
By Direction

Encl: (1) Department of Defense AB 32 brief of 25 Jun 07

Department of Defense: AB 32 Discussion

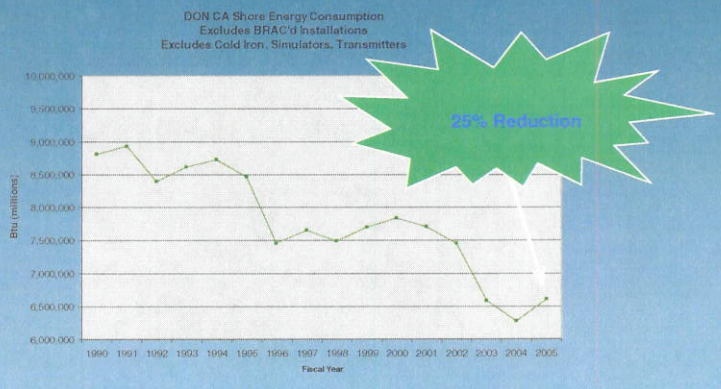
Greenhouse Gas/ Energy Reduction Goals

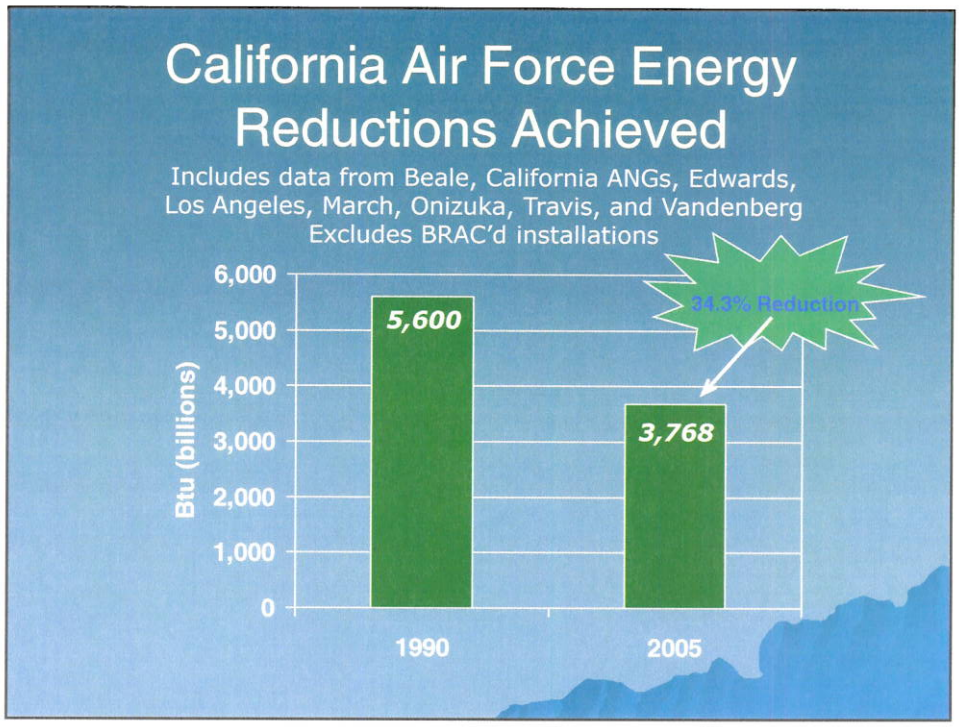
California (GHG)	Executive Order (Energy/GHG)	Congressional Requirements
1990 levels by 2020 (AB 32)	30% below 1990 levels by 2010 (historic EO 13123)	20% GHG reduction (EPACT 1992)
80% below 1990 levels by 2050 (EO S-0305)	30% below 2003 levels by 2015 or 3% annually (current EO 13423)	2% annual energy reduction goal (EPACT 2005)

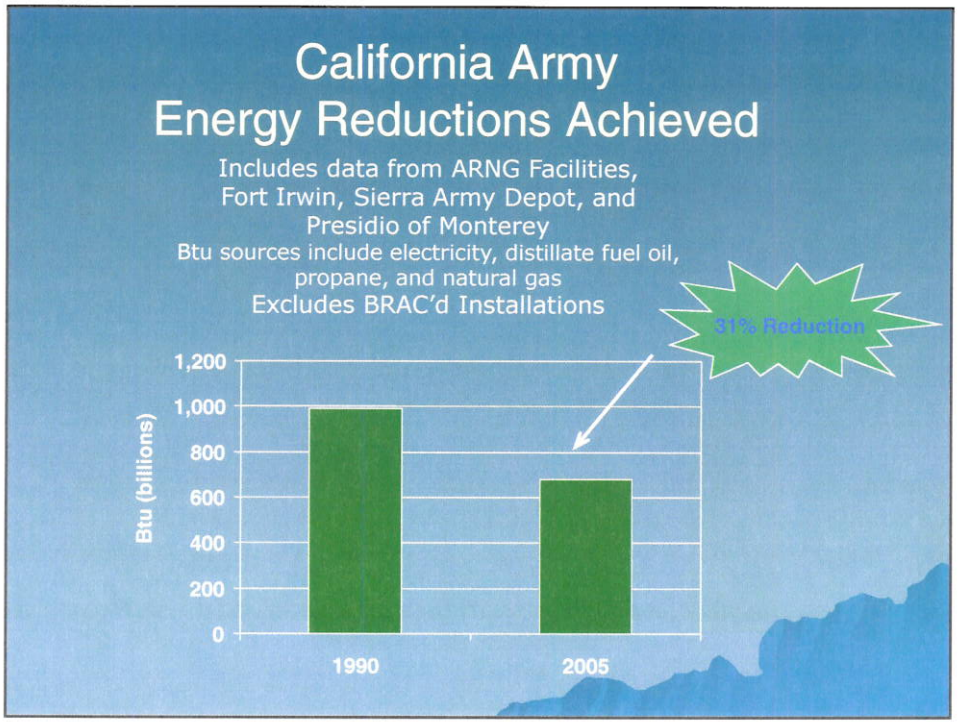
DOD Energy Programs

- Energy Efficiency Projects
- Purchasing Renewable Energy
- Renewable Generation, Cogeneration
- New and Retrofit Facility Construction
- Energy Management - O&M
- New Technology Validation
- Training and Personnel Awareness
- Utilities Metering
- Dedicated Energy Managers

California DON Energy Reductions Achieved



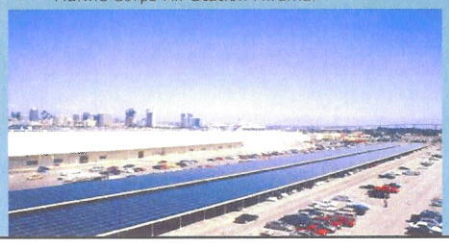

California Air Force Energy Reductions Achieved
Includes data from Beale, California ANGs, Edwards, Los Angeles, March, Onizuka, Travis, and Vandenberg
Excludes BRAC'd installations
Btu (billions)
6,000
5,000
4,000
3,000
2,000
1,000
0
5,600
3,768
24.3% Reduction
1990
2005


California Army Energy Reductions Achieved
Includes data from ARNG Facilities, Fort Irwin, Sierra Army Depot, and Presidio of Monterey
Btu sources include electricity, distillate fuel oil, propane, and natural gas
Excludes BRAC'd Installations
Btu (billions)
1,200
1,000
800
600
400
200
0
31% Reduction
1990
2005

Greenhouse Gas Reductions – DoN Alternate Energy Sources

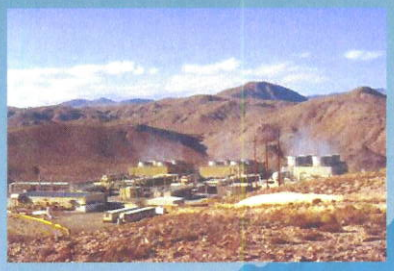
Solar Energy (3,134 kW)

- Naval Base Coronado
- Naval Base Point Loma
- Naval Medical Center
- Naval Base Ventura County
- San Clemente Island
- Naval Air Facility El Centro
- Naval Air Weapons Station China Lake
- Naval Weapons Station Seal Beach
- Naval Support Activity Monterey
- Marine Corps Combat Center 29 Palms
- Marine Corps Base Camp Pendleton
- Marine Corps Air Station Miramar



Geothermal Energy (270,000 kW)

- Naval Air Weapons Station China Lake



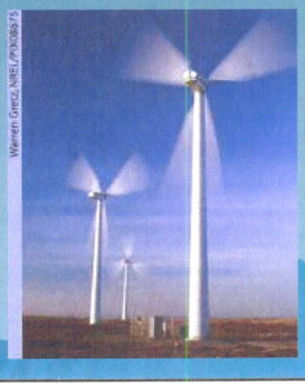
Greenhouse Gas Reductions – DoN Alternate Energy Sources

Solar Thermal & Microturbines (180kW)

- Naval Base San Diego
- Naval Base Ventura County
- Marine Corps Base Camp Pendleton
- Naval Base Coronado

Wind Energy (2,245 kW)

- San Clemente & San Nicholas Islands



Greenhouse Gas Reductions – DoN Alternate Energy Sources

Biodiesel Fuels

- 1.8 million gallons B20 fuel in 2006
- Primary fuel used for compression engines for non-tactical vehicles
- Barstow, Camp Pendleton, Miramar Marine Corp. Air Station, Edwards Air Force Base, Vandenberg Air Force Base and two sites at the San Diego Naval Station.

Greenhouse Gas Reductions – DoN/USA Alternate Energy Sources

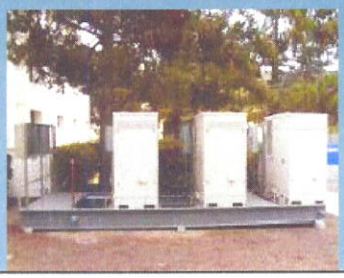
Fuel Cells

Fuel Cell (2,505kW)

- Naval Base Coronado
- Naval Base Point Loma
- Naval Base Ventura
- Naval Air Weapons Station China Lake
- Marine Corps Base Camp Pendleton
- Marine Corps Air Station Miramar

Army California Projects

- Fort Irwin –
  - generates portion of energy with renewable thermal energy
  - uses million solar roof technology (MSR) for stand along lighting and a remote off-grid facility (20 kW)
  - installed photovoltaic for landfill weigh station which (1 KW)
  - installed 220 geothermal heat pumps in family housing in 1994-95 which yields 2310 KW of power.
- Presidio of Monterey –
  - purchases nearly 15, 000 MWh of solar energy (FY 2005 and 2006).-



Hydrogen Fueling Station

-California Hydrogen Highway

-Camp Pendleton's dual use hydrogen fueling station

Greenhouse Gas Reductions – USAF Alternate Energy Sources

EPA's Green Power Partnership

- **Air Force won the EPA's Climate Challenge Award in 2005**
- **Air Force was the largest green power purchaser in the US** Sept 2006
  - Over 1 Billion kWh purchased nationwide
  - Edwards AFB (2005) - 68% of power needs are from a renewable source
  - Beale AFB (2005) – 14% of power needs are from a renewable source

Synthetic Fuel Testing / Research

- **Air Force Flight Test Center (Edwards AFB) Tested Synthetic Fuel in a Fully Operational B-52 Aircraft** Story (Sept 2006)
- **Air Force / Industry / Academia working together to develop additional synthetic fuels from bio-mass sources, including agricultural and wood products**

Greenhouse Gas Reductions – USAF Alternate Energy Sources

Solar Energy

- **March ARB: Two photovoltaic projects (300 kW and 100 kW)**
  - Solar Panels placed on the Roofs of New Covered Parking Facilities
  - Estimated to provide March ARB with nearly 8 percent of the electricity it needs to operate its facilities
- **An 895-kilowatt photovoltaic project is planned for Fresno ANGB**

Enhanced Use Leasing

- **Air Force is investigating opportunities for the development of alternate energy projects by industry on underutilized portions of installations.**

AB 32 Discussion Items

- Recognition/credit for military reductions
- Exclusion of tactical sources
- Recognition of installation issues
  - Definition of facility
  - Incorporate US EPA Title V Guidance Document
- Resolve biodiesel issues