S. HRG. 107–1004

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003: REVIEW OF ENVIRONMENTAL PROTECTION MANDATES

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

REVIEW OF SECTIONS 2105, 2016, 2017(a)–(b), 2108 AND 2019 OF S. 2225, A BILL TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2003 FOR MILITARY ACTIVITIES OF DEPARTMENT OF DEFENSE, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR FISCAL YEAR 2003

JULY 9, 2002

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED SEVENTH CONGRESS
SECOND SESSION

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ADDITIONAL MATERIAL

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003: REVIEW OF ENVIRONMENTAL PROTECTION MANDATES

TUESDAY, JULY 9, 2002

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m. in room 406, Senate Dirksen Building, Hon. James M. Jeffords (chairman of the committee) presiding.

Present: Senators Jeffords, Warner, Smith, and Inhofe.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. The committee will come to order.

I welcome our witnesses today and note that we have several who have traveled great distances to attend this hearing. On our first panel, we will hear testimony from Admiral William Fallon, who is Vice Chief of Naval Operations. Welcome, Admiral. On our second panel, we will hear from Ms. Jamie Clark, from the National Wildlife Federation, former director of the Fish and Wildlife Service in the Clinton administration. I note that in Ms. Clark's written testimony that she has extensive experience with defense matters, including a position as the fish and wildlife administrator for the Department of the Army.

We will hear from several State witnesses, Mr. Dan Miller, First Assistant Attorney General from the State of Colorado; who is submitting his written testimony on behalf of Colorado and several other States, including attorneys general of Arizona, California, the Commonwealth of Massachusetts, Nevada, New York, Oregon, Utah, Idaho and Washington.

Mr. Stanley Phillippe, from the State of California, will testify for the Association of State and Territorial Solid Waste Management Officials and Mr. William Hurd, the Solicitor General from the Commonwealth of Virginia. We will hear from Mr. Bonner Cohen, a senior fellow from Lexington Institute. I am pleased to welcome Mr. David Henkin, who will testify for EarthJustice. Mr. Henkin has flown here on short notice from Hawaii. His efforts certainly tell us of the level of interest, or perhaps I should say concern, with the proposals.

The proposals to which I refer were included in the Administration's Defense Authorization bill this year. In effect, these proposals, which are contained in Title XII of that bill, amend six envi-

ronmental statutes. Five of these statutes are within the jurisdiction of this committee.

I am not aware of any precedent for Congress acting in such a broad, sweeping manner to substantially alter existing environmental law through freestanding legislation. Moreover, these proposals were never submitted to the committee, but were proposed for inclusion in a bill that would not have been considered by this committee.

Through the wisdom of the Armed Services Committee, I would particularly like to thank Chairman Levin, these proposals were not included in the DOD authorization bill, either in committee or in the final bill passed by the Senate. I understand, however, that there may be plans to include these provisions within the upcoming conference of the DOD authorization bill. I would be sorely disappointed and I would oppose such an effort.

I also would like to note that Senator Lieberman, who is a member of the Armed Services Committee, may not be able to attend the hearing today. Nevertheless, I am authorized to say that the Senator opposes these proposals on such procedural and substantive grounds, and that he intends to oppose any efforts to advance the proposals in conference. Already I have received a large volume of letters expressing concern with the scope and eventual effects of these proposals should they become law.

Even without the benefit of testimony we will hear today, I am already aware that these proposals as drafted present concerns, particularly for the States, and also for citizens living near Federal training facilities. These proposals are complex and should be carefully examined by experts in both Federal and State law. Moreover, since many environmental laws contain provisions that favor Federal facilities by allowing for exemption, when the President declares an exemption to be in the national interest, we must carefully examine the need for these proposals.

I am not aware of many instances, if any, where the defense agencies that sought the waivers available to them under current law. Instead, the Agencies now seek permanent waivers of the laws that apply to their facilities. Congress intended the environmental laws to apply to the Federal facility. If any other entity were asking for a permanent exemption from environmental law, we would afford no less scrutiny to their proposals.

So I would like to make clear that by conducting this hearing today, I do not intend to clear the way for these proposals to be added to the DOD bill in conference. I agreed to hold a hearing on these proposals when the Ranking Member filed them as amendments to our water infrastructure bill earlier this year. Frankly, I believe that amendment would have been defeated at that time. But rather than to put it to a vote, I agreed instead to conduct a hearing, consistent with my desire to proceed in a regular order on matters within this committee's jurisdiction.

It is my strong belief that if these proposals move through this Congress or any future Congress, they should be backed by a convincing demonstration of need and should be scrutinized, drafted and considered by the committee. The threshold for a demonstration of need will be quite high.

Finally, there are two provisions amending the Endangered Species Act and Migratory Bird Treaty Act that are currently in the House version of the DOD authorization bill. I have received numerous letters of concern about these provisions, and I am aware that no committee of jurisdiction over these statutes has examined these proposals to evaluate these concerns.

With so little information to back them, it is unfortunate that these provisions appear in the House bill. As such, I am opposed to their inclusion in the final DOD authorization bill. I look forward to hearing the testimony here today. I would note that some of our witnesses may have chosen to speak to the provisions contained in the Administration's proposal to amend the Marine Mammal Protection Acts. This is a statute not in our jurisdiction. This subject was not within the scope of the bipartisan official notice for today's hearing. So I will ask the witnesses to confine their remarks to these areas of the proposal that are the subject of the hearing here today.

With that, I turn to my good friend from New Hampshire.

OPENING STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. Thank you, Mr. Chairman.

I thank all the witnesses for being here today. I believe it's the first time that all four of the services have been represented at the joint chiefs level committee hearing, outside the Armed Services Committee, but I might be wrong on that. But we're certainly honored to hear your testimony today.

Let me just clarify for my own perspective here, this is not, at least in my view, Mr. Chairman, a hearing on any bill or any proposal or any initiative at all. It's an opportunity to hear both sides of a very delicate issue. It's a chance to look at the conflicts and try to work them out. I am not a sponsor of any proposal or any initiative, any bill whatsoever to draw any conclusions.

But sometimes there are obstacles to training, which I think we as a Congress have to address, whether right or wrong. We have to make the decision as to whether there is some reason why there is some obstacle out there that keeps us from training. We saw one that wasn't really an environmental obstacle, it was a concern at Vieques, where there were some concerns expressed about human beings not animals. So these things do come up.

My purpose in being here is to try to address these issues in a way so we can hear from those folks who are trying to defend our country, to see where there may be problems we can work out. I have been on numerous military installations in my tenure in the Congress, and every time I've been there I've seen great efforts taken to try to be very sensitive to the environment and to the wildlife and habitat that are on those military installations. Indeed, spent a few years at sea during the Vietnam War and also saw even then attempts to avoid confrontation with sea mammals.

So it's up to us, really, to appropriately balance those goals for defense and environmental protection. I think frankly the military has done that. But I think there are times when these things do come up in conflict. It's important to note also that during the last, I will just take one issue, Mr. Chairman, with you. During the last

16 months, service witnesses, military, have appeared before Congress to speak to encroachment issues at 5 different hearings, the Subcommittee on Readiness and Management of the Senate Armed Services Committee, on March 20, 2001, the House Committee on Government Reform on May 9, 2001, May 16, 2002 in the Subcommittee on Military Readiness in the House Armed Services Committee, May 22, 2001 and March 8, 2002. So there have been hearings and it has been out there. It's true, we have not dealt with it at all.

I will be very brief, but I think just to mention a couple of specifics. The Migratory Bird Treaty Act. In March of this year, the District of Columbia Circuit Court held that military training should be halted if it could result in the incidental death or injury of a single migratory bird, not necessary an endangered species. So it could be a seagull, a duck or any other species that may not be an endangered species. While this decision directly affects training exercises on an island in the South Pacific, the decision could be used to halt training at every military base in our Nation.

I think we just need to look at these issues and see whether the military is responding properly or not. It's my understanding the Migratory Bird Treat Act was intended to apply to hunting of migratory birds, not to unintended or incidental harm. Intentional damage is one thing, unintentional is another. The Pentagon has asked the Congress to restore the interpretation of that Migratory Bird Treaty, so that they understand and have clarification as to what is expected of them.

I think it's reasonable, Mr. Chairman, to hear from the military on this and find out where there are confrontations or where there could be confrontations or where there is conflict, and we'll try to address it. Thank you.

[The prepared statement of Senator Smith follows:]

STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Thank you, Mr. Chairman, for working with me and honoring the request of this side for this very important hearing. I want to welcome some of our most senior military leaders to today's hearing. Welcome to Admiral Fallon, General Keane, General Foglesong and General Williams. I understand that today is the first time all four services have been represented at the Joint Vice Chiefs of Staff level in any hearing outside the Armed Services Committee—we are honored to have you here to testify. The purpose of this hearing is to consider DoD's Readiness and Range Preservation Initiative. Mr. Chairman, we are at war—and thus far we have been blessed to have so few casualties. A primary reason for that is the tremendous training that our soldiers get before going into battle. Training saves lives. Unfortunately, there are obstacles to this training that we must address. The Readiness and Range Preservation Initiative balances two of our country's priorities: national defense and protecting the environment. It is up to us in Congress to clarify how to appropriately balance these goals of national defense and environmental protection.

It is important to note that this legislative proposal does not contain exemptions or sweeping rollbacks of environmental law. The proposal instead keeps DoD subject to environmental laws and tries to clarify how DoD can achieve its day-to-day readiness mission in balance with environmental stewardship.

Let me talk a little about the specifics of the proposal. First, the Migratory Bird Treaty Act. In March of this year, a D.C. Circuit court held that military training should be halted if it could result in the incidental death or injury of a single migratory bird. There are numerous migratory birds. While this decision directly affects live fire training exercises on an island in the South Pacific, this decision could be used to halt training at every military base in our Nation. That cannot occur. The Pentagon is asking to restore the interpretation of the Migratory Bird Treaty Act

that has existed for 83 years prior to the recent court ruling. The Migratory Bird Treaty Act applies to hunting of migratory birds. The Migratory Bird Treaty Act was never intended to apply to unintended, incidental harm to migratory birds.

Our military is also requesting clarification that there is no need to designate critical habitat under the Endangered Species Act at military installations which have an Integrated Natural Resources Management Plan. These plans are required by another environmental law, the Sikes Act, which only applies to the military. The Sikes Act requires the military to holistically address conservation of a military base's natural resources. This requested clarification is supported by the U.S. Fish and Wildlife Service, and confirms existing policy of the last two Administrations.

DoD is also requesting clarification that munitions fired on operational ranges are not solid waste or releases requiring cleanup under the Resource Conservation and Recovery Act as well as the Superfund law. Most of what DoD is requesting simply codifies an Environmental Protection Agency regulation called the Military Munitions Rule. Some litigants are claiming that after a round is fired on an operational range, any material that is left on the range should be immediately subject to clean up under these laws. There is no way to clean up the range without halting training activities. What makes sense is to apply these remediation laws when the range is no longer operational. For those unusual circumstances when an actual endangerment exists on an operational range or there are significant offsite environmental consequences, then existing authorities under Superfund and the Safe Drinking Water Act can be used.

The military is also requesting clarification on the "general conformity" requirement under the Clean Air Act, which is only applicable to Federal agencies. They are requesting a 3-year compliance window to ensure that proposed military readiness activities conform to the applicable State Implementation Plan. This flexibility will facilitate new Base Realignments and Closings in 2005, which will substantially reduce DoD's aggregate air emissions.

Finally, the DoD is requesting clarification on the vague definition of harassment under the Marine Mammal Protection Act, which currently includes imprecise terms such as annoyance or the potential to disturb. This clarification is consistent with the recommendation of the National Research Council, and was developed by the Departments of Commerce, Interior, and Defense under the last two Administrations.

Mr. Chairman, these are all reasonable and responsible legislative proposals that recognize both the need to properly train soldiers and the responsibility to be good stewards of the environment. Thank you again for holding this hearing today.

Senator JEFFORDS. Thank you, and we welcome the witnesses again.

Senator WARNER. May I say a few words?

Senator JEFFORDS. Certainly, Senator Warner. Please proceed.

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator WARNER. I joined Senator Smith and Senator Inhofe in requesting the chair for this hearing. Because I have certain responsibilities as the Ranking Member of the Armed Services Committee, particularly with regard to the forthcoming conference, where we have in the House bill certain provisions which will be addressed in that conference. I felt it important that we have the record of this committee to use as a guide in conference. We will somehow, Mr. Chairman, reconcile with Senator Levin and yourself a means by which to address these issues in the conference, so that it does not appear or set a precedent that we're overriding the responsibility of this committee, a committee on which I have been proud to serve for many, many years.

So having said that, I want to comment a little bit, take a word from the Ranking Member's opening statement, balance. That's what we have to achieve. The men and women of the Armed Forces are good stewards of our environment. I think per capita there are probably more outdoorsmen in the organization of our U.S. military

than any other organization of the Federal Government. They have respected it all these many year.

Now we, because of the encroachment of the buildings around our bases, which were once located in remote areas but now are surrounded often by cities and towns, we have to use certain ranges, we're restricted, we just can't pick up and move another distance and find another range. We've got to do it in a manner that's consistent with the framework of environmental laws.

Mr. Chairman and members of this committee, one thing, if we stop to think of why Congress exists, it certainly exists to train and equip and protect those who proudly wear the uniform of this country, those who are called on at any hour of the day to go beyond our shores and defend the freedom of this Nation. Indeed now, we're about to witness a new command here in the United States, CINCNORTH, that will marshal certain military assets to protect us here at home. Training is indispensable.

Now, I would hope as we focus on these issues that we do no violation to the body of environmental laws that has taken generations to buildup and which are so important for the present and future of this country. But we have to recognize that where training of the military and national security interests are existing, we have to determine how we can make such modifications to those environmental laws that will enable the training to go forward but not set a precedent that those exceptions can be applied in other areas of our life here in this country, whatever it may be. In other words, we have to draw these laws that we may make, and hopefully will make, to permit the training to go forward in such a way that it does not establish a precedent for widespread abuse or change in this general body of environmental law.

So I thank the chair and I thank the Ranking Member for arranging this hearing. As I understand, Mr. Chairman, I followed your opening comments to the witnesses. Once again, with regard to the Solicitor General's Office of Virginia, what was your ruling on that?

Senator JEFFORDS. That we would hear his testimony.

Senator WARNER. I thank the chair, because clearly we have an important rule in this committee with regard to prior submission of testimony that should be followed. But I view it as a personal courtesy to myself and the Governor that the exception would be made.

Senator JEFFORDS. I am pleased to do so.

Let me start off by saying as a retired Navy Captain, and a gunfire support gunnery officer on a destroyer, I'm impressed by having this opportunity to hear the testimony of such a distinguished panel of general officers, which I never would have dreamed of in my earlier years.

Senator INHOFE. Mr. Chairman.

Senator JEFFORDS. Senator Inhofe, if you desire to make an opening statement, now is the time to make it.

Senator INHOFE. Thank you.

Senator WARNER. Well, we did want to state for the record that the chairman served in the Navy, active duty for 3 years on destroyers, stayed in the Reserves, obtained the rank of Captain, and

I see that knowledge and background being brought to bear on this issue, the expertise.

Senator INHOFE. Here I am, the only Army guy with three Navy guys.

[Laughter.]

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. I didn't mean to interrupt you, Mr. Chairman, I just landed and just got up here and am a little out of breath. I do have a lengthy statement, which I'll spare you, and make that as part of the record.

I am very much concerned. Of all the services represented here today, I have visited ranges and training areas. I have personally witnessed the problems that are there. I think the first introduction that I had, General Williams, was in Camp LeJeune. That was when they were putting the ribbons around the suspected habitat of the red-cockaded woodpecker. At that time, I'm trying to get it worded properly and apparently I won't be able to do it, but the environmental compliances at that time were actually exceeded, the cost of that exceeded what we were paying for ammunition.

It's something that is very critical, I think probably the majority of us at this table feel that we need to enhance our military. We have a lot of areas, modernization, quality of life, MILCON, that are really suffering right now, and we need to do something about it. It's to the point where you can't do it at the expense of one or the other. The bottom line, I think, Senator Warner, is it's just going to have to be increased at some point if we're going to carry out the expectations of the American people.

As I see the problem, you folks are such good stewards of the environment you're creating more of a problem for yourselves. I know this is true, I could use Fort Bragg, Camp LeJeune, and use the red-cockaded woodpecker example, that because of the fact that you have done such a good the breed has increased to the point that you're using up more of your training area because you've done such a good job. Something has to give.

We have to at this time right now, we're at war, we're going to be at war for a long time. We have to put our priorities down, put as the No. 1 priority for what we're supposed to be doing here in Washington is to defend our country. That's what we're in the middle of doing right now. I really believe, even Mr. Chairman, if this were something that was temporary, to be able to set aside some of these onerous regulations, to allow you to properly train our young people who are going into battle, so that lives will be saved. I can't think of anything that is more important that we're supposed to be doing than that.

So I'm glad we're finally having this hearing. We have talked about this for a long period of time. I'm hoping that as a result of this hearing, we're going to be able to quantify a lot of things we had not been able to quantify before as to what the real cost to our training comes to in terms of what sacrifices we have to make, what our young people going into battle might be lacking as a result of this, so that we can get down and let the American people know. I've often said that all we really need in this committee is

cost-benefit analysis, and let the public know what this is costing and what the benefits are, and let them help us make a decision. Hopefully this committee hearing today will help us to do that.

Thank you, Mr. Chairman.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Good afternoon. Having worked closely with Senators Smith and Warner to request via letter this hearing on the Range Readiness and Preservation Initiative of the Department of Defense, and after much delay, I am glad that we are finally all here today. I am thankful that the initial decision of the chairman to deny our request for a hearing has been revisited and wisely overturned.

I am extremely pleased and honored to see the Vice Chiefs of Staff of our Armed Forces all here today. I feel that their presence is invaluable. I believe the presence of these fine gentlemen most definitely signals the importance the Department of Defense places on this issue. It is all the more impressive that they have taken the time to come here today during a time of war on terrorism. In addition, I understand that this hearing represents the first time that the Vice Chiefs have ever testified together other than before the Armed Services Committees. Thank you all, and good to see you.

I have a great deal of concern about the issues of range readiness and preservation which are before us today. I served as the chairman of the Readiness Subcommittee of the Senate Armed Services Committee for 4 years and currently serve as ranking member of the Readiness Subcommittee. Indeed, I served in the Army decades ago, and we just did not have the readiness problems then that we face today. These problems are caused by an ever-growing maze of environmental procedures and regulations in which we are losing the ability to prepare our patriot children, our war fighters, for war. Speaking of children, I have 4 children and 11 grandchildren. I want them to have to have clean air, fresh water, and pure soil. I want them to have abundant flora and flourishing fauna.

That brings me to the thesis for this hearing. That is: The God-given rights and liberties and free market capitalism that our military defend around the world translate directly into cleaner air, fresher water, purer soil, abundant flora, and flourishing fauna. The simple fact is that freer nations have higher standards of living, and, very significantly, that includes attaining higher environmental standards. Simply put: Enabling our military HELPS God's green earth.

With that straightforward truth in mind, let's examine the makeup of today's hearing. Opposing our military today are the usual troika of (1) Government employee organizations, (2) Lawyers/trial lawyers, and (3) Eco-radicals.

First we have the government employee organizations. These bureaucrats are always concerned with the prospect of lost jobs. Innovative and improved paperwork processes can certainly achieve a better bang (pun intended) for our taxpayer dollars. More efficient government can result in smaller government with fewer employees. It is no coincidence that government employee groups routinely oppose these government innovations and improvements, and indeed support more cumbersome and paperwork-intensive regimes focused on more procedural hurdles rather than improved results and better performance. They want more government, not less; to them it means more government jobs.

How many times has ASTSWMO, or like groups such as STAPPA/ALAPCO testified before Congress, and how many times were they opposing the streamlining of procedural paperwork? Just recently this committee heard the government employee group STAPPA/ALAPCO testify as to its support for the 30+ rulemakings and procedural encumbrances and increased paperwork of the Jeffords-Lieberman regulatory air restrictions bill which Senator Voinovich so eloquently explained and so visually illustrated. Today again we have STAPPA/ALAPCO promoting big government in the testimony. These groups of government bureaucrats invariably wind up testifying for bigger government and opposing smaller government.

To add insult to injury, not only are the salaries of these individual government employees paid with our tax dollars; quite often the groups themselves receive separate, additional, appropriated dollars to pay for the groups themselves and the activities of the groups. As I say, these activities almost invariably amount to lobbying for bigger government and more expenditures of our tax dollars with an emphasis not on better results but rather on more procedures. We have thus created a self-

perpetuating, government-bloating apparatus. This must stop. We have to cease the big-government funding for lobbyists for big-government funding.

Second we have the lawyers. The self-interested bands of government bloaters are invariably joined by the trial lawyers and their front groups who see increased opportunities to sue with every single procedural hurdle they can create. Trial lawyers too are interested in full employment. For example, these lawyers swear blind allegiance to the much maligned and tragically flawed CERCLA/Superfund Act. It is no coincidence that the CERCLA/Superfund Act is commonly called the "Lawyers' Full Employment Act" due to the fact that so much money goes to lawyers, including government lawyers, and so little actually goes to clean our water and soil. With so many twisted and convoluted regulatory procedures, and particularly eco-regulatory procedures, we have created the world's largest maze complete with an invasive species to run through the maze—the trial lawyer.

Third we have the eco-radical groups. These groups are more interested in propagating issues for fund-raising than they are in solving problems. Congressman J.D. Hayworth of Arizona illustrates this point well. When he asked the Sierra Club for some modest financial help to save some particular bald eagles in Arizona, the Sierra Club rejected his coordinating efforts claiming a lack of funds, only to turn right around and run hundreds of thousands of dollars of TV commercials attacking him. The eco-radicals didn't solve a situation; instead they prioritized propaganda.

I'm here to tell you that the troika of these government employee groups and trial lawyer groups and eco-radical groups and their big-spending, procedure-obsessed, self-preservation instincts are out of touch with the vast majority of Americans who want leaner and more effective government that focuses on and achieves better results. These groups have a common yearning for more Federal regulations, more Federal bureaucracy, in other words, more central planning. We have seen the failures of central planning in the former Soviet Union, and it is not a good idea to replicate central planning in America.

This is serious business. Our nations's defense is on the line. You simply cannot prepare for the defense of our nation in an arcade. Within the past week I have heard complaints from real troops lamenting the impairment of live-fire training due to the inability to use ammunition. I am concerned for this generation of our patriot children and for the future generations of our patriot children. You just can't give our war-fighting snipers the best training by making them say "Bang Bang" instead of actually firing the gun. You just can't give our war-fighting bombers the best training by making them simply say "Bombs Away" rather than actually dropping a bomb. This situation is actually occurring, and many Americans have not been told of the truth of the matter.

Well, I say Americans deserve the truth and can most definitely handle the truth. I see it as my job both as member of this committee, as well as former chair and current ranking member of the Readiness Subcommittee of our Armed Services Committee, to inform the American people.

Now I have come full circle back to my original point that what is good for the defense of our God-given rights and freedoms the globe-over is good for the environment that God has created for us.

Do the Communist nations have the best environments? Definitely not. Look at the environmental disasters of the Communists of the former Soviet Union created. Do the nations without free markets, without respect for human rights, and without enforcement of property rights have the best environments? Definitely not.

When our military defends against the Communists of North Korea we are defending the environment. When our military defends against the Communists of North Vietnam we are defending the environment. When our military defends Kuwait against the dictatorial regime in Iraq, we are defending the environment. Do you remember the vast oil fires that Saddam Hussein set with malice toward the environment in the oil fields of Kuwait?

The American service men and women defend our environment, both here and around the globe. Let's ready our services. I stand firmly with our military and look forward to the testimony of the Vice Chiefs.

Senator JEFFORDS. Thank you for your statement.

With this, I welcome General John M. Keane, General Michael J. Williams, and General Robert H. Foglesong to the table to join Admiral Fallon. Admiral Fallon, your entire written statement will be made a part of the record in this hearing. Please proceed with your remarks.

Senator WARNER. Mr. Chairman, could I inquire, do the other vice chiefs of staff have statements, and could they not be admitted to the record likewise, immediately following that of Admiral Fallon?

Senator JEFFORDS. They will be made a part of the record.

Senator WARNER. I thank the chair.

STATEMENT OF ADMIRAL WILLIAM FALLON, VICE CHIEF OF NAVAL OPERATIONS, U.S. DEPARTMENT OF THE NAVY, ACCOMPANIED BY: GENERAL JOHN M. KEANE, VICE CHIEF OF STAFF, U.S. ARMY; GENERAL MICHAEL J. WILLIAMS, ASSISTANT COMMANDANT OF THE MARINE CORPS; GENERAL ROBERT H. FOGLESONG, VICE CHIEF OF STAFF, U.S. AIR FORCE

Admiral FALLON. Mr. Chairman, distinguished members of the committee, I'm very, very grateful for the opportunity to be here today with my colleagues, the other Vice Chiefs of the Services, to address this very important issue of readiness and range preservation. In a nutshell, the most critical issue for us is that the requirement to train to enable us to achieve readiness is increasingly challenged by the interpretation of some of the environmental regulations that are on the books today.

We are involved in this global war on terrorism. We feel it is absolutely imperative that we train our people to the best of our ability, and to provide them with the tools to be effective in combat and to preserve their lives when they go forward to serve this Nation. To do that, we need to preserve ranges and facilities to enable us to train these people.

Increasingly, we find encroachment of different kinds are making this very difficult. The interpretation again of some of these legislative endeavors is prohibiting in many cases, and severely restricting our training operations around the world. We are absolutely committed to both imperatives of readiness for our forces and conservation of our environment. Although there's a relatively small amount of Federal land that's actually involved in military training, for the Navy, about 1 percent of all Federal lands are used by us for military purposes, we're finding that this is a challenge. It's the interpretations rather than the acts themselves that are the issue.

If I could give you a couple of examples that impact readiness. The first, the designation as critical habitat under the Endangered Species Act is a bar to land use for military training activities. The trend is to take these areas, and identify them as critical habitats for individual species. In reality today, as a result of the Sikes Act passed some years ago, all of the services use integrated natural resource management plans, INRMPs. These plans are required in all areas in which we have bases and operations. These acts in fact consider the entire environment, not just a single species that is typically addressed in critical habitats. But these plans exist and are in fact very effective in not only preserving the environment but promoting species, as several of you have identified already today, the growth and enhancement of these species.

The second example I'd like to bring to your attention is this Migratory Bird Treaty Act. It was recently cited by a court to issue an injunction against Navy training out in the Northern Mariana

Islands of Guam and Farallon de Medinilla because of the possibility of incidental take of migratory birds.

Mr. Chairman, in deference to your request to not address the Marine Mammal Protection Act, I'll forego that and just move on to state a fundamental request. That is that we would like to attempt to restore balance, as Senator Warner mentioned, balance between conservation and environmental concerns which are at the highest priority, and also our requirement by law to train our people to prepare them for combat. We believe that we can do both.

Mr. Chairman, I have a letter here sent to Mr. Levin by General Myers, the chairman of the Joint Chiefs, I believe you may have it, but I'd like to have this entered into the record. This is a letter of support for this readiness and range preservation initiative that he asked me to bring over.

Senator JEFFORDS. It will be accepted and made part of the record. Thank you.

[The letter follows:]

CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

9 May 2002

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman,

In mid-April, the Department of Defense (DOD) forwarded to Congress the Readiness and Range Preservation Initiative. The Service Chiefs and I fully support this proposed legislation and consider it important to the readiness of our Armed Forces.

Decisions by courts and regulatory agencies have greatly expanded the application of environmental laws to military training and testing. The most striking example is the recent decision by a Federal judge to halt training at our Farallon De Medinilla range near Guam for 30 days - with a permanent halt threatened. The court held that a permit is required under the Migratory Bird Treaty Act if we incidentally harm even one bird during military training. This ruling halts vital training for pilots and shipboard crews deploying in support of Operation ENDURING FREEDOM and threatens military training and testing nationwide. These decisions are steadily eroding our ability to train as we fight. Elimination of the most remote or minor risks to the environment should not add real risk to the safety of our men and women in uniform.

We have an obligation to the American people to provide the best training and weapons available to their sons and daughters who serve this country so well. A Service member's first exposure to realistic combat conditions should not be under enemy fire. We deploy the most ready, capable armed forces in the world; however, the cumulative effect of the expansion of environmental laws is impacting military training and testing. Alternatives to realistic training impose a cost and the options available to provide combat training are steadily shrinking.

The Services serve as guardian for millions of acres of public lands and hundreds of endangered species. They are not seeking broad exemptions for all environmental laws. They are proud of their environmental stewardship, having invested $48 billion on environmental programs over the last decade. The proposed legislation is designed to restore needed balance and only affects unique military activities necessary to prepare for combat. It has no effect on other DOD activities.

The Service Chiefs and I join the Secretary of Defense in requesting your support for Readiness and Range Preservation Initiative. We thank you for your support for the men and women in uniform who serve our great Nation.

Sincerely,

RICHARD B. MYERS
Chairman
of the Joint Chiefs of Staff

Admiral FALLON. Thank you very much, Senator.

In summary, sir, I would like to thank you and to state our appreciation for allowing us to be here today and for your consideration of this initiative. We stand ready to respond to your questions, and we believe that a balance between the issue of readiness and conservation is clearly in the best interests of all Americans and very achievable. Thank you very much, Senator.

Senator JEFFORDS. Thank you.

We will now proceed with some questions. Admiral Fallon, you noted in your testimony that training and testing on ranges is increasingly constrained, and that "encroachment has reduced the

number of days available for training, caused temporary or permanent loss of range access, decreased scheduling flexibility and driven up costs." However, in a study released just this month, the GAO made four findings undermining these claims. I'd like you to respond.

First, DOD has not completed an inventory of its own training facilities. According to the GAO, commanders sometimes find out about other training facilities by chance. Second, GAO found that the Department does not know what its own training requirements are. GAO found that military service has not "comprehensively reviewed available range resources to determine whether assets are adequate to meet need."

Third, the GAO concluded that the Pentagon has no data showing that the encroachment has increased costs, no installation GAO visited could provide data on costs incurred as a result of encroachment. In fact, the studies showed that the costs for environmental compliance had declined. Finally, and I believe most importantly, GAO reported that the services demonstrated no significant reduction in readiness as a result of the encroachment.

How can you justify your claim that these exemptions to environmental laws are warranted when there has been no evidence, not even a study, on what the problem is?

Admiral FALLON. Mr. Chairman, if I could touch on your last comment about exemptions. We're not asking for exemptions. We're asking for a clarification of definitions, in our case, very narrow applications of particular words, so that the individual courts don't feel a requirement to make an interpretation on each particular issue, that they can have some guidance and help in this area.

If I could give an anecdote. This recent case in which the island, Farallon de Medinilla, north of Guam, where training was prohibited, the presiding judge felt that his reading and understanding of the law left him little room but to issue this injunction. But he urged the Navy to seek legislative relief to clarify this particular issue.

But back to your initial statement, I have not seen this GAO report and can't take issue with every point. I can only tell you that from my own experience in the last couple of years, my previous assignment, I was down at the Second Fleet in Norfolk, and as such charged with the training and preparation of our forces, sailors and marines, for their overseas deployments in the Atlantic Coast. I can tell you that the impact, the fallout of the loss of Vieques for live ordnance training caused us to do a very, very comprehensive search of every available training area. I and my staff personally looked at every single facility from the Mexican border all the way to Maine and beyond in an attempt to find appropriate places to do our training.

So I'm not sure where the statement is coming from that we don't have an idea what's out there. We certainly did a comprehensive search for places.

The impact of not having this training available, I can tell you for certain, has had a great financial impact and a real impact in terms of time and that's certainly money to us, and an impact to the taxpayer because we were forced to send the fleet to other areas well beyond the traditional training places in an attempt to

do some kind of workaround makeup training to come to grips with the fact that we couldn't use those territories.

So I haven't seen it, and I welcome the opportunity to take a look at this report.

Senator JEFFORDS. We'll make sure you get a copy of the report. You should have that.

General KEANE. Could I add something to that, Mr. Chairman?

Senator JEFFORDS. Yes, General.

General KEANE. First of all, the Army knows where its ranges are, and we also know what our training requirements are. I can make that statement unequivocally to you. So I do take issue with the GAO report. I haven't seen it myself either.

It is true that we have not documented the readiness degradation that's taken place as a result of environmental impact. But we all know it's there. I commanded Fort Bragg, which is the home of our special forces and our paratrooper forces. Every month, I had to provide a readiness report to the U.S. Army leadership. In that, I mentioned the impact of the endangered species that we were managing at Fort Bragg.

Even common sense would tell you, the restrictions that were imposed on us at Fort Bragg, and by the way, that is one of 12 installations where we're managing 14 critical habitats. Let me just read you some of the restrictions, what I mean by common sense will tell you the impact it's having on us.

Around every cavity tree, which are plentiful in number and cover the vast majority of the 130,000 acres that we have, we are not allowed, we have a 200-foot buffer around each tree. There is no bivouacking or occupation for more than 2 hours, there is no use of camouflage, there is no weapons firing other than 762 and 50 caliber blank ammunition, there is no use of generators, no use of riot agents, no use of smoke grenades, no digging. That's tough on an Army, no digging. No vehicles closer than 50 feet.

The impact of that is profound. When you're out there facing a soldier day in and day out and you're looking at the frustration that the leaders have, because they're doing things in areas where they know they shouldn't be training, because it's unrealistic for them to be there, or they're at a time of day where they know they probably would not be doing this kind of activity, because they're trying to keep the noise down and protect the cavities and so on. We have great difficulties facing those soldiers and dealing with the reality of that impact on them.

I think what we're saying is, we have been good stewards of the environment. We were downright polluters at one time. I won't hide that from you. As the consciousness of America was aroused in terms of protecting our natural resources, so was the consciousness of the U.S. Armed Forces. Most of us, while we are in this position in the Pentagon, we've spent the last 10 or 15 years out there dealing with this issue ourselves, protecting our natural resources and the environment ourselves. We have seen the ever-increasing tension, and we have this collision of two national priorities. One is to protect our natural resources and the other one is the national defense. They are colliding, in our professional military judgment. It is out of balance and out of whack.

To give you a couple more examples, the U.S. Fish and Wildlife Service is about to declare 145 plant species in Hawaii as endangered species and will have to declare a critical habitat. That will bring our Hawaii training program to its knees. It's already suffering, we have a $25 million range there that's never open, and for the last 3 years, the Makua range has been closed. We just recently opened it because of the war on terrorism.

We have these impacts on us. We are very concerned about what is taking place with the expansion of environmental laws as they pertain to unexploded ordnance. There is a lawsuit pending in Alaska, and it revolves around a section of land referred to as Eagle Flats, which in our vernacular is an operating impact area where we fire artillery munitions into it. The lawsuit entails declaring the unexploded munitions and the other constituent munitions, the residue from munitions that are exploded, as hazardous and solid waste. If that is a fact, if that becomes a reality, it would render that range inoperable for us, as it would put all other 400 operating ranges that the U.S. Army has, as well as the other services, in jeopardy.

So we're here not just because of what is happening now and the challenges of the past, we're here looking at the future and telling the committee that there are serious challenges out there. What we're trying to avoid is a calamity. We don't want to send a single soldier, airman or marine into combat not properly trained, and to deal with the reality of what combat is all about.

I talked to a young soldier who fought in the Battle of Anaconda. He hailed from the 10th Mountain Division, he was wounded, in Walter Reed. The kind of fighting that Mike Williams' troops do and the Army does is fundamentally about a test of wills and skill. This soldier was with a force of 60 Americans outnumbered by 350 Al-Qaeda. They fought for 12 hours. We got the best of them, we killed 60 of these folks. We took no fatalities, we had 20 something wounded. I said, "What do you think produced the difference?" He said, "Sir, they were as tough as we are, they gave no quarter, they didn't back up." He said, "Fundamentally what the difference was, was our skill. We shot better than they did, and we maneuvered and fired better than they did."

That is the essence of our training, and it produces those kinds of results. That's what we're so concerned about, Senator, is that we see this train wreck coming, and we're trying to avoid it. It's not just the problems we have today, which are formidable. But it's the problem as we see in the future.

I think what we're asking the Congress is, is this really what you had intended when these laws were passed. I think we need clarification of that, because we believe it's out of balance. Thank you.

Senator JEFFORDS. That's why we're here today.

General Williams, do you have a statement or comments?

General WILLIAMS. I have a written statement that we have admitted to the record. I would like to add to General Keane's eloquent remarks, we in the Marine Corps wanted to try to quantify the impact of environmental constraints on readiness. We took a unit in what is our trademark, the amphibious assault, from ship to shore, and then movement beyond the beach. We listed all the mission essential tasks that that unit is supposed to be able to per-

form in order to be fully trained. We took out from that all the tasks that require firing weapons, because we knew we'd get safety and environmental concerns mixed up. So we just looked at non-firing tasks.

About 68 to 70 percent of those tasks, we can perform at Camp Pendleton. The other 30 percent of those tasks need to be done elsewhere. We do that, we take our troops to Marine Corps Base Twenty–Nine Palms, where they have access to ranges and areas where they can do the remainder of their training. But the fact is that the continuity of training is broken. We assault across the beach and then we stop and we go around an area, a vernal pool or other designated area, and we regroup, we train some more, we stop. So the rhythm of training is constantly disrupted.

I believe that the best gift we could give our young Marines is to have them trained hard and trained often, to the highest standards we can push. We are seeing this balance slip away and we too are concerned about the future. I don't want my successor's successor to be back here in 5 years explaining why we weren't as trained and as ready as we could be.

Senator JEFFORDS. General Foglesong.

General FOGLESONG. Thank you, sir.

This is a hard thing, as everybody has discussed. I will tell you, we have a ranch in Montana and we think it's un–American to assault the environment. This is kind of my family tradition and the way we think about things.

On the other hand, I'm also a fighter pilot, and it's un–American to send our fighter pilots into a fair fight. The thing that's made sure we never had to send them into a fair fight to a large degree has been our opportunity to train. We are the best trained Air Force in the world. Fundamental to that training has been our ranges. So we appreciate the opportunity to come in and talk about that today.

I want to give you one anecdotal story. While the GAO report may be right to a degree, and we have not quantified to the best of our ability the impacts of the implications of the interpretations of the laws on our ranges, I will tell you, it does have an impact. Two years ago, on more than one occasion at Davis–Monthan Air Force Base, I'd take a force ship out. If I were going with an operational squadron and we were all highly qualified, get to the end of the runway and be called and told that the pronghorn antelope are on range three, then we would stop at the end of the runway and call the other three flight members and brief them on the new targets that we would be going to.

For experienced fighter pilots, that works. Often, we take inexperienced pilots out, maybe even brand new fighter pilots, in training, have to do the same thing at the end of the runway and explain to them what the target is going to look like on a new range on the fly, so to speak. Those sorties are much less effective than they could have been. In some cases, we lose those sorties.

We do that because the environment is important to us, and it's not something that we are against. We do that because we think it's the right thing to do. So what we're concerned about in the Air Force now is really what was alluded to earlier, not exemptions to the law, rather clarifications to the law, so that we don't restrict

ourselves more than we are now, especially into a future that we don't fully understand our range requirements. Our footprint is likely to get larger, rather than smaller, as we, for instance, take on the F–22, we will require a larger air space because of it, and because of opportunities to go out and drop live munitions will save lives in combat.

So for those reasons, we would ask that you consider the intent of the law as originally passed. Again, we're not asking for exceptions to the law, exemptions to the law, we just ask for clarification so we can go back to what we thought was the right stewardship and the right guidelines to follow for the environment. Thank you, sir.

Senator JEFFORDS. Senator Smith.

Senator SMITH. Thank you very much, Mr. Chairman.

I'm trying to walk through the statute and try to understand the dilemma you face. The term legislative change and clarification, are they two different items in your mind or do they mean the same thing? For some clarification in the law, clarification would be you probably wouldn't change the written law but somebody would clarify it for you, and legislative change means you're going to write some changes, is that correct?

Admiral FALLON. Yes, sir.

Senator SMITH. Does anybody differ with that?

Well, there are two terms that have been used here almost interchangeably, one, legislative change, and the other clarification. I just want to try to understand that. But I think we tend to agree, I really didn't want to go too far down that track.

I wanted to use an example, though, and help me, any of you who would like to answer this. Let's try RCRA first. This is the statute, the term solid waste means any garbage, refuse, sludge or any other discarded material from industrial, commercial, mining and agricultural operations and through community activities, but does not include material in domestic sewage or materials in irrigation return flows or industrial discharges, which are point sources subject to permits. It goes on to say, the President may exempt, the President may exempt, any solid waste management facility of any department from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. I'll come back to that, I just want to make one more point, give you one more statute.

CERCLA, or Superfund, the term release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment, including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant, but excludes any release which may results in exposure to persons solely within the workplace, and so forth. Then it says, the President may issue such orders regarding response actions at any specified site of the Department of Defense as may be necessary to protect the national security interest of the United States at that site or facility. It goes on to clarify that.

So I guess the question is, is there a process problem here? Is it, OK, the President can do this, by Executive Order or some type of decision, and it takes, if you want to fire on a range and there's

a migratory bird that's there that's maybe not endangered, say a seagull or something, and is there a process here that would just make it impossible for you—that's not a good example, because I want to stick to the Superfund and RCRA.

What happens if there is somebody that raises an issue with what you're doing in terms of RCRA or Superfund, and the President, at least according to this statute, can say, we exempt you, go ahead, continue what you're doing? What happens? What's getting in the way here? That's what I'm trying to understand, as it pertains to those two statutes.

General WILLIAMS. My understanding of this, sir, and this is now a dog watching television, so I'm not sure I'm going to get this right——

[Laughter.]

General WILLIAMS. But the process by which these exemptions are requested is long and tedious.

Senator SMITH. How long?

General WILLIAMS. I'm told up to 8 or 9 months. The threshold for the exemption itself is very high, the paramount interest of the United States. It's very difficult to justify a rifle range at Quantico as being in the paramount interest of the United States. With over, probably over 1,000 ranges in DOD, to expect the President to declare these things, and then there's also a reporting requirement to Congress whenever the President exercises his power of exemption.

So to use the exemptions instead of clarification of the law in the example that you cite, what we are looking for is language that says that hazardous waste on an operating range is exempt from cleanup as long as it remains on the operating range. The military would still be responsible for cleaning ranges that are abandoned or closed, and we would still be responsible to clean an operating range if the hazardous waste leaked off the range.

That's in sum. We think in most cases we need additional language in the statute to explain precisely the occasional taking of migratory birds during military training on an operational range does not violate the Migratory Bird Treaty Act.

Senator SMITH. So if there is a problem with either RCRA or CERCLA here, and in your view, let's just say it directly impacts an action that you want to take tomorrow, for whatever reason, for training or perhaps even some operation, what happens? Do you go directly to the White House with a request?

General WILLIAMS. We just don't do it.

Senator SMITH. You don't do it. So then there's a process that unfolds that takes a long, long time which could be several months.

General WILLIAMS. Yes, sir.

Senator SMITH. It gets, so basically you're bogged down without really getting an answer.

General WILLIAMS. That's really why in the past, sir, none of the services have made use of the exemptions. The exemptions were designed on purpose, with a very high threshold, and they were designed to let the interagency process in various Agencies of the Government comment on the exemption.

Senator SMITH. But I'm just trying to understand, I'm not trying to harangue you here, if you have that situation, if you call the President tomorrow morning or tonight and say, we've got to have

relief here, can he issue the exemption at that point and you go ahead?

General WILLIAMS. Sir, to my knowledge, he could do so, if he were convinced it was in the paramount national interest. But then there's a process after that that goes, and then he would have to report his actions to the Congress.

Senator SMITH. So you have to decide whether it goes to the level of asking for Presidential relief or exemption?

General WILLIAMS. Yes, sir. In the past, history shows that we have decided that it does not.

Senator SMITH. Probably not in the short term.

General WILLIAMS. Really, the status quo as it existed up until several years ago, we've been working with it. We've been working with the Endangered Species Act and the other acts. It is the ever-increasingly wide interpretations of these acts in litigation that's really causing the problem. The EPA and the services have an agreement on the range hazardous waste. The agreement was as I described it to you.

But there is now litigation and if the litigants win, that agreement will be no longer enforced.

Senator SMITH. My time has probably expired, I just wanted clarification. Did you have a comment, Admiral Fallon?

Admiral FALLON. Yes, sir, this business of exemptions, exemptions exist in law for some of these issues, but not for all. For example, in the business of endangered species, there is an exemption for national security, never been invoked yet to the best of our knowledge. There are no exemptions in the Migratory Bird Treaty Act nor in the Marine Mammal Protection Act, two issues that are constantly in front us. That is not an option.

The issue becomes for us one of interpretation of the existing law. For example, this challenge out in the Pacific at the training range a couple of months ago, the Migratory Bird Treaty Act does not address the issue of a permit for incidental takes. That's the lexicon for the inadvertent harassment or demise of a creature in this situation. It just doesn't address it. So it's up to the courts then to decide whether first of all it is applicable, and this is how we get into this. Up until recently, there had been no, to the best of our knowledge, no ruling in this area at all until the judge issued the injunction.

So there are different issues depending on the particular statute. But some of them have no exemption.

Senator SMITH. Thank you, Mr. Chairman.

Senator JEFFORDS. Senator Warner.

Senator WARNER. This has been very helpful testimony. I think we have gotten into a very important dialog on how best to strike the balance that each of you in your statements have stated is necessary. I'm just going to say openly here, those that are not in favor of perhaps some of the efforts by the military, let's look at a solution to it.

I say that, we need help, I'll speak to myself, I need a little help trying to figure this out. In no way are we trying to run roughshod over this valued body of environmental law which has been compiled by generations and do so just in the name of national defense. On the other hand, if you're seeking clarifications, if that clarifica-

tion applies to you, it may apply to a much wider range of persons or organizations in such a way that there is really a diminution in the effectiveness of that particular law.

So where I'm going to focus my work, and open myself up to suggestions from anybody here in the audience or otherwise that can help, how can we do it in such a manner as to narrow, whether it's the word exemption or waiver or something, so that it applies to the needs of our U.S. military, but would not in any way provide a basis for others availing themselves of what you're seeking to achieve.

Now, frankly, this is beyond your pay grade. You gentleman are all saddled with trying to fight a war right now. These are some things the legislative draftsmen and the attorneys and many others who work, labor in this field hard, can I think figure out how to go about it. So that's what I'm going to try and work on, Mr. Chairman, to see what we can do.

The one question I have, and I'd like to put my questions in for the record. Give us some idea of the urgency of this matter. Just in generalities. As the chairman has pointed out, the chairman of the Armed Services Committee, and I will consult with him on this, we do not wish in this conference to run roughshod over this body of law and certainly, I'll fight hard not to do it. But if we can figure out some kind of a fix to enable this situation, maybe for a period of time, Mr. Chairman, to allow the training to go on, particularly in this period of war time, and then within that period of time we sit down and figure out how we can do it on a more permanent basis, so as not to run roughshod over the environmental laws, and at the same time achieve our goals. So I petition all those who might have better ideas than I have at this moment as to how to figure it out. That would be my goal.

Is that consistent with your goals, Admiral Fallon?

Admiral FALLON. Very much so, Senator.

Senator WARNER. With yours, General Keane?

General KEANE. Yes, sir, very much so.

Senator WARNER. Well, I thank you. I'll return for the next panel, Mr. Chairman.

Senator JEFFORDS. Thank you. That's an excellent question. I want to ask the same one as to what kind of guidance do you get, who do you call, what's available to you for what you can do under those circumstances? Is there any phone you can lift and get somebody on the end that has the authority or the ability to answer your questions?

General WILLIAMS. All of us have environmental lawyers on our staffs. All of us work as closely as possible with the Fish and Wildlife Service, in the case of the Endangered Species Act, and the appropriate regulatory agency. For the most part, our relations with those Agencies are good relations. The compromises that we have worked out over time have been reasonable. It was a Fish and Wildlife Service compromise that enabled us to continue training at Camp Pendleton, when there was a proposal to make over 50,000 acres, which is half the base, protected habitat.

What we can't control is the pace of litigation. When the courts rule, we're stuck with the result, obviously, as they did at Farallon de Medinilla. So it is critical that we move on this quickly, because

as we sit here, there are any number of lawsuits pending in courts, and the courts are open to interpret the law, because in most cases, there is no specific mention of what constitutes a legitimate military use of military property.

Senator WARNER. If I might follow on, how urgent is this matter in terms of our national security and training? Is it a month by month? Because realistically, if we don't address it now, it's not likely to be addressed until way into next spring at the earliest. What detriment is there to your training cycle? Of course, General Williams, I commend you, you wake up in the morning and there's a court suit out there, and the judge is ruling and bang, down goes that clarification or whatever you had been operating under for a period of time. You can't stop the training, because your people are ready to go abroad.

General WILLIAMS. The issue for us I think, for the most part, is erosion. If we wait another year, our training base will have eroded by some extent and I can't quantify that extent. I see what's happened and I see the pace in litigation and I am concerned that if we don't talk about this now and find a way to stop that erosion and restore some of the balance, we're going to be, every year, fighting a steeper battle uphill.

General KEANE. Senator, one of the things that has increased our sense of urgency is certainly the fact that the Nation is at war. There is sort of an open contract in terms of how long that war is going to last. And that's got all of us very concerned, as we are increasing the training at all our installations. We call it surge training in the Army, and our soldiers are going through it right now, for preparations for future conflict. That also obviously is part of the denominator here.

The Army, just like General Williams was saying, is very concerned about pending litigations which could shut down our operating ranges, as it pertains to the RCRA and its impact on unexploded ordnance, which has us very concerned. We are managing the endangered species, and I think we've done an incredible job. We are frustrated by it at times, because I know that the red-cockaded woodpecker loves paratroopers. There's absolutely no doubt about it. Because the only place they live is where we're protecting them at Fort Bragg, NC. All around us, where there were also critical habitats, that habitat has been destroyed by developers. But we are protecting them, and we have learned how to do that.

But as the endangered species increase in numbers and plants are increasing in numbers, and there have been, these habitats are being assigned to our installation, it's exacerbating our problems. It makes managing them that much more difficult. So if there is a sense of urgency that's here now that hasn't been there 4 or 5 years ago, it's because the problem is getting so much larger.

Senator WARNER. We may have to see if there is a short-term fix while Congress and the environmental community work on a long-term fix.

General KEANE. We would be able to help you, for the record, with that as well, if you would like, sir.

Admiral FALLON. Senator, there is a near-term readiness challenge, this problem out at FDM in the Pacific. We are under, the

appeals court granted a stay on the injunction. This is just a temporary reprieve to allow us to train right now. But this is a really critical issue of timeliness.

Our forces that are forward deployed and stationed in the western Pacific, in Japan and Okinawa, depend on this range, it's the only live ordnance training facility that we have out there. It's not as good as their training facilities back in the continental United States, but it's the only thing we have.

When this was taken away, these people, who are going down to the North Arabian Sea to enter combat in Afghanistan, had no place to train. There was no option until the court of appeals stayed. So this is what was a gradually creeping encroachment problem and has suddenly become something right in our faces. We could use some immediate relief, sir.

Senator JEFFORDS. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. I think things have been covered very well, and I appreciate the straightforward answers that you folks have given to these questions. One thing for clarification is, Mr. Chairman, you read from a report. Is that something fairly recent, and can you give me the name of that report?

Senator JEFFORDS. Yes, it's the GAO report to Congress, June 2002. It's very recent, on military training, and the Department of Defense lacks a comprehensive plan to manage encroachment on training ranges.

Senator INHOFE. The reason I ask, I recall when you made your opening statement, two things, there was not adequate data, they concluded not adequate data that would show that there is a direct cost increase to this, No. 1, and No. 2, that there is a degradation of training. I think that was in there, the way you stated it.

With that in mind, I do think that needs to be clarified. I think you did it, General Keane. I'd like to ask you, each one of you, to give an example of the costs that you say, of course you say you had it mostly under control, the endangered species portion, but there's a cost to that. The ranges that have the turtles running around in there, there is a cost to that. There are personnel being used.

I'd like to have each one of you give an example of something that would be a cost example in your particular branch, and then second, an example of degradation of training. Let me give you a hint. I think Admiral Fallon, you'd be the one I should ask this for. And as I've spent many, many, not just weeks and months now, it's getting into the years, trying to get our live range at Vieques back, my concern has been that if we allow that to happen and they were using primarily environmental reasons for shutting down the live range, that had an effect on all the other ranges. You've already stated the problems that we're having out there.

We do know that in southern Sardinia, the range we have down there with the Italians is one that we're going to lose, or each month that goes by, we have fewer days we can use that range. We know that Cape Moratt in northern Scotland is another one, in fact, I was there when they said, "Well, wait a minute. If the United States allows their people to protect and close the ranges they own from live fire, why should we let them be using our range

here in northern Scotland?" It's a good question, a difficult question to answer.

But as far as degradation is concerned, and I think it was 2 or 3 years ago that while they were doing some work on the range in Kuwait, there were five people killed, I believe four of those were Americans. In the accident report they specifically said one of the contributing reasons was they had not had the opportunity to use live training. So there is a good example that I would see as a degradation of training. Since you are one of the two authors of the Bates–Collin report, you're very familiar with what I'm talking about and how that affects the others.

So if each one of you could maybe give an example, a cost example and a degradation of training example, or maybe two or three, if you would do that, just for the record.

General KEANE. First of all, dealing with costs, and these are direct costs, in the U.S. Army, we have 4,000 people whose sole purpose it is to work the environment. It's not a part time job, it's a full time job. We spend $1.5 billion a year on this subject.

Senator INHOFE. Four thousand?

General KEANE. We have 4,000 people.

Senator INHOFE. Just the Army?

General KEANE. That's just the Army. And we spend $1.5 billion doing this on an annual basis.

Indirect costs that I don't have available to me, at my fingertips, that take place at every installation, because there are now——

Senator INHOFE. At that point, General Keane, if you could for the record send this to us.

[The information requested for the record follows:]

Critical Habitat Designation Impact. Since 1966, at Naval Amphibious Base (NAB) Coronado, the Navy has spent approximately $675,000/year on conservation and management programs for the Western Snowy Plover and the California Least Tern, increasing nesting by almost 300 percent. However, Navy's successful stewardship program has resulted in the loss of approximately 45 percent of its training area, and NAB Coronado has lost over 60 percent of its training beaches to encroachment due to critical habitat designation in 1999. The response has been to substantially alter training activities or to conduct them elsewhere, which reduces realism, disrupts training cycles, reduces access to training areas, and increases costs and the already considerable time Sailors must spend away from their families before leaving for extended deployments.

On San Clemente Island, CA, the Navy spends approximately $2.6 million per year to accommodate the Loggerhead Shrike. During certain times of the year, the Navy can only use the southern half of the island (where the bombardment area is located) 3 days a week to allow for research to evaluate the birds. If the shrike population decreases the U.S. Fish and Wildlife Service (USFWS) may further restrict training or prohibit it altogether.

Incidental Take Permits. Navy implemented a turtle protection program on Vieques that required daily patrols for endangered sea turtle nests. The incidental take statement in USFWS's biological opinion on Navy training at Vieques allowed the Navy to take only one turtle in the course of training. This low number of authorized takes forced the Navy to expend more effort and funding on turtle surveys. On average, Navy spends several days and $100,000 per battle group training exercise cycle conducting turtle surveys. Additionally, the low number of authorized incidental takes has forced the Navy to expend more time on planning training exercises that utilize the beaches. In some instances, exercises have been moved to other parts of the beach where there are fewer turtles. At other times, exercises have been severely curtailed. For example, amphibious warfare training exercises have been moved, scaled back, or dropped only because of their potential to take more than one turtle.

Costs not captured but still an impact. (Currently attempting to find way to roll up these costs.) An example is the requirement for F–14 squadrons to travel from

Naval Air Station (NAS) Oceana in Virginia Beach to NAS Key West to complete the Strike Fighter Advanced Readiness Program (SFARP) because they are unable to complete this training locally due to encroachment restrictions (range, night, noise, etc). These extras, which are not currently captured, including additional flight hours for the transit to and from Florida, TAD dollars, and PERSTEMPO increases. Maintenance costs also increase due to shipment of required maintenance equipment and rapid action repair items. These costs, flight hours, steaming hours for ships, and Quality of Life costs for the personnel unable to conduct readiness activities locally are currently not captured.

General KEANE. I'll provide you with that. In terms of training degradation, I gave you examples at Fort Bragg, there's another one at Fort Hood where we're also protecting two endangered species, both of those are birds. It restricts training on 66,000 acres, which is over one-third of the total acreage at Fort Hood, TX. Again, common sense tells you that there are challenges here, because again, there's no digging and there's no destruction of the habitat permitted whatsoever. During the months of March to August, which is our prime training time in terms of weather, we cannot move our vehicles, except on roads and established trails. That makes no sense to our armor formations, who have to practice in formation so they have to bring large numbers of vehicles out that are practicing those formations, so we can understand relationships and so on in doing that.

Certainly, simulation has gone a long way in helping us practice things to skill repetition and to proficiency without having to go to the field. Most of that is in the training of leaders. But to train organizations and large groups of organizations on the ground, like General Williams' challenge has, and the U.S. Army has, you have to get out there and practice those skill sets. So there's degradation that takes place at Fort Hood, Texas, which is the home of the Army's heavy armor corps, and it has two divisions there, the 1st Cavalry Division and the 4th Infantry Division and III Corps Headquarters. Of course, that's our No. 1 counter-attack corps.

The degradation takes place in every place in the Army where we have endangered species. What we're concerned about, as I stated earlier, is the increasing management that's having to take place as the endangered species are moving not just from animals but also to plants. They are continuing to rise, and further exacerbate the problem.

Senator INHOFE. Good answer. Admiral Fallon?

Admiral FALLON. Senator, I can give you a couple of examples. One, on San Clemente Island, where we spend about $2.6 million a year working to help in the loggerhead shrike species. If I could, the challenge that we have is that we're on a rotational cycle with our forces. Generally about every 6 months, we send battle groups and amphibious ready groups with the Marines forward. We're not able to just defer training for 3 or 4 months to accommodate a challenge. For example, in San Clemente, 8 months of the year, we're only permitted, because of the loggerhead shrike, which by the way, through the stewardship of the people out there on the island, has increased in the last 10 years from a count of 13 up to 180 today in the wild on that island. So they are certainly good stewards of the environment by that measure.

Four days a week, no live ordnance training. Other restrictions in some areas, there are two training ranges there, 90 percent of

one is not accessible, 50 percent of the other one is not accessible. The only times that remain are 3 days a week. That's a real impact on our ability to train our rotational forces there.

To give you one other example, a different scenario. We have a weapons station down near San Diego in Fallbrook. This entire area is a critical habitat for the California gnatcatcher, another species of bird. So common sense things, like cutting fire lanes, are prohibited. This is a weapons station, with a danger of brush fire and so forth, in California. It's this kind of interpretive relief that we're really seeking. It has a real impact.

Senator INHOFE. Any other comments?

General WILLIAMS. Yes, sir. In answer to your questions, the Marine Corps spent last year $117 million on environmental compliance issues and environmental compliance.

Senator INHOFE. These are direct costs?

General WILLIAMS. Yes, sir. We have about 420 full time employees who do environmental work.

As far as the degradation of training issue, I have one, this was a report of the commanding general of the unit that lost the ability to bomb out at Farallon. He was asked by the court to tell them what the impact was on readiness.

He said, in anticipation of the injunction, we canceled 24 sorties scheduled to drop 51,000 pounds of ordnance. We then, in anticipation of the continuing, we have already canceled June and July air to ground training. As a result of the above-described lost training opportunities, this squadron's readiness has been irreparably harmed. It is right now less combat ready than it would be if it had been able to train. The longer the injunction remains in effect, the more it will degrade. There is no other range in the Pacific theater of this caliber. Although attempts will be made to use ranges in Australia, Thailand, Okinawa or South Korea, use of these ranges will be wholly dependent on the desires of foreign nations.

Senator INHOFE. Thank you.

General FOGLESONG. Sir, I'll just refer back to my earlier example, on the Barry Goldwater range, we lose annually about 3 percent of our live drops, just can't recover them, they have to come back and bring the ordnance back. So those numbers are easy to quantify and I'll give them to you for the record.

Senator INHOFE. That would be good, I appreciate it. Thank you, Mr. Chairman, I know I went over my time.

But I'd like to ask each one of you if you would have some staff put together some specific things like that, it would be very helpful to me to able to have that. In other words, both on degradation and on cost. Thank you very much, Mr. Chairman.

Senator JEFFORDS. Thank you. The panel has done an excellent job in making us better aware of the problems you face. We deeply appreciate the time and effort that has gone into your preparation. We have another panel that was scheduled at 2:30, so we will now move on to them. Thank you very much.

We are pleased to have you all here. We had a little delay, but a very interesting and worthwhile one. The first witness is Jamie Clark. Please proceed.

STATEMENT OF JAMIE RAPPAPORT CLARK, SENIOR VICE PRESIDENT FOR CONSERVATION PROGRAMS, NATIONAL WILDLIFE FEDERATION

Ms. CLARK. Thank you, Mr. Chairman, and good afternoon to you and the other members of the committee.

My name is Jamie Rappaport Clark, and I am here today to testify on behalf of the National Wildlife Federation, the Nation's largest conservation education and advocacy organization. I thank the committee for the opportunity to testify today.

I currently serve as senior vice president for Conservation Programs at NWF. Prior to arriving at the Federation, I served for 13 years at the U.S. Fish and Wildlife Service, with the last 4 years as Director. Prior to that, I served in a variety of management and wildlife biology positions in the Department of Defense. I am the daughter of an Army officer, so I have lived on or near military bases throughout my entire childhood.

On numerous occasions during my 10 years with the Service and the Defense Department, DOD rolled up its sleeves and worked to comply with environmental laws while ensuring military preparedness. Today, though, I think we're at a crossroads. Will the Defense Department continue to build on its long record of wildlife conservation and respect for environmental laws, or will it now retreat from this role and take on a new role as the unregulated despoiler of our environment?

Unfortunately, at the highest levels of this Administration, efforts are underway to give the Defense Department an unwarranted free pass from complying with many of the Nation's environmental laws. At the center of this effort is the Readiness and Range Preservation Initiative, a proposal by the Administration to exempt the Defense Department from key provisions of six environmental laws: the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the Marine Mammal Protection Act, the Clean Air Act, Resources Conservation and Recovery Act, and Superfund. Congress' approval of these exemptions constitutes one of the largest rollbacks of environmental legislation in our Nation's history. These exemptions are part of the pattern of resist, rollback and renege on environmental laws that this Administration has adopted far too often.

These attacks on environmental laws must be kept out of the bills that emerge from the Defense authorization and supplemental appropriations conference committees. We recognized that military readiness is vital. However, the environmental laws targeted by this Administration already contain site specific exemption and permitting procedures that enable DOD to achieve its readiness objectives, while taking the environment into account.

As we heard before, according to a recent GAO report, the Defense Department has provided no evidence that environmental laws are at fault for any of the gaps in the readiness that may exist today. Before Congress considers weakening fundamental environmental safeguards, DOD should be asked to produce a comprehensive study of the real obstacles to achieving readiness.

To justify its proposed exemptions from the ESA, the Administration has provided a handful of anecdotes about problems at individual installations. I certainly do not dismiss the challenges that

Defense has faced in balancing environmental and readiness objectives at some of its installations. However, the best way for Congress to help DOD meet these challenges is to encourage them to engage in early consultation and to provide the Fish and Wildlife Service and other environmental experts with the funding they need to carry out their consultation duties in a timely manner.

By engaging in early consultations at the local level, DOD can solve problems before they turn into major headaches. A perfect example we heard earlier is how this can be done is at Camp LeJeune in North Carolina, which does provide important essential habitat for the endangered red-cockaded woodpecker. Rather than complaining to Congress about ESA restrictions on its base, the Marine Corps worked very closely with the Fish and Wildlife Service and crafted a plan that calls for each of the birds' colonies to be incorporated into their training missions to be marked on the maps as land mines. DOD was sufficiently proud of the results that it produced this poster that we have to my left, which correctly asserts that the Marines, teaming with the Service, are proving that a first rate military force can train while protecting endangered species.

As this example shows, the Endangered Species act brings DOD and other Federal Agencies to the table to develop solutions, and it provides the flexibility needed to make a wide range of solutions possible. In contrast, the Administration's proposal would tell Defense to simply abandon its work at the Service and the public in balancing readiness and environmental objectives, and decide unilaterally what level of environmental protection to provide. Such an abandonment of our military's long and proud tradition of collaborative wildlife stewardship would be very unfortunate.

I'd like to just make a few points about the Migratory Bird Treaty Act exemption passed by the House in its defense bill. This nationwide exemption would greatly reduce protection of migratory birds. And yet, the Defense Department has offered nothing more than a single district court ruling to justify it. Certainly, congressional review of the challenges implementing the MBTA is warranted. But considering the importance of migratory birds to the health of our environment and our economy, such a review should be thoughtful and searching. Any changes to the MBTA should only be made after careful study of the new approaches being taken, the problems being encountered and the potential policy solutions, and only after opportunities for public input and important debate.

In summary, the National Wildlife Federation urges the Senate to reject all attempts to roll back the environmental protections under the guise of national security We are clearly committed to working closely with the Congress and others to ensure that both military readiness and environmental security are maintained.

Thank you again for the opportunity to testify, and I will be happy to respond to questions.

Senator JEFFORDS. Thank you very much.

Dr. Cohen.

STATEMENT OF BONNER COHEN, SENIOR FELLOW, LEXINGTON INSTITUTE

Mr. COHEN. Thank you very much, Mr. Chairman.

My name is Bonner Cohen, I'm a senior fellow at the Lexington Institute, a non-partisan, non-profit public policy organization located in Arlington, VA. I want to thank Chairman Jeffords, Ranking Member Smith and other members of the distinguished panel for the opportunity to address this very important issue today.

In recent years, environmental laws designed to do such things as protect endangered species, safeguard migratory birds and other noble endeavors, have been applied largely as a result of lawsuits, increasingly to military installations and military activities where they are coming increasingly in conflict with the training of soldiers for battle. Everyone in this room knows that the military has a unique mission, one which requires the utmost training of our soldiers for the test of battle.

The Joint Chiefs of Staff came here today because they had a problem to solve. Failure to do so in a timely and sensible fashion will put young lives needlessly at risk. This need not be the case. By making a few carefully selected and very narrow clarifications of some of our environmental laws, we can both provide for additional environmental progress and prepare our soldiers for the rigors of combat.

I will restrict my comments today to just a couple of things. In my written comments, I had mentioned the Marine Mammal Protection Act. In deference to the request of the chairman, I will forego that here and concentrate instead on the Migratory Bird Treaty Act and Endangered Species Act.

On March 13 of this year, a Federal judge ruled that the U.S. Navy, by using its facility at a base known primarily by its acronym, FDM, in the west Pacific, by using that it was, the term is, incidentally taking birds and to continue activities there, its military activities there, by taking birds it would have to receive a permit. As a result of that action, FDM, a tiny island, one-third of an acre, located 70 miles north of Taipei, has been closed pending a judge's final decision on what will be required of that.

I think anyone who looks at the purpose of a gunnery range, anyone who looks at the purpose of a bombing range knows that during the process of these activities, some birds are going to be killed. Common sense tells us that. Common sense also tells us that pilots preparing for battle need to be trained in such a manner with conditions that are as close to combat reality as possible.

I think it is worth noting that when the Migratory Bird Treaty Act was enacted in 1918, it was done so for the purpose of regulating duck hunting. This was before the days when such organizations as Ducks Unlimited did such a splendid job in restoring duck habitat. It had nothing to do at the time, and had nothing to do for decades, with the problem of military readiness.

The conflict need not be what it is. I think common sense tells us that by returning to the legal and regulatory status quo, as it has existed for over 80 years, we can provide the military with the kind of facility it needs, for which, as the gentlemen in the first panel mentioned, there are no alternatives in that part of the

world, so we can provide for the kind of training that our pilots need before they are sent into the rigorous combat.

I will turn very briefly then to the Endangered Species Act. The Department of Defense manages some 25 million acres of land, and over 425 military installations where some 300 threatened or endangered species have sanctuary. More often than not, it is good environmental stewardship that attracts threatened and endangered species to certain areas, a point raised earlier by Senator Inhofe.

Thanks in large part to litigation, to lawsuits which have been brought forward, we now are facing the possibility of the Endangered Species Act, particularly the critical habitat provision of the Endangered Species Act, to be applied to military installations. We heard from the first panel the kinds of problems that this is already causing in such places as Camp Pendleton, CA, Camp LeJeune, NC, and Fort Hood, TX; problems which are only likely to go from bad to worse in the years to come, as more litigation is brought forward.

One of the things I think we want to do this afternoon is discuss intelligent, sensible solutions to these problems, so that we can reconcile the needs of the environment with the needs for military readiness. In fact, the Integrated Natural Resource Management Plans, already employed and already required by the Sikes Act, where the Department of Defense works very closely with the Department of Interior and State wildlife agencies, have provided remarkable conditions that have in fact provided protection for the endangered species, whether it's the red-cockaded woodpecker or what have you. Indeed, the very effectiveness of the Integrated Natural Resources Management Plans is attested to by the presence of so many threatened and endangered species on these lands.

No institution created by humans is going to work perfectly. What we're looking for this afternoon are common sense solutions. Rather than apply the critical habitat designation of the Endangered Species Act to military bases where they have created a host of problems that we heard about from members of the first panel, we should instead, in my view, stick with the plans that are already working so remarkably well.

What we're ultimately talking about here are the conditions under which soldiers are going to be trained and sent into battle. So let me close my comments by posing two questions. If soldiers are not to be trained in realistic conditions, in areas designated for that purpose, then where are they supposed to be trained? If weapons systems cannot be tested in areas designated for those purposes, then where is the weapons testing supposed to take place?

Thank you very much.

Senator JEFFORDS. Thank you, Dr. Cohen.

Mr. Henkin.

STATEMENT OF DAVID HENKIN, STAFF ATTORNEY, EARTHJUSTICE, HONOLULU, HI

Mr. HENKIN. Aloha, Mr. Chairman, members of the committee.

My name is David Henkin, and I'm here today from Hawaii to testify on behalf of EarthJustice, the non-profit law firm for the environment. I thank you all for this opportunity to testify in opposi-

tion to the exemptions proposed in the Department of Defense's Readiness and Range Preservation Initiative.

As staff attorney for EarthJustice in its Honolulu office for 7 years, I have spent much of my career working with the critical habitat provisions of the Endangered Species Act to extend protection to essential recovery habitat for Hawaii's imperiled plants and animals. Accordingly, I will focus my testimony discussing why the proposed ESA exemption is unnecessary to ensure military preparedness and why, if enacted, it could spell disaster for important efforts to bring endangered species from the brink of extinction to recovery.

Before I continue, I should mention that EarthJustice is the attorney for the plaintiffs in the Migratory Bird Treaty Act case involving Farallon de Medinilla, and I am prepared to answer questions you may have regarding that issue as well. I will mention only that, currently, there is no injunction in place. The court of appeals has lifted the injunction, and in fact, there was only an injunction in place for something on the order of only 2 or 3 weeks. So the Navy has been free to train as it sees fit while this issue is being worked out in the courts.

With respect to the ESA exemption, and it is an exemption, it's not a clarification, it's quite clear under existing law that critical habitat can be, and is, designated on military lands as well as other Federal, State and private lands. There was no intent to carve out an exemption for military lands. So this is not a clarification, this is a new "carving out," or exemption. It would exempt any military lands, any Department of Defense lands, if there is a Integrated Natural Resource Management Plan in place. Significantly, all that the proposed exemption requires is that the INRMPS address special management considerations. It does not require that the way in which they address the management needs of endangered species be adequate. There is no adequacy review. Therefore, effectively what this exemption is seeking to do is eliminate critical habitat protection from all military lands, because under the Sikes Act, they all have to have INRMPs in place. So as soon as those INRMPs are completed, and, by definition, they will all address to some extent habitat and species needs, then all the bases arguably would be automatically exempt if this exemption were to become law.

Moreover, although the previous panel was focusing on military training needs, the exemption is not so narrowly worded. It would reach all DOD lands, even if they are used for recreation, or other non-training needs. It would take them out of the protection of critical habitat. Second, to the extent that the DOD tries to characterize its exemption as merely a clarification of existing policy, that is simply not correct. In Hawaii we have experience with the U.S. Fish and Wildlife Service reviewing the INRMPs for 11 military installations. And you have, with my testimony I have included a table that discusses their review of the INRMPs for 11 military installations throughout the State of Hawaii. In each and every case, the Fish and Wildlife Service determined that none of them provided adequately for the long-term conservation of Hawaii's endangered and threatened plants, and consequently none of them could substitute for critical habitat.

By excluding these installations from critical habitat, the proposed exemption would be a major setback in the struggle to save endangered and threatened species in Hawaii such as the endangered Cyanea superba, which is only found at Makua Military Reservation on Oahu, and the endangered O'ahu 'elepaio, which is found on three military installations on the island of Oahu.

Not only that, the proposed exemption could similarly jeopardize the recovery of hundreds of species throughout the country. When one considers that the DOD controls over 25 million acres, home to over 300 federally listed species, the implications for species recovery of this exemption is enormous.

I'd like to point out another difference between the INRMPs and critical habitat. INRMPs are static documents. In other words, they are prepared once, and then, by law, they are only revised once every 5 years. So they do not guarantee that the review of DOD activities will be based on the best science available. In contrast, critical habitat has effect every time there is a site-specific and case-by-case analysis of what the impact of the proposed action will be on endangered species and threatened species and their habitat. By law that has to use the best science available. So only with critical habitat will we have the best scientifically based decisions for our endangered species.

Finally, I would just like to mention briefly that there is no need for this exemption. Senator Inhofe mentioned the need for a cost-benefit analysis. Well, that's exactly what critical habitat designation provides, a cost-benefit analysis through Section 4(b)(2). Through that cost-benefit analysis, the Service already excluded all Camp Pendleton lands from gnatcatcher critical habitat. So there's already a cost-benefit provision, and it works to address the DOD's concerns.

Second, briefly I'd like to mention Section 7(j), which is the exemption that the Secretary of Defense, not the President, but the Secretary of Defense can automatically invoke any time he feels that the Endangered Species Act is getting in the way of national security. That exemption has never been invoked, which leads one to question the need for the proposed legislation.

Thank you very much for the opportunity to testify. We hope that you will continue to exclude these exemptions from the legislation that you finally adopt.

Senator JEFFORDS. Thank you.

Solicitor General Hurd, we're pleased to have you with us. Please proceed.

STATEMENT OF HON. WILLIAM HURD, SOLICITOR GENERAL, OFFICE OF THE ATTORNEY GENERAL, RICHMOND, VA

Mr. HURD. Thank you, Mr. Chairman, Ranking Member Smith. I appreciate the chance to be here today to express the views of the Virginia Attorney General, Jerry Kilgore. I apologize that my views are not in writing to give to the committee, but I will put them in afterwards with a written copy.

We agree that military readiness and environmental protection are compatible goals. For this reason, we have no objection to the proposed clarifications in RCRA and CERCLA. On the one hand, the Department of Defense has said their proposal is critical to the

national defense. We would say that the changes will in no way affect the way that we in Virginia, or any other State, to our knowledge, goes about enforcing RCRA and CERCLA. In fact, we have a lot of military ranges in Virginia, and we've never had a need to use our laws against of DOD's operational ranges.

In short, it is our view that passing these clarifications will do no harm to the environment in Virginia and no harm to our authority in Virginia as the chief enforcer of our State's environmental laws.

Now, the question has been raised about whether there is any adverse impact on our military readiness as a result of the present version of these laws. Mr. Chairman, there's no brass on my shoulders today and no brass on the shoulders of anyone else at this table right now. The Joint Chiefs have already addressed the question of military readiness. With due respect to my colleague to the left from the Attorney General's office in Colorado, I would suggest that this committee takes its views on military readiness from military general and not from attorney generals.

There is also a question of whether these clarifications would undermine States' authority in dealing with the military. In our office, we argue State authority an awful lot. We argue federalism in court all the time. But in matters affecting our common defense, there is no place for States' rights. This is a matter of common defense.

There is also the question of exactly what do these changes do in RCRA and CERCLA? Well, they don't affect the closed ranges, they affect the operational ranges. They do not modify EPA's existing authority to take action under CERCLA Section 106, if there is an imminent and substantial endangerment, even on an operational basis. Nor do they affect the States' authority to act if there is a migration off an operational base.

There have been, as my new friend to the right demonstrates, there have been actions of private groups against the military under various environmental laws. But no one has identified, to my knowledge, any action brought under RCRA or CERCLA by any attorney general's office. It is in fact not the attorney generals who are using these laws, it is private interest groups that are driving the military to make these clarifications. So for that reason, too, the clarification sought by the military will in no way undermine the authority of the attorneys general to take appropriate action with respect to protecting the environment in our home States.

In sum, it is the view of Virginia Attorney General Jerry Kilgore that military readiness and environmental protection are compatible goals. For that reason, we agree with the Joint Chiefs. These proposals to modify RCRA and CERCLA are an appropriate way to advance these twin goals.

Thank you, Mr. Chairman.

Senator JEFFORDS. Thank you for your statement.

Mr. Miller.

STATEMENT OF DAN MILLER, FIRST ASSISTANT ATTORNEY GENERAL, NATURAL RESOURCES AND ENVIRONMENT SECTION, COLORADO DEPARTMENT OF LAW, DENVER, CO

Mr. MILLER. Thank you, Mr. Chairman, Senator Smith.

My prepared remarks today are made on behalf of the Attorneys General of Arizona, California, Colorado, Idaho, Massachusetts, Nevada, New Mexico, New York, Oregon, Utah and Washington. I have also submitted a detailed written statement that has also been endorsed by these States.

Today I am only going to address those parts of the Department of Defense's proposals that would amend the Clean Air Act, RCRA and CERCLA. These are the laws for which the States are the primary implementers or in the case of CERCLA, major partners with the Environmental Protection Agency.

First, we absolutely support the goal of maintaining the readiness of our Nation's armed forces. The men and women of our armed forces simply must have all appropriate training.

At the same time, we strongly support our environmental laws, and we recognized that military activities can have severe impacts on the environment and human health. In our view, furthering military readiness and ensuring environmental protection are compatible goals, not mutually exclusive. The question is how to harmonize these competing concerns.

I would like to make three main points today. First, as far as we are aware, the Department of Defense has not identified a single instance in which RCRA, CERCLA or the Clean Air Act has actually adversely impacted readiness. Consequently, we do not believe that these proposed amendments are necessary.

Second, RCRA, CERCLA and the Clean Air Act already provide sufficient flexibility to accommodate potential conflicts in the unlikely event that they were to occur. Third, we also think that the Department of Defense's amendments go far beyond its stated concerns with maintaining military readiness and would likely provide a very broad exemption from State and EPA authority under RCRA and CERCLA for explosives and munitions.

Regarding flexibility, RCRA, CERCLA and the Clean Air Act all allow the President to exempt the Department of Defense from their requirements on a case-by-case basis. Yet the Federal Government has never invoked these exemptions for military readiness purposes. The exemptions provide flexibility, coupled with accountability. Accountability is important, because Federal Agencies have a history of seeking to avoid compliance with environmental requirements. Federal Agencies have consistently had a worse compliance record than private industry, except under RCRA. The reason for that is that in 1992, Congress amended RCRA to authorize the States to hold Federal Agencies accountable for violating hazardous waste laws by penalizing them. Since 1992, Federal Agencies' hazardous waste compliance rates have steadily improved, and now surpass the private sector.

Accountability is also important because of the environmental impact of military activities. Over 10 percent of the 1,221 sites currently listed on the Superfund National Priorities List are Department of Defense facilities. Although DOD has not documented instances in which these three laws have adversely impacted readiness, it has nevertheless proposed broad amendments. For example, proposed Section 2019 defines munitions, explosives, unexploded ordnance and related constituents are solid waste and thus subject to EPA regulation under RCRA as hazardous waste.

By limiting which munitions meet the definition of solid waste, this amendment may also narrow the scope of State authority over munitions, because the term solid waste is used in RCRA's waiver of sovereign immunity, that's the provision of RCRA that allows States to regulate Federal Agencies.

Under Section 2019, the only time munitions that have been used or fired on an operational range can be a solid waste is if they were removed from the range, they are recovered and then buried, or they migrate off-range and are not addressed under CERCLA. This redefinition of solid waste likely preempts State and EPA authority over munitions, explosives and the like on operational ranges. But contrary to DOD's assertions, it also likely eliminates State and EPA authority over the cleanup of munitions on closed ranges and on DOD and private sites other than ranges.

Under DOD's definition, munitions that were deposited on an operational range and simply remain there after the range closes are not solid waste and not subject to RCRA. These residual munitions are precisely the problem at closed ranges. DOD estimates that there are up to 16 million acres of former ranges contaminated with unexploded ordnance in the country. Many of these ranges are now in private hands. In addition to the obvious explosive hazards, many munitions and explosives constituents have toxic or potential carcinogenic effects and can contaminate groundwater, as has happened at the Massachusetts Military Reservation.

Proposed Section 2019(a)(2) also exempts from the definition of solid waste explosives and munitions that are used in training or research development, testing and evaluation of military munitions, weapons or weapons systems. This provision appears to create a wholesale exemption for explosives and munitions that apply to any facility with such waste, including private contractor sites, Department of Energy facilities, regardless of when the waste was disposed.

In closing, we do not believe that DOD's far-reaching amendments to RCRA, CERCLA or the Clean Air Act are warranted. Instead, we would offer to work with the Department to adopt its readiness concerns within the context of existing environmental laws. We would urge that any proposed legislation on this issue go through a normal legislative process with public hearings before the committees with jurisdiction over the environmental laws.

Thank you.

Senator JEFFORDS. Thank you, Mr. Miller, for a very helpful statement.

Mr. Phillippe.

STATEMENT OF STANLEY PHILLIPPE, DIVISION CHIEF, OFFICE OF MILITARY FACILITIES, DEPARTMENT OF TOXIC SUBSTANCES CONTROL, REGION 3, ON BEHALF OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS (ASTSWMO)

Mr. PHILLIPPE. Thank you, Mr. Chairman, Senators. I believe you have my written testimony so I'll be brief today.

Good afternoon. My name is Stan Phillippe. I chair the Federal Facilities Research Subcommittee for the Association of State and Territorial Solid Waste Management Officials, ASTSWMO. Thank

you for inviting ASTSWMO to testify concerning Department of Defense recent proposed amendments to RCRA and CERCLA.

ASTSWMO is a non-profit, non-partisan association of which represents the collective interests of waste program directors of the Nation's States and territories. We are involved with base closure, cleanup and re-use, remediation of formerly used defense sites, as well as military facilities. We implement these laws in question.

I am here to tell you today of our association's opposition to the amending language for RCRA and CERCLA proposed by DOD and to urge that you oppose these changes to the key environmental statutes. But I am also here to assure you that our association's members have strong and continuing support also for ensuring the readiness of the armed forces.

That said, our examination of the proposed legislative April 2002 package DOD has titled Readiness and Range Preservation Initiative leads us to question both the need for and the wisdom of the proposed changes to these definitions. We are unaware of cases where State regulators have adversely affected readiness by seeking compliance with RCRA or CERCLA. To the contrary, State regulators routinely work with their military counterparts at the bases within the existing hazardous waste laws to find solutions to environmental problems in ways that avoid impacts to the bases' main defense mission. Concerns with RCRA or CERCLA appear to be speculative at most.

The absence of any report of existing situations involving impacts on readiness seem to confirm our believe that normal RCRA regulation has not impacted military training on operational ranges. The more common State interest is the application of RCRA and State hazardous waste statutes to clean up requirements for closed and closing ranges that have been or will be transferred out of Federal ownership for civilian use. These cleanup requirements have nothing to do with current training activities and do not potentially endanger effectiveness of training.

However, the proposed DOD changes to the statutory definitions of solid waste and to releases would arguably not only affect the application of the statute to operating ranges, but also to closed and closing ranges. As the State implementers of hazardous waste and cleanup laws, and given the complex nature of these fundamental statutory definitions, we believe that this is one of those cases where the first principle should be to do no harm.

The suggested changes to RCRA and CERCLA read beyond DOD's immediate needs and could affect our later jurisdiction for cleanup of unexploded ordnance and other environmental hazards that may be caused by range use. If RCRA or CERCLA ever did impact readiness, these laws, as you have heard, contain Federal authority already to suspend application for national interests. We are not suggesting that the use of these authorities should be come routine, nor that they be used lightly, but they area available.

Let me close with a thought that the proposed changes to RCRA and CERCLA are not justified by demonstration that RCRA or CERCLA have adversely affected readiness or that the changes are necessary in light of the flexibility that already exists within these laws. We think that it could have undesirable consequences on the Nation's primary hazardous waste and remediation statutes. States

are concerned that the changes could eliminate State authority in the cleanup process for explosives and other range hazards, even in cases where the ranges are now or will be State, local or private property.

I want to reiterate our desire to assist DOD and the military services to continue to work with them in making effective use of their active range resources, and to improve the likelihood that those ranges can continue to be usable. Thank you for requesting our testimony on this legislation. We feel that we can continue to work with the military to solve range cleanup problems without amending national environmental statutes, and we think that kind of cooperation is our best course for the future.

Thank you.

Senator JEFFORDS. Thank you again. Thanks to all of you for excellent statements.

As the President has stated, we are in a war situation, and it's important that we make sure that nothing is adversely affecting our capacity in that regard.

I would like to ask a question of each of you, then my partners here will have an opportunity also. My question is first to Ms. Clark. With regard to the changes proposed to the Migratory Bird Treaty Act, you suggested that no changes to the Act should be made, especially while memorandums of understanding are being developed between the Federal Agencies. Would you elaborate on this and tell the committee what the timetable is for the MOUs?

Ms. CLARK. Certainly, Mr. Chairman. I suggested that there should not be wholesale, sweeping exemptions to a law that has not been adequately reviewed in the policy arena. The issue in the Farallons is serious, and I'm not going to underestimate that. But as the record shows, it is under appeal, and I also understand that the military is working with the Fish and Wildlife Service on a special use permit. So that might be accommodated.

While I was in the Government, certainly with the Fish and Wildlife Service, we spent a fair amount of time looking at the Migratory Bird Treaty Act. It's a law that's over 80 years old. It deserves a serious look and a serious policy debate on how you accommodate environmental security with issues like military preparedness. There are MOUs and I think policy issues that are being evaluated, they certainly were in the former Administration, I imagine they are being evaluated in this Administration. So I think this is one of timeliness, and not to have an immediate knee jerk reaction when there is not documentation to suggest that there's a problem.

I believe that there can be ways through the policy arena and through current law to construct a process by which environmental security and military preparedness can be achieved.

Senator JEFFORDS. This is for Ms. Clark and Mr. Henkin. This Administration has said that the Clinton administration, when you were director of the Fish and Wildlife Service, Ms. Clark, decided that the Integrated Natural Resources Management Plans, required under the Sikes Act, would provide for appropriate endangered species habitat management, there was no need to designate critical habitat on military installations that have completed these plans.

However, in your testimony, and in yours, Mr. Henkin, you say that they are not sufficient. Could you please clarify for the committee the difference between what the previous Administration was supporting and what is in this proposal? Ms. Clark first.

Ms. CLARK. Certainly. I did indeed work very closely with the military, the Air Force in particular, in looking at the INRMPs as developed under the Sikes Act. What this initiative and this Administration does do is give blanket carte blanche evaluation and carte blanche head nods to all INRMPs regardless of quality. I was involved very clearly in a number of issues with the military when we were evaluating the sufficiency and quality of Integrated Natural Resources Management Plans, and whether or not they provided conservation benefits to the species that were under evaluation, whether or not the military department had guarantees regarding implementation of the plan, and whether or not there was adaptive management and monitoring involved in all the INRMPs. That was the case in Camp Pendleton, when in fact we proposed the significant overlay of critical habitat, then based on the military readiness needs, plus the quality of their resource management plan, we withdrew that proposal.

So I'm not here to say that Integrated Natural Resources Management Plans can't be sufficient. But to across the board do a sweeping statement that if you develop a plan it's good enough I think is shortsighted and biological suicide. It's an incorrect way to address declining species.

Senator JEFFORDS. Thank you. Mr. Henkin.

Mr. HENKIN. Yes, I'll just continue with that line of thinking, which is that when the Service is considering whether to designate critical habitat on military installations, it takes a careful look at the INRMP to see whether there are adequate provisions for the conservation of the species and habitat found there, whether there is adaptive management, and whether there is a long-term commitment to implementing those provisions. It doesn't look just at whether there is a plan that addresses these issues. It looks to see whether or not there is a plan that addresses these issues adequately and guarantees that they're going to be implemented.

This is not a theoretical discussion as to whether the proposed exemption language implements existing policy. It manifestly does not, as the chart that is included in my testimony makes clear, my written testimony made to the committee. The Fish and Wildlife Service is in the process right now in the State of Hawaii of looking at designation of critical habitat for plants throughout the State. As part of that designation process, they have very carefully reviewed the INRMPs for 11 military installations, both Army and Navy. They have found in each and every case that those INRMPs were wanting, that they did not have adequate funding, that they did not have adequate management.

If this exemption were to become law, what you would find is a much lower level of protection, inadequate protection for endangered species and their habitats. So the current proposed exemption does not implement existing policy. What the existing policy does, and the part of the policy I think is quite appropriate, is when it considers INRMPs as part of the cost-benefit analysis. Under Section 4(b)(2) of the Endangered Species Act, critical habi-

tat designation must be based on a cost-benefit analysis. So one of the things you need to put into the equation is what type of management currently that habitat and that species is receiving. Because that gives you an idea of what incremental advantage designating critical habitat will give.

Then you also look at the cost to the facility.

Camp Pendleton is an example of where there was a determination made that, because of the adequacy of the management that had been put in place there and the commitment to carrying through with that management, in addition hearing the concerns of the Marines about limitations on training, the Fish and Wildlife Service exercised its discretion to eliminate certain, actually all of the gnatcatcher critical habitat from Pendleton. That is an example of the type of decisionmaking, case-by-case decisionmaking, case-by-case balancing, that exists under the current law and that would be taken away in a blanket fashion, with no showing of military need and no showing of adequacy of management, under the proposed exemption.

Senator JEFFORDS. Mr. Miller, it is your understanding that these proposals would affect closed military bases as well as operational facilities. Is that correct?

Mr. MILLER. Yes, it is.

Senator JEFFORDS. There has been some confusion about whether munitions waste is currently considered to be a solid waste under the Resources Conservation and Recovery Act. As I understand these proposals, the munitions waste would be exempt from the definition of solid waste?

Mr. MILLER. That's correct. Munitions, explosives, constituents, unexploded ordnance would all be exempted from the definition of solid waste under RCRA.

Senator JEFFORDS. Is such an exemption a change from current law?

Mr. MILLER. Yes, it would be. In 1992, in the Federal Facility Compliance Act, Congress directed the EPA to promulgate regulations defining when military munitions become solid waste. EPA enacted a regulation that specified a certain narrow class of munitions with these solid wastes and withheld judgment on determining whether waste, particularly at closed transferred ranges, whether munitions of those ranges would be solid waste or not.

Pending the Department of Defense's development of what was known as the Range Rule, DOD had proposed to promulgate a regulation governing the cleanup of munitions at closed, transferred and transferring ranges. They ultimately withdrew that regulation, it was never finally promulgated. EPA, when it originally promulgated its munitions rule, had indicated it would revisit the issue of whether these munitions were solid waste or not. So they had expressed an intent, I think, to regulate them. But they have not yet done so.

Senator JEFFORDS. My final question, I am generally aware that the waivers of sovereign immunity have been hotly debated in the context of enforcement of the environmental laws at military facilities. I am concerned that this debate often stalls cleanup. Is it your experience that the sovereign immunity is often invoked by the

Federal facilities and how might this situation be affected by these proposals?

Ms. MILER. It is our experience that Federal Agencies frequently rely on limited, frequently argue that the waivers of immunity in the environmental law should be construed very narrowly and that the States should not be able to regulate cleanup of their facilities. In Colorado, we had a lengthy litigation against the Army regarding cleanup at the Rocky Mountain arsenal where they made sovereign immunity arguments, among others. Ultimately the State prevailed in the Tenth Circuit. The Tenth Circuit held that State authority under RCRA exists side by side with Federal authority under CERCLA.

But what these amendments would do is, by amending the definition of solid waste, to exclude most munitions, including unexploded ordnance on closed ranges from the definition of solid waste. That would likely be interpreted to preempt State authority. That's because the RCRA waiver of sovereign immunity is phrased in terms of State requirements respecting the control and abatement of solid waste. So if the Federal statute exempts munitions from the definition of solid waste, then they don't fall within the scope of the waiver, and State efforts to use State authorities or RCRA authority to address the cleanup of those wastes would be preempted.

For example, we have a lawsuit that we filed, a citizen suit, where the RCRA citizen suit provision against the United States regarding the cleanup of unexploded ordnance at the former Lowry Bombing and Gunnery Range, which is a 60,000 acre range. It's a formerly used Defense site, now largely in private hands, but some of it is in local public ownership. It's on the eastern edge of the Denver metropolitan area, it's about to become suburbanized. But if these amendments were to pass, I think it could severely affect our legal position in that suit, and affect the State's authority to ensure an adequate cleanup of these lands that are about to become part of the city of Aurora.

Senator JEFFORDS. Senator Smith.

Senator SMITH. Mr. Miller, were you just talked about closed basis or operational bases?

Mr. MILLER. The amendments go to both, go to State authority and EPA authority at both closed and operational ranges. My response to Senator Jeffords' question primarily was addressing the closed ranges.

Senator SMITH. The lawsuit was over closed.

Mr. MILLER. The lawsuit is at a closed range, that's correct.

Senator SMITH. You all heard the military officers who were here before you. They're trying to do the best they can to lead our troops at a very, very difficult time. But yet you all heard them say that the existing statutes are difficult for them, to put it nicely. If you want to put it a little more abruptly, a little stronger, they can't work under them. The remedy doesn't work. Did they mislead us? Or is there a problem here? Those of you that, I think the four of you here who are saying that the remedy they propose is wrong, well, let's make that assumption for the sake of argument. Then what do we do?

Mr. Phillippe, what do we do? Just a short answer, please.

Mr. PHILLIPPE. Sir, I think most of the examples that they cited were outside of the area that our association deals with, which is RCRA and CERCLA. I'm just not aware of any examples where RCRA and CERCLA have hopped up and gotten in their way at a range.

Senator SMITH. You said that you consistently, I'm trying to paraphrase, you have consistently worked with DOD and the military service to resolve range related issues dealing with those statutes. In how many instances have you done that?

Mr. PHILLIPPE. We tried to do some canvassing to figure out some actual examples where RCRA or CERCLA either had gotten in the way of a readiness or training issue, or where we'd worked things out. The list was not a very good list. We just don't have a lot of examples at all.

Senator SMITH. How many?

Mr. PHILLIPPE. Typically the kinds of things that I got back were places where we've made modifications in cleanup schedules, because funding has been shifted from the environmental cleanup program to some other military need.

Senator SMITH. Then there are some problems, then, you have to deal with it, right? There are some problems being addressed here. If anybody else would like to comment on the first question, please go ahead.

Mr. HENKIN. Yes, sir. With respect to whether there's a problem, my personal view, and our EarthJustice's view is, "if it ain't broke, don't fix it." The laws already provide for the flexibility to address the issue that have been raised by the first panel, and with the exception of the MBTA, and we can address that separately, they all have provisions for exemptions. In response to your question, sir, the General made it quite clear that the military never have has requested any of those exemptions, but if it needed them on an emergency basis, the President could respond quickly. With respect to the Endangered Species Act, it is not the President from whom the military would have to seek an exemption, but it is the Secretary of Defense, the Cabinet official with the primary responsibility for making sure that our military is prepared.

So, in light of the GAO report which seriously questions the factual foundation, basically there isn't data there. I'm not saying that there aren't issues, but what I am saying is that we don't have any real information about what the issues are, so that we can approach them in a productive fashion. Many of the examples cited, at least the ones that I'm familiar with, have nothing to do with the proposed changes to the laws that they're talking about.

Senator SMITH. But again, we're talking about the possibility of leading men and women who are trained in battle, who are properly trained into battle. I think you're correct, that the law, you are correct that the statutes do provide remedies. I don't think that's the issue. I think the issue is, is the remedy acceptable in a difficult time such as a time as war. We can say a jury can assess a death penalty and then maybe 30 years later maybe it's applied, if it's ever applied. That's not acceptable. It might be great for the guy on death row, especially. But I mean, the point is, we don't have that kind of timeframe to work with.

Let me just give you an example. You said, you used the term that the injunction we're talking about in that military, in that Farallon de Medinilla case here's what the court said. Now, you're the General and you're out there and you're told you have to train the troops. I'm not arguing the point about it, I want to protect wildlife as much as anybody else. But you're the General out there, you have to conduct these exercises, you're told to have your guys prepared to be in the Persian Gulf next year or whatever. And here comes the order, upon consideration of the emergency motion for stay of injunction pending appeal, ordered that appellant's motion be granted, that is, that they be allowed to continue to train, the appellant being Secretary Rumsfeld and the Secretary of the Navy.

The District Court's May 1, 2002 order enjoining appellants from conducting military training exercises on the island of Farallon de Medinilla that can potentially wound or kill migratory birds is stayed, pending further order of the court. So it's a temporary stay, not a permanent stay.

So now you're the officer out there, and you're damned if you do and damned if you don't. If you go out and conduct the exercises, and more birds get killed, then you're further exacerbating your problem. If you don't conduct the exercises, you're risking the lives of men and women in battle. We could argue that, but the point is, the General out there, he's got to make the decision. It's not a clear cut case.

So I think what we ought to be doing here, instead of arguing about whether the exact summary of the request of the Administration is appropriate or not, Ms. Clark, and you said that, I don't think we should b arguing about that. Maybe it is, maybe it isn't. Maybe there are just some things that I think we might be misreading what the intention was here.

I have talked to all the officers involved in this, and I believe that they want to comply, they just want some reasonable standard that would allow them to make decisions that they have to make. When the President says, get the troops ready for Iraq tomorrow or whatever the case may be, they've got to do it. You know, these kinds of court orders, with all due respect, they could be forced into court again, for perhaps exacerbating a species problem or a migratory bird problem as a result of the court order that told them to do it anyway.

That's the only point I'm trying to make. I think we should get away from saying that these guys are wrong in bringing this point up and that they somehow want to violate all the laws. I think Senator Inhofe made a very good point, he talked about species growing as a result of management on the reserve. I'm familiar with the cockaded woodpecker at Camp LeJeune, because I've been down there and I've seen that. But again, if the woodpecker has a certain amount of habitat, and I don't have the specifics, but just say it's 100 acres of habitat, and because of good management, the bird begins to move into 200 acres of habitat, and you have five times as many woodpeckers as you had before, and I think one of the Generals or the Admiral used the example of the turtles. They started with 8 or 10 turtles, now they have 120 turtles as a result of management. So now they're going to be punished for conducting the exercise.

This is the part that I'm trying to get a handle on. I have interest in both areas here, as a member of this committee and the Armed Services Committee, and Senator Warner does. But I just think we're missing the boat if we're going to say that the intention here for the military is to throw all the environmental laws out and just act on every single one of these. I think what they're asking for is clarification. I just would ask you, if you could, to respond in what might be a reasonable clarification that an operational officer in the field in some CINC somewhere in the world has to make a decision on.

Ms. CLARK. If I could try and respond to that, Senator. I think it's unfortunate that this is building to becoming a choice between protecting our natural heritage or defending our national security. Our challenge is to figure out a way to do both. I am not about to discount the concerns of the military readiness professionals. I've seen it and I've lived it and it's very real. All we have to do for those of us that are around the Chesapeake Bay is look at what the green space is that's left, it's Aberdeen Proving Grounds, it's Fort Meade, it's Patuxent Naval Air Station that host a terrific abundance of wildlife that have been lost around the Bay because of just the sheer development pressures.

At Fort Bragg, I can remember clearly being down there with the military officers while we sat and looked at what they used to call the measles map, which were the red-cockaded woodpecker trees all over the installation. And a lot of their compression of training activity may have been certainly a function of what was happening with endangered species. But a lot of that open area was being compromised by the sheer enormity of the development pressure.

To Fort Bragg's credit, and the Army's credit, they worked with the Nature Conservancy and the Fish and Wildlife Service and others to create some buffer around Fort Bragg to take the pressure off the installation. So the military just because of their virtual existence and their buffer areas do create some of the havens, because of the development pressure.

Senator SMITH. I don't want to belabor it, but I just would like, and it's not meant to be hostile, it's just meant to try for me to understand what the person on the base whose job is to advise the General on wildlife management, and the General, supposing in the case of the woodpecker at Camp LeJeune, it's not a case, it's a fictitious example, but let's say that the bird for whatever reason has now moved out into hostile hundreds of other acres of the base.

Well, what happens? What do we do? Does the bird get the land, or does the military get the land? What happens? What are we supposed to do in a situation like that where our own success in preserving that particular wildlife habitat and the wildlife itself comes in direct conflict, because it continues to encroach? What do we do?

Ms. CLARK. I referred to in my testimony the notion of early involved consultation. That hasn't been that long that the military and the Fish and Wildlife Service or National Marine Fisheries Service have worked closely in trying to balance the needs for environmental protection with military readiness. In those instances where the Services were brought in early to understand the battlefield conditions or the needs of military preparedness, they have

worked out collaborative compromises. I have seen that over and over and over.

My concern and the concern of the National Wildlife Federation is to have a carte blanche, sweeping exemption is a bit shortsighted, when in fact what we need to encourage is collaboration and early involvement and reconciliation of concerns and differences in the dynamic environment, rather than trying to accommodate 25 million acres, 400 plus installations, with one sweeping statement.

Mr. HENKIN. If I may, sir, with respect to the two issues that you raised, FDM, and the red-cockaded woodpecker. First, with respect to the woodpecker, there is nothing in the Endangered Species Act that prohibits the Fish and Wildlife Service from authorizing the military to kill, to take individual members of endangered species as long as it is not going to jeopardize their continued existence. I think a lot of the concerns that were expressed by the previous panel had to do with limitations on training imposed by the Section 9 take prohibition, rather than critical habitat. Because very few of these installations have critical habitat designated on them.

So with respect to that expansion, to the extent that you're not jeopardizing, in other words, pushing the bird to extinction, the law as it exists already allows for this mechanism to try and mitigate and minimize that take to the maximum extent practicable.

Senator SMITH. The law allows it——

Mr. HENKIN. The law allows it and it can be done.

With respect to FDM——

Senator SMITH. I don't want to encroach on Senator Warner's time, but the law allows for it, no one will dispute that. It's the way the law allows for it that's the problem. You can't get a decision in a reasonable amount of time. That's the issue. Nobody's answered that question yet.

Mr. HENKIN. I think with respect to FDM, the Navy recognized the need to get a Migratory Bird Treaty Act permit back in the 1990's. In 1996 or 1997, it applied for a permit. And the Fish and Wildlife Service denied it a permit, because the Navy had not put together a permit application that satisfied the requirements of the law. Rather than try to work with the Service, and this is now 5 years ago, rather than try and work with the Service to see whether or not there was the possibility to get a permit under existing regulations, or if there needed to be new regulations to address this unique situation, the Navy went ahead with its bombing.

The situation right now is that the Department of Justice attorney has represented to the court that both the Department of Defense and the Fish and Wildlife Service believe that, under the current legal structures, they can secure a permit. Now, that's still in progress, both in the courts and in the permitting process. So we don't know what the outcome of that is going to be at this point.

But as far as the commander who is concerned about whether he can schedule training, I don't think there's any dispute—and we represent the plaintiffs, who are now the appellees—that while the injunction is stayed, the Navy may train. That's the situation that we have right now. I guess the last thing on that score is that with respect to the Migratory Bird Treaty Act, this has been in effect for over 80 years. In all that time, this is the first instance in which

the military has expressed any concerns in terms of its application. It just seems to us that it is premature to exempt all military activities from the MBTA without additional working through these issues in the courts.

Senator JEFFORDS. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman.

Mr. Chairman, we've had a good hearing. And I say that to you and the Ranking Member, I've learned a lot and I have more to learn. But I want to phrase my question to you, just to the panel, if anybody wants to volunteer an answer. I've looked over your credentials and background and you certainly have, all of you, a lot of experience.

No. 1, we're all equal patriots. You're no less a patriot than the officers who sat before you here with 30 plus years of service. I start with that assumption. And you're concerned as I'm concerned about the young persons, basically your age, Mr. Henkin, who are moving out there into combat tomorrow. And they need to train. So we're all on the same base of fact.

The problem as I see it is that these officers have come forward to represent that the courts in their decisions and so forth are just impeding the progress to the point where they can no longer deal with going through, as you said, Ms. Clark, the regulations and the hearings and all these things. In the meantime, the President is saying, look, I want this aircraft carrier or this division in place in 60 days. So we've got to do something. It seems to me, is there a short-term fix on this thing while we all sit down over a longer period of time to try and understand it? In other words, I see the pressure from our national defense. I don't want to run roughshod over the environmental laws.

Has anyone got an idea? Am I wrong in the assumption that a clarification could open up certain interpretations which would allow far more use of other areas in military ranges in such a way that it would be antithetical to environmental law goals, and therefore we'd better focus on just, the President says, I need this range and I've got to use it and I've got to use it now, despite this court's decision. Can anybody help me on this? What do we do?

Mr. HENKIN. Senator, if I may?

Senator WARNER. Yes.

Mr. HENKIN. With respect to all the laws that the committee is considering today with the exception of the Migratory Bird Treaty Act, there is currently immediate relief available for any essential national security training. If the laws are deemed to be in conflict with that training happening, and that's via an exemption that's automatic under the ESA, and as I understand it, although I'm not——

Senator WARNER. That was my understanding when I waled into the hearing room. But right in that very chair sat the Marine Corps officer saying, we just don't do it any more, it takes too long, we can't get it done. Did you hear him on that?

Mr. HENKIN. I did hear, yes, sir, I did hear that he said that not only, "We don't do it any more," but that they have never done it. I wonder why they haven't tried it. And I agree with those who testified earlier saying that these should be used sparingly. The in-

tent, these exemptions should be used sparingly, they are intended to deal with only——

Senator WARNER. I agree with that.

Mr. HENKIN [continuing]. Situations of true national emergency and national security, not convenience or expedience. I am not suggesting that the other gentlemen are seeking them for that purpose. But they haven't tried that process. And the answer that I heard to Senator Smith's question about how quickly could you get an exemption from the President I believe was overnight. That's not how they do it. They've never done it, but he represented it—but it could be done if we were truly talking about national security. And with respect to the Endangered Species Act, it's the Secretary of Defense who makes that finding.

Again, the exemption from any provision of the Endangered Species Act, be it the take prohibition, critical habitat, even pushing species to extinction, is in Secretary Rumsfeld's sole discretion to invoke that. Again, he should not do it lightly; he should not do it frequently. But if your concern is, and I think we all share this concern, that our country address whatever threats face it, as we need to do, the authority exists under the existing laws to address it in the short term. With respect to the Migratory Bird Treaty Act, those issues are still being worked out in court, and the status quo, the current situation is that the Navy and any other branch of the services that wishes to train at FDM can do so.

Senator WARNER. I know each of the officers personally, have known several of them for a long period of time. They are individuals that are well intentioned and very clear, law abiding individuals. They have a legion of people behind them who are environmental experts.

Now, somewhere, there's a breakdown. Because I have to assume that those environmental experts in the Department of Defense are as knowledgeable, and you've spoken very knowledgeably here, as you are, why are they not telling these officers, well, you can do it this way if you wish, you don't need all these waivers and clarifications? Somewhere there is a breakdown, and I intend, presumably others likewise, to sit down in a room with all these people and put to them the tough question, you know, Mr. Henkin says you've got the authority to do it, now why are you coming up here asking for this relief?

Ms. CLARK. Senator Warner, I think I have some insight into their reluctance to raise the flag of an exemption. And I also, in listening to the four gentlemen in the previous panel, have come to realize that what they have proposed isn't going to solve their problem. Because especially for the Endangered Species Act, when one of you asked, give me some examples, I think it was Senator Smith, give me some examples for the record of conflicts, most of the examples that they gave would not be resolved by their proposal.

So I think part of this, if we could all just take a deep breath and better try to collaborate and understand what the rub is and what the conflict is, we might be able to find some creative policy solutions. I think, and I've been in enough of these meetings to know that the reluctance to declare the Secretarial exemption to the Endangered Species Act clearly has to do with who is going to

take the responsibility and shoulder the responsibility for making that decision. It's not politically palatable to make a decision to circumvent an environmental law. But clearly, the Secretary of Defense has that capability. I think it just has been, there's been reluctance in the past. I think in a time of war, with clear documentation, that I'm sure they must have, it is within the jurisdiction and has never historically happened.

Senator WARNER. Mr. Chairman, I hope that our record will be available soon, so that we can take this colloquy to the Department of Defense and show it to them and say, look, these are well intentioned people, they want to try and help, what is your rebuttal to this? I'm curious, is anybody in the audience from the Department of Defense? Just raise your hand. In other words, they all left the room and nobody's listening to this—in the back corner. You're going to hear from me, OK?

[Laughter.]

Senator WARNER. Take into heart what we're trying to do here, please, sir, I say that respectfully.

Let me ask one last little clarification. I've sort of rambled around a little bit. And that is the word clarification. Would it be better from the protection of the framework of environmental laws to try and seek clarifications or to proceed on these routes of the Presidential exemptions or waivers?

Mr. MILLER. May I respond to that, Senator? At least with respect to the pollution control laws, RCRA, CERCLA and the Clean Air Act, I think it would be preferable to rely on the case-by-case exemptions. As we testified earlier, it's our understanding that the Department of Defense has not identified situations where there have been actual impacts caused by those three laws on readiness. We heard a lot of examples of impacts on readiness today. Listening to testimony it appeared to me that those all occurred under the animal protection laws.

The only example that was given with respect to RCRA or CERCLA was the citizen suit that's been filed in the State of Alaska. I would disagree with the testimony, with the conclusions that the previous panel drew that if the plaintiffs are successful in that lawsuit that it would have a significant impact on readiness. I think the consequence would be actually to further readiness by maintaining range sustainability. Because the result would be that they'd have to get a permit under RCRA. You could establish, as we've described in our written testimony, it would be possible to establish permit conditions that allowed for continued military training while protecting the environment. I don't really see any real conflict there.

Further, you have expressed serious concern that any clarifications, whatever you want to call it, to the laws, not be extended beyond the Department of Defense, basically not to go beyond military readiness concerns. I think that the existing national security exemption in each of the pollution control laws clearly fits that bill. That's what it's there for. It's not available to private industry, it has to be made under those three laws by the President.

But it's not a significant burden. In the written materials that I submitted, there is an example of a Presidential determination that President Bush made this last year with respect to security

concerns, not readiness, but national security concerns at the Air Force Groom Lake facility in Nevada. This exempts the Air Force from having to comply with certain RCRA information requirements. It's three paragraphs long.

So I don't think it's a significant burden, particularly for the pollution control laws, where it appears to us that the likelihood of conflicts between the requirements of those laws and military readiness is really fairly remote. The case-by-case exemptions that already exist in the statute——

Senator WARNER. Does anyone else just wish to address the question of clarification versus exemption with regard to the presentation of the environmental laws?

Mr. COHEN. Yes, Senator Warner, I'd like to address that very briefly. I was struck by the tenor of the gentlemen in the first panel. How often in public policy debates do we have the opportunity to see problems coming? The gentlemen came over here today because they are noticing that something isn't working, they are encountering problems. When they look at the existing regulatory structure, they are finding that with respect to training soldiers for combat, there are such impediments on that that it's difficult for them to get from here to there.

They came over here today, they explained to us the difficulties they encountered, and they made proposals as to how they were to be addressed. They universally came up with the conclusion, came to the conclusion that clarifications were the way to go, clarifications, not exemptions, clarifications were the best way to address this problem. It's very difficult, as the GAO report has been referred to, to talk about this issue in terms of quantity. In other words, what we're talking about here, in training that goes on on bases all over this country on a day to day basis, not the kinds of things that would require a Presidential order of some kind, just the kind of day to day training to train soldiers for the rigors of combat, that certain things need to be done.

It is, I think, vitally, vitally important for us to realize that they have suddenly come up with, encountered barriers that they don't know how to deal with. What I hope we have begun here this afternoon is a dialog on how to deal with this. We cannot proceed on the assumption that there are no problems. We must instead look for solutions.

Mr. HURD. If I could add one comment, following Dr. Cohen's remarks. It seems to me that one problem with this exemption route is that it imposes upon the President the responsibility to make decisions that ought to be made by a field grade officer, in many cases, about what training is appropriate and when it's needed. Moreover, the standard that must be met here is very high, for a case-by-case basis. And that particular case is paramount national security. The President, it seems to me, has better things to do than worry about training decisions that ought to be made at that low level.

With respect to Mr. Miller's comments about closed bases, I've sat here with this law in front of me trying to go through it, trying to grasp why he thinks it applies to closed bases. I can't do it. It seems to me the law does, the changes do what the Joint Chiefs have asked. But if there is some problem with that, some ambi-

guity he finds, it seems to me the solution is to write in a new sentence, not to chuck the whole idea.

Senator WARNER. I thank you, I have used all my time.

Senator JEFFORDS. Senator Smith.

Senator SMITH. Tell me one thing, help me understand this. Were they wrong in the FDM case? Were they wrong in the FDM case to go through the court, to seek relief through the courts? Should they have gotten a waiver and not gone through the courts? I'm just asking as to what the proper procedure should be in a case like that. Did the military err by asking for relief in the courts in that particular case?

Mr. HENKIN. The case was brought by a citizens group. So it was not at the Navy's initiative, it was in response to the district court's order. I guess my perspective on it is similar to that that Ms. Clark expressed, which is, back in 1997, 5 years ago, had the Navy worked with the Fish and Wildlife Service to try to address how to reconcile those needs, we wouldn't be——

Senator SMITH. You took them to court, didn't you?

Mr. HENKIN. Well, because, and as the district court found, because they were bombing and killing birds without a permit. There is no, no one has ever said to the court, and no court in this action has found that, if they had a permit, there would have been any problem. The problem was, like a lot of regulatory programs, the Migratory Bird Treaty Act requires people who are taking action to seek out a permit, make sure they have the proper things in place before they go about the action.

Senator SMITH. But they appealed, I know they took them to court for the birds that were killed. But what I'm trying to get at is, if they appealed for a decision, if they went to the President for an exemption, that doesn't stop your lawsuit.

Mr. HENKIN. If an exemption were granted, it sure would.

Senator SMITH. It would stop the lawsuit if an exemption were granted? Well, I think Mr. Hurd made a very good point, though. For the President to get into a command, it's not just a command decision. I mean, it is a command decision in terms of the training. But it's also a decision about, on the other side of the coin, about the wildlife. The President, I don't think in most cases, would have that kind of detail on his plate, to be able to make a good decision without a whole bunch of information that would have to flow all the way up.

So I mean, it just seems to me, the bottom line is we have some problems here in term of process. I don't think there's anybody trying to get around the law, but I think there is a problem in term of process as to how we work this out when real problems occur.

Mr. HENKIN. In terms of the process, I go back to the Endangered Species Act and the designation of critical habitat which allows a case-by-case review, which we do strongly favor, rather than blanket exemptions. Particularly with the critical habitat provisions, blanket exemptions that would extend beyond military training facilities.

But in that, there are two levels of case-by-case review. One is in the designation of that habitat under Section 4(b)(2), and that's a Camp Pendleton type situation where there was no need for a Presidential exemption. It was the cost-benefit analysis that the

law required that led the Fish and Wildlife Service to hear the Marine's concerns and exempt the entire facility. If the Department of Defense is dissatisfied with the outcome to the extent that it feels that not only does it burden . . . . Because I think we all have to be honest, that environmental protection doesn't come for free; it requires an effort from all Federal Agencies. In fact, under the ESA, all the American people bear some percentage of that burden, to make sure we protect our species and our habitat, and poll after poll shows that the American people feel that that's the right way to go.

But in the case where the case-by-case review in Section 4(b)(2) led to a situation where the Chiefs of Staff felt that there was truly a national security issue raised, it would not fall to the President but to the Secretary of Defense to make that determination, again, case by case.

Senator JEFFORDS. Thank you all. This has been very helpful. I'm not sure how much we cleared up or what we will decide, but it's been fascinating to listen and to ponder what this committee must do, if anything. Thank you all.

Before I close, I want to ask unanimous consent for the statement of Senator Lieberman to be put into the record without objection.

We should warn you that officially, all the members that would have been here have the right to now write you questions. But I wouldn't stand waiting by the mail box too long.

Thank you.

[Whereupon, at 5:23 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Mr. Chairman, I applaud you for holding this hearing today on the Readiness and Range Preservation Initiative provisions that have arisen in the context of the National Defense Authorization Act for Fiscal Year 2003. This is an important debate that raises issues under the jurisdiction of this committee and I am pleased, Mr. Chairman, that we will have this hearing record to share with the conferees of the House and Senate on the Defense Authorization bill.

Mr. Chairman, I think we can all agree that it is imperative to maintain our military's superior readiness capabilities, particularly as we call upon our armed forces to defend us in the war against terrorism. I believe we are united in our desire to ensure that all of our troops have the training and experience they need to enhance their effectiveness in combat and to minimize the likelihood of casualties.

The testimony of the Vice Chiefs of Staffs for our armed forces, and the Readiness and Range Preservation Initiative that they advocate, raises the concern that certain of our environmental laws may impede the military's ability to maximize the readiness of its troops for combat. This is not a concern that we can take lightly, and we should consider the matter seriously. I know that's precisely the reason you called this hearing today, Mr. Chairman.

That said, we must also recognize that our bedrock environmental laws play a vital role in protecting the health and well-being of our citizens, and our precious natural resources. I firmly believe that we can have the greatest, most well-prepared military in the world and maintain our high environmental standards. And, Mr. Chairman, I'm not sure that we need to make changes to current law to achieve this balance.

From what I have found in the testimony submitted to this committee today, the Department of Defense has developed a remarkable record of environmental stewardship, coming to the table with other Federal agencies to develop innovative solutions to enhance military readiness while protecting the environment and public health. It has done this despite its previous legacy of large-scale environmental con-

tamination, much of which continues to haunt the Department today and cost the taxpayers billions of dollars.

Part of this new-found success is due to the environmental laws developed in this country over several decades and the public's emerging environmental consciousness. Most of our environmental laws provide some measure of flexibility to our armed forces to respond to national security concerns on a case by case basis. Some of those flexibility mechanisms have never been invoked by the Department.

So, Mr. Chairman, I hope this hearing will help us better understand exactly what the Department of Defense's concerns really are, and whether the environmental exemptions, or "clarifications," requested by the Department actually address those concerns.

Thank you again Mr. Chairman for holding this hearing today, and I look forward to hearing the testimony of the witnesses.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

I want to begin by thanking the chairman for his leadership, as always. Today we consider attempts to exempt the Department of Defense from or otherwise weaken DOD's compliance with a number of major Federal environmental laws. These include: (1) the Superfund law and the Resource Conservation and Recovery Act, both of which govern toxic waste management and cleanup; (2) the Wilderness Act of 1964, which concerns Bureau of Land Management control of public land, (3) the Endangered Species Act, and (4) the Clean Air Act.

As a member of the Defense Authorization Conference Committee and a member of the Committee on Environment and Public Works, I feel I have a particular responsibility to make my position on this matter known, and to make it clear.

I have two major objections to the blanket exemptions to environmental law that some are seeking to push through conference.

The first objection is procedural.

The changes being contemplated are substantial. They will have far-reaching effects on environmental and public health law. Therefore, they demand thorough scrutiny in the congressional committee that is responsible for such consideration. In large part, that is this Committee on Environment and Public Works.

When profound changes to our environmental protection regime are at stake, we can't go through the legislative backdoor or side door. We owe it to the American people to go through the front door—and that means full consideration in this committee.

I am grateful for today's hearing, but this should be only the beginning. It would be an inappropriate usurpation of our oversight responsibilities, not to mention a waste of this committee's considerable expertise, for the Defense Conference to rush the changes through.

My second objection is substantive.

There may very well be a need to carve out some DOD exceptions and exemptions to the environmental laws I've mentioned. Especially in the midst of the war on terrorism, we must be prepared to adjust any and all regulations that might interfere with our military preparedness.

But we must not jump to the conclusion that these critical laws need to be busted up with a sledgehammer rather than carefully altered with a scalpel. That is what we would, in effect, be doing by allowing this matter to jump over the consideration of this committee right into the Defense Authorization Conference Committee.

At the present time, we have no reason to believe that compliance with these laws would in any way hinder the readiness of our armed forces. In fact, as the General Accounting Office reported last month, the military's own readiness data does not show that environmental laws have significantly affected training readiness. The GAO also found that DOD's readiness reports show high levels of training readiness for most units. And in those few instances of when units reported lower training readiness, DOD officials rarely cited lack of adequate training ranges, areas or airspace as the cause.

So the available evidence shows that strong environmental defense and strong national defense can coexist—and are, in fact, currently coexisting. Let's not misrepresent the facts and be forced into a false choice that we will later regret.

The fact is, what we know about this problem so far suggests that it's not the fault of the environmental laws where and when DOD is having compliance or readiness problems; in most cases, the bulk of the burden—and the bulk of the blame—appears to fall on DOD's shoulders. That may or may not be the case when we finish studying this issue—as I said, there must be room for flexibility within these

environmental laws—but it underlines the importance of thoughtful consideration, not a mad rush to undercut these critical protections, one by one.

I am eager to consider such changes and, if and where appropriate, give DOD additional flexibility under the rules. But when we do, we'll do our editing with a slim red marker—not, as some would have it, with a match.

Thank you.

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Mr. Chairman, I want to thank you for holding this hearing today.

We have the finest military in the world. And the brave men and women of our military are the best fighting force in the world. That has been evident to all of the world since the tragic events of September 11.

Over the last 10 months, we have called on our military to carry out a global fight against terrorism. That is an important fight. And the military has legitimate needs in carrying out that fight.

But, it is not legitimate, in my view, to use the war against terrorism as an excuse to run roughshod over our environmental laws.

The Department of Defense has asked Congress to give it blanket exemptions from six environmental laws that everybody else—in the public and private sector—is required to meet.

Yet, I have seen nothing specific to substantiate DoD's claims that broad exemptions from some of our most important environmental laws are necessary.

First, Mr. Chairman, most environmental laws already have an exemption for national security. For example, the Endangered Species Act allows for an exemption if "the Secretary of Defense finds that such exemption is necessary for reasons of national security."

Second, in the cases that I'm familiar with, under existing environmental laws, the military has been allowed to continue with environmentally destructive activities as long as reasonable modifications are used to protect human health and the environment.

Third, the military in general does not have a problem getting permits for their projects. To my knowledge, the National Marine Fisheries Services has never denied the military a permit under the Marine Mammal Protection Act. We do not need to weaken the law.

A recent example in my State at Fort Irwin in southern California involves the Endangered Species Act. That base is home to numerous endangered desert species and includes some of the last remaining habitat for the desert tortoise. The Army engages in heavy-duty tank maneuvers across this landscape, despite the tortoise. However, it avoids certain areas and takes certain precautions to minimize the impact to the tortoise. That is an appropriate balance.

We entrust the military to 25 million acres of public land. A lot of that land contains important habitat for fish, wildlife and birds, including approximately 300 threatened and endangered species. While I am sure the military would be pleased to have those lands designated a sacrifice zone for wildlife, we can't afford to. Too much of the rest of our landscape has been decimated. The military, like all Federal agencies that are entrusted with our precious and multi-purpose public lands, must do its part.

Our military exists to protect the health and well-being of our homeland and our citizens. Yet ironically, the effect of DOD's far-reaching and audacious proposal is that its domestic activities would lead to the degradation of our homeland. And in the case of the air quality and hazardous waste exemptions that DOD is seeking, it would create a significant public menace.

I can think of no reason that DOD should be allowed to leave behind munitions, ordnance, and toxic waste. Under this proposal, DOD would not be required to clean up live ordnance on or off the base! Why? How do long-term clean-up efforts affect military readiness? That is a direct threat to the civilian population.

Similarly, I can think of no reason that the military should be given a blanket exemption from the Clean Air Act for 3 years. Why? Why 3 years? And why every facility? We know that air pollution causes deaths. We know it causes asthma in children. If that isn't a threat to "homeland security," I don't know what is.

We better have very good reasons to allow increased air pollution, increased toxic waste, and increased wildlife destruction—but I have yet to see any.

How will killing whales and songbirds increase military readiness? How will leaving PCBs, heavy metals, and other poisons in our own native soil increase military readiness? How will the release of poisons like sulfur dioxide into our air increase

military readiness? Unless there are valid answers to those questions, there is no justification for this proposal.

Admittedly, the military's needs are complex and varied. In some cases, it may be entirely appropriate that they be relieved temporarily of their environmental obligations so that the nation's security can be ensured. But that is a serious decision. And it should be done on a case-by-case basis. The current statutes provide for such case-by-case decisions. A blanket exception simply is not necessary.

STATEMENT OF HON. JON S. CORZINE, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Thank you, Mr. Chairman. I appreciate you holding this hearing on the Administration's proposals on military readiness.

Mr. Chairman, like all of my colleagues I strongly support military readiness. The war on terrorism demands that our troops receive the best training possible, and be prepared for any contingency that they might encounter.

But I also believe that we need to be careful about what we sacrifice in the name of the war on terrorism, whether it's civil rights or environmental protection.

So I am here today to say that I oppose the Administration's proposals to provide blanket exemptions from our environmental laws to the Department of Defense. DOD has asserted that these exemptions are needed for readiness, but they simply have not made a compelling case. That's not just my opinion. That's what the GAO found when they looked at the issue in May of this year.

I'm sure we will hear some damning anecdotes today about how environmental laws have caused problems. But to provide blanket exemptions on the basis of a few anecdotes is at best a knee-jerk reaction to what has not been shown to be a systemic problem. Furthermore, most environmental laws already have provisions that enable exemptions in cases of national security. In the case of the Endangered Species Act, the relevant provision has never been used, which to me strongly suggests that the ESA is not hindering DOD's ability to train and prepare our troops.

Mr. Chairman, let me repeat: I strongly support DOD in the war on terrorism, as do my constituents. We all support doing what it takes to ensure that our troops our ready. But I can't support additional exemptions from environmental law when they have not been shown to be needed, and when current law already contains mechanisms to address national security concerns. Thank you.

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Mr. Chairman, this committee has a bipartisan tradition that the Federal Government should be covered by the same environmental laws the private sector has to live under. There shouldn't be a double standard.

When this committee last considered Superfund reform, I was prepared to offer an amendment along with Senator Voinovich to eliminate the double standard in the Superfund law of how it treats private sector Superfund sites and Federal facilities. This markup was suspended before our bipartisan amendment came up for a vote.

The Wyden/Voinovich amendment was the same amendment that Senator Allard and I offered the year before and that was approved during the Committee markup of S. 8.

This issue is about the health and safety of our citizens. If you live downwind or downstream from a contaminated site, it doesn't matter whether the owner of the site is a private company or the Federal Government. If your health is in jeopardy, you need the same level of protection no matter who the owner is. You need equal protection under the law.

What the Department of Defense's proposal would do is create a double standard—the EPA would have one set of rules for the private sector and another for Federal agencies.

This year, we've all been given a vivid reminder of the role the Department of Defense has in protecting our country. I appreciate the work of our military and of the men and women who are part of it. This hearing is not in any way about whether or not we support our armed forces. That's a given. It's about balancing our national security with our environmental security.

I understand that the DOD's believes some of our environmental laws are endangering military readiness by limiting certain types of training. However, the GAO stated in a report published last month, that the military services had not been able to demonstrate any reduction in readiness due to laws such as the Endangered Species Act or the Migratory Bird Treaty Act.

My concern about what some are seeking, is that it could invalidate hundreds of complex negotiations worked out between the citizens of this country and State and Federal agencies. The Department of Defense's proposal would permanently exempt DOD from having to work with EPA and State agencies on the clean-up of sites such as the Umatilla Chemical Depot in my home State of Oregon.

That chemical weapons depot contains 11 percent of the nation's deadly nerve agents such as sarin and mustard gas. As you can imagine, the communities in this area have asked for, and rightly received, good faith assurances that every possible precaution would be taken to guarantee their safety. In fact, the Governor has spent most of the last 8 years negotiating a dependable emergency preparedness plan with the community, as noted in the *Seattle Times* of June 19:

Kitzhaber and Oregon regulators are right to demand high standards for the disposal of the chemical weapons. Their efforts no doubt have made the process safer for the public.

If these proposed amendments became law, DOD would have the power to come in and wave the agreements and procedures that have been reached in Umatilla County. That doesn't sound to me like the participatory democracy the Founders had in mind.

Our citizens who live in the shadow polluting at contaminated Federal facilities should not have to wait years or decades to obtain the health and environmental protections our laws are supposed to provide. I urge all members of the Committee to support the bipartisan tradition on this Committee to provide citizens who live downwind or downstream from Federal facilities equal protection under our environmental laws.

STATEMENT OF ADM. WILLIAM J. FALLON, U.S. NAVY, VICE-CHIEF OF NAVAL OPERATIONS

INTRODUCTION

Mr. Chairman and members of the committee, thank you for this opportunity to share my views regarding how the Readiness and Range Preservation Initiative (RRPI) will further military readiness and environmental conservation. I appreciate your attention to this vital and timely topic, which is of great importance to our security and our environment today and into the future.

READINESS

Our Navy provides combat-ready forces as powerful representatives of American sovereignty. In the weeks following September 11, naval forces were at the leading edge of our nation's efforts against terrorism. Navy and Marine Corps carrier strike aircraft, in concert with US Air Force bombers and tankers, flew hundreds of miles beyond the sea, destroying the enemy's ability to fight. Sustained from the sea, U.S. Marines, Navy SEALS, Seabees, and Special Operations Forces worked with local allies to free Afghanistan from the Taliban Regime and Al Qaeda terrorist network. Today, naval forces are deployed to multiple theaters of operations in the Global War On Terrorism and our mission is far from over.

One thing we have learned—readiness is paramount. Before this nation sends the precious resource of our youth into harm's way, we owe it to them to provide every measure of safety possible—and that starts with realistic and comprehensive training. The extraordinary success achieved thus far in Operation ENDURING FREEDOM is a direct result of our commitment to train as we fight. We rely on the full use of our ranges and facilities to provide the combat-like experience that gives our forces a competitive advantage in war. But as we think about future operations, I am concerned about growing impediments to our ability to execute our highly successful training procedures.

Realistic, demanding training has proven key to survival in combat time and again. For example, data from World Wars I and II indicates that aviators who survive their first five combat engagements are likely to survive the war. Similarly, realistic training greatly increases U.S. combat effectiveness. For example, the ratio of enemy aircraft shot down by U.S. aircraft in Vietnam improved from less than 1-to-1 to 13-to-1 after the Navy established its Fighter Weapons School, popularly known as TOPGUN. More recent data shows aircrews who receive realistic training in the delivery of precision-guided munitions have twice the hit-to-miss ratio as those who do not receive such training.

Similar training demands also exist at sea. New ultra-quiet diesel-electric submarines armed with deadly torpedoes and cruise missiles are proliferating widely. New technologies such as these could significantly threaten our fleet as we deploy

around the world to assure access for joint forces, project power from the sea, and maintain open sea-lanes for trade.

To successfully defend against such threats, our Sailors must train realistically with the latest technology, including next-generation passive and active sonars. Unfortunately, training and testing on our ranges is increasingly constrained by encroachment that reduces the number of training days, detracts from training realism, causes temporary or permanent loss of range access, decreases scheduling flexibility, and drives up costs.

Encroachment issues have increased significantly over the past three decades. Training areas that were originally located in isolated areas are today surrounded by recreational areas, urban and suburban sprawl, and constrained by State and Federal environmental laws and regulations. Additionally, successful stewardship programs have increased the number of protected species on our ranges, which has resulted in less training flexibility. Finally, cumbersome permitting processes negatively impact our ability to train.

BALANCING MILITARY READINESS AND THE ENVIRONMENT

Military readiness and environmental conservation are both national imperatives to which our Navy is committed. They are, however, currently out of balance.

Central to this imbalance is the "precautionary principle" (which is endorsed by some regulatory authorities), which holds that in the absence of evidence to the contrary, one must assume military training will adversely affect the environment. Although well intended, application of the "precautionary principle" results in trying to prove a negative, i.e. that training will cause no harm. Proving a negative is often difficult—if not impossible—and has led to the cancellation, curtailment, or adjustment of training to avoid even the possibility of disturbing endangered species and marine mammals. The loss of training that ensues detracts from combat readiness.

NAVY'S ENVIRONMENTAL STEWARDSHIP

A desire to better balance readiness and environmental stewardship should not be taken as a lessening of our Navy's commitment to environmental protection. Our environmental budget request for FY–2003 is more than $700 million. This funding supports environmental compliance and conservation, pollution prevention, environmental research, the development of new technologies, and environmental cleanup at Active and Reserve bases. Largely as a result of such stewardship, military lands present very favorable habitats for plants and wildlife, including many protected species.

CHALLENGES POSED BY EXISTING ENVIRONMENTAL LAWS

The Department of Defense and the Navy are leaders in environmental stewardship. Nevertheless, there are several environmental initiatives that could, with modification, fulfill their intent of environmental protection while simultaneously allowing military forces to sustain readiness. The RRPI addresses these issues and will help establish one fundamental to our future combat readiness, that is restoring the balance between readiness and conservation. Specifically, I ask for your help with addressing ambiguities in the Migratory Bird Treaty Act, Endangered Species Act, and Marine Mammal Protection Act.

Migratory Bird Treaty Act

Litigation under the Migratory Bird Treaty Act (MBTA) has resulted in restrictions on training. The MBTA was enacted more than 80 years ago to regulate commercial duck hunting and to conserve migratory birds. Since a U.S. Circuit Court of Appeals ruling in 2000, the MBTA has been viewed by some as a vehicle for regulating a wide range of activities that affect nearly every species of bird. Relying on this decision, third parties have filed suit challenging the unintentional taking (killing or harming) of migratory birds incidental to military training.

Adoption of RRPI would allow for the continuation of training activities vital to national security while requiring that the military services take practical steps to prevent injuries to birds in the course of training. This would return the MBTA to a responsible posture, as it was interpreted and applied for more than 80 years.

Endangered Species Act

Designating military training ranges as critical habitats under the Endangered Species Act (ESA) can undermine the purpose for which they were set aside. Some Federal courts have held that critical habitats are intended for species recovery. Under the ESA, controlling or action agencies are required to ensure that their actions do not destroy or adversely modify designated habitats. Hence designation as

critical habitats could limit land uses that would diminish the value of that land for species recovery—including military training.

DoD is already obligated under the Sikes Act to develop Integrated Natural Resource Management Plans (INRMP) for lands under military control. INRMPs address management of natural resources in the context of the missions for which the lands were placed under control of the military services. INRMPs are prepared in cooperation with the U.S. Fish and Wildlife Service (USFWS) and State agencies, and these agencies recommend ways for DoD installations to better provide for species conservation and recovery.

The Navy has worked hard to ensure its training successfully coexists with the protection of endangered species. For example, Naval Amphibious Base (NAB) Coronado has been home to Navy frogmen since their inception in World War II. All of their basic skills from diving to hydrographic reconnaissance have been taught on its beaches and in the bays surrounding the base. To protect the environment, the Navy has spent about $675,000 per year since 1996 on conservation and management programs for the Western Snowy Plover and Least Tern, endangered birds that nest in that area. That effort has successfully increased the number of Least Tern nests by 600 percent and the number of Western Snowy Plover nests by almost 300 percent.

Ironically, this successful stewardship effort resulted in a loss of training area. Due to encroachment, including increased population of the Western Snowy Plover and Least Tern, NAB Coronado lost the use of an estimated 80 percent of its training beaches. In response, the Navy had to substantially alter training activities or conduct them elsewhere, disrupting training cycles, increasing costs, and adding to the time Sailors spend away from their families.

Adopting the RRPI would mitigate such situations in the future, by balancing training needs with the protection of threatened or endangered species. Changing the law to clearly establish that an approved INRMP plan provides sufficient species protection—rather than designating more and more land as critical habitats—would retain flexibility for the services in places where training needs and endangered species protection must coexist.

Marine Mammal Protection Act

Access for military training is an issue at sea as well as ashore. The Marine Mammal Protection Act has curtailed this access. Its definition of "harassment" has been a source of confusion since it was included in 1994 amendments to the statute. The statute defines "harassment" in terms of "annoyance" or the "potential to disturb"—standards that are difficult to interpret. The definition of harassment and its application are pivotal because authorization must be obtained in advance of any activity that would constitute harassment.

Vagaries in the definition of harassment make it very difficult for Navy exercise planners and scientists to determine if a permit (technically known as an authorization) is required before commencing mission—essential training or testing. It also makes it difficult to judge how much mitigation is needed—and therefore how much training realism must be lost—to reduce the impact of any harassment or other type of taking to a negligible level. The Navy is not alone in its opinion that lack of clarity in the MMPA has led to restrictive and inconsistent interpretations of the definition of harassment. In testimony before Congress, the Assistant Administrator for the National Marine Fisheries Service (NMFS) stated that, "NMFS has experienced difficulties with respect to implementation and interpretation of the current definition of harassment."

Assuming a permit is required for training or testing, the application process requires at least 4 months—and sometimes years—to complete, and then the application is effective for only 1 year. Because Navy operations are tied to world events, exercise planning and testing is often done on short notice. This sometimes precludes the identification of training and testing platforms and locations far enough in advance to factor in the lengthy permit application process required by the MMPA.

Examples of this dilemma can be seen in Office of Naval Research (ONR) tests designed to measure sound in the water as it relates to improving the Navy's capability to detect enemy submarines. Over the past several years, ONR has had to curtail or stop elements of various tests due to challenges linked to the MMPA's definition of harassment and its lengthy permitting requirements. In May 2000, for example, disagreement with the regulatory community ensued over ONR's analysis of the impact of its testing on marine mammals. This led ONR in a subsequent test to spend $800,000 for mitigation measures, to avoid even the possibility of disturbing marine mammals.

More recently, key training for the USS CARL VINSON Battle Group was canceled because a permit could not be obtained in an expeditious manner to "potentially disturb" seals when target drones flew over them. This resulted in the deployment of three ships of the Battle Group to Operation ENDURING FREEDOM without the benefit of anti-ship cruise missile defensive training.

Amending the definition of "harassment," as proposed by the Administration, would eliminate application of the MMPA to benign naval activities that cause only minor changes in marine mammal behavior, eliminate the need for mitigation that undermines critical training involving only benign effects, and increase training flexibility by allowing greater use of acoustical sources. The Navy would still be required under the proposed definition of "harassment" to apply for permits and adopt mitigation for activities having a significant biological effect on marine mammals.

SUMMARY

We face an enemy today who is determined to destroy our way of life. The President has told us to "be ready" to face this threat. To fulfill this directive, we must conduct comprehensive combat training—arming our Sailors with experience. This requires full use of our ranges and operating areas. In return, the Navy has proven itself an able steward of our natural resources, and we will continue to promote the health of lands entrusted to our care.

I thank the committee for your continued strong support of our Navy and I ask for your full consideration of passing the RRPI legislation. It will help the services sustain military readiness in this time of war and into the future, when we will face a growing array of deadly threats. It will also support our on-going efforts at environmental conservation. Achieving the best balance of these national imperatives is in the interests of all Americans, and your Navy is committed to achieving that goal.

RESPONSES OF ADM. WILLIAM FALLON TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Admiral, some have taken the position that the MMPA is not within our jurisdiction. I pointed out during the hearing that the MIMPA is within our jurisdiction to the extent that the issue involves endangered marine mammals, which this legislation clearly does involve. Your written testimony goes into some detail on the Navy's position on this issue, but I would like to know if you have any additional comments to make for the record on the subject of the Department's proposed clarification of the M1VIPA.

Response. The definition of "harassment" in the MMPA is important to the Navy because it controls which Naval activities require a letter of authorization or an incidental harassment authorization (essentially two forms of permit) from National Marine Fisheries Service (NMFS) or Fish and Wildlife Service (FWS) (for a limited number of species) under the MMPA. The application process is lengthy and, in the end, usually results in excessive restrictions on training.

The MMPA's definition of "harassment" has been a source of confusion since the definition was included in 1994 amendments to the statute. The statute defines "harassment" in terms of "annoyance" or the "potential to disturb," vague standards that have been applied inconsistently and are difficult to interpret. NMFS attempted to solve this problem through a regulatory interpretation of "harassment," but that interpretation is itself being challenged in court as contrary to the statute — emphasizing the need for Congress to definitively settle the question through legislation. Without such further clarification of the term, however, NIMFS has interpreted a broad array of reactions as evidencing harassment, noting, for example, that "[a]ny sound that is detectable is (at least in theory) capable of eliciting a disturbance reaction by a marine mammal." Also, "[an incidental harassment take is presumed to occur when marine mammals . . . react to the generated sounds or to visual cues." An interpretation this broad could lead to the permitting of all naval vessels simply leaving harbor.

More recently, as noted above, NMFS has attempted to clarify the definition of "harassment" by regulation, but in addition to judicial challenge by environmental groups the Marine Mammal Commission has challenged it on these efforts, noting in the case of one Navy-proposed action that "[a]ny behavioral reaction would technically constitute harassment."

Recognizing that the definition of harassment was problematic, in 2000 the Navy, NMFS, FWS, and the Marine Mammal Commission developed a definition of "harassment" which all four agencies could accept. The Office of Management and Budget during the Clinton administration approved this language and the Department of Commerce has submitted it as part of its effort to reauthorize the MMPA in 2001.

The reauthorization of the MMPA has been delayed by a variety of other complex issues, however, and the Administration believes that clarifying the application of this provision to military readiness activities is sufficiently urgent to require an independent legislative initiative.

DoD's proposal reflects the agreement reached during the Clinton administration and adopted by the Bush administration, except that DOD's new definition would apply only to military readiness activities. The definition clarifies that "harassment" applies only to injury or significant potential of injury, disturbance or likely disturbance of natural, behavior patterns to the point of abandonment or significant alteration, and to disturbance directed at a specific animal. DoD believes that this standard would ensure protection of marine mammals, but also provide the military with sufficient flexibility to conduct training and other operations essential to national security. DoD will remain subject to the MMPA for injury and behavioral changes that affect important biological functions.

Amending the definition of "harassment," as proposed by DoD, would:

- Focus the attention of regulators on activities that are of genuine significance to the welfare of marine mammals, rather than dissipating regulatory attention among a host of activities without biological significance;
- eliminate application of the MMPA to benign naval activities that cause only minor changes in marine mammal behavior—narrowing the number of takes by harassment;
- clarify the distinction between activities that may produce biologically significant effects and those that have only benign effects, reducing the need for mitigation that could undermine critical training.
- increase training flexibility by allowing greater use of acoustical sources, without immunizing the Navy from regulation of activities that lead to whale strandings; and
- reduce impediments to deployment of mission-essential systems.

DOD's proposed amendment to the definition of harassment is consistent with the position advanced by the National Research Council (NRC) in a report to Congress in March 2000. According to the NRC, if the current definition of Level B harassment (detectable changes in behavior) were applied to commercial shipping and recreational boating as strenuously as it is applied to scientific and naval activities, the result would be crippling regulation of nearly every motorized vessel operating in U.S. waters. NRC advocates instead a definition of harassment that focuses on significant adverse biological effects in marine mammal stocks.

DoD believes its proposed amendment to the MMPA will ensure protection of marine mammals while allowing sufficient flexibility to conduct training and other operations essential to national security. Left unchanged, the current definition of harassment will continue to be the subject of litigation brought by special interest groups. Only this past month, for example, a NMFS-issued harassment permit authorizing Navy to deploy an important asset was questioned by a Federal court over the definition of harassment.

Site-Specific Situations

Application of the current definition of "harassment" has impacted Navy training and other operations essential to military readiness. Navy operations are expeditionary in nature, which means world events often require planning exercises on short notice. This challenge is especially acute for the Atlantic Fleet, which over the past 2 years has often had to find alternate training sites for Vieques. To date, the operational Navy has been able to avoid having to apply for a take permit only by altering its training and adopting mitigation measures that eliminate even the possibility that a training event will disturb a marine mammal.

One example of such adjustments can be seen in the Office of Naval Research (ONR)-sponsored Littoral Warfare Advanced Development (LWAD) program for testing various, and often unrelated, methods for measuring sound in the water as it relates to improving the U.S. Navy's anti-submarine warfare capabilities. Over the past several years, ONR has had to curtail or stop elements of the program due to IVIIVIPA permitting requirements. In May 2000, an LWAD test was severely curtailed because of the lack of clarity in the MMPA. NIIVIFS rejected animal resource data that ONR had obtained from NMFS's own sources, disagreed over ONIR's analysis of impacts on marine mammals, and refused to provide an alternative impacts analysis methodology. Experiences like this led ONR, in a subsequent test, to spend $800,000 for mitigation to avoid even the possibility of disturbing marine mammals.

Question 2. If past military readiness reports have not shown declines in unit readiness due to training deficiencies, as some read the recent GAO report to say,

then why is there any urgency to act now? Doesn't the GAO Report's conclusion mean that DoD's training capabilities are presently unaffected by encroachment?

Response. The fact that DOD has yet to precisely quantify the impacts of environmental encroachment on its training capabilities and readiness does not mean that readiness has not been affected. DOD is in fact attempting to improve quantification of encroachment impacts, and this effort is in the early stage of development. The military, because of its commitment to the environment, has for years attempted to work around encroachment impediments. Over time, these impediments to training have grown to the point where DOD has recognized that readiness is now threatened. Accordingly, DOD has attempted to act proactively to avoid a readiness disaster by bringing this matter to the attention of Congress before the problem becomes critical.

RESPONSES OF ADM. WILLIAM FALLON TO ADDITIONAL QUESTIONS FROM SENATOR WARNER

Question 1. On provision of the Administration's Readiness and Range Preservation Initiative (RRPI) would authorize the Department of Defense to incidentally "take" migratory birds under the Migratory Bird Treaty Act without a permit. Is it fair to say that absent legislative relief, the military departments will remain vulnerable under this act to lawsuits and permanent injunctions for training activities, as has occurred at the Navy's Pacific bombing range, Farallon de Medinilla (FDM)?

Response. Yes. All military departments would be vulnerable to lawsuits and injunctions of training activities. Migratory birds are ubiquitous on all DOD lands. Anywhere a range exists there is always the potential for the incidental "take" of a migratory bird. This would potentially subject DOD to numerous litigation risks that could result in injunctions as occurred at FDM. Potential impacts to DOD include: reduced training for mission readiness and resultant potential readiness declines, increased costs for litigation expenses, increased staff time devoted to litigation, etc. The Navy does not intentionally "take" migratory birds. We are good stewards of the land, and sea surrounding our installations. In carrying out our Title 10 responsibilities for National Defense we also ensure that we reduce as much as possible any incidental takes of migratory birds. Moreover, other Federal agencies would encounter the same risk of injunction to their activities as well.

Question 2. What would be the readiness impact if training operations at FDM were permanently shut down?

Response. Because of the events of September 11, 2001, we have an increased number of units required for combat operations on very short notice. With an increasing surge of short notice deployments, Farallon de Medinilla (FDM) becomes a necessity for training and readiness in the war against terrorism. We rely on FDM for qualification and range practice for these short notice units. The value of the range is significantly enhanced because it is the only available training range in the Western Pacific under U.S. control. Without FDM, and with all other ranges in the Pacific theater under foreign control, we would be at the mercy of host governments for our readiness and training. Use of foreign ranges by transiting units is inefficient and can inhibit mission readiness because of the time required for advance notice to and prior coordination with host governments. Foreign ranges may not be available during the brief and often unforeseeable windows of time when Seventh Fleet units may need to use them.

Additionally, FDM is the only target range in the Pacific for the delivery of live Precision Guided Weapons and high-speed anti-radiation missiles (HARM) for expenditure training. The War on Terrorism has been heavily dependent on "smart" munitions (i.e., laser and infra-red guided missiles and bombs), and their use requires training. Closing FDM will therefore mean that units transiting the U.S. Seventh Fleet area of responsibility may not have adequate range training time before they are required to engage in combat operations in support of Operation Enduring Freedom.

Under the Administration's Migratory Bird Treaty Act proposal, the Department of Defense would be required to reduce the number of takings to the maximum extent practicable.

Question 3. Would this requirement be inconsistent with the current practices of the military departments?

Response. The Navy is a good steward of our nation's lands and waters. On Farillon de Medinilla (FDM) for instance, the Navy has practices in place that mitigate the "taking" of migratory birds. These practices include: limiting the quantity of ordnance targeted on FDM, limiting the primary target area to the central and

southern portion of FDM, environmental monitoring, and funding mitigation measures on other Mariana islands.

During the preparation of the Final Environmental Impact Statement (FEIS) for Military Training in the Marianas, the types and quantity of ordnance used on FDM was specified, monitored, and tracked. By limiting the type and quantity of ordnance delivered to FDM, disturbance to seabird populations is considerably reduced.

Based on recommendations from U.S. Fish and Wildlife Service, the target areas on FDM have been limited to the central and southern portions of the island. By designating the target areas, the most sensitive seabird population areas on the northern tip and eastern plateau edge are excluded from weapons impact. Maps provided in the FEIS and the Navy's Marianas Training Handbook specify the target areas. Specific targets have been placed within the designated area to further focus the delivery of ordnance away from the seabird population. The recommendation is implemented through notices to all users of the bombing range and through local regulations concerning use of the range. Use of ordnance, live or inert, is not authorized on the northern 400M of FDM, on the narrow land bridge near the center part of the island, on the eastern cliff face, or in the surrounding waters. The use of live cluster weapons, scatterable munitions, fuel air explosions, incendiaries, or bombs greater than 2,000 pounds is not authorized. A low and slow clearing pass over the range is required prior to releasing ordnance. Ships without aircraft support must circumnavigate the island prior to firing evolution. Users must submit an after-action report.

A Navy biologist, in cooperation with Commonwealth of Northern Marianas (CNMI) Fish and Game Division, conducts monthly aerial (helicopter) bird surveys on FDM to understand the population dynamics of the seabirds and to assess long-term effect of military use of FDM.

Based on U.S. Fish and Wildlife Service (USFWS) recommendation, the Navy funds mitigation projects on other Mariana Islands. These projects have included improvement of habitat of the Micronesian Megapode on the other northern Marianas Islands. This mitigation project also benefits migratory birds by improving the general habitat for all the birds. The Navy funded a $100,000 per year project to reduce feral goat populations on Sarigan Island. The feral goats are the most significant threat to habitat for the Megapode and other species. Based on the success of the Sarigan project, Navy is also removing goats from Anatahan Island.

Question 4. The Endangered Species Act provides for a national security exemption. Upon signing the Endangered Species Act into law, President Carter stated that the Department of Defense should rely on this exemption " . . . only in grave circumstances posing a clear and immediate threat to national security." Has this exemption ever been used? If so, how and if not why? What are the difficulties associated with the use of such an exemption?

Response. No, the exemption has not been used. There is an exemption under the Endangered Species Act (ESA) if the Secretary of Defense (SECDEF) finds it is necessary for reasons of national security. That exemption, however, is better used to address emergencies or unusual situations that are of relatively short duration. The need to train for combat, to plan and execute military readiness activities, is a 7-day a week, 52 weeks a year, requirement. The Secretary of Defense's ability to waive environmental requirements in case of war or national emergency cannot ensure that our young men and women are ready for the first day of combat, which is what readiness is all about.

Procedurally, there are numerous difficulties to implementing the national security exemption under Section 7 of the Endangered Species Act. First, this is a provision that requires the Endangered Species Committee to grant an exemption for agency action if SECDEF finds "that such an exemption is necessary for reasons of national security." The Department of Interior (DOI) believes that this exemption requires a 9-month administrative process. This exemption cannot be used until after consultations with DOI or National Marine Fisheries Service have been completed, and only when the regulatory agency has asserted that the military's training activity will jeopardize the continued existence of threatened or endangered species. According to DOI, this exemption is not available where the regulatory agency has endorsed the military's training activity albeit subject to limitations.

Critical habitat designations impose rigid limitations on military use of bases, denying commanders the flexibility to manage these lands for the benefit of both readiness and endangered species. The Administration's proposal would preclude the designation of critical habitat under the Endangered Species Act on Department of Defense installations where an Integrated Natural Resource Management Plan (INRMP) has been completed, consistent with the Sikes Act.

Question 5. How would this management approach benefit both readiness and endangered species?

Response. Integrated Natural Resource Management Plans (INRMP) provide a process that will ensure the Navy meets its stewardship and regulatory responsibilities not only for endangered species but also for other areas of natural resources. The INRMP also ensures that the Navy can meet its military readiness and national security responsibilities under Title 10 by ensuring no reduction of military mission capability. This process provides for a well thought out balancing process that ensures endangered species are protected and that projects are developed to further natural resources stewardship in general and endangered species protection in specific. The Navy will continue to consult under Section 7 of the Endangered Species Act, and in no way does the INRMP process lessen protection afforded endangered and threatened species. The Navy has consistently shown through our stewardship programs that we not only protect natural resources but also contribute significantly to the increase in population numbers of endangered and threatened species on our lands. For instance, at Naval Amphibious Base Coronado, Navy stewardship has resulted in incredible increases in the populations of both the California Least Tern (600 percent) and the Western Snowy Plover (300 percent), and on San Clemente Island, the Navy's captive breeding program has seen endangered Loggerhead Shrike populations increase from 13 to 187 birds. The systematic INRMP process uses staff time and resources of both the military and U.S. Fish and Wildlife Service more efficiently, avoiding the administrative burden that the consultative procedure would require under critical habitat procedures for endangered species. In fact, DOD encourages other Federal agencies to explore processes similar to INRMPs; the benefits of this in the long run will reduce the incredible nationwide burden of administrative paperwork for critical habitat consultations, which would benefit the nation's overall endangered species recovery efforts. Using a process approach, the Navy will provide long-term cost effective programs that meet stewardship and readiness missions. This will bring balance to both resulting in long-term sustainability of natural resources and critical mission readiness for our men and women in uniform.

Some critics have suggested that substituting INRMPS for critical habitat designation would be contrary to the purpose and intent of the Endangered Specific Act. It is my belief that there is a need for a balanced approach, which allows for realistic training, and without such a balance we run the risk of endangering our men and women in uniform.

Question 6. If this legislative proposal is not successful, what testing and training ranges would be impacted by future critical habitat designations and what would be the overall military readiness impact?

Response. Every single DOD testing and training range would potentially be impacted by increasing critical habitat designations. The U.S. Fish and Wildlife Service (USFWS) is under court order to accelerate designation of critical habitat. For instance, on July 2, 2002, U.S. District Court for Southern California ruled that USFWS must reconsider designating critical habitat for eight plant species. Over time additional species potentially will be listed and increasing areas will be designated as critical habitat. Much of this is driven by current and potential future litigation over what is listed and critical habitat designations that the USFWS faces (such as the California Native Plant Society and the Center for Biological Diversity lawsuit on the eight plants in Southern California) Litigation is driving listing and critical habitat designations for the USFWS, for instance, in Hawaii. Navy ranges potentially impacted include (all currently have endangered and threatened species present): Naval Weapons Station Seal Beach, Detachment Fallbrook, Pacific Missile Firing Range, San Clemente Island, Marianas (FDM, Tinian) and Guam, Naval Air Station Fallon, NAS Lemoore, China Lake, Point Mugu Range complex and Vieques.

Listed below are several instances of where the Navy has responded to critical habitat designations:

Naval Weapons Station Seal Beach, CA, Detachment Fallbrook. Fallbrook's mission is to provide quality and responsive logistics, technical, and weapons support to the U.S. Pacific Fleet, U.S. Marine Corps, and other military units. It serves as a vital component for our nation's defense by storing and providing munitions to Navy and Marine Corps forces during the critical initial phases of a conflict. Falibrook consists of 8,850 acres located in the southern foothills of the Santa Ana Mountains in northern San Diego County.

a. Critical habitat was designated for the coastal California gnatcatcher found at the Naval Weapons Station Seal Beach, Detachment Fallbrook. Navy comments were provided to the proposal to designate critical habitat at Fallbrook, which asserted that designation was redundant and unwarranted. Despite the Navy's

proactive resource management and coordination of an INRMP with USFWS and California, final critical habitat designation in October 2000 included all of Fallbrook, with minor exception for certain already-developed areas. The critical habitat included not only unoccupied habitat areas, but also areas that are unsuitable as a habitat for the California gnatcatcher. A primary concern is military and public safety if critical habitat requirements adversely affect the efficacy of clear zones and fire safety breaks on the installation. Designating the entire installation produces restrictions that may degrade Fallbrook's overall ability to perform its military mission and to adequately comply with strict explosive safety standards.

b. Fallbrook also had to contend with the Final Designation of Critical Habitat for the Arroyo Southwestern Toad in February 2001. Navy comments were provided to the proposal to designate approximately 15 percent of Fallbrook as critical habitat for the toad, in particular emphasizing the problematic designation of multiple and overlapping critical habitats at a single facility and the resulting conflicting habitat management requirements. Proposed projects and ongoing maintenance requirements exist in areas of Fallbrook that do not contain constituent elements of critical habitat for the toad, but were included in critical habitat designation. Critical habitat designation will pose potential restrictions on fire prevention and containment measures such as fuel breaks and fire access roads will pose significant threats to the storage of munitions.

Both critical habitat designations lead to confusion for natural resources management, particularly in regard to the joint management of other listed species (e.g., Stephens' kangaroo rat), and conflicts between the two species critical habitat management requirements. The Integrated Natural Resource Management Plan (INRMP) process provides a multi-species approach to natural resources management, and is, therefore, the better mechanism for minimizing and possibly avoiding these management challenges.

Pacific Missile Range Facility, Hawaii. The Pacific Missile Range Facility (PMRF) on the island of Kauai in Hawaii is the recognized leader in combining training and testing. PMRF supports a wide variety of training exercises and developmental tests involving space, air, surface, and sub-surface units. PMRF has the ability to provide simultaneous real-time tracking information on participants, targets, and weapons on its 42,000 square miles of sea and airspace. PMRF provides a fully instrumented ocean training range, where aircraft, surface ships and submarines may train one against the other, or in collaboration, to deal with a variety of potential incoming adverse threats.

In May 2002, USFWS announced the availability of the draft economic analysis for the proposed designations of critical habitat for plant species from the islands of Kauai and Nihau, Hawaii, and reopening of the comment period for the proposal to determine the prudence of designating critical habitat for these plants. Navy comments were submitted on the proposed designation.

Navy stewardship efforts: The Navy coordinated with USFWS for preparation of a biological assessment for the 1998 PMRF Enhanced Capability Environmental Impact Statement (EIS)

Impact: Designation of critical habitat over lands used by PMRF serves as an unnecessary restraint and limitation on the installation's flexibility, adversely affecting its ability to perform its national defense mission and in planning for future mission needs. Particular impacts associated with PMRF facilities at Koke'e and Makaha Ridge were emphasized in comments submitted by CINCPACFLT to USFWS.

Marianas and Guam Range Complex. USFWS Action: In May 2002, in response to a lawsuit brought against USFWS, an agreement was reached between environmental groups and USFWS to designate and protect critical habitat areas for six endangered species on Guam. The agreement calls for designation of critical habitat by June 1, 2003. Species are the Marianas fruit bat, little Marianas fruit bat, Marianas crow, Guam Micronesian kingfisher, Guam broadbill, and Guam bridled white-eye.

Navy Stewardship History: The Guam Overlay National Wildlife Refuge was originally created on Navy land in lieu of a critical habitat designation for the protection of the endangered Marianas moorhen, as well as seven other endangered species. This refuge was established via a cooperative agreement between the Navy and the USFWS. Establishment of the refuge on Navy lands represents Navy's strong commitment for a coordinated species protection program.

Impact: All of the Navy's training areas in the Marianas have endangered species located on them, but none have yet been designated critical habitat. The agreement could lead to critical habitat.

The INRMPs would only be used as a substitute for designation of critical habitat in those instances in which the plans addressed endangered or threatened species and their habitats.

Question 7. What would be the role of the Fish and Wildlife Service regarding the preparation and implementation of these plans?

Response. Fish and Wildlife Service (USFWS) is a partner in the preparation and implementation of Integrated Natural Resource Management Plans (INRMP) . Section 2904 of the Sikes Act Improvement Act states that the INRMP shall reflect "mutual agreement of the U.S. Fish and Wildlife Service and the States concerning conservation, protection, and management of fish and wildlife resources." INRMPs are prepared "in cooperation with" the USFWS and appropriate State fish and wildlife agencies. The entire INRMP is shared with these agencies for review. The Department of Defense (DOD) also takes advantage of the expertise of the USFWS and State fish and wildlife agencies to provide expertise in the task of preparing the INRMPs. DOD works closely with USFWS in working groups all the way from the local level to Washington D.C. USFWS regional offices endorse the INRMPs and field staff from the USFWS work closely with military biologists for recovery efforts on military installations. DOD will consult with USFWS on INRMP projects requiring Section 7 consultations under the Endangered Species Act.

Readiness and Range Preservation Initiative. During the July 9, 2002, hearing before the Environment and Public Works Committee, reference was made to the General Accounting Office (GAO) report on Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges, June 2002 (GAO–02–614) . That report stated: "Despite the loss of some capabilities, service readiness data do not indicate the extent to which encroachment has significantly affected reported training readiness." "At the same time, the services face difficulties in fully assessing the impact of training ranges on readiness because they have not fully defined their training range requirements and lack information on the training resources available to support those requirements."

Question 8. How would you address this GAO statement? What is the basis for concluding that environmental encroachment is a problem that warrants legislative relief, particularly in relation to the Migratory Bird Treaty Act and the Endangered Species Act?

Response. First, the fact that DOD has yet to quantify the impacts of environmental encroachment on readiness does not mean that readiness has not been affected. The first sentence in the Conclusion of the GAO report (Page 30) states: "DoD and the military services have lost training range capabilities and can be expected to experience increased losses in the future absent efforts to mitigate encroachment." Also, Director Holman (GAO) stated in his oral testimony, "[E]ach installation we visited indicated that they had lost capabilities in terms of times ranges were available for the types of training that could be conducted . . . Again, the potential problem with workarounds is that they lack—can lack realism; can lead to the use of practice and tactics that are contrary to what would be employed in combat." DOD is in fact attempting to quantify encroachment impacts. This effort, however, is in its infancy. The military, because of its commitment to the environment, has for years attempted to work around encroachment impediments. Over time, these impediments to training have grown to the point where DOD has recognized that readiness is threatened. Accordingly, DOD has attempted to act proactively to avoid a readiness disaster by bringing this matter to the attention of Congress before the problem becomes critical.

Military installations have increasingly evolved from rural and isolated locations to areas surrounded by urban sprawl. This has resulted in DoD lands becoming "islands of biodiversity in a sea of development." Wildlife such as migratory birds and endangered species increasingly find military ranges and installations to be safe harbors in the midst of the loss of other habitats outside military installation boundaries. The military has been forced to shoulder increased stewardship responsibilities as other habitat disappears. The USFWS in the face of increasing litigation (GAO 02–581 of June 2002) has become increasingly dependent on military lands for meeting endangered species recovery goals for certain species of wildlife and plants. The USFWS mission is focused only on species preservations. The military on the other hand, has the more complicated duty of balancing Title 10 responsibilities (readiness) with environmental stewardship. As increasing numbers of species have been listed from the first charismatic mega fauna to the tiniest species such as fairy shrimp, the military confronts increased numbers of species currently listed and proposed for listing as well as significant increases in critical habitat designations that are often driven by court interpretations of our environmental laws. Such legal interpretations create challenges for military commanders required to ensure we meet our nation's national security goals as required by Title 10, as well as meeting their stewardship responsibilities. The few remaining proposals in the

RRPI will aid our commanders in achieving balance which will ensure that America's fighting forces are fully prepared to meet current and future challenges.

STATEMENT OF GEN. JOHN M. KEANE, VICE CHIEF OF STAFF, U.S. ARMY

Mr. Chairman and members of the committee. Thank you for this opportunity to present the Army's perspective on the Readiness and Range Preservation Initiative (RRPI).

The exceptional performance of our units in Afghanistan clearly indicates that The Army is fully prepared to meet our full-spectrum obligation to fight and win the Nation's wars, whenever and wherever the Nation calls. Our success to date, and our ultimate victory in this war and future wars, is dependant upon highly trained Soldiers and units who are proficient in the employment of their equipment. The only way to achieve the requisite level of individual and collective competency is through repetitive, challenging, and realistic live-fire and maneuver training—training that melds soldiers and equipment into a combat ready unit.

Maneuver land and live-fire ranges are an indispensable element to this process. The Army's ranges, as well as those of our sister Services, provide opportunities to develop and improve our Soldiers' proficiency, competence, and confidence in the use of sophisticated weapons systems. We must retain those resources that allow our forces to maintain the level of readiness that the American people have come to expect, and deserve—and without which we will not be adequately prepared to defend America. For this reason, the Army has committed significant resources to the preservation of its lands and, in the process, amassed a record of good stewardship of the environment.

Despite The Army's commitment to preservation, externally driven factors, such as urban sprawl, management of threatened and endangered species, and the expanding application of environmental laws to live-fire activities have the ability to constrain and introduce an unacceptable degree of artificiality to military training. In an effort to curb this trend, the Army has worked within the Administration to develop a set of proposals that clarify the application of several environmental laws to military testing and training.

The Administration would like to work together with Congress to improve the processes by which we manage environmental issues on Army and other DoD lands to ensure both realistic training for our Soldiers and protection of the land and resources. We will continue to work with the other Federal agencies to ensure that as these proposals are adopted they are implemented in a manner that preserves our ability to maintain trained and ready forces and protect the environment in a manner consistent with congressional intent.

The Army's primary concerns are training restrictions that stem from urban sprawl, the resultant increase in Army responsibility to manage and protect threatened and endangered species, and the expanded application of environmental regulations to the use of military munitions.

URBAN SPRAWL

When many of our installations were established, they were generally located in rural areas isolated from civilian populations. However, urban growth and development of land around our training facilities has changed that. Army installations, once far from public view, are now located in suburban and often in the midst of large urban areas.

Unchecked residential and community growth cause tension between military operations and neighboring communities over noise, dust, and other effects of Army training. Noise, for example, is a sensitive issue in communities surrounding Fort Drum, New York; Fort Sill, Oklahoma; Fort Bragg, North Carolina; Fort Carson, Colorado; Fort Campbell, Kentucky; Fort Hood, Texas; Fort Lewis, Washington; Fort Riley, Kansas; Fort Stewart, Georgia; and Fort AP Hill, VA. Additionally, The Army faces a particular challenge in managing noise issues related to the Aviation School and its extended flight training areas over and around Fort Rucker, Alabama. As populations around these and other installations continue to grow, the Army expects other encroachment-related concerns to intensify.

RRPI contains two provisions that address the ability of the military departments to work in partnership with our neighbors to establish protective buffer zones around military installations. One provision allows military departments to enter into agreements with third parties—such as private conservation organizations—to prevent urban development that threatens testing and training. Another provision allows the Department of Defense to convey surplus property to a State or local government, or to nonprofit organizations that exist for the primary purpose of pro-

tecting open spaces and natural resources. The proposal allows the transfer of land only if it is used for conservation purposes in perpetuity. Both of these proposals would assist the Department of Defense in maintaining "buffer zones" between ranges and bases and urban areas, and preserve needed habitat for potentially imperiled species, lessening the need for legal restrictions. They serve both the interests of military readiness and environmental protection.

THREATENED AND ENDANGERED SPECIES AND HABITAT

While the Army has been very successful in conserving and protecting endangered species, two things are evident. First, as we focus our training missions and Transformation on specific installations, we find that endangered species restrictions already limit the use of a significant portion of the landscape. Second, as the habitat surrounding our installations is degraded by incompatible development, pressure on the Army to conserve habitat on post increases. These factors tend to restrict our access to needed training land, restrict the types of training activities that we can conduct on the land, and restrict the times and duration of training events conducted.

Army lands host 170 federally listed species on 94 installations. Critical habitat for listed species has been designated on 12 installations to include Fort Lewis, Washington and Fort Irwin, California—two installations that are critical to maintaining the war-fighting readiness of the Army. For example, at Fort Lewis 70 percent of the training land is designated as critical habitat for the threatened Northern Spotted Owl. Six of the twelve installations, including Fort Lewis, are as yet unoccupied by the species for which critical habitat is designated.

The Red-Cockaded Woodpecker in the Southeast United States affects four major installations (Fort Bragg, North Carolina; Fort Stewart, Georgia; Fort Benning, Georgia; and Fort Polk, Louisiana) and two major service school training installations (Fort Jackson, South Carolina; and Fort Gordon, Georgia). The training restrictions associated with the 200-foot buffers around each cavity tree include: no bivouacking or occupation for more than 2 hours; no use of camouflage; no weapons firing other than 7.62mm and .50 cal blank (e.g., no artillery, rockets, etc.); no use of generators, no use of riot agents; no use of incendiary devices; no use of smoke grenades; and no digging of tank ditches or fighting positions. During maneuver, vehicles cannot come closer than 50 feet to cavity trees.

The Red-Cockaded Woodpecker has benefited from the quality habitat provided by our installations' lands that have been actively managed and insulated from urbanization, development, and commercial forestry practices in the region. The Army has committed significant resources to support conservation and recovery of the species. However, while The Army spent more than $45 million over the past 12 years on conservation management programs for Red Cockaded Woodpecker recovery, private developers adjacent to our installation have not made similar commitments.

At Fort Hood, Texas, the biological opinion issued under the Endangered Species Act for both the Golden Cheeked Warbler and the Black Capped Vireo, restricts training on over 66,000 acres (33 percent) of training land. These restrictions include no digging, no tree or brush cutting, and no "habitat destruction" throughout the year on the entire core and non-core area. From March through August, vehicle and dismounted maneuver is restricted to established trails, and halts in restricted areas are limited to 2 hours in designated endangered species "core areas" (46,620 acres of the 66,000 acres are designated "core areas"). Artillery firing, smoke generation, and riot control grenades are prohibited within 100 meters of the boundaries of the designated "core areas." Use of camouflage netting and bivouac are prohibited across the entire "core area" during these months.

Protection of threatened and endangered species restricts training at many other Army installations. At Fort Huachuca, Arizona, for example, management of endangered bats and two other species restricts the types, timing, and locations of military activities. Listing of the Arroyo Southwestern Toad and designation of critical habitat may have serious effects on both land and air-based training. The southern corridor at the National Training Center, Fort Irwin, California, is designated critical habitat for the Desert Tortoise and 22,000 acres cannot be used for maneuver. This designation reduces the amount of training that can be conducted on the installation and limits maneuver training to the central corridor. Wendell Ford, Kentucky; Camp Grayling, Michigan; Camp Ripley, Minnesota; Camp Shelby, Mississippi; Camp Perry, Ohio; Camp Leesburg, South Carolina; and Orchard/Gowen Field, Indiana—all National Guard training facilities—experience training restrictions based on endangered species management. The U.S. Fish and Wildlife Service is currently proposing to designate critical habitat for 146 plant species in Hawaii. These proposed designations will affect seven different training areas and are ex-

pected to have further adverse impacts in the form of additional training activity restrictions, administrative burden, and restricted access. This list is not exhaustive, but does illustrate that the Army feels the effects of this issue at many locations across the country.

Designation of critical habitat on Army installations adds management costs and reduces the availability of land on which to train. New designations require installations to enter into consultation with the Fish and Wildlife Service and limit or cease training activities while consultation is conducted. Training restrictions can even apply when critical habitat is designated on military installations where species do not occur.

In addition to the RRPI's real property acquisition and conveyance authorities, which allow for preservation of species habitat around Army installations, the RRPI contains a provision that specifically addresses the overlapping natural resource management requirements of the Endangered Species Act and the Sikes Act. The proposal provides that the existence of an approved Integrated Natural Resource Management Plan (INRMP), required under the Sikes Act and coordinated with the Fish and Wildlife Service, precludes the need to designate critical habitat under the Endangered Species Act. This has been the practice at a number of Army installations, but the Fish and Wildlife Service is being challenged in court for the practice.

INRMPs take a more holistic approach to managing natural resources. They strike a balance and integrate military training needs with natural resources management practices to ensure that both imperatives are met. Management under an INRMP, in lieu of critical habitat designation, allows Army commanders increased flexibility to use the land on the installation to meet changing mission needs.

EXTENSION OF ENVIRONMENTAL LAWS AND REGULATIONS TO UNEXPLODED ORDNANCE AND MUNITIONS CONSTITUENTS

The development of our current environmental statutes and regulations addressing waste management, pollution elimination, and cleanup of contamination did not take into account, nor foresee, application to military training lands and military weapon systems. The use of environmental statutes, such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation & Recovery Act (RCRA), and the Safe Drinking Water Act to require investigation and cleanup of munitions and their constituents on operational military ranges will likely impact the Army's ability to fulfill its national security mission by causing the shut down or disruption of live-fire training. A number of these statutes contain broad, discretionary enforcement thresholds that are based on the assessment of the environmental regulatory authority as to whether a given condition or activity presents a "potential" risk or "imminent" hazard to human health or natural resources. These assessments have resulted in added restrictions on the Army. While some of the environmental statutes provide for short-term national security exemptions (often at the Presidential level), these statutes contain few practical methods for consideration of the unique military readiness impacts of enforcement on military ranges. Clarification of the regulatory framework applicable to military training operations would be an appropriate manner in which to address the issue.

The Army at Fort Richardson, Alaska, is currently facing a lawsuit alleging violations of the Clean Water Act, RCRA, and CERCLA associated with firing munitions at Eagle River Flats range. The RCRA allegation is that munitions fired into or onto Eagle River Flats are RCRA statutory solid wastes that present an imminent and substantial endangerment to health or the environment. The CERCLA allegations are that the act of firing munitions onto an operational range and the continued presence of those munitions on the range constitute a release of hazardous substances potentially requiring reporting, characterization, and remediation.

If munitions used for their intended purpose are considered to be statutory solid waste, the Army could be forced to perform corrective action or remediation of Eagle River Flats. Live-fire training during the remediation would be impossible, and the only mortar and artillery impact area at Fort Richardson would be lost to training. The 172d Infantry Brigade would be unable to conduct a large portion of its mission essential live-fire training operations.

If courts agree with the plaintiff, then live-fire training and testing operations at every Army range (more than 400) could be subject to CERCLA response requirements. Further lawsuits could compel the Environmental Protection Agency and State regulators in all U.S. regions to enforce the same standards on other military ranges. These findings would not only dramatically impact the readiness of the 172d Infantry Brigade in Alaska, but the entire Department of Defense.

The RRPI contains provisions affecting both RCRA and CERCLA clarifying that live-fire training does not constitute disposal of hazardous waste or releases of hazardous substances, as these terms are used in RCRA and CERCLA. These proposals seek to codify the existing practice by the Environmental Protection Agency and State environmental regulatory agencies and remove ambiguity currently in the law. These proposals confirm that the cleanup of military munitions is not required so long as munitions remain on operational ranges where they were fired. The policies governing cleanup of munitions located off an operational range and munitions causing imminent danger on-range would remain unchanged—as would policies governing clean-up of former ranges and other defense sites. These provisions do not seek to avoid the Army's responsibilities to clean-up formerly used defense sites or to protect the environment from potentially harmful impacts. These provisions seek to clarify and affirm existing policies and ensure that military ranges, set aside to allow live training and contain potential impacts, continue to be available to the soldiers that need to train for combat.

BALANCING MILITARY MISSION AND ENVIRONMENTAL PROTECTION

The Army's effort to preserve and protect effective training and testing has three components:

1. Seek needed changes to laws and regulations: The Army advocates an environmental regulatory framework for military facilities that recognizes their uniqueness and allows for successful and protective environmental management. The lack of clarity in regulatory authorities and standards in existing laws limits the Army's ability to plan, program, and budget for compliance requirements. We also advocate the empowerment of the Services to work off-post with private landowners, local governments, public agencies, and non-profit organizations to solve land use conflicts that threaten training.

2. Obtain resources to implement the Army's Sustainable Range Program (SRP). SRP is the foundation for sustaining live fire and maneuver training and the environment on our ranges. The objective of SRP is to maximize the capability, availability, accessibility of ranges and land to support doctrinal training and testing requirements. SRP is based on three tenets. First, develop and maintain information excellence to have complete data on all aspects of our ranges, their operational characteristics as training facilities, their physical characteristics as real property, and their characteristics as part of the natural and cultural environment. Second, apply integrated management across the four disciplines that directly affect ranges: range operations and modernization; facilities and installation management; explosives safety; and environmental management. Third, establish an outreach campaign to inform decisionmakers and the community and ensure that their concerns are identified and addressed. In this way we will improve public understanding of why the Army must conduct training and testing and how we are moving to a more sophisticated management approach. As we have in the past, The Army will continue to improve range operations, range modernization, state-of-the-art land and resource management, research on munitions effects and management of unexploded ordnance, and public outreach.

3. Support and foster cooperation among regulators and the military, emphasizing the need to balance military readiness concerns and environmental regulation. The Army believes that Congress should continue to recognize that the training required for Army readiness is a positive societal good and a legal mandate.

CONCLUSION

The Army is committed to its responsibility as an environmental steward for the 16.5 million acres America entrusts to us. However, we are equally committed to another precious resource that America entrusts to us—her sons and daughters. We are obligated to provide our soldiers with the most realistic training scenarios possible to fully prepare them for the rigors of war. Although The Army will never abandon its environmental responsibilities, we must have land to train.

Unless we can resolve several issues at our key training areas, we face the very real possibility that we will lose some of our critical training areas or, at a minimum, we will be forced to deny our soldiers the opportunity to participate in the number and kind of exercises required to retain perishable skills.

For 227 years, the Army has kept its covenant with the American people to fight and win our Nation's wars. In all that time, we have never failed them, and we never will. Building and maintaining an Army is a shared responsibility between the Congress, the Administration, those in uniform, and the American people. Working with Congress, we will keep The Army ready to meet the challenges of today and tomorrow.

Thank you, Mr. Chairman and distinguished members of the committee for allowing me to appear before you today. I look forward to discussing these issues with you.

RESPONSES OF GEN. JOHN M. KEANE TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Some have characterized the recent GAO report on encroachment and military training as providing little evidence that military readiness is being hampered by encroachment. In light of this, why are the provisions in the Department's Readiness and Range Preservation Initiative necessary?

Response. The GAO found that the Services have incrementally lost training capabilities due to encroachment and absent efforts to mitigate encroachment, can be expected to experience increased losses in the future. Encroachment diminishes training realism and restricts the types, locations, and times of training events. However, GAO also found that DoD has not adequately quantified the readiness impacts associated with encroachment on military training. The Army is working with OSD and our sister Services to identify mechanisms for measuring and reporting encroachment-related restrictions and their impacts on our capability to support essential training and testing. The lack of a quantifiable measure does not make impacts of encroachment on our live training ranges any less real.

Over the last few years, environmental laws have been interpreted and applied in ways that we do not believe Congress intended and to conditions that were not anticipated when the laws were passed. Our proposed legislation seeks clarification of congressional intent and affirmation of principles and rules of law that have been followed for decades. These proposals are not sweeping exemptions, but rather are "surgical" amendments designed to clarify how these laws are to be applied to certain uniquely military activities that are most necessary to ensure military readiness. I fear that if we do nothing about the conditions facing our training areas we will have a readiness train wreck. The time to act is now.

Question 2. If past military readiness reports have not shown declines in unit readiness due to training deficiencies, as some read the recent GAO report to say, then why is there any urgency to act now? Doesn't the GAO Report's conclusion mean that DoD's training capabilities are presently unaffected by encroachment?

Response. Historically, environmental constraints at Army installations have not been cited as the reason for reductions of training capabilities or readiness ratings. Environmental constraints are often viewed as "control measures" necessary to avoid conflict with environmental regulators and commanders routinely implement training work-arounds. Over time, these constraints and work-around are accepted as "business as usual." Incremental reductions in training capabilities have long-term cumulative impacts that may not be apparent to individual commanders during their tour of command. The Army is encouraging commanders to evaluate more closely the cumulative impacts on live training that have resulted from environmental constraints and to document those impacts as notes in Unit Status Reports and in the Installation Status Report.

As stated in response to the previous question, GAO found that the Services have incrementally lost training capabilities due to encroachment and, absent efforts to mitigate encroachment, can be expected to experience increased losses in the future. However, GAO also found that DoD has not adequately quantified the readiness impacts associated with encroachment on military training. The Army is working with OSD and our sister Services to identify mechanisms for measuring and reporting encroachment-related restrictions and their impacts on our capability to support essential training and testing. The lack of a quantifiable measure does not make impacts of encroachment on our live training ranges any less real.

STATEMENT OF GEN. MICHAEL J. WILLIAMS, ASSISTANT COMMANDANT OF THE MARINE CORPS

Chairman Jeffords, Senator Smith, and members of the committee, thank you for the opportunity to speak to you concerning the Readiness and Range Preservation Initiative. Your efforts on behalf of our men and women in uniform ensure that the Nation's military remains ready and that our service members and their families enjoy the quality of life that they deserve. It is my opinion that good quality of life begins with realistic training that will result in success on the battlefield and the ultimate return of your Marines home to their families.

I welcome the opportunity to offer testimony as the committee considers the implications of encroachment. The Readiness and Range Preservation Initiative is fundamentally important to the Nation because encroachment is on the rise and if left unchecked will detrimentally impact the mission of our bases, stations, and ranges in the near term and threaten our future military readiness in the long term. At stake for your Marine Corps is the cost of success in combat. We must do all in our power to ensure that Marines, members of our sister Services, and service member families do not pay an unnecessarily high price for that success. Marines must train as they will fight and we require access to unencumbered sea, land, and airspace to properly conduct this training.

During the last 16 months, Service witnesses have appeared before Congress to speak to encroachment issues at five different hearings: the Subcommittee on Readiness and Management Support of the Senate Armed Services Committee, 20 March 2001; the House Committee on Government Reform, 09 May 2001 and 16 May 2002; and the Subcommittee on Military Readiness of the House Armed Services Committee, 22 May 2001 and 08 March 2002. Thankfully, the Readiness and Range Preservation Initiative emerged as a result of these hearings where Marine Corps witnesses, among others, were afforded the opportunity to articulate in detail the Corps' position on the issue of encroachment.

The challenge of encroachment is clear, as is the importance of this hearing and the proposed Initiative. The absolute necessity of maintaining military readiness is beyond debate, and readiness depends upon quality training that realistically simulates combat conditions. The issue, then, is how to balance the demands of national security with environmental stewardship, which at times are competing but are often complimentary.

Most of the Marine Corps' bases and stations were established in remote areas prior to or during World War 11. Since then significant urban development has occurred around many of these installations. At the same time, our war fighting doctrine, weapon platforms, and tactics have evolved to counter new threats. The Marine Corps now requires greater standoff distances and larger maneuver areas. Simultaneously, our access to training resources is becoming more constrained, primarily as a result of growing populations around our bases and stations. The dramatic urban development near many of our installations has had numerous unintended consequences. For example, wildlife (often threatened or endangered species) seeks out our installations, as they are often the last remaining open spaces in areas otherwise overtaken by human habitation and use.

Previous testimony at the hearings referenced above provided compelling statements regarding; encroachment. The Marine Corps recognized, however, that evidence of negative encroachment impacts, though persuasive, were largely anecdotal. Consequently, the Marine Corps set out to establish quantitative data regarding this issue. Selecting Marine Corps Base Camp Pendleton, California as the subject of the study, we examined encroachment impacts on a Marine Air Ground Task Force during the conduct of an amphibious landing. We relied upon established standards to measure the proficiency of Marines based upon the Individual Training Standards of their military occupational specialties. The performance of Marine units was assessed against long established standards based upon Mission Essential Task Lists.

We used these standards as the building blocks upon which we were able to quantify encroachment impacts. The study selected separate combat arms elements of the Marine Air Ground Task Force to examine. Completion rates for each task were evaluated through extensive interviews with subject matter experts. Given that safety during training is paramount, and therefore certain types of training can be limited for safety purposes, the study concentrated on non-firing tasks (defined as all tasks that did not involve the use of live ammunition or explosives). In doing so, we avoided any concern that the study would confuse safety with encroachment issues.

The initial results of the Camp Pendleton Quantitative Study were surprising. Three combat arms elements were able to accomplish only 69 percent of established standards for non-firing field training. Endangered species were the largest contributing encroachment factor in this study. Figures 1 and 2 illustrate many of the restrictions along the Camp Pendleton coastline.

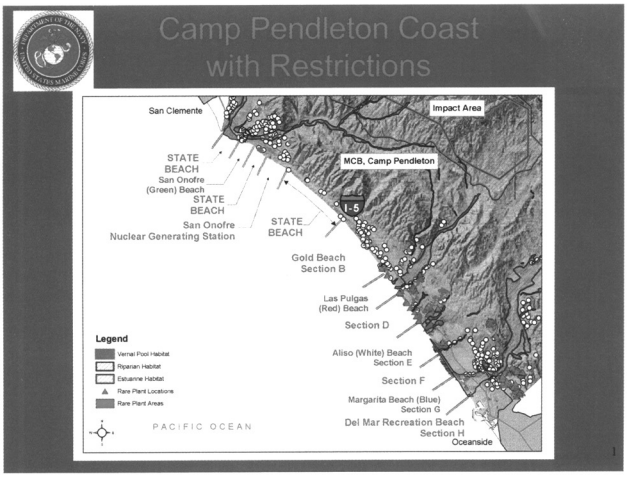


Figure 1

Figure 2

The analysis of this study continues, and additional data will be forthcoming. In the interim, Figure 3 is provided as a graphic example of the study's findings. I want to note that this study is not meant to identify the combat readiness of any particular Marine unit; instead, the study is a report card on Camp Pendleton's ability to provide the training environment necessary for Marines to complete their missions to task or standard. Marines who cannot get their training at Camp Pendleton must and do go elsewhere to train. Naturally, there are associated costs here, not only in terms of money but also in quality of life.

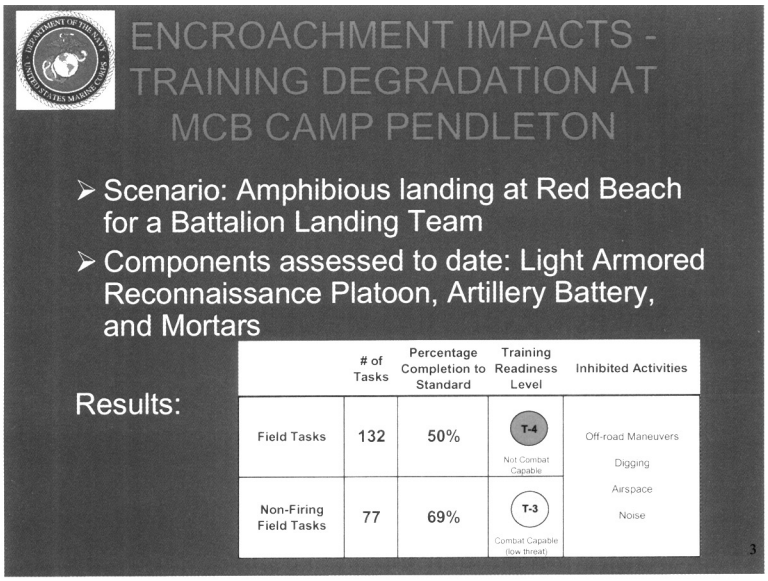

ENCROACHMENT IMPACTS - TRAINING DEGRADATION AT MCB CAMP PENDLETON
Scenario: Amphibious landing at Red Beach for a Battalion Landing Team
Components assessed to date: Light Armored Reconnaissance Platoon, Artillery Battery, and Mortars
Results:
# of Tasks
Percentage Completion to Standard
Training Readiness Level
Inhibited Activities
Field Tasks
132
50%
T-4
Not Combat Capable
Non-Firing Field Tasks
77
69%
T-3
Combat Capable (low threat)
Off-road Maneuvers
Digging
Airspace
Noise
3

Figure 3

Naturally, evidence of negative encroachment impacts is not limited to the Camp Pendleton Quantitative Study. Perhaps the most sweeping example within the Marine Corps is the recent effort to designate critical habitat on 57 percent of the 125,000-acre Camp Pendleton and 65 percent of the 12,000-acre Marine Corps Air Station Miramar. The Marine Corps worked with the U.S. Fish and Wildlife Service to develop a scientifically and legally based policy that precluded the need to designate critical habitat on Miramar, and precluded the designation of critical habitat on the vast majority of Camp Pendleton. This matter is still subject to legal challenge by special interests groups. The Readiness and Range Preservation Initiative has within it a provision that would codify current Fish and Wildlife Service policy. Absent the passage of this specific provision, environmental litigation may still cause over 65 percent of Marine Corps Air Station Miramar and over 50 percent of Camp Pendleton to be designated critical habitat.

As our legislative response to the Pendleton/Miramar critical habitat proposals demonstrate, clarification of existing law in accordance with Administration policy is the purpose of the Initiative. A roll back of the environmental stewardship responsibilities of the armed forces is not the intent of the Initiative. Rather, by clarifying relevant environmental statutes, the Initiative will enhance the ability of the armed forces to train properly for combat.

A military installation can be viewed as a "tale of two cities." On the one hand, our installations are comparable to many medium-sized cities, complete with populations of 50,000 residents, schools, wastewater treatment facilities, power plants, and a hospital. There are environmental responsibilities associated with each of these amenities, and we seek no relief from any of these responsibilities. A military installation, however, is also a military combat test and training center. The primary purpose of the military installation is to promote military readiness. No civilian city has a similar purpose. It is within the venue of military readiness, that we seek to address the impact of encroachment on combat readiness activities. Our goal is to establish the appropriate balance between our Title X responsibility to be combat ready at all times, and our additional environmental compliance and stewardship responsibilities. The Initiative's provisions are focused solely on readiness activities. Marine Corps activities unrelated to combat remain unchanged.

Encroachment has grown over time, and while each individual issue may not seem detrimental to our training mission, it is the cumulative effect of these, and the foreseeable increase in these encroachment pressures that has lead the Department of Defense to seek the clarifications of existing statutes.

Many of the measures included within the Department of Defense legislative proposal, and all of the provisions included within the House version of the 2002 Department of Defense Authorization Bill, are designed to maintain the status quo so that our training can continue at its current pace. For example, the migratory bird provision is designed to address a recent court opinion that would, if left unchecked, introduce a new requirement into the Migratory Bird Treaty Act regulatory framework not present in over 80 years of the Act's history. Similarly, the critical habitat provision codifies the current Fish and Wildlife Service policy. This policy holds that Integrated Natural Resource Management Plans prepared pursuant to the Sikes Act provide the special management considerations necessary under the Endangered Species Act. Critical habitat designation on military installations is, therefore, unnecessary. The ecosystem management initiatives at Camp Pendleton in California that resulted in an increase in the number of nesting pairs of California least terns (an endangered shorebird) from 209 pairs in 1985 to 1,064 pairs in 2001 is an illustration of the success of our natural resource management plans.

The Marine Corps is a good steward of the resources entrusted to it. We are particularly proud of our success in the recovery of endangered species at Camp Pendleton and the proactive timber management at Marine Corps Base Camp Lejeune. We have also worked tirelessly to preserve archeological resources at the Marine Corps Recruit Depot Parris Island and to provide public access to recreation areas at the Marine Corps Logistic Base, Albany. Our programs provide for multi-function use of the real estate we manage—as long as it does not compromise the installation's particular national defense mission.

As I noted above, environmental protection and Marine Corps training are compatible. Our responsibility to the American people is to maintain a high state of readiness while preserving and protecting the environment of the Nation. Unlike commercial developers, the military needs a natural environment for realistic field training. In fact, our environmental management efforts have resulted in military lands supporting proportionally a much higher number of endangered species than Departments of Interior or Agriculture lands.

Passage of the Readiness and Range Preservation Initiative is imperative because encroachment threatens to extend existing laws and regulations beyond the contexts

for which they were intended, frustrating the use of military lands and test and training ranges for their designated purposes. The Initiative is key to future readiness. It is an appropriate response to the encroachment threat, and I encourage your full support for this balanced approach toward both the requirement to maintain military readiness and the requirement to protect the environmental resources of the Nation.

RESPONSES OF GEN. MICHAEL J. WILLIAMS TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. General, it has been said that you "now seek permanent waivers of the laws that apply to [military] facilities". Is that fair comment? If not, why isn't it fair comment?

Response. Our initiatives have been portrayed by some as attempting to "exempt" the Department of Defense from environmental statutes. In reality, the Readiness and Range Preservation Initiative would apply only to military readiness activities, not to closed ranges or ranges that close in the future, and not to the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage, schools, housing, motor pools, and ongoing cleanup activities. Our initiative thus excludes DOD activities that have traditionally been of greatest concern to State and Federal regulators, and includes only uniquely military activities—what the Department does that is unlike any other governmental or private activity.

The Department is seeking modest clarification in these laws; our proposals would confirm—not change—regulatory policies that were put in place under previous Administrations. Our proposals are critical to sustaining readiness, while their environmental effects range from neutral to positive. We want to restore an appropriate balance between defense and environmental interests. The land, sea, and airspace we use to train our Marines are essential national assets, but environmental and other regulations can have unintentional consequences and greatly limit the military's ability to effectively train for combat.

Question 2. Are the emergency exemptions provided in some environmental laws sufficient to address the readiness concerns you discussed in your testimony?

Response. Our initiative does not seek to "exempt" even our readiness activities from environmental laws. Rather, it confirms the previous Administration's policy in three areas: (1) INRIVIPs and critical habitat; (2) "harassment" under the Marine Mammal Protection Act; and (3) Federal agency obligations under the Migratory Bird Treaty Act. Moreover, our initiative gives States and DoD only temporary flexibility under the conformity provisions of the Clean Air Act, not permanent relief. The limited changes that we seek are a more limited approach than under the emergency authority available in most (but not all) environmental laws. For example, invocation of existing emergency authority would fully exempt DoD from environmental compliance responsibilities, thereby increasing the possibility of environmental harm. Although existing exemptions are a valuable hedge against unexpected future emergencies, they cannot provide the legal basis for the Nation's everyday military readiness activities. Training at Camp Pendleton, for example, is continuous, 365 days a year, with an average of 130 daily training events. The Range and Readiness Preservation Initiative is designed to address these day-to-day military training needs. If I may be permitted to offer the following analogy: every car should have a tool-box for emergencies; if you need the tool-box to get to work every day, you probably need to fix the car. We shouldn't have to use an exemption process to conduct daily training. We should, instead, fix the car. We seek to address the impact of encroachment on combat readiness activities, not to roll back environmental requirements as some have alleged. Our goal is to establish the appropriate balance between our Title X responsibility to be combat-ready at all times, and our additional environmental compliance and stewardship responsibilities. The Initiative's provisions are focused solely on readiness activities. Marine Corps activities unrelated to combat remain unchanged.

STATEMENT OF GEN. ROBERT H. FOGLESONG, VICE CHIEF OF STAFF, U.S. AIR FORCE

INTRODUCTION

Committing this Nation to combat is arguably the hardest decision the President and Congress will have to make. This Nation's leadership expects, even demands, that its military be ready to go to war. The effectiveness of America's military ulti-

mately guarantees our way of life. The United States Air Force's effectiveness starts with training—training the way we fight. Key provisions in this year's Defense Authorization Act (S. 2225) impact how we will manage the installations, ranges, and airspace so vital to our combat readiness and effectiveness.

Maintaining continued operations at our installations and access to our ranges and airspace is critical. In fact, if our ability to train our aircrews should diminish, America will soon lose its edge in air combat proficiency. We cannot solely rely on current Air Force technology to provide an advantage against our next adversary—our next adversary may have access to more advanced equipment than ours. Our installations, ranges, and airspace are critical national assets that allow the Air Force to test new equipment, develop new tactics, and train our forces to be combat-ready.

It is self-evident that we must be able to train as we are expected to fight. To do so, we must maintain adequate test and training resources. Our goal is to meet our evolving military needs while addressing and resolving, to the maximum extent possible, public concerns and Federal, tribal, State, and other agency issues. However, competing needs or uses for these resources, coupled with legal and procedural requirements to adjust for new mission needs, are eroding the resource base that supports our test and training capability.

We have followed a practice of flexibility and willingness to adapt to the extent possible without compromising our operations. Sustainable access to ranges benefits many people. Our ranges contain significant cultural and natural areas, are used for grazing and crop production, and allow hunting or other forms of outdoor recreation. We share airspace and airwaves with major sectors of our economy. However, we are faced with restrictions as well as competing economic uses for assets that undermine our mission performance and can ultimately affect our readiness, a condition commonly referred to as encroachment.

RANGE MANAGEMENT AND ENCROACHMENT

The Air Force is experiencing encroachment that stresses our ability to maintain training and readiness in several areas: spectrum, air quality, noise, unexploded ordnance, endangered species, and access to shared-use airspace. Chapter 101A of S. 2225 contained language designed to clarify the interpretation and application of governing statutes for air quality, munitions response, and species and habitat protection that will ensure that military training and readiness are not compromised as the military departments carry out their environmental protection responsibilities. In addition, the legislation provides for improved property conservation procedures to assist private sector organizations in conserving and protecting land and natural resources.

SPECIES AND HABITAT PROTECTION

Currently, 79 federally listed threatened and endangered species live on approximately nine million acres of Air Force lands and waters. As an example, on the Barry M. Goldwater Range (BMGR) in Arizona we follow the movement of approximately 100 Sonoran Pronghorn antelope. The DoD flies about 70,000 sorties yearly on the BMGR and our biologists track the antelope's movements to ensure they are not in the target area. If they are spotted, the missions projected for that area are diverted or canceled. Working hand-in-hand with the U.S. Fish and Wildlife Service (FWS) and the Arizona Department of Game and Fish, we strive to ensure the survival of this endangered subspecies of antelope.

At the Nevada Test and Training Range (NTTR), operated by Nellis Air Force Base, the Air Force supports the Bureau of Land Management's wild horse program on over 390,000 acres of the NTTR. In the southern portion of the range we have fenced target areas to ensure the Desert Tortoise is not affected by our operations. Additionally, in Nevada and Arizona we work with local communities and tribes to ensure the protection of cultural resources.

At Tyndall Air Force Base in Florida, we monitor the nests of about 100 Loggerhead and Green Sea Turtles daily, physically protecting their homes with wire mesh. We do this to ensure compliance with the Endangered Species Act (ESA) and guarantee our aircrews get the training they need to accomplish their mission.

At Eglin Air Force Base in Florida, we electronically tag and track endangered Gulf Sturgeon to ensure they are not impacted by our operations. The water impact/detonation area is monitored for sturgeon prior to training. If sturgeon are detected in the area, detonation is moved or delayed. Eglin also serves as the home to the endangered Red-Cockaded Woodpecker. By working closely with the FWS, we have been able to nearly double their population. Additionally, our biologists are doing everything possible to aid the Flatwoods Salamander and Eastern Indigo Snake.

Again, we do this to support the ESA, serve as good stewards of our nation's resources, *and* maintain our combat readiness.

In some cases, our installations and ranges are the only large, undeveloped, and relatively undisturbed areas remaining in growing urban areas. This can result in Air Force lands becoming a refuge in the region that can support endangered species. Biological Opinions resulting from required Endangered Species Act assessments have resulted in range and airspace restrictions mainly associated with aircraft noise and munitions use. We operate with altitude restrictions because of the noise and its possible effects on endangered species in States such as Arizona, New Mexico, and Texas.

The potential designation of range areas as a critical habitat or marine sanctuary may seriously limit our ability to perform training and test missions. We need to work within the Administration to ensure a balance between two national imperatives: military readiness and environmental conservation.

UNEXPLODED ORDNANCE (UXO)

UXO and the disposal of residue material (primarily scrap metal) on air-to-ground ranges is one area where we have extensively investigated our practices and policies. UXO and range residue (used targets, inert ordnance, etc.) physically occupy only a small part of any air-to-ground range, but its presence is an increasingly expensive problem. The costs associated with clearing closed ranges have led us to the conclusion that we need to plan and manage for the entire life-cycle of a range.

The Air Force first started clearing ordnance from active ranges in the late 1940's. Active range clearance not only provides for safe target area operations, but also provides airfield-recovery training for our Explosive Ordnance Disposal technicians. Air Force policy requires that active air-to-ground ranges be cleared on a quarterly, annual, and 5-year basis at varying distances from each target. Our currently scheduled UXO and residue removal program, along with modifications to our range-clearing practices, will ensure long-term range sustainability and the safety of personnel on the range. Our ultimate goal is to manage our ranges effectively and efficiently throughout the life-cycle process providing for sustainable operations, safe and effective UXO management and long-term environmental stewardship.

The Air Force also understands its responsibility to manage materiel from our ordinance if it travels off-range, and supports Section 2019 of the bill because it clarifies our obligation to respond to potential offsite impacts from our munitions training.

AIR QUALITY

Many of our largest and most important installations are located in areas that are experiencing rapid growth and the attendant pressures resulting from air quality standards. A number of our bases are currently located in "non-attainment" areas, which are places that failed to meet EPA standards for air pollution, and more bases are in areas that are trending toward non-attainment. Air quality pressures generally affect operations at our installations more than on our ranges, but they potentially limit our basing options for force realignments and weapon system beddowns. If any beddown action is found not to conform to the State implementation plan for Clean Air Act compliance, the Air Force must either obtain air quality credits or reduce other emissions at the base to counterbalance the impact. Military mission requirements frequently demand operational changes with little or no lead-time to adjust for requirements such as conformity. The Air Force supports the legislative provision that allows for emission limit compliance over a 3-year period so that mission critical operations can still take place while appropriate mitigation is arranged. We continue to work with State regulators and local communities to ensure we have the flexibility to base aircraft at our installations which have huge investments in infrastructure not only on the installation itself, but also in the ranges used by its aircraft.

SPECTRUM REALLOCATION

The RF frequencies below about 5000 MHz are the most valuable part of the spectrum for the kinds of highly mobile functions carried out at our test ranges. Over the past decade, the Federal Government has lost access to over 235 MHz of bandwidth in this part of the spectrum—due primarily to International and congressionally mandated reallocations. For example, until 1992, the DoD and private sector aerospace industry were authorized to use 80 MHz of designated spectrum in "Upper-S Band" to transmit real-time telemetry data from flight tests of manned aircraft. This spectrum bandwidth was needed to support increasing telemetry bandwidths requirements for future fighters and bombers. In 1992, the World Radio

Conference (WRC) reallocated the lower 50 MHz of this frequency band to provide spectrum for broadcasting high quality audio from geostationary satellites. In 1997, under the requirements of the Balanced Budget Act of 1997, we were forced to transfer an additional 5 MHz of the original 80 MHz wide frequency band, leaving only a 25 MHz increment for flight test telemetry in this spectrum. Loss of this 55 MHz of spectrum causes, for example, delays in major flight-test programs.

CONCLUSION

In conclusion, we thank the committee for allowing the Air Force to share the details of its concerns over the growing issue of encroachment. The Air Force understands its obligation to identify competing human and environmental needs and to establish a compatible use of resources. However, it also recognizes it has a unique need to perform a military mission. The multi-billion dollar effort in Defense programs to conserve, protect, and restore the environment will continue to achieve lasting successes in all areas of protecting human health and the environment. The Air Force appreciates the committee's support so that we can maintain our stewardship of the environment and still train and prepare the men and women of the Armed Forces.

RESPONSES OF GEN. ROBERT H. FOGLESONG TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. General, some have criticized the House of Representatives for including in its version of the fiscal year 2003 Defense Authorization Bill two of your requests, [regarding ESA and MBTA], specifically because the House had too little information to justify including such provisions. Is that fair comment? If not, why isn't that fair comment?

Response. The Air Force believes the request for legislative relief was valid for two reasons. First, the military departments have provided Congress, 0MB, and other Federal agencies detailed compilations of the numerous and problematic instances where expansive interpretations of these two statutes have impaired military readiness. Second, the GAO report on military encroachment concluded that the "DOD and the military services have lost training range capabilities and can be expected to experience increased losses in the future absent efforts to mitigate encroachment."

Question 2. The GAO report recommends that the DoD develop and maintain inventories of its training ranges, capacities and capabilities; finalize a comprehensive plan of administrative actions that includes goals, timelines, projected costs, and the clear assignment of responsibilities for addressing encroachment issues, and periodically reporting on progress in addressing encroachment issues. What are the Department's plans in terms of implementing these recommendations?

Response. The Air Force is developing an Environmental Resource! Capability Framework designed to identify, quantify, and assess how military readiness can be adversely affected when access to the resource base needed for training is limited or degraded from incompatible uses, statutory restrictions, or economic competition. This will enable the Air Force to measure the extent to which encroachment has caused, or will cause training and operational deficiencies.

Question 3. Admiral Fallon responded to a question as to how he could justify the RRPI in light of the fact that there "has been no evidence, not even a study, on what the problem is". What response would the Air Force have to this question?

Response. The Air Force has provided Congress, 0MB, and other Federal agencies with examples of impairments to military readiness due to encroachment. In addition, the GAO report on military encroachment concluded that "DOD and the military services have lost training range capabilities and can be expected to experience increased losses in the future absent efforts to mitigate encroachment."

STATEMENT OF JAMIE RAPPAPORT CLARK, SENIOR VICE PRESIDENT FOR CONSERVATION PROGRAMS, NATIONAL WILDLIFE FEDERATION

Good morning, Mr. Chairman and members of the committee. My name is Jamie Rappaport Clark and I am here to testify on behalf of the National Wildlife Federation, the nation's largest conservation education and advocacy organization. I thank the committee for this opportunity to testify on the interplay of our environmental laws and the Defense Department's readiness activities on its military bases.

I currently serve as Senior Vice President for Conservation Programs, where I oversee the organization's policy and advocacy work. Prior to arriving at National Wildlife Federation in 2001, I served for 13 years at the U.S. Fish and Wildlife Service, with the last 4 years as the Director of the agency. Prior to that, I served as Fish and Wildlife Administrator for the Department of the Army, Natural and Cultural Resources Program Manager for the National Guard Bureau, and Research Biologist for U.S. Army Medical Research Institute. I am the daughter of an U.S. Army Colonel, and lived on or near military bases throughout my entire childhood.

Based on this experience, I am very familiar with the Defense Department's long history of leadership in wildlife conservation. On numerous occasions during my tenures at FWS and the Defense Department, the Defense Department rolled up its sleeves and worked with wildlife agency experts to find a way to comply with environmental laws and conserve imperiled wildlife while achieving military preparedness objectives.

Today, we are at a crossroads. Will the Defense Department continue to build on its long record of wildlife conservation and respect for environmental laws and protections? Or will it now retreat from its historical role as one of the stewards of the nation's wildlife and take on a new role as an unregulated despoiler of our environment?

Unfortunately, at the highest levels of this Administration, efforts are underway to give the Defense Department an unwarranted free pass from complying with the nation's environmental laws. At the center of this effort is the Readiness and Range Preservation Initiative, a proposal by the Administration to exempt the Defense Department from key provisions of six environmental laws: the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the Marine Mammal Protection Act, the Clean Air Act, Resources Conservation and Recovery Act, and Superfund.

At the request of the Administration, all six of these exemptions were included in S. 2225, the Defense Authorization bill, as originally introduced in the Senate. Fortunately, they were not included in the Senate Armed Services Committee markup and were not added to the bill passed by the Senate on June 28, 2002. However, two of these proposed exemptions—concerning the ESA and the MBTA—were incorporated into the House version of the Defense Authorization bill. Two other riders not sought by DOD were also inserted—one that would undermine Utah wilderness protections, and one that would waive State environmental laws to allow a new toll road through endangered species habitat in southern California. Attached to my testimony are fact sheets prepared by NWF and colleagues from other environmental groups explaining each of these exemptions. The National Wildlife Federation, along with its colleagues in the rest of the environmental community, strongly urges Senators on the conference committee for the DOD Authorization bill to ensure that these attacks on environmental laws are kept out of the conferenced bill.

I should also note that the House has placed a rider on the FY02 Supplemental Appropriations bill that would exempt DOD from its ESA obligation to address the harmful effects of DOD decisions that deplete local water supplies. This exemption likewise is pending before a conference committee. We strongly urge Senators on the Supplemental Appropriations conference committee to ensure that these attacks on environmental laws are kept out of the conferenced bill.

OVERARCHING CONCERNS WITH THE ADMINISTRATION'S READINESS INITIATIVE

The ESA, MBTA and other environmental laws now under attack provide an essential bulwark of protection for the ecosystems that sustain us all. The American people understand the central role played by these laws in maintaining their health and safety and quality of life. According to an April 2002 poll by the Zogby public opinion research firm, 85 percent of Americans believe that the Defense Department, like all other Federal agencies, should comply with the nation's environmental laws.

The National Wildlife Federation recognizes that military readiness also is vitally important. However, where we part company with this Administration is on whether wholesale exemptions from environmental laws are needed to achieve readiness. The environmental laws targeted by this Administration already contain site-specific exemption and permitting procedures that enable the Defense Department to achieve its readiness objectives while still taking the environment into account.

The General Accounting Office recently investigated allegations that environmental laws and other kinds of encroachments are unduly restricting DOD's ability to carry out its readiness and training mission. According to GAO's June 2002 report, entitled "Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges," there is no proof that environmental laws are at fault for any of the minor gaps in readiness that may exist. Specifically, GAO found:

- The Armed Services' own readiness data does not show that environmental laws have significantly affected training readiness.
- DOD officials themselves admit that population growth around military installations is responsible for past and present encroachment problems.
- The Armed Services have never assessed the overall impacts of encroachment on training costs.
- DOD's readiness reports show high levels of training readiness for most units. In those few instances of when units reported lower training readiness, DOD officials rarely cited lack of adequate training ranges, areas or airspace as the cause.
- DOD has not fully defined training range requirements and lacks information on training resources available to the Services to meet those requirements. Problems at individual installations may therefore be overstated.

These findings make absolutely clear that DOD has not yet made its case that environmental laws have significantly reduced DOD's readiness. Before Congress embarks upon weakening fundamental environmental safeguards, DOD should be asked to produce a comprehensive study of the problems faced in achieving readiness. The study should investigate all of the potential obstacles to achieving readiness, including not only environmental laws but also sprawling human populations near military installations and ineffective growth management laws. The study also should include a discussion of alternative approaches for achieving readiness that do not conflict with the national environmental protection goals, such as using virtual or constructive simulation technology.

The DOD has provided a handful of anecdotes about the difficulties that it has faced protecting the environment at individual bases. I do not dismiss the challenges that DOD has faced in balancing environmental and readiness objectives at some of its bases. From my own experience at FWS, I know that some of these problems are vexing and can sometimes take years to resolve. However, these problems can best be addressed by early consultations between DOD officials and experts in FWS and other environmental agencies. Congress can help ameliorate these problems by providing these agencies with the funds they need to implement our environmental laws. Providing the funding needed for inter-agency consultations would be a cost-effective investment in both environmental protection and military readiness.

Providing nationwide exemptions to DOD would not eliminate the challenge of balancing environmental protections and military readiness. It would simply eliminate DOD's incentive to devise creative solutions working in tandem with experts at the environmental agencies and with the public. Congress should encourage DOD to work with other agencies and the public to solve readiness and environmental challenges at the local level, taking into account local conditions, taking advantage of local wisdom and using existing provisions of environmental laws.

It is my experience that the existing framework of environmental laws provides DOD with plenty of flexibility to achieve solutions at the local level. The National Wildlife Federation stands ready to work with DOD to find these solutions.

Because the proposed exemptions from the ESA and MBTA will soon be debated in conference committee, and because these are the laws with which I have significant experience, the remainder of my testimony today will focus on them. However, the other proposed exemptions likewise pose a serious threat to the environment and public health. I have attached to my testimony several fact sheets, prepared by colleagues in other conservation groups, explaining why the other exemptions are equally problematic.

CONCERNS WITH THE ENDANGERED SPECIES ACT EXEMPTION

The ESA exemption passed by the House differs slightly from the one introduced in the Senate as part of the Administration's package. Because the House language will be the subject of the upcoming debate in conference committee, I will focus on that version.

H.R. 4546 would prohibit the Fish and Wildlife Service or National Marine Fisheries Service (Service) from designating critical habitat on any lands owned or controlled by DOD if an Integrated Natural Resources Management Plan (INRMP) has been developed pursuant to the Sikes Act and the Service determines that the plan "addresses special management consideration or protection." This exemption is problematic in a number of respects.

Eliminates a Crucial Species Protection Tool

First, this exemption would take away a crucial tool for ensuring the survival and recovery of imperiled species. Of the various ESA protections, the critical habitat protection is the only one that specifically calls for protection of habitat needed for recovery of listed species. It is a fundamental tenet of biology that habitat must be

protected if we ever hope to achieve the recovery of imperiled fish, wildlife and plant species.

Under Section 7 of the ESA, DOD is required to consult about its proposed training actions with wildlife experts at the Services. This consultation typically leads to development of what is known as a "work-around," a strategy for avoiding or minimizing harm to listed species and their habitats while still providing a rigorous training regimen.

H.R. 4546 would replace these crucial protections with management plans developed pursuant to the Sikes Act, which does not require the protection of listed species or their habitats. It merely directs DOD to prepare INRMPs that protect wildlife "to the extent appropriate." Thus, even INRMPs that allow destruction of essential habitat and that put fish, wildlife or plant species at serious risk of extinction would be substituted for critical habitat protections.

Moreover, the ESA's consultation procedure that currently enables DOD and the Service to "look before they leap" into a potentially harmful training exercise would be sacrificed. Under H.R. 4546, the Service can do nothing more than rubber stamp DOD's management plan upon submittal, so long as the plan contains "special management considerations." The Service has no subsequent consultation role as individual training exercises are devised.

This reduction in species protection would have major implications for our nation's rich natural heritage. DOD manages approximately 25 million acres of land on more than 425 major military installations. These lands are home to at least 300 federally listed species. Without the refuge provided by these bases, many of these species would slide rapidly toward extinction.

Readiness Can Be Achieved Without Sacrificing Species Protection

A second reason why the ESA exemption is problematic is because it takes away crucial species protections without any clear gains in military readiness. There is simply no evidence that elimination of ESA protections would improve readiness. In fact, negotiations of work-arounds under the ESA typically produce a "win-win," where readiness is achieved while imperiled species are protected.

Allow me to provide a few brief examples. At Camp Lejeune in North Carolina, every colony tree of the endangered red-cockaded woodpecker is marked on a map, and Marines are trained to operate their vehicles as if those mapped locations are land mines. On the Mokapu Peninsula of Marine Corps Base Hawaii, the growth of non-native plants, which can decrease the reproductive success of endangered waterbirds, is controlled through annual "mud-ops" maneuvers by Marine Corps Assault Vehicles. Just before the onset of nesting season, these 26 ton vehicles are deployed in plow-like maneuvers that break the thick mats of invasive plants, improving nesting and feeding opportunities while also giving drivers valuable practice in unusual terrain.

These examples, along with additional ones that we provide in our ESA fact sheets attached to this testimony, highlight a major trend that I believe has been missed by those promoting the DOD exemptions. In recent years, DOD has increasingly incorporated the concept of sustainability into its management plans. It has done this not just in response to environmental laws, but also because sustainable use of DOD lands often makes sense from a military readiness and cost-effectiveness standpoint. By leaving woodpecker colony trees intact, DOD preserves a realistic training scenario for those who would be fighting battles in forested areas abroad. By operating tanks so that they avoid the threatened desert tortoise, DOD prevents erosion, a problem that is extremely difficult and costly to remedy.

The ESA Already Provides DOD With Two Safety Valves if Irreconcilable Conflicts Were to Arise

A third reason why the ESA exemption is problematic is because the ESA already provides DOD with the necessary flexibility to meet its training objectives. As I already mentioned, the Section 7 consultation process provides a very workable mechanism for DOD and the Services to negotiate solutions to virtually every challenge that arises. If that process does not lead to a solution, Congress provides at least two safety valves.

First, under Section 7(j) of the ESA an exemption "shall" be granted for an activity if the Secretary of Defense finds the exemption is necessary for reasons of national security. To this date, DOD has never sought an exemption under Section 7(j), highlighting that the challenge of reconciling training needs with species conservation is adequately being addressed in the Section 7 consultation process.

Second, under Section 4(b) of the ESA, the Service is authorized to exclude any area from critical habitat designation if it determines that the benefits of exclusion outweigh the benefits of specifying the area. (An exception is made for when the

Service finds that failure to designate an area as critical habitat will result in the extinction of a species—a finding that the Service has never made.) In making this decision, the Service must consider "the economic impact, and any other relevant impact" of the critical habitat designation. DOD has recently availed itself of this provision to convince the U.S. Fish and Wildlife Service to exclude the vast majority of habitat at Camp Pendleton—habitat deemed critical in a proposed rulemaking—from final critical habitat designations.

As this example illustrates, where there are site-specific conflicts between training needs and species conservation needs, the ESA provides a mechanism for resolving them in a manner that allows DOD to achieve its readiness objectives. Granting DOD a nationwide ESA exemption, which would apply in many places where no irreconcilable conflicts between training needs and conservation needs have arisen, would be harmful to imperiled species and totally unnecessary to achieve readiness objectives.

I have attached several ESA fact sheets that highlight additional reasons why a nationwide ESA exemption for DOD is inappropriate.

CONCERNS WITH THE MIGRATORY BIRD TREATY ACT EXEMPTION

The MBTA exemption passed by the House differs slightly from the one introduced in the Senate as part of the Administration's package. Because the House language will be the subject of the upcoming debate in conference committee, I will focus on that version.

H.R. 4546 completely exempts DOD from any obligation to comply with the MBTA when migratory birds are incidentally taken as a result of its readiness activities. This nationwide exemption would greatly reduce protection of migratory birds, and it has not been shown to be necessary to achieve readiness objectives.

The Defense Department has cited just one example of how the MBTA could be used to prevent it from achieving readiness objectives: the recent court ruling in *Center for Biological Diversity* v. *Pirie*, 2002 WL 389944 (D.D.C. 2002). In that case, a trial judge agreed with environmentalists that DOD had violated the MBTA in connection with its live fire training exercises on the island of Farallon de Medinilla. The court enjoined the training exercises until DOD secured a permit.

There are at least two important reasons why this court ruling should not form the basis for awarding DOD a nationwide exemption from MBTA. First, the ruling has been appealed, and the injunction will be stayed for the entire length of the appeal. It makes no sense to enact legislation when the sole basis for that action could disappear when the appellate court issues its ruling. Second, DOD has now applied to the U.S. Fish and Wildlife Service (FWS) for a "special purpose" permit to allow its live fire training activities on Farallon de Medinilla to continue. It would be premature for Congress to act before the permitting process has played itself out and the scope of the problem is better understood.

The National Wildlife Federation strongly opposes any legislative changes to the MBTA until at least two crucial steps are taken. First, Congress should give breathing space to collaborative efforts currently being undertaken by the Federal agencies. Beginning with the Administration in which I served and continuing with the current Administration, FWS has embarked upon developing a series of Memoranda of Understanding (MOUs) with each Federal agency with activities affecting migratory birds. These MOUs, which are designed to protect migratory birds while giving Federal agencies the flexibility they need to accomplish their missions, are an important step forward for the MBTA program, and Congress should provide sufficient time for the agencies to make them work.

Second, a thorough policy review is needed to determine how best to modernize the overall MBTA program. Growing human populations and sprawling development patterns have led to increased interactions between people and migratory birds and serious declines in many bird populations. Neither Congress nor recent Administrations have ever seriously attempted to grapple with this problem in a comprehensive way. Before making changes to this important statute, Congress should undertake or help launch a major review of the challenges faced in implementing the MBTA and the potential policy responses to those challenges. If this committee were to elect to proceed down this path, the National Wildlife Federation would be willing to assist. Among others, the following issues would need to be considered:

- What is the extent of incidental takings of migratory birds and their nests in the U.S.? Which human activities cause the greatest amount of takings? Which activities pose the greatest threat to bird populations?

- What strategies have been employed by FWS to protect migratory birds from harm caused by incidental takings? What improvements are needed? Can we buildupon these strategies, or is an entirely new approach needed?
- Does FWS have the authority to authorize incidental takings under the MBTA and the underlying treaties? What amount of mitigation or compensation would the Interior Department need to require from permit applicants to achieve compatibility with the MBTA and the treaties?
- Could FWS reasonably be expected to impose permitting requirements on non-Federal entities, which are not subject to the threat of citizen suits (as are Federal agencies under the APA)? If FWS exercises its discretion not to enforce the MBTA against non-Federal entities, could it reasonably be expected to impose permitting requirements solely on Federal entities?
- If FWS were to institute a program for the permitting of incidental take by Federal and/or non-Federal entities, how would the program be designed? How many permit applications could be expected? How would offsetting conservation measures be designed, funded, implemented and monitored?
- What funding is currently provided to FWS and other agencies to implement the MBTA? How much additional funding would be needed to implement a program for the permitting of incidental take? What are the prospects of securing such funding?
- What other policy approaches are available to regulate incidental take aside from a permitting program? How much funding would these approaches require?
- What has been the role of the States in implementing the MBTA? What role should they play?
- What would be the effect of deregulating incidental take? Are there ways to protect migratory birds from the harmful incidental effects of human activity apart from a regulatory prohibition?
- If we conclude that deregulating incidental take is appropriate with respect at least some kinds of human activity (e.g., certain DOD training exercises), could this be accomplished without congressional involvement? If congressional action is needed, would revision of the MBTA to exempt certain activities violate the underlying treaties? What would be the implications of treaty violations?
- Is work needed to clarify or improve the treaties? What is the potential for working with this Administration and Canada, Mexico, Russia and Japan on updating the treaty framework?

As this list of unanswered questions makes clear, updating the MBTA to address the major challenge of conserving migratory birds would not be a simple task. Allowing individual agencies faced with a site-specific problem to rush into Congress and secure nationwide exemptions would complicate the task even further. It would encourage any other agency with an MBTA issue to appeal immediately to Congress rather than participating in the normal administrative and judicial processes.

Congress should reject the Administration's attempt to secure an ad hoc exemption from the MBTA for DOD. Any changes to MBTA should be made only after careful study of the new approaches being taken, the problems being encountered and the potential policy solutions, and only after substantial opportunities for public input and debate. To sidestep these precautionary measures and grant ad hoc exemptions would potentially violate our treaty obligations to the countries with which we share migratory birds. Such an action also would betray the millions of people in this country who care deeply about the future of their migratory birds.

CONCLUSION

In summary, the National Wildlife Federation strongly opposes the Administration's efforts to exempt DOD from the nation's environmental laws. We urge Senators who participate in the conference committees for the Defense Authorization bill or the Supplemental Appropriations bill to reject the exemptions found in the House versions of those bills, as well as any other efforts to weaken environmental protection under the guise of national security.

Thank you for the opportunity to testify today.

OPERATION RCW: THE NEW AIR-GROUND TEAM

THE MARINES

WE'RE SAVING A FEW GOOD SPECIES

Teamwork between air and ground forces is critical to the success of the U.S. Marine Corps, but when Marines take the field at Camp Lejeune, they often find the

red-cockaded woodpecker already controls the sky. That's because the Marines, teaming up with the U.S. Fish and Wildlife Service, are proving that a first-rate military force can train while protecting endangered species. One result: the red-cockaded woodpecker is thriving at Camp Lejeune. That's what happens when your best friends are Marines.

NATIONAL WILDLIFE FEDERATION FACTSHEET:

OPPOSE ANY AMENDMENTS TO S. 2225 THAT WOULD EXEMPT DOD FROM THE ENDANGERED SPECIES ACT OR OTHER ENVIRONMENTAL LAWS

In response to a last-minute request from the Department of Defense (DOD), the House of Representatives added language to its FY03 defense authorization bill, H.R. 4546, that would greatly reduce DOD's obligations under the Endangered Species Act and other environmental laws. DOD will likely seek similar exemptions when S. 2225, the Senate Armed Service Committee's defense authorization bill, is reconciled with the House bill in conference committee.

H.R. 4546 would prohibit the Fish and Wildlife Service or National Marine Fisheries Service (Service) from designating critical habitat on any lands owned or controlled by DOD if an Integrated Natural Resources Management Plan (INRMP) has been developed pursuant to the Sikes Act and the Service determines that the plan "addresses special management consideration or protection." To safeguard this nation's natural heritage—especially the hundreds of imperiled species residing on military lands—this ESA exemption must be removed.

DOD CAN ACHIEVE READINESS WITHOUT WEAKENING THE ESA

H.R. 4546's changes to the ESA are not needed for DOD to take whatever action it deems necessary to achieve military readiness. The ESA already provides an exemption from the law's requirements if the Secretary of Defense finds an action must be carried out for reasons of national security. If protecting critical habitat hampers national security efforts at a particular training facility, DOD can seek an exemption under Section 7(j). To this date, no exemption has ever been sought. DOD also can request that the Service exercise its authority under the ESA to exclude specific parcels from critical habitat designations altogether where such designations would conflict with training needs. Providing DOD with a blanket legislative exemption, which would apply in the many places where no conflict between wildlife conservation and national security exists, is unjustified.

H.R. 4546 ELIMINATES THE DUTY TO DESIGNATE AND PROTECT CRITICAL HABITAT—A CRUCIAL SAFETY NET FOR SPECIES ON THE BRINK OF EXTINCTION

The ESA requires that the Service designate critical habitat, and that Federal agencies avoid taking action that will destroy or adversely modify that habitat. Critical habitat is defined by the ESA as habitat needed by imperiled species to remain viable over the long term. Whereas other ESA provisions focus on ensuring short-term survival needs, the ESA's requirement to protect critical habitat is the only provision that clearly addresses what is needed to achieve the law's basic goal—recovery and removal from the list of threatened and endangered species. Thus, critical habitat protection is an essential part of the law's "safety net" for imperiled species.

By requiring that critical habitat protection be replaced by INRMPs, H.R. 4546 would remove this crucial safety net. Unlike the ESA, the Sikes Act does not require protection of imperiled species. It merely directs DOD to prepare INRMPs that protect wildlife "to the extent appropriate." Under H.R. 4546, even INRMPs that put fish, wildlife or plant species at risk of extinction would be substituted for critical habitat protections.

H.R. 4546 DOES NOT PROVIDE FOR MEANINGFUL REVIEW OF INRMPS

Under its current informal policy, the Service applies a three-part test to determine whether an INRMP sufficiently protects imperiled species to justify substituting the INRMP for critical habitat designation. On at least three occasions over the past year, the Service concluded that INRMPs were not sufficiently protective and went forward with critical habitat designation. Under H.R. 4546, the Service's review function would essentially be eliminated. Instead, it would be required to substitute an INRMP for critical habitat protection whenever the INRMP "addresses special management consideration or protection." Under this exceedingly loose standard, the Service would essentially be precluded from designating critical

habitat on military lands, even in cases where the INRMP fails to adequately protect imperiled species.

H.R. 4546 WEAKENS SPECIES PROTECTIONS ON LANDS NOT USED FOR MILITARY TRAINING

H.R. 4546 requires that INRMPs be substituted for critical habitat protections on lands "owned or controlled" by DOD, regardless of whether the military is actually using those lands for any training exercises. Thus, the bill would exempt DOD from its ESA obligations even in places where no training is taking place. For example, at Camp Pendleton in southern California, DOD leases some of its land to the San Onofre State Beach Park. H.R. 4546 would deny critical habitat protections to several endangered species there, including the tidewater goby, California gnatcatcher, and the southwestern arroyo toad—causing harm to these species without providing any military benefits.

H.R. 4546 LEAVES SPECIES VULNERABLE TO HARM FROM NON-DOD FEDERAL ACTIVITIES

Where critical habitat has been designated on military land, offsite activities of non-DOD Federal agencies that cause harm to that habitat (e.g., road building by the Federal Highway Administration that causes excessive sedimentation in a salmon stream) would normally be subject to ESA review. Under H.R. 4546, this review, and a key opportunity for modifying the harmful activity, would be eliminated. This is because INRMPs, unlike critical habitat designations, govern only the activities of DOD.

H.R. 4546 REDUCES DOD'S DUTY TO CONSULT UNDER THE ESA

Despite its language stating that it does not affect the duty of DOD to consult with the Service under Section 7 of the ESA, H.R. 4546 in fact substantially reduces DOD's duty to consult. When an action is proposed in a habitat important to an imperiled species but not currently occupied, the consultation duty under the ESA normally arises only if that habitat has been formally designated as critical. Under H.R. 4546, critical habitat designation would be eliminated, and thus DOD would be relieved of any responsibility to consult with the Service about the impact of its activities.

H.R. 4546'S ESA LOOPHOLE WAS ADOPTED WITHOUT ADEQUATE OPPORTUNITY FOR REVIEW

The House adopted DOD's proposed ESA loophole without any hearings or any other effort to receive input from individuals and groups outside DOD. Such far-reaching changes to the ESA, our nation's most important wildlife law, should be considered carefully within the committee of jurisdiction, with adequate time for review and input by interested and knowledgeable parties.

Please ask your Senators to oppose amendments to the Defense Authorization bill that exempt DOD from the Endangered Species Act and other environmental laws!

CONSERVING IMPERILED WILDLIFE AT MILITARY BASES: DOD HAS NOT IDENTIFIED ANY PROBLEMS JUSTIFYING AN ESA EXEMPTION

At the request of the Department of Defense (DOD), the House of Representatives has added language to its FY03 defense authorization bill, H.R. 4546, that would greatly reduce DOD's obligations under the Endangered Species Act and other environmental laws. DOD will likely seek similar exemptions when S. 2514, the Senate Armed Service Committee's defense authorization bill, comes to the Senate floor or in conference committee.

The General Accounting Office has concluded, based on a review of DOD's own readiness reports, that the military is at a high state of readiness and that DOD has never demonstrated that the ESA has significantly impeded training.

Why does DOD nonetheless seek a sweeping ESA exemption? It turns out that DOD has nothing to offer besides a handful of anecdotes about being required to come to the negotiating table to develop "work arounds" to protect the last remaining habitats of endangered species. An analysis of these anecdotes shows that sweeping exemptions from the ESA are unwarranted—DOD has been able to carry out its training mission while complying with the ESA. Due to these successful negotiations, DOD has never found it necessary to utilize the "national security" exemption procedure provided by the ESA.

CAMP PENDLETON, CALIFORNIA

DOD ASSERTION: "Sixty percent of Camp Pendleton is designated as critical habitat for the endangered California gnatcatcher" threatening to render the base "unusable for realistic combat training."

THE REST OF THE STORY: This is incorrect. The U.S. Fish and Wildlife Service (FWS) initially proposed to designate critical habitat for the gnatcatcher at Camp Pendleton, but ultimately determined that the benefits of exclusion outweighed the benefits of designation and exercised its discretion under current law to exclude all of Camp Pendleton from the gnatcatcher's critical habitat designation.

In fact, despite the presence of 18 endangered species, less than 6 percent—not the reported sixty percent—of Camp Pendleton's 125,000 acres is designated as critical habitat for any species. Camp Pendleton's successful efforts to protect the endangered snowy plover were recently celebrated in DOD's "We're Saving a Few Good Species" poster campaign, with DOD declaring that "an elite military force can train in environmentally sensitive areas and protect a threatened species at the same time."

DOD ASSERTION: "There's 17 miles of beach line at Camp Pendleton and about 500 yards of that can be used for amphibious operation."

THE REST OF THE STORY: The biggest limitation on training is not critical habitat designation but the presence of Interstate 5, the San Onofre Nuclear Generation Plant and other topographic access limitations. The ESA only limits large-unit amphibious landings on two to three miles of the 17-mile beach and only during the 5- to 6-month nesting seasons of the endangered Western snowy plover and California least tern.

NAVAL BASE AT CORONADO, CALIFORNIA

DOD ASSERTION: "When Navy SEALs land on beaches at Naval Base Coronado during nesting season, they have to disrupt their tactical formation to move in narrow lanes marked by green tape, to avoid disturbing the nests of the Western snowy plover and California least tern."

THE REST OF THE STORY: Of the base's 5,000-yard ocean coastline, the presence of these two endangered birds only restricts the use of one, 500-yard training lane and the restriction is only in place for the birds' 5- to 6-month nesting season. And, as the Navy acknowledges, this nest-marking "work around" has been important to species recovery.

SAN CLEMENTE ISLAND, CALIFORNIA

DOD ASSERTION: The presence of the endangered loggerhead shrike shorebird has curtailed "the use of illumination rounds or other potentially incendiary shells during shore bombardment exercises at San Clemente during the 6-month loggerhead shrike breeding season."

THE REST OF THE STORY: The loggerhead shrike first became imperiled on the island due to the Navy's introduction of a goat that decimated the bird's habitat. As a result of conservation efforts on the island, the shrike's population, once as low was 13 birds, now consists of 106 birds.

The use of live ordinance is restricted from June to October (not during the February-June breeding season) because of the risk of fire, but this could be remedied by the use of inert ordinance. The sole reason provided by the Marine Corps for its failure to use inert ordinance is that its inventory of this kind of ordinance is limited.

VIEQUES ISLAND NAVAL RANGE, PUERTO RICO

DOD ASSERTION: ESA protections for the endangered hawksbill and leatherback sea turtles have restricted training at this range, including the possibility of "halting the entire training exercise for a Carrier Battle Group in the event of observing a single sea turtle."

THE REST OF THE STORY: As a result of formal consultation under the ESA, the Navy agreed to institute precautionary conservation measures. In response, FWS issued a no-jeopardy Biological Opinion allowing battle group exercises to go forward without fear of delay due to the ESA. The Navy's conservation measures, such as the relocation of turtle eggs to a hatchery during amphibious landings, have resulted in the successful hatching of over 17,000 hawksbill and leatherback sea turtle eggs.

BARRY M. GOLDWATER AIR FORCE RANGE, ARIZONA

DOD ASSERTION: "In the calendar year 2000, almost 40 percent of the live fire missions at the Goldwater Range were canceled."

THE REST OF THE STORY: This base is home to the last remaining Sonoran pronghorn in the United States—with just 99 animals left, it is one of the most endangered species of large mammals in the world. The pronghorn's continued existence is threatened by air and ground maneuvers, including bombing, strafing, artillery fire and low-level flights. Despite this fact, DOD's proposed legislation would not address the situation at Goldwater, as FWS has not designated any of the range as critical habitat for the pronghorn out of fear that doing so "could seriously limit the Air Force's ability to modify missions on its lands." In return, the Air Force is participating in a regional ecological study with the Department of the Interior, the Nature Conservancy, and the Sonoran Institute as a starting point for their conservation efforts.

FORT HOOD, TEXAS

DOD ASSERTION: "Only about 17 percent of Fort Hood lands are available for training without restriction."

THE REST OF THE STORY: Endangered species conservation measures are singled out for blame in the limitation of training exercises at Fort Hood, yet over 74 percent of the base's 217,600 acres are currently restricted in order to accommodate large-scale cattle operations. Conversely, less than 34 percent of Fort Hood's training land has faced limited restrictions because of the presence of two endangered birds, the black capped vireo and the golden cheeked warbler. Even on these restricted lands, however, many training activities are still allowed. In certain "core areas" within the endangered birds' habitat, the use of chemical grenades, artillery firing and digging are limited.

DOD has successfully worked with the ESA to achieve its military readiness objectives while conserving imperiled species. Please ask your Senators to oppose amendments to the Defense Authorization bill that exempt DOD from the Endangered Species Act and other environmental laws!

DOD HAS A LONG HISTORY OF WORKING SUCCESSFULLY WITH THE ESA

At the request of the Department of Defense (DOD), the House of Representatives has added language to its FY03 defense authorization bill, H.R. 4546, that would greatly reduce DOD's obligations under the Endangered Species Act (ESA) and other environmental laws. DOD will likely seek similar exemptions when S. 2514, the Senate Armed Service Committee's defense authorization bill, comes to the Senate floor or in conference committee.

DOD argues that the ESA is too inflexible and that a sweeping new exemption is needed. However, this argument is not based on having encountered insurmountable hurdles complying with the ESA. In fact, the General Accounting Office has concluded, based on a review of DOD's own readiness reports, that the military is at a high state of readiness and that DOD has never demonstrated that the ESA has significantly impeded training.

Nonetheless, without any public debate, DOD seeks to bypass the ESA's careful balancing between military training needs and conservation of imperiled wildlife. The facts show that this would be an unfortunate and unnecessary departure from DOD's long history of working successfully with the ESA.

MARINE CORPS AIR STATION MIRAMAR, CALIFORNIA

In an effort to protect the station's ten endangered species, the U.S. Fish and Wildlife Service (FWS) initially proposed to designate 65 percent of Miramar's land area as critical habitat. FWS later exercised its discretion under existing law and withdrew this proposed designation after the Marine Corps established a framework to protect and preserve the station's endangered species, guaranteed the plan would be implemented, and defined measures to judge the plan's effectiveness. According to DOD, in so doing, "the plan made military readiness activities and endangered species protection mutually compatible."

MOKAPU PENINSULA OF MARINE CORPS BASE HAWAII

Among the 50 species of birds that call this island home are all four of Hawaii's endangered waterbirds: the Hawaiian stilt, Hawaiian coot, Hawaiian gallinule, and the Hawaiian duck. Management activities at the base have more than doubled the

number of stilts on the base over the past 20 years. The growth of non-native plants, which can decrease the waterbirds' reproductive success, is controlled through annual "mud-ops" maneuvers by Marine Corps Assault Vehicles (AAVs). Just before the onset of nesting season, these 26 ton vehicles are deliberately deployed in supervised plow-like maneuvers that break the thick mats of invasive plants, improving nesting and feeding opportunities while also giving drivers valuable practice in unusual terrain.

AIR FORCE IN ALASKA

In 1995 FWS found that the Air Force's low-level, high speed training flights in Alaska had the potential to disturb the three North American subspecies of endangered peregrine falcons. After the Air Force consulted with FWS under the ESA, the Air Force agreed to protective "no-fly" zones around dense peregrine nesting locations. The peregrine falcon has since recovered to the point that it has been removed from the ESA's list of threatened and endangered species, and FWS has declared that "the knowledge gained by Air Force research projects was important in the recovery process."

MARINE CORPS BASE CAMP LEJEUNE, NORTH CAROLINA

Initially 10 percent of this base was restricted in order to protect the red-cockaded woodpecker, but now only 1 percent of the base is restricted for that purpose, as the number of breeding pairs of the bird have doubled in the past 10 years. The Marines attribute the success of its conservation efforts to its partnership with FWS, the State of North Carolina, academic experts, and environmental advocacy groups.

FORT BRAGG, NORTH CAROLINA

Fort Bragg contains important habitat for the red-cockaded woodpecker, enabling the base to proudly claim that "this single species has survived because of the havens provided by our installations' training land and ranges." Working with the Nature Conservancy and others, DOD has created buffers around its installations and training areas, lessening restrictions on training while enabling the endangered red-cockaded woodpecker to move closer to recovery.

DOD has successfully worked with the ESA to achieve its military readiness objectives while conserving imperiled species. Please ask your Senators to oppose amendments to the Defense Authorization bill that exempt DOD from the Endangered Species Act and other environmental laws!

TITLE XIV-UTTR—A BACKDOOR ATTACK ON UTAH WILDERNESS IN DEFENSE AUTHORIZATION ACT H.R. 4546

The Defense Authorization Act passed out of the Armed Services Committee of the House of Representatives with a last minute anti-wilderness provision inserted in the Chairman's Mark.

This last minute addition (Title XIV-UTTR) would:

1. Undermine the Wilderness Act of 1964 with unacceptable and unjustified wilderness management language;
2. Dramatically expand DOD control of over 11 million acres of Bureau of Land Management (BLM) public land when DOD currently controls only the airspace above these lands
3. Designate minimal acreage as wilderness which would have less protection than these lands currently have as Wilderness Study Areas;
4. Stop a BLM planning process which will likely result in additional Wilderness Study Areas.

This Utah Test & Training Range (UTTR) provision has the following serious problems:

1. It puts in place never-before used management language for newly designated wilderness that would allow new and unrestricted on-the-ground military development on Bureau of Land Management (BLM) lands designated as wilderness; allow the military to unilaterally close public access within designated BLM wilderness; explicitly deny a Federal water right necessary to protect wildlife and other natural resources within designated wilderness; and release 100,000's of acres of BLM-identified wilderness-quality lands from current and future consideration as Wilderness Study Areas. Taken together, these provisions go far beyond any language ever included in enacted wilderness legislation.
2. It would also put in place unprecedented high levels of DOD control for all BLM lands falling underneath the airspace of the Utah Test and Training Range

(UTTR)—turning about 10,000 square miles of Utah into a de facto military reserve by requiring that the Secretary of Interior get permission from the Secretary of the Air Force and the Utah National Guard before changing or updating any Resource Management Plan for BLM lands falling underneath UTTR airspace.

3. Finally, it would dramatically shortchange the American public when it comes to protecting deserving wilderness lands. The provision designates as wilderness only a small portion of lands included in America's Redrock Wilderness Act (H.R. 1613 and S. 786)—a bills currently co-sponsored by 162 members of the House of Representatives and 16 members of the Senate.

At the least, this far-reaching attempt to weaken the Wilderness Act of 1964, expand DOD control over BLM lands, and shortchange the amount of wilderness to be designated in Utah should go through normal congressional processes, including congressional hearings where the public has an opportunity to comment. Burying this provision in the Defense Authorization Bill so that it cannot be considered in the light of day is a serious abuse of the legislative process.

In addition:

1. DOD has not released any reports demonstrating a need for Title XIV.
2. DOD has not requested Title XIV.
3. There has never been any conflict between conservation groups and the DOD use of the Utah Test and Training Range airspace even though over 440,000 sorties have been flown in the UTTR airspace since the Wilderness Study Areas were created.
4. Title XIV has not been the subject of a congressional hearing in the House or Senate Armed Services Committees.
5. Title XIV was not subject to the regular amendment process in the House Armed Services Committee due to its introduction as part of the Chairman's mark.
6. The House Resources Committee and the Senate Energy Committee are the committees having jurisdiction over all decisions concerning wilderness on BLM lands but have had no opportunity to review or comment on Title XIV.
7. Title XIV was not subject to amendment on the House floor even though an amendment to strike Title XIV was sought by the ranking member of the House Armed Services Committee, the House Minority Leader, and the sponsor of H.R. 1613 (America's Redrock Wilderness Act) which is cosponsored by 162 House members. Additionally, Representative Boehlert (R–NY) sent a memo to other moderate House Republicans indicating that he would vote to strike Title XIV if an amendment to strike was allowed on the House floor by the Rules Committee.
8. The eventual rule that guided House floor debate was highly contested—passing on a narrow 215–200 vote.

The view that Title XIV is both procedurally and substantively flawed is shared by many members of the Armed Services Committee—see pages 348–349 of their report for "Additional Views Concerning Title XIV—Utah Test and Training Range." These members of the Armed Services Committee conclude their assessment of Title XIV with the following:

> The bottom line is two fold. All House members have a stake in preserving the committee process. House rules on committee jurisdiction exist for a reason, and we should abide by them absent some compelling exceptional justification. None has been provided here.
>
> Second, it is wrong to ram through any committee contentious provisions of sweeping scope and substantive import. This wrong has been exacerbated in this case by the absence of committee hearings and the legislative legerdemain of embedding a previously unseen title of the bill in the chairman's mark.
>
> We cannot sanction procedural and substantive transgressions of this magnitude.

DoD Fiscal Year 2002 Authorization—Foothill Tollroad Rider Fact Sheet

OVERVIEW

The House Version of the fiscal year 2002 Department of Defense Authorization Act contains a provision that would *exempt the Secretary of Defense from California State law* when granting an easement for a controversial, environmentally damaging toll road through a California State Park that is leased to California by the Marine Corps.

THE FOOTHILL TOLLROAD SOUTH

• Sixteen mile-long, four lane toll road in southern Orange County and northern San Diego County
• The road will bisect some of the last open space in southern Orange County, pave over vital habitat critical to the survival of at least eight endangered species (including steelhead trout and the coastal California gnatcatcher), greatly expand urban sprawl and increase water pollution.
• The "preferred alignment" of the toll road will also run directly through San Onofre Beach State Park.
  • The park comprises over 2,000 acres and is part of one of the last large coastal open spaces in Southern California.
  • With well-over a million visitors in 1995–1996, San Onofre is the 10th most visited in California's State Park system.[1]

A RIDER WILL EXEMPT APPROVAL AND OPPERATION OF THIS PROJECT FROM CALIFORNIA LAW

• The United States Marine Corps owns land which it leases to the State of California for San Onofre State Beach Park. Accordingly, before the Park may be used as a possible route for the Foothill Tollroad, the Secretary of Defense must grant an easement across the property.
• Section 2867 of the House fiscal year 2002 Defense Authorization Act would require the Secretary of Defense to grant an easement for the construction of the Foothill South to the Transportation Corridor Agencies ("Agency") "notwithstanding *any provision* of State law that would otherwise prevent the Secretary from granting the easement or the Agency from constructing, operating, or maintaining the restricted access highway" (emphasis added).
• Effect of this language would be to *totally exempt* the Secretary of Defense from all California environmental, public safety and transportation laws.
• This language could also be interpreted as *totally exempting the Transportation Corridor Agencies*—which is not a part of the Department of Defense or even a Federal agency—*from California State law*.

THE KOLBE AMENDMENT

An amendment added to fiscal year 2002 Supplemental Spending bill by Rep. Kolbe attempts to exempt the Department of Defense from complying with the substantive and procedural protections of the Endangered Species Act (Sec. 7) when imperiled species or their habitats are threatened by increases in off-base water consumption that result from decisions made by the DoD. This nationwide exemption seeks to create a new precedent to prevent the assessment, and mitigation, of indirect impacts of certain DoD actions. This provision provides the DoD a different standard of effects analysis than those that apply to virtually every other Federal entity. The consideration of indirect effects of a Federal action is a well-established legal principal in many our nation's environmental laws, such as the Endangered Species Act and the National Environmental Policy Act. Similarly, this provision could prevent any analysis of interrelated and interdependent actions that would not occur but for an action taken by the DoD as required by the ESA.

This amendment could also adversely affect other water users. As it seeks to prevent the DoD from being held responsible for off-base impacts that would not occur but for the Department's actions, water users that share a water basin with the DoD could find themselves bearing responsibility for the off-base impacts caused by a Department decision.

Although the amendment is superficially limited to water consumption that occurs off of the military base and that is "not under the direct authority and control" of the Secretary of Defense, it arguably exempts Defense Department actions that could have major offsite impacts. For example, Defense Department actions, such as hiring decisions or defense contracting, can have significant growth-inducing effects in a community. However, because the water use of those new hires may not be within the direct control of the Defense Department, such decisions could be exempt from ESA review under this amendment. Moreover, the Department of Defense could potentially exempt many of its actions from the ESA simply by outsourcing its functions through defense contracts. This provision might well allow DOD to carry out actions that clearly will cause the extinction of a species without

[1] California Department of Parks and Recreation, Mitigation Assessment of FTC-South Impacts on San Onofre State Beach, August 1997, at p. 2.

any consideration, through the FWS consultation process, of mitigation measures or reasonable alternatives that might protect the species.

THREATENS A NATIONALLY RECOGNIZED ECOLOGICAL TREASURE

One area particularly threatened by this amendment is Arizona's San Pedro River, one of the richest biological reserves in all of North America. In 1988 Congress designated it as the San Pedro National Riparian Conservation Area. It was the first "Globally Important Bird Area" identified in North America by the American Bird Conservancy and was also recognized by the Nature Conservancy as one of the world's eight "Last Great Places". According to an April 2000 article in National Geographic "82 species of mammals—a community unmatched anywhere north of the tropics-inhabit this valley" and "the San Pedro harbors the richest, most dense and diverse inland bird population in the United States as well—385 species."

The immediate impact of this amendment could be to further threaten the survival of San Pedro River. Today, the San Pedro is being dewatered as a result of water consumption, and much of that water consumption is a result of the Department of Defense's operations at Fort Huachuca, an army base located near the river. Under the terms of this amendment, the Fort's actions, many of which result in additional personnel moving to Sierra Vista and, consequently, in increased water consumption, could occur without any consideration of the extent to which they jeopardize the river and its rare species and without any consideration of alternatives that might be reasonably be available.

BACKGROUNDER ON THE READINESS AND RANGE PRESERVATION INITIATIVE'S PROPOSED EXEMPTIONS FROM THE CLEAN AIR ACT

The Readiness and Range Preservation Initiative's (RRPI) proposed revisions to the Clean Air Act are designed to exempt the Department of Defense from having to comply with our national public health air quality standards, called national ambient air quality standards or NAAQS. This means that those living in areas with military bases could breathe dirtier air, which could result in more premature deaths, asthma attacks, cardiopulmonary problems, and other adverse health and environmental effects. The sweeping exemptions within this proposal are unnecessary as the Clean Air Act has ample provisions to reconcile clean air requirements with national security and military readiness concerns.

THE THREAT TO PUBLIC HEALTH

The Clean Air Act requires states to analyze their pollution, and then develop comprehensive plans that delineate how a State will attain the Federal air quality standards and how it will verify such attainment.[1] The Federal Government is required to do its share, ensuring that its activities do not impair air quality and conform to any applicable Federal or State implementation plan for attaining the NAAQS.[2] This means that DOD activities cannot cause or contribute to a violation of any NAAQS, increase the frequency or severity of NAAQS violations, or delay attainment of a standard. To ensure this, certain proposed Federal activities trigger an analysis of emissions to determine the activity's impact on air quality, called a conformity analysis. If this analysis shows that pollution will increase above a certain threshold amount (this varies from 25—100 tons per year depending on the pollutant and the region's attainment status[3]), the Federal Government must take steps to mitigate or offset these additional emissions.

Because RRPI defines military readiness so broadly, it attempts to permanently exempt DOD from conforming to Federal or State implementation plans for attaining the NAAQS for a broad range of activities. RRPI attempts to give DOD a 3-year extension on its conformity analysis and allow the Federal Government to proceed with its activities while analyzing those same activity's effects on air quality. Although the RRPI contains language requiring DOD to cooperate with a State to ensure conformity within 3 years of the date of new activities, it subsequently attempts to remove all the hammers for ensuring that they do so and to preempt a State from taking action to require reductions from the DOD. Thus, an area that violates the NAAQS because of these military activities could no longer have to take steps to meet them or take additional steps to reduce air pollution. This could result

[1] 42 USC § 7511a (§ 182).
[2] 42 USC § 7506(c) (§ 176(c)).
[3] 40 CFR § 93.153(b)(1) and 40 CFR § 51.853(b) and (c).

in those living in areas with military bases breathing dirtier air, which could result in more premature deaths, asthma attacks and other adverse health and environmental effects.

THE PROPOSED EXEMPTIONS ARE UNNECESSARY

These exemptions are unnecessary as the Clean Air Act provides ample mechanisms for exempting DOD activities where there is a military or a national security need. Notably, the DOD has been unable to provide a single example of the Clean Air Act hampering military readiness. In fact, examples provided in the DOD's own materials demonstrate that the Clean Air Act provides adequate flexibility for military activities.

Exemptions

1. If the President "determines it to be in the paramount interest of the United States. . . ." he may:

- exempt any emission source of any Federal department, agency or instrumentality from compliance with local, State or Federal air pollution requirements, processes and sanctions for two consecutive 1 year periods, or
- issue regulations exempting from compliance "any weaponry, equipment, aircraft, vehicles, or other classes or categories of property owned or operated by the Armed Forces . . . ." for unlimited 3 year intervals[4]

2. Initial actions in response to "emergencies or natural disasters" are exempt from conformity, and continuing actions for unlimited 6 month periods if the head of DOD makes a written determination that the conformity analysis would lead to an unacceptable delay.[5] Emergency is defined as "a situation where extremely quick action on the part of Federal agencies involved is needed where the timing of such Federal activities makes it impractical to meet the requirements of this subpart, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist attacks and military mobilizations".[6]

3. The following Federal activities are exempt from conformity. "the routine, recurring transportation of material and personnel", [r]outine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (where no new support of facilities or personnel are required) to perform as operational groups and/or for repair or overhaul."[7]

4. Actions that "implement a foreign affairs function" of the U.S. are exempt from conformity.[8]

THESE SWEEPING EXEMPTIONS HAVE BEEN PROPOSED WITHOUT ADEQUATE REVIEW

RRPI's sweeping exemptions have been proposed at the last moment and without adequate review and discussion. The late notice and rushed nature of these proposals indicates an unwillingness to have a full and fair debate. Far reaching changes that attempt to exempt the Federal Government from its own public health and environmental laws must receive careful consideration by the committees of jurisdiction with adequate time for review and input by interested and knowledgeable parties. The Clean Air Act is one of the nation's oldest and most successful environmental and public health laws. It must not be rolled back in a hasty and unnecessary attempt to exempt DOD from complying with our national public health air quality standards.

[4] 42 USC § 7418(b) (§ 118(b)).
[5] 40 CFR § 51.853(d)(2) and (e) respectively, and § 93.153(d)(2) and (e) respectively.
[6] 40 CFR § 93.152
[7] 40 CFR § 51.853(vii) and (viii) respectively, and § 93.153 (vii) and (viii) respectively.
[8] 40 CFR § 51.853(c)(xviii) and § 93.153(c)(xviii).

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS/
ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS,
Washington, DC, May 2, 2002.

Hon. CARL LEVIN, *Chairman,*
Committee on Armed Services,
U.S. Senate,
Washington, DC.

Hon. JOHN W. WARNER, *Ranking Member,*
Committee on Armed Services,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEVIN AND SENATOR WARNER: On behalf of the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO)—the two national associations representing State and local air pollution control officials—I write to you today to express concerns regarding potential changes to Clean Air Act (CAA) provisions as they relate to activities of the U.S. Department of Defense (DOD), and to urge against such potential changes during your Committee's mark-up of DOD's authorization legislation for fiscal year 2003.

It is our associations' understanding that, as part of your Committee's forthcoming deliberations over the Department of Defense Authorization Act for Fiscal Year 2003, amendments to various environmental and public health statutes will be offered. These amendments, which are based on recommendations by DOD, would provide broad statutory exemptions for purposes of military readiness. We urge your Committee to reject these changes, including those to Section 176 of the CAA, relating to the conformity of Federal actions (including those of DOD) to Federal or State implementation plans for attaining health-based National Ambient Air Quality Standards. STAPPA and ALAPCO believe that such exemptions are unnecessary, in that the CAA already provides DOD ample flexibility to carry out its duties during times of war and emergency.

Under Section 118 of the CAA, the President may exempt DOD from any requirements of the Act upon finding that it is of "paramount interest of the United States to do so." Further, the Federal regulations implementing the CAA's "general conformity" provisions from which DOD specifically seeks exemption, also allow DOD to suspend compliance in the case of emergencies (which, by definition, include terrorist activities and military mobilizations) and further, permit DOD to conduct routine movement of material, personnel and mobile assets, such as ships and aircraft, provided no new support facilities are constructed.

In light of the broad statutory and regulatory flexibilities already provided, we do not believe that additional CAA exemptions are necessary in order for DOD to conduct military readiness activities. Further, we believe the CAA exemptions sought by DOD would, essentially, serve only to allow routine, non-emergency activities that require the construction of additional support facilities to skirt important environmental requirements. The significant adverse air quality impacts that could result from such exemptions could unnecessarily place the health of our nation's citizens at risk.

STAPPA and ALAPCO urge you and your colleagues to reject actions to exempt DOD from CAA requirements. If, however, such actions are to be further pursued, we respectfully request that Congress allow for full participation by all interested parties, including State and local air pollution control officials, and that other congressional committees with jurisdiction over CAA issues also be included.

If you have any questions, or if STAPPA and ALAPCO can provide any further information, please do not hesitate to contact me at (202) 624–7864.

Sincerely,

S. WILLIAM BECKER.

PLEASE OPPOSE THE DEPARTMENT OF DEFENSE'S ATTEMPT TO WEAKEN OUR NATION'S TOXIC WASTE MANAGEMENT AND CLEAN UP LAWS

The Department of Defense ("DoD") is attempting to weaken the ability of states, EPA, and citizens to protect public health and environmental quality from toxic waste. DoD is seeking broad exemptions from two laws: (1) the Comprehensive Environmental Response Compensation and Liability Act ("Superfund"), our nation's preeminent toxic waste cleanup law; and (2) the Resource Conservation and Recovery Act ("RCRA"), which establishes a cradle-to-grave management system for handling hazardous wastes. DoD's proposal could preempt State and EPA authorities,

and allow contamination to migrate unchecked, vastly increasing cleanup costs and threats to public health.

DOD IS ONE OF THE NATION'S BIGGEST POLLUTERS

Contamination and hazardous wastes at DoD installations poses serious threats to public health and environmental quality. DoD is the nation's largest polluter at the country's most heavily contaminated toxic waste sites. In fiscal year 1994:

• DoD facilities accounted for 81 percent of all Federal facilities listed under Superfund.

• DoD had 129 Superfund sites, out of 160 total Federal Superfund sites.

DOD TOXIC WASTE SITES THREATEN PUBLIC HEALTH AND THE ENVIRONMENT

Contaminated DoD facilities threaten public health.

• Massachusetts Military Reservation, Cape Cod, MA: The facility has contaminated the sole source drinking water aquifer for over 400,000 people. Military installations are located on top of more than 10 sole source aquifers across the Nation.

• Hunters Point Naval Shipyard, San Francisco, CA: An underground hazardous waste landfill caught fire at the shipyard. The Navy failed to notify local residents for weeks after the fire started. People complained of headaches, lesions, nausea, asthma and other illnesses.

• Starmet Corp., Concord, MA: Depleted uranium ("DU") ammunition contaminated groundwater with uranium at levels more than 3,000 times above Safe Drinking Water Act standards. DU is in soil more than a mile from the production facility, at levels 16 times greater than background.

DOD'S PROPOSAL COULD WEAKEN SUPERFUND'S PROTECTIONS

DoD's proposal could weaken the authority of EPA, states and citizens to protect communities from toxic waste. DoD's proposal could shift most contaminated sites into the Supefund program where DoD—not EPA or states—largely has authority to issue cleanup orders and conduct oversight authority of its own cleanups. Section 2019(b) of DoD's proposal would exempt "explosives, unexploded ordinance, munitions, monition fragments, or constituents thereof" that are on a range from the definition of "release." DoD's proposal could:

• Eliminate EPA authority under Section 104 to clean up a release or respond to a substantial threat of a release of hazardous substances on ranges.

• Weaken EPA and State authority to clean up contamination that migrates off of ranges and control the source of contamination on ranges.

• Stop states and Federal agencies from collecting natural resources damages from DoD when its contamination injures sensitive public resources, including wildlife, fisheries, and recreational areas.

• Remove authority to clean up certain chemicals under Superfund, since this law uses RCRA's definition of "hazardous waste" to define "hazardous substances" under Superfund. However, DoD's proposal excludes certain chemicals from RCRA's definition.

DOD IS A MAJOR VIOLATOR OF RCRA'S REQUIREMENTS

In fiscal year 1997 and fiscal year 1998, DoD was cited for 403 violations of RCRA, nearly three times more violations than the next most cited Federal agency.

• In fiscal year 1997, DoD accounted for 75 percent of all RCRA enforcement actions against Federal facilities.

• In fiscal year 1998, DoD accounted for 66 percent of all RCRA enforcement actions against Federal facilities.

• In 1994, EPA cited Fort Richardson, in Alaska, for 12 violations of RCRA, including illegal storage of hazardous waste; failure to make hazardous waste determinations; inadequate closure, contingency and waste analysis plans; and failure to obtain physical and chemical analysis.

DOD'S PROPOSAL COULD WEAKEN RCRA'S ABILITY TO PROTECT PUBLIC HEALTH

DoD's proposal could largely exempt the department from RCRA's most effective provisions for protecting public health. It could take away the most effective too that EPA, states, and citizens have for enforcing laws that protect communities from hazardous waste. Section 2019(a) of DoD's proposal would exempt "explosives, unexploded ordinance, munitions, monition fragments, or constituents thereof" from the definition of "solid waste" under numerous circumstances. RCRA uses "solid waste" to define "hazardous wastes" regulated under RCRA's Subtitle C. DoD's proposal could:

• Weaken protections against more than 20 dangerous chemicals that are linked to cancer, birth defects, and damage to the heart, liver, and kidneys.
• Exempt private businesses and DoD facilities that conduct "research, development, testing, and evaluation of military munitions, weapons, or weapon systems" from RCRA's regulations.
• Undermine EPA's authority to order DoD to clean up contamination that "may present an imminent and substantial endangerment" to human health or the environment.
• Eviscerate the ability of citizens and states to force DoD to clean up contamination that "may present an imminent and substantial endangerment" to human health or the environment.
• Preempt State authority to increase protections beyond RCRA's minimum Federal standards.
• Preempt State and EPA authority at cleanup contamination at military ranges (active, inactive, closed, and transferred) and at sites other than military ranges.
• Preclude RCRA cleanups of onsite and offsite contamination if DoD merely claimed to be "addressing" the threats under Superfund, which could include studying the contamination without undertaking any cleanup activities.

STATE AND FEDERAL ENVIRONMENTAL OFFICIALS OPPOSE DOD'S PROPOSAL

The Environmental Council of the States (comprised of State environmental Commissioners, Directors, and Secretaries), National Governors' Association, National Association of Attorneys General, National Conference of State Legislatures, and the Association of State and Territorial Solid Waste Management Officials all oppose DoD's current proposal.

SUPERFUND AND RCRA ALREADY GIVE DOD CASE-BY-CASE EXEMPTIONS FROM LAWS

Superfund and RCRA both have provisions that allow DoD to be exempt from these laws.
• Superfund Section 120 allows the President to exempt DoD from Superfund "as may be necessary to protect the national security interests of the United States." The President must notify Congress of exemptions and include the reasons for the exemptions.
• RCRA Section 6961 allows the President to exempt DoD from RCRA for 1 year if he determines "it to be in the paramount interest of the United States." The President can grant additional exemptions and must inform Congress of all exemptions and his reasons for granting them.

RESPONSES OF JAMIE RAPPORT CLARK TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. You testified that "in listening to the four gentlemen in the previous panel [1] have come to realize that what they have proposed isn't going to solve their problem . . . most of the examples that they gave would not he resolved by their proposal." Please explain your thoughts in this regard, given that the four-star officers you refer to continue to maintain that their problems would be solved by the RRPI.

Response. Most of the examples of difficulties complying with the ESA cited by the Defense Department (e.g., Fort Hood, Fort Bragg) are on installations that do not have any designated critical habitat. Other ESA provisions, such as the take prohibition, have conic into play. Thus, the RRPI, which applies solely to the critical habitat provision of the ESA, would not solve most of the problems about which DOD complains.

My discussion of other ESA provisions should not be interpreted at a suggestion that nationwide exemptions from these provisions should be considered. Such exemptions would, like the proposed critical habitat exemption, simply eliminate DOD's incentive to devise creative solutions working in tandem with experts at the environmental agencies and with the public. As 1 stated in my testimony, Congress should encourage DOD to work with other agencies and the public to solve readiness and environmental challenges at the local level, taking into account local conditions, taking advantage of local wisdom and using existing provisions of environmental laws.

Question 2. You have suggested that early consultations between DoD and the EWS would address the concerns raised by DoD as far as the Endangered Species Act is concerned. However, the DoD disagrees because, among other reasons, such consultations would in no way address the problem presented by later-raised cults

from private organizations. If you disagree with this analysis, please explain exactly why you disagree with the President and the Secretary of Defense on this issue.

Response. Early consultation between the DoD and the FWS through its management plans have already successfully addressed concerns raised by the DoD in regard to the. ESA and, hi each case, The resolution negotiated by the agencies has not been challenged by private organizations. Camp Lejeune in North Carolina and the red-cockaded woodpecker, and Mokapu Peninsula on the Marine Corps Base Hawaii and endangered waterbirds are two examples of where the DoD and FWS worked together early to prevent problems with regard to endangered species. And at the Marine Corps Air Station Miramar. California, in an effort to protect the station's ten endangered species, the FWS initially proposed to designate 65 percent of Miramar's land area as critical habitat. FWS later exercised its discretion under existing law and withdrew this proposed designation after the Marine Corps established a framework to protect and preserve the station's endangered species, guaranteed the plan would be implemented, and defined measures to judge the plait's effectiveness. According to DOD, in so doing, 11the plan made military readiness activities and endangered species protection mutually compatible."

Question 3. In your written testimony you state your view that the issue at hand is a dichotomy; e.g., either the Defense Department will "continue to build on its long record of wildlife conservation and respect for environmental laws and protections", or it will "take on a new role as an unregulated despoiler of our environment". In light of the compelling evidence presented in the first panel for the need for clarifications to existing law do you still believe upon reflection that of the Congress enacts these clarifications the result will mean America's military will, necessarily, become an unregulated despoiler of our environment?

Response. These exemptions (not "clarifications") could very well lead to this result. DOD manages approximately 25 million acres of land. These lands are home to at least 300 federally listed species. Providing nationwide exemptions to DoD would simply eliminate DOD's incentive to devise creative solutions working together with experts at the environmental agencies and with the public, to the detriment of listed species.

Question 4. Given the very modest nature of the clarifications the Administration is requesting, and the fact that no State has ever initiated enforcement litigation (to my knowledge) regarding an operational range, please explain why you characterize these requests for clarifications of certain laws as "an attack on environmental laws."

Response. The proposed exemption to the Endangered Species Act would be precedent setting and would not he "modest." In time, other agencies or industries could also request similar exemptions. Sections 7(a)(l), 7(a)(2), 7(j) and 4(b) of the ESA already provide opportunities for the FWS and DoD to work together to protect Endangered Species and achieve military readiness objectives. Thus, providing this dangerous, precedent setting exemption is unwarranted.

States do not enforce the ESA, so there is no relevance to the fact that states have not initiated enforcement litigation regarding an operational range. The two Federal wildlife, agencies, on the other hand, have worked to achieve ESA compliance on operational training ranges.

Question 5. In your testimony, you consistently refer to the clarifications contained in the Readiness and Range Preservation Initiative as "exemptions". Isn't it true that neither the word "exemption" nor "exempt" is contained in the RRPI? Furthermore, isn't it also true that the RRPI is merely clarifying certain definitions, such as "critical habitat" under the ESA, or "solid waste" under CERCLA?

Response. The only feature of the RRPI to be enacted into law was the Migratory Bird Treaty Act provision, which was characterized in the Defense Authorization Act as an "exemption." With regard to the ESA, the Defense Department's request is to effectively exempt DOD from any obligation to comply with the critical habitat provisions of the ESA if certain minimal steps are taken.

Question 6. You referred to the recent GAO report. isn't it true that this report was completed save only for the inclusion of the Department's remarks, prior to the release of the RRP1 and therefore, did not address it specifically? Isn't it also true that the GAO report reaches the unequivocal conclusion that our "military services have lost training range capabilities and can he expected to experience increased losses in the future absent efforts to mitigate encroachment"?

Response. Although the GAO report does not address the RRPI specifically, it addresses the environmental compliance issues raised by the RRPI and concludes that DOD has not met its burden of proving that this is a significant hindrance to training. The GAO'S conclusion that "military services have lost training range capabili-

ties and can he expected to experience increased losses in the future absent efforts to mitigate encroachment" does not specify environmental laws as the encroachment issue. Encroachment is caused by many factors. Weakening environmental laws will not solve the encroachment problem.

Question 7. You testified that "the Defense Department has provided no evidence that environmental laws are at fault for any of the gaps in the readiness that may exist today. Yet minutes before you gave this testimony, for example, you heard General Keane testify that the Army's fighting readiness has been impeded by environmental laws which require at Ft. Bragg a 200-foot buffer around every tree where a migratory bird might nest, no bivouacking or occupation of the nearby area for more than 2 hours, no use of camouflage, no weapons firing other than 762 and 50 caliber blank ammunition, no use of generators, no use of riot agents, no use of smoke grenades, and no digging. He testified that the impact of that is profound. Since you heard that testimony and then testified yourself that the Department has provided "no evidence," I must ask if it is your contention that General Keane was misleading by this testimony? If so, please state with as much particularity as you are able, all facts that support such a contention.

Response. I am not aware of any law that requires the Army from placing a 200-foot buffer around every tree where a migratory bird might nest. Perhaps General Keane was referring to the limitations on activities around the nests of the endangered red-cockaded woodpecker. These "work arounds" were negotiated between DOD and FWS, and have repeatedly been characterized by DOD as a success story that has allowed DOD to train effectively while conserving wildlife.

In fact, the United States Army Environmental Center, Environmental Update, Training Lands Management, by Mike Cast, in Winter 2000, reported the following: "As a result of these practices and protection from development, FORSCOM installations such as Fort Bragg, NC and Fort Stewart, GA, harbor old-age stands of longleaf pine and provide some of the best habitat available for federally listed species such as the red-cockaded woodpecker, which builds its nesting cavities in this species of pine. Training can he conducted in well maintained red-cockaded woodpecker habitat, and that does enhance training."

Question 8. You testified that "the Defense Department has provided no evidence that environmental laws are at fault for any of the gaps in the readiness that may exist today". Yet minutes before you gave this testimony, for example, General Williams testified that "the Marine Corps wanted to try to quantify the impact of environmental constraints on readiness We took a unit in . . . the amphibious assault, ,from. ship to ship and then movement beyond the beach, and we listed all the mission essential tasks that that unit is supposed to be able to perform in order to he fully trained . . . we just looked at non-firing tasks. And about 60 to 70 percent of those tasks, we can't perform at Camp Pendleton. Since you heard that testimony and then testified yourself that the Department has provided "no evidence", I must ask if it is your contention that General Williams was misleading by this testimony. If so, please state with as much particularity as you are able, all facts that support such a contention.

Further research is needed on the meaning of General Williams' statement that "68 to 70 percent of certain non-firing tasks could not be performed." My understanding is that certain activities concerning toxic pollution are prohibited (e.g., disposal of oil), but that activities in and around wildlife habitat are allowed, subject to reasonable restrictions on time, place and manner. As stated in the Range and Training Regulations Environmental Operations Map for Camp Pendleton, dated September 2001, "It is essential to consider environmental concerns while planning training operations and exercises. Proper planning will preserve all training facilities for future generations of Marines; therefore it is essential that training units adhere to the [environmental protection] provisions of this Chapter."

Question 9. Attached to your written testimony is a document which states that the "National Governor's Association, National Association of Attorneys General, National Conference of State Legislatures" among others, "all oppose the DoD's current proposal". Is it your contention that this is a truthful statement? If so, please provide copies of the resolution of each of these organizations expressing their formal position on the RRPL.

Response. Attached to this document are letters and resolutions from the organizations stating opposition to the DoD's proposal.

Question 10. Isn't it true that the purpose of the 1918 Migratory Bird Treaty Act was to stop the intentional hunting of migratory birds for commercial reasons such as feathers for ladies. hats? The recent DC District Court case held that the MBTA as written prohibits both intentional and unintentional harm to migratory birds.

Isn't this a perversion of congressional intent? Wouldn't the RRPI merely restore the original intent of the Act?

Response. The Migratory Bird Treaty Act protects migratory birds from a variety of threats, including but nor limited to hunting. Under the Act, it is illegal, unless permitted by regulations, to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to he shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird." (16 U.S.C. 703).

ATTACHMENTS

THE ENVIRONMENTAL COUNCIL OF THE STATES,
Washington, DC, May 1, 2002.

Hon. BOB STUMP, *Chairman,*
House Armed Services Committee,
U.S. House Committee on Armed Services,
Washington, DC.

DEAR CHAIRMAN STUMP: Today your committee is scheduled to work on H.R. 4546 Department of Defense (DOD) authorizing language pertaining to factors that may impact DOD's military readiness. This letter is to express the concerns of the States regarding possible changes to environmental laws.

The Environmental Council of the States (ECOS) is a non-profit, non-partisan organization comprised of State environmental Commissioners, Directors, and Secretaries throughout the country. This group represents the leadership of State and territorial environmental programs and is responsible for making certain our nation's air, water, and environment are clean, safe, and protected.

At a recent ECOS meeting, Department of Defense Principal Undersecretary of Environment and Installations, Mr. Philip Grone, and other DOD personnel, presented proposed legislative language entitled "Readiness and Range Preservation Initiative" which had been presented in the Subcommittee on Military Readiness. Our member states had a lively discussion on this legislation.

ECOS members strongly support military readiness, adequate training, and preparation for military personnel. Our members recognize that military readiness requires the Department of Defense (DOD) to train armed forces under realistic conditions, including field testing and evaluating weapons systems and other military equipment. We further recognize that "external" factors such as urban and suburban sprawl and increasing wildlife habitat pressures have affected DOD's training and equipment testing and evaluation activities. In addition, there have been isolated cases where environmental regulation requirements may have affected military operations. However, we also note that there are military activities with recognized environmental impacts. The issue raised by this proposed legislation is how to appropriately balance DOD's necessary training and readiness activities with ensuring protection of human health and the environment and avoiding a legacy of environmental problems. It is a proper and timely subject for discussion and development of public policy.

States have the challenging job of front-line implementation of our nation's environmental pollution laws. States have a long history of working cooperatively with DOD to resolve competing needs. Further, existing laws provide flexibility to accommodate DOD's current "short-terms" concerns about regulatory impacts to military training and readiness activities. In particular, ECOS membership is concerned with the earlier version containing proposed changes to the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act; and the Clean Air Act. Although the Readiness Subcommittee has removed sections pertaining to these laws and the version before your committee contains legislation addressing other laws, these three are at the core of ECOS member agencies' missions. All three laws already have provisions for the President or Secretary of Defense to exempt DOD from its statutory and regulatory requirements upon a finding that it is necessary for national security or in the interests of the United States. These three laws also contain other provisions providing for flexibility.

In the short time that states have had to evaluate the legislation, serious questions have been raised about the changes to the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act, both of which relate to active and closed DOD facilities. At our meeting,

DOD representatives were unable to offer examples of problems with State regulators that would support the need for the proposed changes. In fact, the concern appeared to be more directed toward private citizens' suits brought under Federal law. ECOS is particularly concerned about unintended consequences that may occur by changing the definition of solid waste and the associated impacts to the authorities states use to provide consistent application of federally delegated environmental programs and State laws.

Changes proposed by the Readiness and Range Preservation Initiative to the Clean Air Act are also problematic. Congress directed the Federal Government to comply with Federal, State, and local requirements for control and abatement of air pollution to the same extent that any person is subject to such requirements. States have relied upon that requirement in crafting the mandated air quality plans for complying with national air standards. The proposed changes will force States into a difficult position of meeting national air standards with all other participants—industry, local infrastructure, State and Federal agencies—while temporarily exempting DOD.

ECOS believes that changes to environmental laws should be carefully considered, including holding hearings in the committees with jurisdiction over these regulations. While DOD has stated that this legislation is narrow in scope and is intended to address issues that apply only to operational combat ranges necessary for military readiness, ECOS members' initial analysis is this legislation is overly broad and may go beyond its stated intent. If the initial proposed changes to RCRA, CERCLA and CAA were to move forward in legislation it may actually undermine the very real progress DOD has made in complying with environmental regulations and stewardship with little improved support of military readiness. We are also concerned with this Federal action encouraging local bases to seek further exemptions to State laws through State legislation, the first example of which has just been introduced in Alaska.

ECOS appreciates that the pressures of urban and suburban sprawl and increasing demands for wildlife habitat are impacting DOD's readiness ability. ECOS is supportive of establishing buffer zones and other conservation easement mechanisms to solve this problem. Indeed, ECOS is encouraged to see this type of language in the Readiness and Range Preservation Initiative and supports the Subcommittee's effort to create tools for States and DOD to tackle this difficult issue.

In closing, while we are very supportive of our military's efforts and recognize the need to train and maintain military readiness, we do not believe DOD has made a convincing case for the proposed changes to RCRA, CERCLA, and CAA. ECOS is willing to immediately begin work with DOD to solve the concerns and issues they have raised regarding these environmental laws, but we remain concerned with the authorizing language before you.

Today, States conduct over 75 percent of all the environmental inspections, collect nearly 95 percent of environmental monitoring data, and are responsible for all State lands and resources. Therefore, ECOS asks that Congress discuss any proposed changes to environmental laws with full participation by interested parties to examine the merits, impacts, and accommodations that should accompany such fundamental changes. ECOS encourages Congress to have this discussion in the committees with jurisdiction over the relevant environmental laws as well as the Armed Services Committee. ECOS stands ready to work with these committees and DOD to ensure development of sustainable range management strategies and jointly work out the necessary long-term solutions to ensure that our military has adequate training ranges.

Sincerely,

MICHELE BROWN,
ECOS-DOD Forum Co-chair,
Commissioner, Alaska Department of Environmental Conservation.

RON HAMMERACHMIDT,
ECOS President,
Director, Kansas Department of Health and Environment.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL,
Washington, DC, April 1, 2002.

Hon. JOEL HEFLEY, *Chairman,*
U.S. House of Representatives,
Committee on Armed Services,
Subcommittee on Military Readiness,
Washington, DC.

DEAR CHAIRMAN HEFLEY: I want to express my appreciation for your consideration in keeping the record open for your March 14, 2002 Subcommittee on Military Readiness hearing until Friday, April 5, 2002. Due to the short timeframe for submitting these comments, we have not been able to compile comprehensive comments from all of the states. We are aware of the Committee's continuing interest in this subject, and will provide you additional relevant information as it becomes available.

We believe strongly, as the primary implementers of the nation's pollution control laws, that in any forum involving Department of Defense exemptions to environmental laws the State perspectives should clearly be on the record. In that regard, I have attached several items to be added to the record of that hearing in order to preserve the state's point of view. First, please find a statement from Colorado Attorney General Ken Salazar. In addition, please add to the record the following Attorneys General sign-on letters describing some of the relevant concerns of State Attorneys General:

(1) June 6, 2001 letter signed by 30 State Attorneys General to the Senate Committee on Armed Services, House Committee on Armed Services, Senate Environment and Public Works Committee and the House Committee on Energy and Commerce Re: Encroachment—Federal Facilities, and

(2) May 18, 2000 letter signed by 21 State Attorneys General to Jacob J. Lew, Director, Office of Management and Budget regarding "the range rule" for unexploded ordnance, and

(3) July 12, 1995 letter signed by 37 State Attorneys General and 11 Governors to President Clinton regarding the cleanup of Federal facilities including their key principles and reform proposals attached thereto.

Thank you again for the courtesy of keeping the record open to submit this information. If you have any questions or concerns, please feel free to contact Blair Tinkle, our Legislative Director, at 202–326–6258.

Sincerely,

LYNN M. ROSS.

STATE OF COLORADO DEPARTMENT OF LAW OFFICE OF THE ATTORNEY GENERAL,
Denver, CO, April 1, 2002.

Hon. JOEL HEFLEY, *Chairman,*
U.S. House of Representatives,
Committee on Armed Services,
Subcommittee on Military Readiness,
Washington, DC.

DEAR CHAIRMAN HEFLEY: Thank you for the opportunity to submit written testimony regarding the impact of environmental regulation on military readiness. Enclosed are several pieces of correspondence that the National Association of Attorneys General has sent over the years. This correspondence is indicative of the states' concerns with Federal agencies'—and more specifically, the Department of Defense's—compliance with State and Federal environmental laws. In addition to this correspondence, we would like the Committee to consider the following observations.

First, we absolutely support maintaining our Nation's military preparedness. We recognize that maintaining military readiness requires that the armed forces receive regular realistic training, and that the military be able to test and evaluate weapons systems and other military equipment under realistic conditions. We also recognize that "external" factors such as urban and suburban sprawl, have impacted the Department of Defense's training, testing and evaluation activities. And we are aware of isolated cases where requirements imposed under the pollution control laws may have affected military operations. At the same time, we are concerned that DOD's training, testing and evaluation activities obviously do have environmental impacts. The question is how to conduct these activities in a manner that maintains readiness while ensuring protection of human health and the environment.

The states are the primary implementers of the nation's pollution control laws. We think that the existing framework of these laws is sufficiently flexible to provide for balancing of environmental and readiness concerns. There is a great deal of flexibility built in to the different regulatory programs, as the Department's own testimony has demonstrated. As we understand the Department's testimony, it is concerned about the cumulative impact of environmental, health and safety restrictions on military readiness, and fears that these impacts will increase. However, the environmental laws already allow either the President or the Secretary of Defense to exempt the Department of Defense from their statutory and regulatory requirements on a case by case basis. All that is required is a finding that doing so is necessary for national security or is in the paramount interests of the United States, depending on the particular statute at issue. Such exemptions exist under the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation and Liability Act, and Safe Drinking Water Act. We understand that to date, these exemption provisions have only been invoked twice, and neither instance involved military training activities.

Other provisions of the environmental laws provide further flexibility to balance environmental protection with other Federal priorities. For example, in 1992, Congress provided EPA authority to issue administrative orders under RCRA to other Federal agencies, but required that such agencies have the opportunity to confer with the EPA administrator before any such order became final. Congress passed a similar amendment to the Safe Drinking Water Act. And Congress has already spoken to the balance between environmental protection and management of waste military munitions. In 1992, Congress rejected a bill that would have authorized the Secretary of Defense to promulgate regulations governing the safe development, handling, use, transportation, and disposal of military munitions. Instead, it directed the Environmental Protection Agency to consult with the Secretary of Defense prior to issuing regulations that define when military munitions become wastes for purposes of RCRA.

Finally, in 1997, Congress created a procedure that allows the Secretary of Defense to temporarily suspend any pending administrative action by another Federal agency that the Secretary determines "affects training or any other readiness activity in a manner that has or would have a significant adverse effect on the military readiness of any of the armed forces or a critical component thereof." During the suspension, the Secretary and the head of the other Federal agency must consult attempt to mitigate or eliminate the adverse impact of the proposed action on readiness, consistent with the purpose of the proposed action.

We understand that the Department plans to propose legislative changes to the environmental laws. We believe that any such changes should be considered very carefully. The history of Federal facility compliance with environmental laws demonstrates that statutory constructs that rely on voluntary efforts by Federal agencies to achieve environmental objectives simply do not work. Even when Congress has clearly stated its intent that Federal agencies be subject to State and Federal environmental laws, the Federal agencies have frequently resisted efforts to require them to comply. The history of the Clean Air Act provides a good example. Before 1970, the Clean Air Act encouraged, but did not require, Federal agencies to comply with its mandates. Congress determined that this voluntary system was not working, and in 1970 amended the act to require Federal agencies to comply. Specifically, Congress added section 118 to the Clean Air Act. The first sentence of the section provides, in relevant part:

> Each department, agency, and instrumentality of . . . the Federal Government . . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

42 U.S.C. §1857f. The 1970 amendments also required the Environmental Protection Agency to establish ambient air quality standards. Each State had to submit plans describing how the State would meet these standards. Kentucky, like most states, submitted a plan that relied on permits as the sole mechanism to establish emissions limitations for air pollution sources, and to establish schedules for achieving compliance with the emissions limitations. Kentucky sought to require several Federal facilities (including the Army's Fort Knox, Fort Campbell and others) to obtain permits. The Federal agencies refused, arguing that section 118 of the Clean Air Act did not obligate them to comply with "procedural" requirements, such as the need to obtain State permits. Without the permit, there was no way for Kentucky to control air pollution from these Federal facilities. The matter went to court, and ultimately the Supreme Court agreed with the Federal agencies. Shortly thereafter, Congress amended the Clean Air Act to require Federal agencies to comply with procedural requirements, including permit requirements.

Even when Congress has plainly required Federal agencies to comply with State and Federal environmental laws, the Federal agencies have worse compliance records than private industry. The sole exception is under RCRA. In 1992, the Supreme Court held that Federal agencies were not subject to penalties for violating State hazardous waste and water quality laws. That same year, Congress amended RCRA to make Federal agencies subject to penalties for violating hazardous waste laws. Since 1992, DOD and other Federal agencies have steadily improved their RCRA compliance rates, to the point where they now have a higher compliance rate than private industry.

This salutary trend stands in stark contrast to Federal agency performance under the Clean Water Act. Unlike RCRA, Congress has not amended the Clean Water Act to subject Federal agencies to penalties for violating Clean Water Act requirements. The percentage of DOD facilities in significant non-compliance with the Clean Water Act has steadily risen over time. Similarly, DOD has long had a higher rate of significant noncompliance with Clean Water Act requirements than private industry, or even civilian Federal agencies.

Thus, we are concerned that providing the Department of Defense statutory exemptions from environmental laws will have adverse impacts on human health and the environment. But such exemptions will have other undesirable impacts as well, substantially increased costs to "remedy" environmental contamination, and greater constraints on use of training ranges. As we stated in our May 31, 2001 letter regarding encroachment, prevention is by far the most effective and least costly means of ensuring environmental protection. It also is a necessary component of sustainable range management. The Department, and the Nation, cannot afford to repeat the experience at the Massachusetts Military Reservation (MMR) at other ranges around the country. There, decades of military training activities have contaminated over 60 billion gallons of groundwater in the sole source aquifer for Cape Cod. This contamination led EPA to suspend most live-fire military training at the MMR artillery range pursuant to its Safe Drinking Water Act authority. Subsequently, the State of Massachusetts and the Army reached an agreement, now embodied in State law, that balances military training needs and environmental protection. The plain lesson here is that ignoring environmental consequences of military training benefits neither the environment, public health, nor military training.

In conclusion, resolving the increasing pressures on military training activities in a manner that protects human health and the environment, while ensuring military readiness, demands creative thinking. The issues involved are many and complex. They would benefit from an open discussion among a full range of affected parties. The states, as the primary implementers of the nation's environmental laws, must play a key role in arriving at any solutions. We thank the Committee for this opportunity to express our views.

KEN SALAZAR,
ATTORNEY GENERAL OF COLORADO,
NAAG Chair, Environment Committee.

ASSOCIATION OF STATE TERRITORIAL SOLID WASTE MANAGMENT OFFICIALS
(ASTSWMO),
Washington, DC, April 16, 2002.

Hon. W.J. "BILLY" TAUZIN, *Chairman,*
Hon. JOHN D. DINGELL, *Ranking Minority Member,*
Committee on Energy and Commerce,
Washington, DC.

DEAR MESSRS.: It is our understanding that there is an emerging Department of Defense proposal for modification of a number of basic environmental studies designed to provide relief from certain requirements in order to facilitate military training. The purpose of this letter is to request the assistance of the leadership of the House Energy and Commerce Committee in ensuring that there is a thorough review of this proposal by each Congressional committee with jurisdiction over these environmental statutes. By a thorough review we mean legislative hearings with opportunity for testimony by knowledgeable expert witnesses representing all sides of the debate, who can assist the Congress in assessing the trade-offs and costs of the proposal.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is a non-profit, non-partisan organization made up of State employees who are responsible for the hazardous waste, solid waste, cleanup and remediation, and underground storage tanks programs of the State and Territories of the U.S. Our members generally have engineering and science backgrounds, and implement

both delegated federal wastes and cleanup programs, as well as parallel State programs. They have hundreds of years of collective experience in expert program implementation and believe it is their obligation to share their professional views with members of Congress with the responsibility for decisions affecting our national environmental statutory framework.

We have examined an early draft of the "Sustainable Defense Readiness and Environmental Protection Act" (SDREPA) that we understand to be under development by DoD. Insofar as it addresses the hazardous waste regulatory and cleanup implications of the Resource Conservation Recovery Act/Solid Waste Disposal Act and the Comprehensive Environmental Response, Compensation, and Liability Act, we have substantial concerns with the current wording. Understanding the motivation of the drafters to seek greater flexibility for military training, we believe that it provides insufficient protection for citizens and the environment following implementation of these requested relief provisions. Our central point is that fundamental changes like these should not be made with a legislative vehicle developed by and for defense authorizations or appropriations.

We view this proposal from the historical perspective that past military operations have left a legacy of contamination that will take billions of dollars and several decades to deal with. Consequently, we are very reluctant to amend sound environmental statutes in ways that could open the door to new releases to the environment. In the past DoD has continually maintained that it has seen compliance and protection of natural resources as part of its national security mission, but it is difficult to reconcile these kinds of fundamental and far reaching changes to environmental statutes with those representations. Our experience is that delaying cleanup and compliance with hazardous waste laws only increases the eventual cost and difficulty of cleanups. We took DoD's promise of its intent to become a model of environmental compliance seriously, and we think that any changes made to enhance military readiness must be accomplished without damages to that goal.

Statutory change that will affect environmental impacts on populations and the environment should be made in the same environmental arena where those statutes were created and debated. For that reason, we urge you to exercise your jurisdiction over these proposed modifications, conduct hearings, take diverse testimony, and make the final judgments about the efficacy of these changes with full input, debate and understanding of their long-term effects on the country. Like all good citizens, we too want to see military training enhanced and improved, and we are willing to subject our analysis and suggested adjustments to the full range of public dialogue. We believe the potential consequences of this legislation are of such significance that all parties should be willing to undergo this same scrutiny.

We are confident that with full analysis and debates, appropriate modifications can be found and made to allow attainment of maximum force readiness without long-term cost to the nation's environment and the safety of its citizens. We trust that you will seek such a course of legislative balance as this DoD proposal is eventually introduced in the Congress. Thank you for considering this request and for your continued interest in our national environment.

Sincerely,

MARK P. GIESFELDT,
ASTSWMO President.

NATIONAL CONFERENCE OF STATE LEGISLATURES

ENVIRONMENT AND ENERGY AND TRANSPORTATION

FEDERAL FACILITIES CLEANUP

Federal and State governments are together faced with managing large quantities of hazardous, radioactive, and mixed (a combination of hazardous and radioactive materials) waste and materials that are located at numerous Federal facilities throughout the United States. Some of these wastes and materials have been improperly handled over the years, necessitating both waste management and environmental restoration at these facilities. These facilities were crucial to the nation's production of nuclear weapons and overall defense strategy, and now are in need of a plan for conscientious and thorough environmental reclamation. These facilities, which belong to the U.S. Department of Energy and the U.S. Department of Defense, each have specific environmental needs that must be addressed.

Radioactive and hazardous wastes have been generated since 1942 by the development, production, and maintenance of uranium, plutonium, and nuclear warheads by the Department of Energy's network of nuclear weapons production facilities, in-

cluding its national research labs. Substantial amounts continue to be generated, even as the environmental restoration effort progresses. This includes transuranic waste (TRU), which the Department of Energy ultimately plans to dispose of at the Waste Isolation Pilot Project (WIPP) near Carlsbad, New Mexico, as well as the high-level radioactive waste generated by the production of nuclear weapons. This high-level waste will be disposed of in the same repository that the Department of Energy will operate for the disposal of spent fuel from commercial nuclear power plants. Significant amounts of low-level radioactive waste and mixed wastes were also generated from nuclear weapons production, as well as general maintenance activities, at military bases. This waste now requires disposal.

Some wastes are currently in inadequate interim storage facilities and pose potentially serious long-term threats to public health and the environment. There are also safety and equity concerns surrounding transportation and ultimate disposal of waste. The states insist that the cleanup and disposal programs advance in an expeditious manner.

Other Federal facilities that have generated waste and may remain unsafe for humans include military bases and formerly used defense sites operated by the Department of Defense. States are also committed to the cleanup and conversion of closed military bases to other beneficial uses as soon as possible. NCSL encourages the Department of Defense to lessen the impacts of closing these facilities by entering into partnerships with business and other private interests in order to turn them into sites of commerce and development.

In 1992, Congress enacted the Federal Facilities Compliance Act which waived the doctrine of sovereign immunity and allowed partial State environmental regulation at Federal facilities. NCSL firmly supports this principle. Furthermore, NCSL believes that:

• The Federal Government should be responsible for the cleanup of Federal facilities. There should be coordination among the Department of Energy, Department of Defense, and the U.S. Environmental Protection Agency with State regulatory agencies to insure that the cleanup of these facilities is properly and efficiently managed.

• The Federal Government should be subject to all State laws governing the cleanup of hazardous and radioactive waste materials.

• Department of Energy facility sites should continue to be incorporated into the National Priority List according to the severity of the risk they pose, but cleanup should be independent of Superfund moneys.

• The Department of Energy should continue to use the contract review process to provide effective oversight and for evaluating integrated contracts for cost accountability.

• Congress should provide for sufficient long-term funding for the effective and timely cleanup and disposal of existing and future wastes. Cost-effective solutions must be developed and implemented by Federal agencies to meet cleanup standards that protect human health and the environment. Congress must fund and Federal agencies must implement an aggressive research and development program to develop and to put into place the technology necessary to address the cleanup situation at all Federal facilities.

• Cleanup work must be accomplished in strict compliance with Federal facility agreements, Federal laws and regulations. Congress should give State and Federal regulators complete enforcement authority necessary to ensure such compliance. For those sites that do not require extensive cleanup, a future use and owner should be identified as quickly as possible in order to return the affected land to productive use.

• States and Indian tribes must have a continuing, substantive role in the planning and oversight activities of the waste-management effort. The Department of Energy must recognize that cultural resources and artifacts may be present on DOE sites, and should partner with affected Indian tribes to identify and mitigate impacts to those resources. The general public must also be involved in the decision-making process.

• Whenever possible, pollution prevention practices should be followed and recovered materials should be recycled or reused.

• As it will be necessary for waste to be transported across state-lines to waste storage and disposal facilities, all transportation must be done in compliance with State and Federal safety procedures for the shipping of hazardous, radioactive, and mixed wastes. States must play an integral role in evaluating the safety of a particular method of transportation and must be continually informed about the status waste movement and storage.

U.S. DEPARTMENT OF ENERGY

Furthermore, NCSL recognizes the work of the Department of Energy's Office of Environment Management in developing Accelerating Cleanup: Focus of 2006, a comprehensive, strategic plan to characterize and prioritize the long-term cleanup and management of wastes at all Department of Energy facilities. NCSL urges the continued implementation of the plan, and supports the following:

• A firm commitment to a cleanup schedule, including aggressive but realistic milestones for all activities. Action should be taken to manage Federal radioactive, hazardous, and mixed waste sites as soon as possible. Studies should be kept to a minimum.

• Federal cleanup efforts must be conducted in full consultation with the affected States and affected Indian tribes. Cleanup efforts should begin with site-specific plans which can then be used to develop a national plan for future cleanups.

U.S. DEPARTMENT OF DEFENSE

NCSL will continue to work with the Federal Government in the development of site-specific cleanup plans. State legislators are interested in the timely cleanup and conversion of bases to lessen the financial impact on the State and local community from the closure of a military facility. The Department of Defense should establish an aggressive cleanup schedule for military facilities, or develop options for the transfer of land to new owners who agree to clean up the site before developing it for future use. The Department of Defense and any future owners should be subject to all State laws governing the cleanup of hazardous and radioactive waste materials. All cleanup efforts should be conducted in full consultation with affected states.

Adopted: August 2001

NATIONAL GOVERNORS ASSOCIATION

POLICY POSITION

NR–4. SUPERFUND POLICY

4.1 Preamble

Superfund, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), is under debate in Congress. In recent years, Superfund has come under increasing scrutiny by the U.S. Environmental Protection Agency (EPA), states, environmental groups, and the business community. Although these stakeholders often have widely divergent views about what is right and wrong with Superfund and how it should be changed, they all share concerns about the efficiency, effectiveness, and equity of Superfund cleanups. Clearly, a variety of legislative remedies and regulatory and administrative changes are needed to improve the program's ability to expeditiously cleanup the nation's worst hazardous waste sites. Moreover, the taxing authority used to support the trust fund has expired, lending urgency to the need to reauthorize the program.

It is imperative that Congress recognize that under the current system; most cleanup work underway is occurring under State programs. The 1,300 sites on the National Priority List (NPL) represent only a fraction of the nation's cleanup sites. Changes to CERCLA will impact both NPL sites and cleanup work moving forward at the State level. Therefore, the Governors strongly believe that changes to CERCLA must not jeopardize the continued effectiveness of State programs. The Governors look forward to participating in this process and to playing a major role in the implementation of the national hazardous waste site cleanup effort.

4.2 Streamlining Remedy Selection

The Governors believe that centralized decisionmaking has unnecessarily slowed the Superfund program and that the protection of public health and ecosystems demands quicker response actions. The site assessment and remedial action programs are particularly cumbersome. They should be streamlined by focusing Superfund regulations and guidance more on specifying the desired end results of cleanup actions and less on the process for determining such results. The Governors believe the following changes would result in more cost-effective cleanups, a simpler remedy selection process, and a more results-oriented approach.

• Cleanup standards should be developed with consideration of different types of land uses. When appropriate, feasible, and cost-effective, these standards should allow unrestricted use of the remediated site.

• "Presumptive" remedies should be available to narrow analysis of alternative remedies at sites fitting certain land use, generic contamination, population, and hydrogeologic conditions.

• States must be able to apply their own standards at sites within the State to accommodate specific environmental conditions and public views. A more streamlined process should be devised for incorporating these standards into the final remedy.

Risk assessment and cost-benefit analysis can be useful tools in selecting cleanup remedies under certain conditions. First, these tools should be used only to select among remedies designed to meet a specified cleanup standard. Second, the use of risk assessment and cost-benefit analysis should be based on generally accepted and uniform procedures and should clearly articulate underlying assumptions and the impact of alternative assumptions, include public participation, and acknowledge nonquantifiable benefits and costs. Third, these techniques should not provide opportunities for preenforcement review.

4.3 State-Federal Role

The impacts of hazardous waste sites are felt primarily at the State and local levels. Therefore, the State role in the program needs to be strengthened. States should have a stronger voice in Superfund decisionmaking, and EPA should be required to authorize or delegate full or partial management of the remedial and emergency removal programs to all capable States interested in administering cleanups. This will accelerate cleanup, avoid duplication of effort, increase efficiency for government and the private sector, reduce transaction costs, provide greater certainty in the program, and maximize the effectiveness of limited State and Federal resources.

EPA's role should be to ensure the proper implementation of the program throughout the Nation by establishing program requirements for delegation. EPA's role also should be to provide technical assistance, to manage part or all of the cleanup program at priority sites in states choosing not to pursue full authorization or delegation, and to ensure that adequate funding is available to states for program implementation. Full authorization or delegation should provide the maximum flexibility necessary to meet State needs and objectives without undue or unnecessary Federal oversight. The process for securing delegation should involve as little administrative burden as possible. In the case of authorization, which would allow states to operate their programs in lieu of the Federal program, CERCLA should establish, through statutory provisions, program criteria for a state-initiated self-certification process to ensure that the program adequately protects human health and the environment. EPA should periodically review State performance, instead of involving itself in site-by-site oversight.

CERCLA should be amended to allow interested states to develop a statewide response program for all contaminated sites in the state, and the administrator of EPA should be required to approve such programs within a reasonable period or show cause as to why he or she has not done so. EPA approval should be based on reasonable performance criteria that are developed with State participation and ensure outcomes substantially consistent with the goals of the Federal program. Once this program has been approved, the State should be permitted to assume full and complete responsibility for management of the cleanup effort at all sites listed by the State as requiring cleanup. Such responsibility should include establishing priorities, undertaking remedial investigations/feasibility studies, selecting remedies, selecting contractors, and conducting remedial cleanups. Authorized states should nominate sites for Federal cleanup funds, and EPA should allocate available funds based on competing national and regional priorities.

4.4 Liability

The liability scheme employed in any hazardous waste cleanup program is critical to the success of that program. The current CERCLA liability scheme serves some purposes well. Its effectiveness at encouraging better waste management is beyond dispute and it has provided resources for waste site cleanups. On the other hand, the Governors believe the current system is flawed in several important respects. Among others, it too often leads to expensive litigation and transaction costs.

The current liability scheme is under scrutiny in Congress and the Governors recognize that the outcome of the debate on Federal liability will have significant, direct effects on State cleanup programs. The program must be responsive to the needs of all parties, including the regulated community, taxpayers, and communities threatened by pollution. The Governors would like to work constructively with Congress in revising the current scheme.

Any resulting liability scheme must:

• ensure that adequate funds are available for cleaning up waste sites and that no unfunded mandates are created for the states;
• allocate cleanup costs fairly and equitably among those responsible for pollution. The liability and transaction costs of small contributors and municipalities must be addressed;
• minimize transaction costs to the greatest extent possible. We must ensure that changes to the existing system do not create new transaction costs or additional opportunities for extensive litigation of new or previously well-settled issues that will only further delay cleanups;
• encourage pollution prevention and improved waste management;
• continue to provide substantial incentives for responsible parties to negotiate cleanup settlements before government enforcement action is necessary;
• complement existing State programs;
• ensure that sites are cleaned up promptly and efficiently; and
• ensure that at non NPL sites, a release of liability under State cleanup laws protective of human health and the environment constitutes, by operation of law, a release from Federal liability.

4.5 State Program Grants

The Governors believe that Superfund cleanup will be faster and more effective if states have adequate capacity to plan and implement the program. To develop such capacity, the fund should be used to support grants to states for program development, site identification and assessment, enforcement, site remediation, oversight, and administrative expenses at all sites.

4.6 State Match

The Governors believe that there is no justification for requiring a larger State match for Superfund cleanup at sites that are publicly operated than for private sites. CERCLA should be amended to provide that the match required for remedial actions is 10 percent at all sites, whether or not they are operated by the State or a political subdivision. There should continue to be no cost share required for removal actions. The 10 percent State share for sites operated by states or political subdivisions should be considered a final settlement of all liability under CERCLA for the State or political subdivision. The Governors support the continued ability of states to apply in-kind services toward the State match requirement.

4.7 Operation and Maintenance Expenses

CERCLA should be clarified to provide that the response trust fund can be used to support operation and maintenance activities during the period in which they are required. It should be clear that these expenditures are subject to the same State match requirements as cleanup actions.

4.8 Natural Resource Damage Claims

The natural resource damage provisions of CERCLA allow Federal, state, and tribal natural resource trustees to require the restoration of natural resources injured, lost, or destroyed as the result of a release of hazardous substances into the environment. The Governors believe this is an important program that must be maintained. The Governors urge Congress to strengthen the program by amending the statute of limitations to run 3 years from completion of a damage assessment; removing the prohibition on funding natural resource damage assessments from Superfund; and providing for judicial review of trustee decisions on the administrative record, subject to the arbitrary and capricious standard. Further, the Governors urge Congress to resist efforts to weaken the program by capping liability for natural resource damages at some level per site or eliminating compensation for nonuse values.

4.9 Federal Facilities

The Governors continue to support legislation that ensures a strong State role in the oversight of Federal facility cleanups. Federal facilities and former Federal facilities are among the worst contaminated sites in the Nation. This condition is a legacy of the lack of regulatory oversight at these sites for most of their history. The double standard of separate rules applying to private citizens and the Federal Government continues to have a detrimental effect on public confidence in government at all levels. Federal facilities should be held to the same standard of compliance as other parties.

Because EPA cannot effectively enforce CERCLA, or any other environmental statute against other Federal agencies, it is critical that states have clear authority to do so. Therefore, the Governors urge Congress to include in any CERCLA reau-

thorization bill provisions authorizing states to require and oversee response activities at Federal facilities, including former Federal facilities.

In virtually every other environmental statute, Congress has waived sovereign immunity and allowed qualified states to enforce State environmental laws at Federal facilities. Such authority has been provided in the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act. As recently as 1992, when the Federal Facility Compliance Act was enacted, Congress once again confirmed its commitment to State enforcement of environmental laws at Federal facilities. We urge this Congress to ensure that CERCLA also follows this sound policy.

4.10 Voluntary Cleanups

The Governors believe that voluntary cleanup activities can make a significant contribution toward the nation's hazardous waste cleanup goals. A number of states have developed highly successful voluntary cleanup programs that have enabled sites to be remediated more quickly and with minimal governmental involvement. CERCLA should be amended to give credit, in the form of a legal release, to volunteers who have cleaned a site to protection standards in accordance with a State voluntary cleanup law protective of human health and the environment. These changes will encourage voluntary cleanup and thus increase the number of cleanups completed. In addition, CERCLA should encourage and provide clear incentives, such as tax exemptions and liability protections for nonculpable parties, for so-called "brownfields" programs at the State level to encourage potentially responsible parties, and for prospective purchasers to reuse and redevelop these contaminated properties.

4.11 National Priorities List

The NPL should be used to facilitate the cleanup of contaminated sites and to protect human health and the environment. Governors should be given the statutory right to concur with the listing of any new NPL sites in their states. The Governors are concerned about proposals to legislatively cap or limit the NPL because of differences in capacities among states, the complexity and cost of some cleanups, the availability of responsible parties, enforcement considerations, and other factors. There must be a continuing Federal commitment to clean up sites under such circumstances. Emphasis should be on prioritizing cleanup fund expenditures to provide the greatest human health and environmental benefits. In the event EPA discovers an imminent and substantial threat to human health and the environment, it may continue to use its emergency removal authority, but any assignment of liability must be consistent with liability assigned under State cleanup laws.

4.12 Remediation Waste

The Governors support the ability of the states to manage remediation waste under State remedial action plans (RAPs) in lieu of traditional Resource Conservation and Recovery Act permits and land disposal treatment requirements. State RAPs should be developed and administered in accordance with State laws pertaining to public participation, remedy selection, and State oversight. A streamlined authorization process should be established through statutory provisions, identifying program criteria for a state-initiated self-certification process to ensure that the program adequately protects human health and the environment. EPA should periodically review State performance, instead of involving itself in RAP-by-RAP oversight.

Time limited (effective Winter Meeting 2001—Winter Meeting 2003). Adopted Annual Meeting 1993; revised Annual Meeting 1995 and Winter Meeting 1997; reaffirmed Winter Meeting 1999 and Winter Meeting 2001.

STATEMENT OF BONNER COHEN, PH.D., SENIOR FELLOW, LEXINGTON INSTITUTE

Good afternoon. My name is Bonner Cohen. I am a senior fellow at the Lexington Institute, a non-profit, non-partisan, public policy research organization located in Arlington, VA. I want to thank Chairman Jeffords, Ranking Member Smith, and the other members of this committee for the opportunity to address a subject bearing directly on our nation's security.

In recent years, well-intended environmental statutes designed to do such things as protect endangered species and safeguard migratory birds have been applied to military installations and activities where they come in direct conflict with the proper training of soldiers for the deadly business of battle. Everyone in this room knows that the military has a unique mission, one that requires the highest state of readiness so as to prevent the needless sacrifice of young lives. The Joint Chiefs of Staff have come here today, because they have a problem that needs to be addressed.

Failure to do so in a timely and sensible fashion will put the lives of those in uniform at an unnecessary risk.

This need not be the case. By making a few narrowly focused, but vitally important, clarifications to some of our environmental statutes, we can continue to provide for environmental progress, without jeopardizing military readiness. Let me briefly address three areas where, through the application of common sense, improvements can be made.

Marine Mammal Protection Act (MMPA): The Marine Mammal Protection Act's definition of "harassment" has been a source of confusion since it was included in the 1994 amendments to the statute. The statute defines "harassment" in terms of "annoyance" or the "potential to disturb," vague standards which have been applied inconsistently and are difficult to interpret. Both the Clinton and the Bush administration have sought to refine this definition. But efforts by the National Marine Fisheries Service to solve the problem through a regulatory interpretation of "harassment" proved unworkable and would have opened the door to substantial litigation. Last year, the Navy, the National Marine Fisheries Service (NMFS), and the US Fish & Wildlife Service (FWS) developed a definition of "harassment" which all three agencies could accept. In line with a recommendation put forward by the National Research Council, it clarifies that "harassment" as applied to military readiness activities to mean death, injury, and other biologically significant effects, including disruption of migration, feeding, breeding, or nursing.

Until the law is amended to clarify the definition of "harassment," the Navy and the NMFS are subject to lawsuits over application of that term. Indeed, several groups have already announced their intention to challenge the deployment of the Navy's Low Frequency Active Sonar, a key defense against ultra-quite diesel submarines, and for which the Navy has an immediate and critical need.

Worldwide, all activities undertaken by the Defense Department account for fewer than 10 deaths or injuries to marine mammals annually, as compared with 4,800 deaths annually resulting from commercial fishing. By giving a science-based definition to "harassment," we can ensure protection of marine mammals while allowing the Armed Forces sufficient flexibility to training and other operations essential to national security.

Migratory Bird Treaty Act (MBTA): On March 13, 2002, a Federal judge, acting on a suit brought by the Center for Biological Diversity, ruled that the incidental takes of migratory birds during the course of training activates at Farallon de Medinilla (FDM) are unlawful under the MBTA without a permit. FDM is a tiny (less than 1/3 square mile), uninhabited island in the West Pacific. It has been used as a firing range for naval gunfire and air bombardment since 1976. The ruling has halted all training exercises on FDM pending the judge's final decision on whether to enjoin the Navy from carrying out bombing exercises at the site.

In an area designated as a bombing range, some accidental killing of migratory birds will take place. Common sense tells us this. Common sense also tells us that shutting down the remote firing range will weaken Armed Forces' to train and test for future conflicts.

The implications for military readiness go far beyond the FDM firing range in the West Pacific. Almost all species of birds everywhere are migratory, and the FDM case was brought in the DC Circuit, which has jurisdiction over all Department of Defense activities. As a result, the recent ruling in the FDM case puts at risk all US military aviation, military telecommunications, and live-fire training nationwide and abroad. A far better solution would be to return to the legal and regulatory status quo as it existed for over 80 years, until the FDM ruling in March.

Endangered Species Act (ESA): The Department of Defense manages 25 million acres on more than 425 military installations in the United States, providing sanctuary to some 300 species listed as threatened or endangered. More often than not, it is good stewardship of land, be it in the public or private sector, that attracts threatened or endangered species. This has created problems for the military which must train troops and test weapons in realistic conditions on bases that harbor endangered species. Applying the ESA's provision pertaining to "critical habitat" to military installations, as some litigants are demanding, would undermine readiness activities in bases all over the country, including Fort Hood, Texas, Camp Pendleton, California, and Fort Polk, Louisiana—just to name a few.

The courts have held that critical habitat is intended for species recovery. Hence, the designation of critical habitat is a bar to any land use that diminishes the value of that land for species recovery. Rather than military lands being used for military purposes, once critical habitat is designated, such lands must be used first for species recovery. The most sensible way to deal with this issue is through a legal instrument that already exists. Instead of critical habitat designation, endangered species on military reservations should continue to be protected through Integrated

Natural Resource Management Plans (INRMPs), which are required under the Sikes Act and are developed in close cooperation with the Department of Interior and State wildlife agencies. This approach has been endorsed by both the Clinton and the Bush administrations. The widespread presence of threatened and endangered species on military bases attests to the effectiveness of INRMPs. There will always be problems, but they are best dealt with through the holistic approach provided by INRMPs rather than through the cumbersome species-by-species analysis required by the designation of critical habitat.

In closing, I would like to pose two questions that go directly to the heart of the readiness issue: If soldiers cannot be trained in realistic conditions in areas designated for that purpose, then where is that training supposed to take place? If weapon systems cannot be tested in realistic conditions in areas designated for that purpose, then where is that testing supposed to take place?

Thank you very much.

STATEMENT OF DAVID HENKIN, STAFF ATTORNEY, EARTHJUSTICE, HONOLULU, HI REGIONAL OFFICE

Aloha, Mr. Chairman and members of the committee. My name is David Henkin, and I have come here today from Hawaii, to testify on behalf of Earthjustice, the non-profit law firm for the environment-dedicated to protecting the magnificent places, natural resources, and wildlife of this earth and to defending the right of all people to a healthy environment. I thank Chairman Jeffords and the committee for this opportunity to testify regarding the exemptions proposed in the Department of Defense's (DOD) Readiness and Range Preservation Initiative and Senate bill 2225.

I have been a staff attorney for Earthjustice in its mid-Pacific office in Honolulu, Hawaii for the past 7 years, working on a variety of issues involving the Endangered Species Act, Migratory Bird Treaty Act, and other Federal and State environmental laws. Before moving to Hawaii in 1995, I worked on similar issues in my home State of California.

On behalf of Earthjustice, I am here today to strongly urge Senators on the conference committee for the DOD Authorization bill and this Senate Environment and Public Works Committee to oppose exemptions for the DOD from our nation's environmental and public health laws. The Administration's Readiness and Range Preservation Initiative seeks broad exemptions from the Clean Air Act, the Resource Conservation and Recovery Act (RCRA), Superfund (CERCLA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the Marine Mammal Protection Act (MMPA). If adopted, these exemptions would severely compromise our nation's efforts to protect the air we breathe, the land on which we live, and the rich diversity of plants and animals with which we share this planet.

We commend the Senate Armed Services Committee for not including these exemptions in the Senate DOD Authorization bill, S. 2514, and thank the entire Senate for keeping these exemptions out of the bill that subsequently passed on June 28, 2002. Unfortunately, the struggle against these anti-environmental riders is not over, since the House version of the DOD Authorization bill (H.R. 4546) includes provisions that seek to weaken protections for endangered species and migratory birds.

BAD ESA EXEMPTION RIDER IN FISCAL YEAR 2002 SUPPLEMENTAL APPROPRIATIONS BILL

The House version of the Fiscal Year 2002 Supplemental Appropriations bill includes a rider that seeks to exempt the DOD from complying with important substantive and procedural protections of the Endangered Species Act when DOD decisions such as hiring and defense contracting result in increased off-base water consumption that threatens imperiled species or their habitats. If adopted, this rider could be used to establish a dangerous new precedent for shielding the indirect impacts of DOD actions from review and for relieving the DOD of its duty to mitigate those impacts. There is no valid reason to apply a standard of analysis for DOD activities that is less protective than the standard that applies to the activities of every other Federal agency.

The indirect effects of Federal actions can be far more damaging than the direct effects. Because of this, the need to consider indirect effects is a well-established principle in many of our nation's environmental laws, including the ESA. The exemption rider in the House version of the Fiscal Year 2002 Supplemental Appropriations bill seeks to not only do away with the consideration of potentially destructive indirect impacts, but may also bar analysis of impacts from interrelated and interdependent actions that would not occur but for an action taken by the DOD. This

would further weaken vital protections Congress intended the ESA would provide endangered and threatened species and their habitats.

In addition to listed species and their habitats, private, State and county water users who share water basins with DOD installations could suffer from passage of this rider. By shielding the DOD from responsibility for off-base impacts resulting from DOD decisions, the rider would shift the burden to other water users either to mitigate the effects of those impacts or risk losing access to water on which they have historically relied.

Were this rider to become law, the DOD could attempt to exempt many potentially destructive actions from the ESA simply by outsourcing its functions through defense contracts, since the DOD may no longer be held accountable for water consumption occurring off base that is "not under the direct authority and control" of the Secretary of Defense. Such decisions greatly threaten national ecological treasures such as Arizona's San Pedro River, where the Army's Fort Huachuca is located. The San Pedro River, federally designated as a National Riparian Conservation Area and recognized by the Nature Conservancy as one of the world's eight "Last Great Places," supports 82 species of mammals and 385 species of birds. The House rider seeks to allow the DOD to carry out actions likely to cause the extinction of listed species without any consideration, through the ESA section 7 consultation process, of mitigation measures or reasonable alternatives that might spare those species.

Earthjustice, along with the overwhelming majority of the American public and over 20 national environmental groups, believes that the DOD should follow the law, as do other agencies and the public. A Zogby International poll conducted on April 19, 2002 found that 85 percent of registered voters believe government agencies such as the DOD should not be exempt from complying with America's environmental laws. Rather than seek to avoid its obligations under Federal environmental laws, the DOD should set an example in protecting and restoring our nation's environmental heritage. We urge Senators to oppose any such exemptions in both the DOD Authorization bill and the fiscal year 2002 Supplemental Appropriations bill.

THE FARALLON DE MEDINILLA CASE AND THE PROPOSED MIGRATORY BIRD TREATY ACT EXEMPTION

Turning to the anti-environmental provisions of the DOD proposal and the House DOD Authorization bill, I would like first to discuss briefly the Migratory Bird Treaty Act litigation involving the Navy's bombing of the island of Farallon de Medinilla (FDM) in the Northern Mariana Islands. This is the case the DOD is using to justify its request for a blanket exemption from the MBTA. In December 2000, the Center for Biological Diversity, represented by Earthjustice, sued the Navy for violating the MBTA by bombing nesting seabirds at FDM, despite the Navy's knowledge that its bombing kills migratory birds and despite the U.S. Fish and Wildlife Service's (FWS) denial of the Navy's application for an MBTA permit, due to the Navy's failure to satisfy the law's basic requirements. FDM, an island of 206 acres, is home to more than a dozen species of migratory birds protected by the MBTA and the international treaties it implements, including one of only two breeding colonies of the great frigatebird in the Mariana island chain and the largest known nesting site for masked boobies in the Mariana and Caroline islands.

On March 13, 2002, Judge Emmet G. Sullivan of the District of Columbia District Court issued an order holding that the Navy's bombing of FDM without an MBTA permit is illegal and, on May 1, 2002, issued a preliminary injunction halting for thirty days all military training exercises at FDM that could harm or kill migratory birds. The D.C. Circuit Court stayed the preliminary injunction on May 21, 2002. Following Judge Sullivan's subsequent issuance of a permanent injunction, the D.C. Circuit granted a stay of that injunction pending appeal on June 5, 2002.

Even though the Navy is now free to train at FDM as it sees fit, the DOD is using the isolated example of this still unresolved litigation to seek an across-the-board exemption from the MBTA for training activities by all branches of the military everywhere. It is seeking to leverage an isolated dispute over a 206-acre island in the middle of the Pacific to exempt 25 million acres of DOD land across the country. If successful in securing this exemption, the DOD could wipe out untold numbers of migratory birds and destroy their nesting and breeding areas without any assessment of biological impacts, any effective oversight, or any real accountability.

There is simply no reason for this exemption. It has been more than eighty years since the MBTA was enacted in 1918 to implement the International Convention for the Protection of Migratory Birds between the United States and Great Britain. In all that time, the FDM case is the only example the DOD can point to where it believes the MBTA may possibly interfere with military training. In the FDM case,

the Department of Justice attorney has represented to the court that both the DOD and FWS think the Navy can get a permit under existing law by applying for a different "special use" permit.

I say, "may possibly" because the FDM case is still working its way through the judicial system and has yet to produce a final outcome. In light of the D.C. Circuit's stay of the district court's injunction, allowing the Navy to train at FDM while the court considers the appeal, there is neither any urgency nor any need to enact legislation weakening the MBTA now.

PROPOSED ENDANGERED SPECIES ACT EXEMPTION

Having spent much of my career working to protect essential recovery habitat for Hawaii's imperiled plants and animals, my primary expertise is in the application of the Endangered Species Act's critical habitat provisions. Accordingly, I will focus the remainder of my testimony discussing why the proposed ESA exemption is unnecessary to ensure military preparedness and why, if enacted, it would spell disaster for important efforts to bring endangered species from the brink of extinction to recovery.

Both S. 2225 and H.R. 4546 (the focus of the upcoming conference committee) contain similar provisions seeking to exempt lands that the DOD owns or controls from critical habitat designations whenever there is an Integrated Natural Resources Management Plan (INRMP) that addresses special management considerations for the listed species found there, and their habitats. While we recognize the DOD's need to train to defend our national interests, such a broad exemption is not needed to accomplish this goal. We urge Senators to ensure that this ESA exemption is not included in the DOD authorization bill for several reasons:

1. The ESA Exemption Seeks to Exclude All DOD Lands from Critical Habitat

The broad wording of the proposed ESA exemption seeks to effectively exclude all DOD lands from critical habitat. To be exempt, the only condition is that the land in question have an INRMP that "*addresses* endangered or threatened species and their habitat." S. 2225, § 2017 (emphasis added); *see also* H.R. 4546, § 312 (INRMP must "address[] special management considerations or protection"). There is no requirement that the INRMP's management be adequate to respond to the species' needs. Rather, as long as the INRMP discusses listed species and their habitats and proposes some form of management, it would pass muster, and the land it covers would be automatically exempt from critical habitat designation.

The Sikes Act mandates that each INRMP provide, to the extent "[c]onsistent with the use of military installations to ensure the preparedness of the Armed Forces," some management of the species and habitats found on the installation in question. 16 U.S.C. § 670a(b). Since all INRMPs must "address" listed species and habitats to some extent, then all DOD lands with a final INRMP would automatically be excluded from critical habitat designation should the proposed exemption become law.

2. The ESA Exemption Seeks to Eliminate an Important Tool for Species Recovery

To appreciate the serious blow that the proposed ESA exemption would deal to efforts to bring endangered and threatened species back from the brink of extinction, one must first understand the vital and unique role critical habitat plays in promoting species recovery.

When it first promulgated the ESA, Congress recognized that habitat loss is "the major cause of the extinction of species worldwide." H.R. Rep. No. 95–1625 at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455. Accordingly, Congress established as a primary purpose of the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

To further this goal, in 1978, Congress amended ESA section 4 to require that FWS and the National Marine Fisheries Service (NFMS) generally must designate critical habitat at the same time that they list any species as endangered or threatened. Congress mandated critical habitat designation for imperiled species because it confers important protection beyond that provided by listing alone. Under ESA section 7(a)(2), Federal agencies must consult FWS or NMFS to ensure that any action they authorize, fund or carry out will not "jeopardize the continued existence of any [listed] species." 16 U.S.C. § 1536(a)(2). For species with designated critical habitat, each Federal agency must, in addition, guarantee that its actions will not "result in the destruction or adverse modification" of that habitat. 16 U.S.C. § 1536(a)(2).

By definition, critical habitat includes areas "essential to the conservation of [listed] species." 16 U.S.C. § 1532(5)(A). "Conservation," in turn, means recovery of these

species "to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. §1532(3). Thus, while the first ESA section 7(a)(2) duty not to "jeopardize the continued existence" of listed species helps to protect them from extinction, critical habitat designation allows these species to *recover* to a non-imperiled status, the ultimate goal of the ESA.

In lobbying for the ESA exemption, the DOD glosses over the significant lowering of the bar of endangered species protection that may result should this provision become law. The DOD emphasizes that it would still have to consult FWS and NMFS under ESA section 7(a)(2), but fails to mention that, in cases where essential recovery habitat is currently unoccupied by listed species, consultation might not be triggered at all absent a formal designation of the habitat as "critical habitat." Consultation for potential impacts to essential recovery habitat that is unoccupied is likely not to occur with an INRMP alone.

For species that are endangered, dispersal into currently unoccupied territory, is in most cases, key to their recovery. In Hawaii, where many plant species have been reduced to single populations, it is vital to protect areas historically occupied—but currently unoccupied—if we are to have any chance of increasing the numbers and distribution of these plants to save them from extinction. Other species, like the Florida panther, may rely on unoccupied habitat to provide dispersal corridors between currently occupied areas.

Moreover, without critical habitat designated, the standards against which any consultations that did take place would measure DOD activities would be much less protective. Rather than ensuring that the DOD's activities would not destroy habitat that is essential to species recovery, the DOD is seeking a requirement only to avoid "jeopardy," that is, pushing a species to extinction. The DOD proposal could have the effect of precluding a species from having any chance at recovery.

When one considers that the DOD controls over 25 million acres of land, home to over 300 federally listed species, the implications for species recovery of the DOD's proposed exemption is enormous. For example, the Army's Makua Military Reservation on O'ahu is home to over thirty endangered plants, many of which are found only in the Makua area, and nowhere else.

3. There is No Need to Weaken the ESA to Achieve Military Readiness

Before eliminating essential protection for recovery habitat on DOD lands, one must take a hard look at whether this drastic measure is necessary. Review of the ESA shows that the law already contains the flexibility the DOD needs to ensure that it can prepare to defend our Nation.

Under ESA section 4(b)(2), before FWS or NMFS can designate critical habitat, they must "tak[e] into consideration the economic impact, *and any other relevant impact*, of specifying any particular area as critical habitat." 16 U.S.C. §1533(b)(2) (emphasis added). Thus, if DOD has a valid concern that designating critical habitat on a particular facility would interfere with vital training activities, the ESA already provides a mechanism to express those concerns and to seek exclusion of specific areas on a case-by-case basis.

The critical habitat designation process for the coastal California gnatcatcher, a threatened bird, illustrates how the existing section 4(b)(2) process takes into consideration concerns about military readiness. As originally proposed, the critical habitat designation for the gnatcatcher would have included about 40 percent of Marine Corps Base Camp Pendleton. 65 Fed. Reg. 63680, 63690 (Oct. 24, 2000). During the public comment periods on the proposal, the Marines expressed concerns that, if finalized, the designation would interfere with vital training activities. The FWS took due note of the Marines' concerns and, pursuant to section 4(b)(2), issued a final rule that excluded all of Camp Pendleton from critical habitat for the California gnatcatcher.

Unlike the careful case-by-case balancing required under section 4(b)(2), the proposed blanket ESA exemption seeks to exclude areas from critical habitat, even if they manifestly have no connection to military readiness. The expansive wording of the proposed exemption extends to all lands "owned or controlled" by DOD, including military exchanges, recreational facilities such as golf courses, commissaries, water treatment facilities, and so forth. Section 4(b)(2)'s existing mechanism for evaluating national defense needs is a far superior way to address the DOD's concerns.

Moreover, the ESA, as currently written, already provides for the potential situation when military activity that might be curtailed by critical habitat designation. Section 7(j) gives the DOD an automatic exemption from any provision of the ESA—including the prohibition on adversely modifying or destroying critical habitat—whenever "the Secretary of Defense finds that such exemption is necessary for rea-

sons of national security." 16 U.S.C. § 1536(j). No other Federal agency has this power to demand an automatic exemption from the ESA's requirements.

Thus, if critical habitat designation were to conflict with military training activities vital for national security, the Secretary of Defense already has the authority to ensure that training will take place, untrammeled by restrictions imposed by critical habitat, or, for that matter, any other ESA provision. The fact that the Secretary of Defense has never felt the need to invoke the automatic exemption provisions of section 7(j) belies the DOD's current claim that the proposed exemption is needed to ensure military readiness.

The ESA, as currently written, already gives the DOD the tools it needs to ensure, on a case-by-case basis, that critical habitat will not interfere with vital training. There is no reason to give the DOD a sweeping exemption from all critical habitat designations, since, in most cases, no conflict between habitat protection and military readiness actually exists.

4. INRMPs Are Inadequate Substitutes for Critical Habitat

The DOD's suggestion that INRMPs can substitute for critical habitat ignores crucial differences between the type of protection that each provides. First, because the Sikes Act mandates that INRMPs tailor their management programs to be consistent with the military mission of the installation in question, the protective measures an INRMP can require are inherently limited in scope. In contrast, ESA section 7(a)(2)'s prohibition on adverse modification or destruction of critical habitat establishes uniform standards for all Federal agencies—including the DOD. Critical habitat provides more protection than INRMPs ever could.

Second, because it comes into play during section 7 consultation, which involves a case-by-case analysis of the likely impacts of proposed military activity, critical habitat ensures that the evaluation of a species' habitat needs will always be based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). In contrast to this dynamic process, INRMPs are static documents, generally updated only once every 5 years. 16 U.S.C. § 670a(b)(2). They do not guarantee that decisions will always be based on the latest and best science, as critical habitat does.

Third, because INRMPs are on-the-ground management plans, their effectiveness depends entirely on their funding level. Without funding, INRMPs provide no benefit to listed species or their habitat.

For example, on the island of O'ahu, FWS recently refused to exclude six Army installations with INRMPs—Dillingham Military Reservation, Kawailoa Training Area, Kahuku Training Area, Makua Military Reservation, Schofield Barracks Military Reservation, and Schofield Barracks East Range—from proposed critical habitat designations for endangered and threatened plants on the grounds that "there is currently no guarantee of long-term funding for management actions that are ongoing or future management actions." 67 Fed. Reg. 37108, 37161.

In contrast to INRMPs, the restrictions on habitat-destroying Federal projects that critical habitat imposes are always there, protecting species regardless of funding.

Fourth, because the prohibition on adversely modifying critical habitat applies to all Federal agencies, critical habitat reaches a broader set of Federal threats than INRMPs, which regulate activities only on military installations. Thus, even if an INRMP contained the most proactive habitat management restrictions imaginable and were fully funded, an installation commander may have no power to stop another Federal agency from carrying out activities off-base, even if the activities were certain to harm habitat resources within installation boundaries. In contrast, critical habitat reaches all Federal activities, whether they take place inside or outside designated habitat.

A recent proposal to expand the runways at Kahului Airport on Maui to accommodate direct flights from abroad vividly illustrates the vital role critical habitat can play in protecting essential recovery habitat—like that found on many military installations—from indirect Federal threats. The National Park Service strongly opposed the airport expansion on the ground that it would increase the rate of introduction of invasive alien species, which eventually would spread to Haleakala National Park, degrading the native habitat found there. However, because Kahului Airport is located outside park boundaries, there was little park managers—whose primary mission is to protect the park's native species and ecosystems—could have done to prevent the Federal Aviation Administration ("FAA") from approving the expansion plans had the State of Hawaii not withdrawn them because of unfavorable economic conditions. In contrast, were critical habitat designated within park boundaries, the FAA would have to ensure that any airport expansion would not likely result, even indirectly, in adverse modification of that essential recovery habi-

tat. See 67 Fed. Reg. 15856, 15954 (Apr. 3, 2002) (noting that designation affects "regulation of airport improvement activities by the FAA").[1]

Similarly, the only way to ensure that Federal activities outside DOD lands will not adversely modify essential recovery habitat on DOD lands is through critical habitat designation. INRMPs only apply to within installation boundaries and, thus, cannot prevent harm from outside Federal activities.

5. The DOD is Seeking a Less Demanding Standard than Current FWS Policy

To persuade Congress to adopt the proposed ESA exemption, the DOD has argued that it is nothing more than a codification of the current FWS policy to exclude from critical habitat those areas that currently receive adequate special management considerations and protection for essential recovery habitat. The standard for exemption in the proposed ESA amendment—that DOD lands have an INRMP that merely "addresses" species and habitat management issues—is much less demanding than the standard FWS currently applies.

Before excluding DOD lands from critical habitat, FWS insists that they meet the following three criteria:

(1) a current INRMP must be complete and provide a conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions as necessary.

67 Fed. Reg. at 15905.

The DOD's recent experience with critical habitat designations in Hawaii contradicts its claim that the proposed ESA exemption is nothing more than a codification of current FWS policy. In case after case, FWS has found INRMPs to be inadequate substitutes for critical habitat.

On Kaua'i, FWS found that management actions on lands under Navy control at Barking Sands and Makaha Ridge "are not sufficient to address the factors inhibiting the long-term conservation" of the endangered plants found there. 67 Fed. Reg. 3940, 3998 (Jan. 28, 2002).

On O'ahu, FWS concluded that existing management actions at six Army installations (Dillingham Military Reservation, Kawailoa Training Area, Kahuku Training Area, Makua Military Reservation, Schofield Barracks Military Reservation, and Schofield Barracks East Range) and for lands under Navy control at Lualualei are not "sufficient to address the primary threats to [listed plant] species" and that "appropriate conservation management strategies have [not] been adequately funded or effectively implemented." 67 Fed. Reg. 37108, 37164 (May 28, 2002); *see also id.* at 37161–63.

In designating critical habitat for the O'ahu 'elepaio, a forest bird, FWS reviewed the INRMPs for three Army installations (Fort Shafter, Makua Military Reservation, and Schofield Barracks) and for Pearl Harbor Naval Magazine Lualualei, finding that "no military installation on O'ahu has completed a final INRMP that provides sufficient management and protection for the elepaio." 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001).

On the Island of Hawaii, FWS found that management at the Army's Pohakuloa Training Area "is not sufficient to address many of the factors inhibiting the long-term conservation of any of [the] 10 [federally listed plant] species" found there. 67 Fed. Reg. 36968, 37002 (May 28, 2002).

Thus, after reviewing INRMPs across the State, the Service found that *none* of them provided adequately for the long-term conservation of Hawaii's endangered and threatened species and their habitats. By excluding these same installations from critical habitat, the proposed ESA exemption would be a major setback in the struggle to save imperiled species in Hawaii—and throughout the country—from extinction.

CONCLUSION

In summary, Earthjustice strongly opposes the DOD's proposal to deprive migratory birds and essential recovery habitat on DOD lands of vital legal protections. Until the FDM litigation reaches a final resolution, it is premature for Congress to assess whether any changes to the MBTA are necessary or appropriate. As for the ESA, the current law provides assurances that training that is truly essential to national security will continue. We urge Senators on the conference committees to reject the exemptions found in the House version of the DOD Authorization bill and

[1] For that reason, the superintendent of Haleakala National Park lobbied heavily for the park's inclusion in critical habitat when FWS proposed critical habitat for endangered and threatened plants on Maui.

the fiscal year 2002 Supplemental Appropriations bill, which would weaken our country's most important environmental and public health laws.

Thank you for the opportunity to testify today.

Fish and Wildlife Service's Findings Regarding Adequacy of INRMPs in Hawai`i

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Navy's Barking Sands and Makaha Ridge Facility, Kaua`i	Plants: *Panicum niihauense* (no common name) *Sesbania tomentosa* (`ohai) *Wilkesia hobdyi* (iliau)	"Management at the Barking Sands and Makaha Ridge Facility lands currently consists of restricting human access and mowing landscaped areas. **These actions alone are not sufficient to address the factors inhibiting the long-term conservation** of [plants] *Panicum niihauense* and *Wilkesia hobdyi*. Therefore, we can not at this time find that management on these lands under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 3940, 3998 (Jan. 28, 2002).
Army's Dillingham Military Reservation, O`ahu	Plants: *Cyperus trachysanthos* (pu`uka`a) *Hibiscus brackenridgei ssp. mokuleianus* (ma`o hau hele) *Nototrichium humile* (kulu`i) *Schiedea kealiae* (no common name)	"We believe this land is needed for the recovery of one or more of these four [plant] species. Currently, the Army is not implementing any management actions for these listed species at the Dillingham Military Reservation (HINHP Database 2001; Army 2001b). In addition, proposed management actions identified for [the plant] *Schiedea kealiae* in the 2001 INRMP are 'subject to available funding'. **We do not believe that appropriate conservation management strategies have been adequately funded or effectively implemented.** Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37161 (May 28, 2002).

Army's Kahuku Training Area, O`ahu	Plants: *Adenophorus periens* (no common name) *Chamaesyce rockii* (`akoko) *Cyanea grimesiana ssp. grimesianna* (haha) *Cyanea koolauensis* (haha) *Cyanea longiflora* (haha) *Eugenia koolauensis* (nioi) *Gardenia mannii* (nanu) *Hesperomannia arborescens* (no common name) *Phyllostegia hirsuta* (no common name) *Tetraplasandra gymnocarpa* (`ohe`ohe)	"Proposed management actions identified for listed plant species in the 2001 INRMP are 'subject to available funding'. **We do not believe that there are sufficient assurances that appropriate conservation management strategies will be adequately funded or effectively implemented.** Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37161-37162 (May 28, 2002).

Army's Kawailoa Training Area, O`ahu	Plants: *Adenophorus periens* (no common name) *Chamaesyce rockii* (`akoko) *Cyanea acuminata* (haha) *Cyanea crispa* (haha) *Cyanea grimesiana ssp. grimesiana* (haha) *Cyanea humboldtiana* (haha) *Cyanea koolauensis* (haha) *Cyanea longiflora* (haha) *Cyanea st.-johnii* (haha) *Cyrtandra dentata* (ha`iwale) *Cyrtandra viridiflora* (ha`iwale) *Delissea subcordata* (no common name) *Eugenia koolauensis* (nioi) *Gardenia mannii* (nanu) *Hesperomannia arborescens* (no common name) *Labordia cyrtandrae* (kamakahala) *Lobelia oahuensis* (no common name) *Melicope lydgatei* (alani) *Myrsine juddii* (kolea) *Phlegmariurus nutans* (wawae`iole) *Phyllostegia hirsuta* (no common name) *Phyllostegia parviflora* (no common name) *Plantago princeps* (ale) *Platanthera holochila* (no common name) *Pteris lidgatei* (no common name) *Sanicula purpurea* (no common name) *Tetraplasandra gymnocarpa* (`ohe`ohe) *Viola oahuensis* (no common name)	"Proposed management actions identified for listed plant species in the 2001 INRMP are 'subject to available funding'. **We do not believe that the current management measures are sufficient to address the primary threats to these species, nor do we believe that there are appropriate assurances that appropriate conservation management strategies will be adequately funded or effectively implemented.** Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37192 (May 28, 2002).

Army's Makua Military Reservation, O`ahu	Plants: *Alectryon macrococcus* (mahoe) *Alsinidendron obovatum* (no common name) *Bonamia menziesii* (no common name) *Cenchrus agrimonioides* (kamanomano) *Chamaesyce celastroides var. keanana* (`akoko) *Ctenitis squamigera* (pauoa) *Cyanea superba* (haha) *Cyrtandra dentata* (ha`iwale) *Delissea subcordata* (no common name) *Diellia falcata* (no common name) *Dubautia herbstobatae* (na`ena`e) *Euphorbia haeleeleana* (`akoko) *Flueggea neowawraea* (mehamehame) *Hedyotis degeneri* (no common name) *Hedyotis parvula* (no common name) *Hibiscus brackenridgei* (ma`o hau hele) *Lepidium arbuscula* (`anaunau) *Lipochaeta tenuifolia* (nehe) *Lobelia niihauensis* (no common name) *Lobelia oahuensis* (no common name) *Neraudia angulata* (no common name) *Nototrichium humile* (kulu`i) *Plantago princeps* (ale) *Sanicula mariversa* (no common name) *Schiedea hookeri* (no common name) *Schiedea nuttallii* (no common name) *Silene lanceolata* (no common name) *Spermolepis hawaiiensis* (no common name) *Tetramolopium filiforme* (no common name) *Tetramolopium lepidotum ssp. lepidotum* (no common name) *Viola chamissoniana ssp. chamissoniana* (`olopu; pamakani)	"While we believe that some of these [plant] species specific actions may control threats in the short term, **we do not believe that these measures are sufficient to address the primary threats to all of the species reported from Makua Military Reservation at this time**... However, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37162-37163 (May 28, 2002).

Army's Makua Military Reservation, O`ahu (continued)	Bird: *Chasiempis sandwichensis ibidis* (O`ahu `elepaio)	"To date, **no military installation on O`ahu has completed a final INRMP that provides sufficient management and protection for the elepaio.**" 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001). **"We have determined that current management [at Makua Military Reservation] does not adequately address the conservation needs of the Oahu elepaio**...." 66 Fed. Reg. at 63768.
Army's Schofield Barracks East Range, O`ahu	Plants: *Chamaesyce rockii* (`akoko) *Cyanea acuminata* (haha) *Cyanea koolauensis* (haha) *Cyanea longiflora* (haha) *Cyanea st.johnii* (haha) *Cyrtandra subumbellata* (ha`iwale) *Gardenia mannii* (nanu) *Hesperomannia arborescens* (no common name) *Isodendrion laurifolium* (aupaka) *Lobelia gaudichaudii ssp. koolauensis* (no common name) *Lobelia oahuensis* (no common name) *Phlegmariurus nutans* (wawae`iole) *Phyllostegia hirsuta* (no common name) *Pteris lidgatei* (no common name) *Sanicula pupurea* (no common name) *Tetraplasandra gymnocarpa* (`ohe`ohe) *Viola oahuensis* (no common name)	"Proposed management actions identified for listed plant species in 2001 INRMP are 'subject to available funding'. **We do not believe that the current management measures are sufficient to address the primary threats to these species, nor do we believe that there are sufficient assurances that appropriate conservation management strategies will be adequately funded or effectively implemented.** Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37163 (May 28, 2002).

Army's Schofield Barracks East Range, O`ahu (continued)	Bird: *Chasiempis sandwichensis ibidis* (O`ahu 'elepaio)	"To date, **no military installation on O`ahu has completed a final INRMP that provides sufficient management and protection for the elepaio.**" 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001). **"We have determined that current management [at Schofield Barracks] does not adequately address the conservation needs of the Oahu elepaio**...." 66 Fed. Reg. at 63768.

Army's Schofield Barracks Military Reservation, O`ahu	Plants: *Abutilon sandwicense* (no common name) *Alectryon macrococcus* (mahoe) *Alsinidendron trinerve* (no common name) *Cenchrus agriminioides* (kamanomano) *Cenitis squamigera* (pauoa) *Cyanea acuminata* (haha) *Cyanea grimesiana ssp. grimesiana* (haha) *Cyanea grimesiana ssp. obatae* (haha) *Cyanea superba* (haha) *Delissea subcordata* (no common name) *Diellia falcata* (no common name) *Diplazium molokaiense* (no common name) *Eragrostis fosbergii* (no common name) *Flueggea neowawraea* (mehamename) *Gardenia mannii* (nanu) *Isodendrion longifolium* (aupaka) *Labordia cyrtandrae* (kamakahala) *Lepidium arbuscula* (`anauŋau) *Lipochaeta lobata var. leptophylla* (nehe) *Lipochaeta tenuifolia* (nehe) *Lobelia niihauensis* (no common name) *Lobelia oahuensis* (no common name) *Neraudia angulata* (no common name) *Nototrichium humile* (kulu`i) *Phyllostegia hirsuta* (no common name) *Phyllostegia mollis* (no common name) *Plantago princeps* (ale) *Schiedea hookeri* (no common name) *Schiedea nuttallii* (no common name) *Solanum sandwicense* (popolo `aiakeakua) *Stenogyne kanehoana* (no common name) *Tetramolopium lepidotum ssp. lepidotum* (no common name) *Urera kaalae* (opuhe) *Viola chamissoniana ssp. chamissoniana* (`olopu; pamakani)	"Proposed management actions identified for listed plant species in the 2001 INRMP are 'subject to available funding'. **We do not believe that the current management measures are sufficient to address the primary threats to these species, nor do we believe that there are sufficient assurances that appropriate conservation management strategies will be adequately funded or effectively implemented.** Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37163 (May 28, 2002).

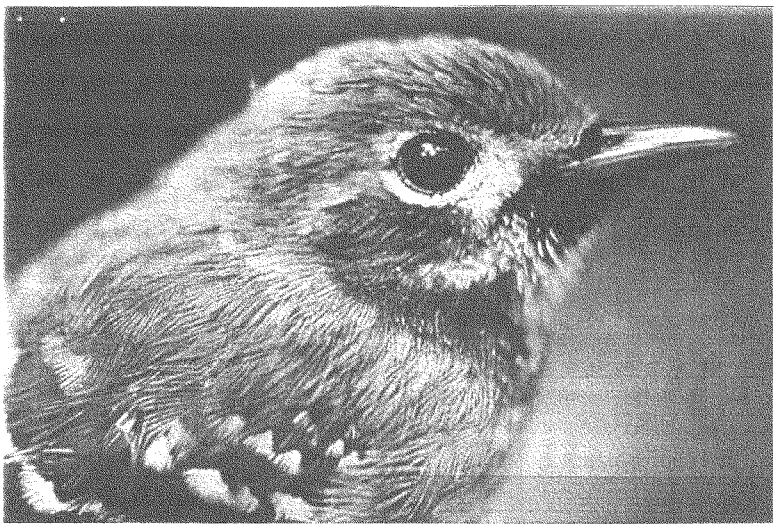
Army's Schofield Barracks Military Reservation, O`ahu (continued)	Bird: *Chasiempis sandwichensis ibidis* (O`ahu 'elepaio)	"To date, **no military installation on O`ahu has completed a final INRMP that provides sufficient management and protection for the elepaio.**" 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001). "[T]he threat to elepaio at Schofield Barracks of wildfires resulting from training activities has not been managed adequately. Larger scale rodent control and improved fire management will be necessary to meet the long-term conservation needs of the elepaio. **We have determined that current management does not adequately address the conservation needs of the Oahu elepaio**...." 66 Fed. Reg.at 63768.
Naval Computer and Telecommunications Area Master Station Pacific Radio Transmitting Facility at Lualualei, O`ahu	Plant: *Marsilea villosa* (`ihi`ihi)	"One [plant] species, *Marsilea villosa*, occurs on land at the Naval Computer and Telecommunications Area Master Station Pacific Radio Transmitting Facility at Lualualei and we believe this land is needed for the recovery of this species. Some management actions to protect and maintain the population are included in the 2001 INRMP but these actions have not been adequately funded or effectively implemented (HINHP Database 2001; Navy 2001a). **Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat.**" 67 Fed. Reg. 37108, 37164 (May 28, 2002).

Naval Magazine Pearl Harbor Lualualei Branch, O`ahu	Plants: *Abutilon sandwicense* (no common name) *Alectryon macrococcus* (mahoe) *Bonamia menziesii* (no common name) *Chamaesyce kuwaleana* (`akoko) *Diellia falcata* (no common name) *Flueggea neowawraea* (mehamehame) *Hedyotis parvula* (no common name) *Lepidium arbuscula* (`anaunau) *Lipochaeta lobata* (nehe) *Lipochaeta tenuifolia* (nehe) *Lobelia niihauensis* (no common name) *Marsilea villosa* (`ihi`ihi) *Melicope sanit-johnii* (alani) *Neraudia angulata* (no common name) *Nototrichium humile* (kulu`i) *Phyllostegia hirsuta* (no common name) *Plantago princeps* (ale) *Sanicula mariversa* (no common name) *Schiedea hookeri* (no common name) *Tetramolopium filiforme* (no common name) *Tetramolopium lepidotum* (no common name) *Urera kaalae* (opuhe) *Viola chamissoniana ssp. chamissoniana* (`olopu; pamakani)	**"We do not believe that these measures are sufficient to address the primary threats to these species on this land, nor do we believe that appropriate conservation management strategies have been adequately funded or effectively implemented.** Therefore, we cannot at this time find that management of this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 37108, 37164 (May 28, 2002).
	Bird: *Chasiempis sandwichensis ibidis* (O`ahu `elepaio)	"The primary threats to the elepaio, predation by alien rats and diseases carried by alien mosquitoes, have not been addressed on Navy lands.... **After reviewing the draft INRMP for NAVMAG Pearl Harbor Lualualei Branch, we have determined that it does not provide for adequate protection or management for the Oahu elepaio.** The draft INRMP does not include a management strategy for the Oahu elepaio and does not provide an evaluation of population distribution, quality and quantity of nesting habitat, threats, and management needs for recovery." 66 Fed. Reg. 63752, 63767 (Dec. 10, 2001).

Army's Fort Shafter, O`ahu	Bird: *Chasiempis sandwichensis ibidis* (O`ahu `elepaio)	**"To date, no military installation on Oahu has completed a final INRMP that provides sufficient management and protection for the elepaio."** 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001).
Army's Pohakuloa Training Area, Island of Hawai`i	Plants: *Asplenium fragile var. insulare* (no common name) *Hedyotis coriacea* (kio`ele) *Neraudia ovata* (no common name) *Portulaca sclerocarpa* (po`e) *Silene hawaiiensis* (no common name) *Silene lanceolata* (no common name) *Solanum incompletum* (popolo ku mai) *Spermolepis hawaiiensis* (no common name) *Tetramolopium arenarium* (no common name) *Zanthoxylum hawaiiense* (a`e)	"However, **current management is not sufficient to address many of the factors inhibiting the long-term conservation of any of these ten [plant] species and thus provide conservation benefits to the species. In addition there is no guarantee of long-term funding for on-going or future management actions**.... Therefore, we can not at this time find that management on this land under Federal jurisdiction is adequate to preclude a proposed designation of critical habitat." 67 Fed. Reg. 36968, 37002 (May 28, 2002).

Number of DOD installations in Hawai`i with INRMPs that FWS determined <u>did not</u> provide adequate management for listed species and their habitats = 11

Number of DOD installations in Hawai`i with INRMPs that FWS determined did provide adequate management for listed species and their habitats = 0



***Chasiempis sandwichensis ibidis* (O`ahu `elepaio)**

Cyanea superba ssp. superba **(haha) found only at Makua Military Reservation on O`ahu, Hawai`i**

RESPONSES OF DAVID L. HENKIN TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. You opened your testimony by promising to explain "why the proposed ESA exemption is unnecessary to ensure military preparedness and why, if enacted, it could spell disaster for important efforts to bring endangered species from the brink of extinction to recover". Yet you never addressed these points, at least not to my satisfaction. In light of the compelling testimony by the generals and admiral as to the grave threat caused to military readiness by the wording of certain existing statutes, and the minor clarifications being requested, please explain, with as much particularity as you are able why the proposals of the RRPI are "unnecessary to ensure military preparedness". Please include in your answer a list of your qualifications as an expert in the area of military preparedness.

Response. When I testified before the Committee, I did not claim to be an expert in the area of military preparedness, and I make no such claim now. As stated in my testimony, my primary expertise is in interpreting and applying the Endangered Species Act's (ESA) critical habitat provisions. I acquired this expertise during years of professional experience seeking to protect essential recovery habitat for Hawaii's imperiled plants and animals. Based on this experience, I am convinced that the proposed ESA exemption is unnecessary to ensure military preparedness and, if enacted, would spell disaster for important efforts to bring endangered species from the brink of extinction to recovery.

The proposed exemption is unnecessary because the ESA already contains the flexibility the Department of Defense (DOD) needs to ensure that it can prepare to defend our nation. Specifically, under ESA section 4(b)(2), before the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service finalizes a critical habitat designation, it must "tak[e] into consideration the economic impact, *and any other relevant impact,* of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). Thus, if the DOD has concerns that designating critical habitat at a particular facility would interfere with vital training activities, the ESA already provides a mechanism to express those concerns and to seek exclusion of specific areas on a case-by-case basis. As explained in my written testimony, the DOD has already had success using this provision to convince the FWS to exclude, based on concerns for military readiness, all of Marine Corps Base Camp Pendleton from the final critical habitat designation for the coastal California gnatcatcher.

Unlike the careful case-by-case balancing required under section 4(b)(2), the proposed blanket ESA exemption seeks to exclude from critical habitat areas identified as essential to endangered species' recovery, even if the areas manifestly have no connection to military readiness. The expansive wording of the proposed exemption extends to all lands "owned or controlled" by the DOD, including military exchanges, recreational facilities such as golf courses, commissaries, water treatment facilities, and so forth. Section 4(b)(2)'s existing mechanism for evaluating national defense needs is a far superior way to address the DOD's concerns.

Moreover, the ESA, as currently written, already provides for the hypothetical situation in which a critical habitat designation might interfere with military activity deemed vital to national security. Section 7(j) gives the DOD an automatic exemption from any provision of the ESA—including the prohibition on adversely modifying or destroying critical habitat—whenever "the Secretary of Defense finds that such exemption is necessary for reasons of national security." 16 U.S.C. § 1536(j). No other Federal agency has this power to secure an automatic exemption from the ESA's requirements. Moreover, as Marine Corps General Michael Williams testified, the DOD could secure such an exemption overnight, if time were of the essence.

Thus, if a critical habitat designation ever were to conflict with military training activities vital for national security, the Secretary of Defense already has the authority to ensure that training takes place, untrammeled by restrictions imposed by critical habitat or, for that matter, any other ESA provision. The fact that, as the generals' and admiral's testimonies confirmed, the Secretary of Defense has never felt the need to invoke an automatic exemption under section 7(j) belies the DOD's current claim that the proposed exemption is needed to ensure military readiness.

Finally, while the generals and admiral related anecdotes (nearly all of which concerned the ESA's prohibitions on unpermitted take of listed species, not critical habitat), they could not refute the findings of the General Accounting Office's (GAO) June 2002 study, which concluded that military reports continue to show high levels of combat readiness across the armed services. There was nothing in the GAO study that suggested a need to change our environmental and public health laws to maintain readiness, much less a need to rush to enact the type of sweeping changes that the DOD proposes. Rather, the report indicated that the various branches of the military have failed to look comprehensively at either opportunities to share train-

ing assets between the services or alternative types of training that could address perceived encroachment conflicts.

Question 2. In answer to a question I put to you at the hearing, you testified that "the Navy . . . in 1996 and 1997 . . . applied for a permit [a]nd the Fish and Wildlife Service denied its permit because [the Navy] had not put together a permit application that satisfied the requirements of the law." Isn't that testimony just plain wrong? Isn't the truth that the Fish and Wildlife Service denied the permit because the Fish and Wildlife Service found it lacked jurisdiction to grant a permit for incidental takings?

Response. No, my testimony is correct. The U.S. Fish and Wildlife Service's stated reasons for denying the Navy's application were: (1) the Navy was unable to show it could ensure compliance with legal limits and conditions applicable to all MBTA permits, such as number and species of birds taken; and (2) even the number of birds the Navy arbitrarily proposed to take "could have a significant impact on local nesting populations." 8/5/96 letter from J. Bradley Bortner to Daniel Moriarty. Also, in the litigation over Navy bombing of Farallon de Medinilla (FDM), the Department of Justice attorney represented to the court that both the DOD and the FWS believed the Navy could get a permit under existing law by applying for a "special use" permit, rather than the "depredation" permit it sought in 1996.

Question 3. With respect to the allegations in the FDM case, isn't it true that there was no unquestioned proof that any birds were in fact taken, and that the allegation—at least as briefed on appeal—that some forty (40) birds per year even might be taken if the injunction did not issue?

Response. No. The Navy acknowledged repeatedly that its activities at FDM take migratory birds. *E.g.*, Navy's Brief on Appeal at 38 ("It is uncontested that the Navy's training on FDM kills migratory birds.") The Navy also acknowledged that "it is impossible to predict with any precision how many birds covered by the MBTA will be harmed by the Navy's exercises." Id. at 37.

Question 4. Isn't it true that the purpose of the 1918 Migratory Bird Treaty Act was to stop the intentional hunting of migratory birds for commercial reasons such as feathers for ladies' hats? The recent D.C. District Court case held that the MBTA as written prohibits both intentional and unintentional harm to migratory birds. Isn't this a perversion of Congressional intent? Wouldn't the RRPI merely restore the original intent of the Act?

Response. No. The purpose of the MBTA was by no means limited to restricting hunting or intentional conduct. *See United States* v. *Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1080 (D. Cob. 1999) ("Congress intended the MBTA to regulate more than just hunting and poaching") (quoting statements of many Members of Congress expressing statute's broader intent). See also *Humane Society* v. *Glickman,* No. 98–1510, 1999 U.S. Dist. LEXIS 19759, at *28 (D.D.C. July 6, 1999) ("Congress . . . also passed the MBTA to preserve for the Nation the aesthetic good that migratory birds delivered as they passed overhead during their annual sojourns. *See* H.R. Rep. No. 65–243, at 2 ("The utility of this measure appeals to many others than farmers and sportsmen, but thousands upon thousands of people—men, women, and children—who have happy memories of their homes made brighter and more attractive by the annual visitation of the robin, the catbird and other insectivorous birds embraced within the treaty')"), *aff'd*, 217 F.3d 882 (D.C. Cir. 2000). Note also that the MBTA by its terms prohibits not only "hunting," "capturing," "shooting," and "trapping," but also "killing," "possessing," "offering for sale," "offering to barter, "bartering," "offering to purchase," "purchasing," "delivering for shipment," "shipping," "exporting," "importing," "delivering for transportation," "transporting," "carrying," and "receiving," 11 U.S.C. § 703, all of which may be performed without exhibiting the physical conduct normally associated with hunting.

STATEMENT OF DANIEL S. MILLER, FIRST ASSISTANT ATTORNEY GENERAL, COLORADO DEPARTMENT OF LAW, ON BEHALF OF THE ATTORNEYS GENERAL OF ARIZONA, CALIFORNIA, COLORADO, MASSACHUSETTS, NEVADA, NEW YORK, OREGON, AND WASHINGTON

INTRODUCTION

Mr. Chairman, thank you for the opportunity to present the State perspective on this issue today. These written remarks are submitted today on behalf of the Attorneys General of Arizona, California, Colorado, the Commonwealth of Massachusetts, Nevada, New York, Oregon, and Washington. Our testimony will address only those parts of the Department of Defense's (DOD's) legislative proposals that would

amend the Clean Air Act, the Resource Conservation and Recovery Act (or RCRA) or the Comprehensive Environmental, Response, Compensation and Liability Act (known as CERCLA). The States are the primary implementers of the Clean Air Act and RCRA, and are major partners with EPA under CERCLA. As the chief law enforcement officers of our respective States, it is our duty to ensure compliance with our environmental laws.

First, let us reiterate that we absolutely support the need to maintain military readiness, and to provide our armed forces with appropriate realistic training to minimize battlefield casualties and increase their combat effectiveness. There is no question of the importance of readiness. However, military training activities can also have substantial adverse impacts on human health and the environment. The question is whether the existing environmental laws allow the military to conduct these activities in a manner that maintains readiness while ensuring protection of human health and the environment. With respect to RCRA, CERCLA and the Clean Air Act, we believe that they do. In our view, furthering military readiness and ensuring environmental protection are compatible goals, not mutually exclusive.

We are not aware of any instances in which RCRA, CERCLA or the Clean Air Act has ever caused an adverse impact on military readiness. To our knowledge, DOD has not cited any examples of any such conflicts. We believe that the likelihood of a future conflict between these laws and military readiness is remote. In the unlikely event of such a conflict, these laws already provide the flexibility necessary to harmonize the competing concerns of military readiness and protection of human health and the environment.

RCRA, CERCLA, and the Clean Air Act provide vital safeguards to protect the health of our citizens and their environment. As a general matter, we think that these safeguards should be maintained or strengthened not weakened. Certainly, any amendments that would weaken the protections these laws provide must be justified by important countervailing considerations that are supported by the facts. While we certainly agree that maintaining readiness is necessary, the lack of any demonstrated conflict with RCRA, CERCLA and Clean Air Act requirements, together with the inherent flexibility of these laws, causes us to conclude that these amendments are unnecessary.

We are concerned that DOD's proposed amendments to RCRA, CERCLA, and the Clean Air Act would undermine State authority and create significant adverse environmental impacts, with no benefit to military readiness. These amendments are far-reaching. We disagree with DOD's statements that these amendments only apply to "operational" ranges. DOD's amendments to RCRA and CERCLA would likely affect cleanups of unexploded ordnance at thousands of sites nationwide, including many that are no longer in Federal ownership, and could be read to exempt all munitions-related and explosives-related wastes from regulation as hazardous waste. The amendments to the Clean Air Act would allow continued violations of health-based air quality standards in cases where there was no impact on readiness.

Finally, we are concerned with the legislative process by which these proposed amendments have been considered. The proposed amendments were proposed as amendments to the Defense Authorization Bill in both Houses of Congress. The legislative language was first made public only 4 days before markup of the Defense Authorization bill in the Readiness Subcommittee of the House of Representatives. Until this hearing before your committee, no hearings on this legislative language have been held before a committee of jurisdiction. These amendments affect the Federal Government's obligations to comply with State and Federal environmental laws. This is an important matter of public policy, with significant implications for environmental protection. It deserves full hearings before the committees of jurisdiction, and the careful deliberation that regular order provides. Because Federal courts closely scrutinize waivers of sovereign immunity, and these proposed amendments would affect the waivers of immunity in RCRA and CERCLA, the need for careful deliberation of the proposed legislative language is even greater.

These amendments continue a trend that has intensified in recent years where legislation that could alter or impair State authority over Federal facility environmental compliance is often not subjected to regular order with hearings before the congressional committees with jurisdiction over the environmental laws, but instead is proposed as amendments to authorization or appropriations bills. The National Association of Attorneys General recently gave preliminary approval to a resolution opposing this practice, which we have attached to our testimony.[1]

[1] See Exhibit 1. The resolution should become final and effective on or about July 8, 2002.

The Clean Air Act, RCRA and CERCLA have not adversely impacted military readiness

As far as we are aware, DOD has not identified any cases in which RCRA or CERCLA have adversely impacted military readiness. Nor are we aware of any such instances. Even DOD's own background materials supporting the "Readiness and Range Preservation Initiative" downplay the need for amending RCRA and CERCLA, characterizing the impact on readiness as merely "potentially significant".[2] DOD's sole justification for its proposed amendments to RCRA and CERCLA is that a citizen suit was recently filed in Alaska alleging that the discharge of ordnance onto an operational military range constitutes "disposal" under RCRA and a "release" under CERCLA.[3] Assuming the plaintiffs prevail in this suit, the appropriate relief would be to require DOD to obtain a RCRA permit for the affected range. Such a permit could be crafted in a manner that would protect the environment while allowing DOD to continue training.[4]

Similarly, DOD has not identified any instances in which the Clean Air Act's conformity requirements have actually prevented the military from conducting the activities it believes are necessary to maintain readiness. Instead, it describes some "near misses," and urges that the proposed exemption is necessary to facilitate the next round of base closures in 2005.[5] These "near misses" are cases where, in fact, potentially conflicting environmental requirements and readiness concerns were successfully resolved through the regulatory process. DOD's proposed amendments to the Clean Air Act would allow continued violations of the health-based National Ambient Air Quality Standards without any demonstration that DOD could not make the necessary emissions offsets.

The environmental laws provide ample flexibility to accommodate any conflicts between military readiness and environmental protection

We think that it is unlikely the Clean Air Act, RCRA, or CERCLA requirements will cause conflicts with military readiness. Based on experience to date, any such conflicts would be rare occurrences. Consequently, we believe that the case-by-case exemption provisions that already exist in each of these laws (described below) are vastly preferable to DOD's proposed across-the-board statutory exemption from environmental requirement. The case-by-case approach accommodates readiness concerns where necessary, and minimizes adverse environmental consequences in the vast majority of cases where there are no conflicts. DOD's approach would weaken environmental protections even in the vast majority of cases where there was no adverse impact on readiness.

The Clean Air Act, RCRA and CERCLA already allow the President to exempt the Department of Defense from their statutory and regulatory requirements on a case-by-case basis.[6] These are not burdensome requirements. All that is required is a finding that doing so is necessary for national security or is in the paramount interests of the United States, depending on the particular statute at issue. For example, President Bush recently made such a finding under RCRA exempting the Air Force facility "near Groom Lake, Nevada, from any Federal, State, interstate or local provision respecting the control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information concerning the operating location to any authorized person."[7] The entire finding consists of

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[2] "Readiness and Range Preservation Initiative Summary," dated April 18, 2002, p. 7 (attached as Exhibit 2).

[3] *Id*.

[4] In the 1992 Federal Facility Compliance Act, Congress directed EPA to promulgate regulations that defined when military munitions become solid wastes. However, EPA has only promulgated such regulations for a small subset of military munitions. Thus, there are currently no RCRA regulations governing management of used or fired munitions on active ranges. Nonetheless, EPA would certainly have the discretion to impose environmentally protective permit conditions that would not adversely impact readiness.

[5] Exhibit 2, p. 6.

[6] 42 U.S.C. §§ 6961(a), 7418(b), and 9620(j). The RCRA exemption, § 6961(a), provides:

"The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of 1 year, but additional exemptions may be granted for periods not to exceed 1 year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption."

[7] 66 Fed. Reg. 50807 (Oct. 4, 2001), attached as Exhibit 3.

three paragraphs. President Clinton made similar findings annually from 1996 through 2000 regarding this same matter to prevent the release of classified information. We understand that to date, the exemption provisions of the Clean Air Act, RCRA and CERCLA have never been invoked because of military readiness concerns.

In addition to providing a case-by-case exemption, section 118(b) of the Clean Air Act authorizes the President to "issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature."[8] This provision allows even greater flexibility than the case-by-case exemptions in managing any potential conflicts between Clean Air Act requirements and readiness concerns.

Other provisions of the environmental laws provide further flexibility to balance environmental protection with other Federal priorities. For example, in 1992, Congress provided EPA authority to issue administrative orders under RCRA to other Federal agencies, but required that such agencies have the opportunity to confer with the EPA Administrator before any such order becomes final.[9] Additionally, Congress has created a procedure that allows the Secretary of Defense to temporarily suspend any pending administrative action by another Federal agency that the Secretary determines "affects training or any other readiness activity in a manner that has or would have a significant adverse effect on the military readiness of any of the armed forces or a critical component thereof."[10] During the suspension, the Secretary and the head of the other Federal agency must consult and attempt to mitigate or eliminate the adverse impact of the proposed action on readiness, consistent with the purpose of the proposed action.[11] If they are unable to reach agreement, the Secretary of Defense must notify the President, who shall resolve the matter.[12]

DOD's compliance record warrants a regulatory structure that ensures accountability

A case-by-case approach to resolving any future potential conflicts between readiness and the requirements of RCRA, CERCLA and the Clean Air Act is preferable to sweeping statutory exemptions because the case-by-case approach provides accountability. Experience since the 1992 Supreme Court decision in *U.S. Department of Energy* v. *Ohio*[13] demonstrates that Federal agencies in general, and DOD in particular, are far more likely to comply with environmental requirements when they can be held accountable. In that case, the Supreme Court held that Federal agencies were not subject to penalties for violating State hazardous waste and water quality laws. In response, Congress swiftly amended RCRA to make Federal agencies subject to penalties for violating hazardous waste laws. Once Congress clarified the States' authority to hold Federal agencies accountable for violating hazardous waste requirements, DOD and other Federal agencies began steadily improving their RCRA compliance rates, bringing the percentage of facilities in compliance from a low of 55.4 percent in fiscal year 1993 to 93.6 percent in fiscal year 2000.[14]

This salutary trend stands in stark contrast to Federal agency performance under the Clean Water Act. Unlike RCRA, Congress did not amend the Clean Water Act following the Ohio decision to subject Federal agencies to penalties for violating Clean Water Act requirements. Since the Supreme Court decision removed the threat that States could hold Federal agencies accountable for violating Clean Water Act requirements by assessing penalties, the percentage of Federal facilities in compliance with the Clean Water Act has fallen steadily fallen over time, from a high of 94.2 percent in fiscal year 1993 to a low of 61.5 percent in fiscal year 1998.[15] While Federal facilities' Clean Water Act compliance rates as a whole rebounded somewhat in fiscal year 1999 and 2000, the overall trend is still downward. DOD's

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[8] 42 U.S.C. § 7418(b).
[9] 42 U.S.C. § 6961(b)(2).
[10] 10 U.S.C. § 2014(a) and (d).
[11] 10 U.S.C. § 2014(c).
[12] 10 U.S.C. § 2014(e).
[13] 503 U.S. 607 (1992).
[14] "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities fiscal year 1999–2000" USEPA Office of Enforcement and Compliance Assurance, EPA 300–R–01–004, September 2001, p. 22, attached as Exhibit 4.
[15] *Id*.

Clean Water Act compliance rates are slightly worse than the Federal agency totals.[16]

Compliance statistics alone, telling as they are, do not paint the entire picture of Federal agencies' resistance to compliance with environmental requirements. Federal agencies in general, and DOD in particular, have long had a history of resistance to environmental regulation. The history of the Clean Air Act provides a good example. Before 1970, the Clean Air Act encouraged, but did not require, Federal agencies to comply with its mandates. Congress determined that this voluntary system was not working, and in 1970 amended the act to require Federal agencies to comply. Specifically, Congress added section 118 to the Clean Air Act. The first sentence of the section provides, in relevant part:

> Each department, agency, and instrumentality of . . . the Federal Government . . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

42 U.S.C. § 1857f. The 1970 amendments also required the Environmental Protection Agency to establish ambient air quality standards. Each State had to submit plans describing how the State would meet these standards. Kentucky, like most States, submitted a plan that relied on permits as the sole mechanism to establish emissions limitations for air pollution sources, and to establish schedules for achieving compliance with the emissions limitations. Kentucky sought to require several Federal facilities (including the Army's Fort Knox, Fort Campbell and others) to obtain permits. The Federal agencies refused, arguing that section 118 of the Clean Air Act did not obligate them to comply with "procedural" requirements, such as the need to obtain State permits. Without the permit, there was no way for Kentucky to control air pollution from these Federal facilities.

The matter went to court, and ultimately, in *Hancock* v. *Train*,[17] the Supreme Court agreed with the Federal agencies. Shortly thereafter, Congress amended the Clean Air Act to require Federal agencies to comply with procedural requirements, including permit requirements.[18] While the challenge to State authority under the Clean Air Act was pending, Federal agencies were also challenging the requirement to obtain State permits under the Clean Water Act's National Pollution Discharge Elimination System program. That challenge resulted in a companion decision to Hancock that also sided with the Federal agencies.[19] Again, Congress acted swiftly to amend the Clean Water Act to require Federal agencies to obtain discharge permits.[20] More recently, DOD spent years challenging State authority over cleanup of contamination at Federal facilities, ultimately losing in the Tenth Circuit.[21]

Nonetheless, DOD continues to challenge State authority over cleanup of contamination at its sites, and in particular to resist State authority over cleanup of munitions-related contamination. In addition, DOD is challenging a number of other environmental requirements:

- DOD is refusing to pay penalties for violations of State requirements related to underground petroleum storage tanks.[22]
- DOD is appealing a determination by an EPA Administrative Law Judge that the Clean Air Act's command that penalties for violations of the Act be calculated by considering, *inter alia*, the economic benefit of the violator's non-compliance applies to Federal agencies.[23]

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[16] *Id.* DOD's Clean Water Act compliance rates for fiscal year 1996–2000 were slightly lower than Federal agencies as a whole. *Id.* at p. 24; "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities, fiscal year 1997–98," USEPA Office of Enforcement and Compliance Assurance, EPA 300–R–00–002, January 2000, p. 26; "The State of Federal Facilities—An Overview of Environmental Compliance at Federal Facilities, fiscal year 1995–96" USEPA Office of Enforcement and Compliance Assurance, EPA 300–R–98–002a, June 1998, pp. ES–11 and ES–12. While the DOD rates also improved in fiscal year 1999 from fiscal year 1998's nadir, they declined again in fiscal year 2000. DOD-specific data for fiscal year 1995 and earlier were not available in time to be included in this testimony.

[17] 426 U.S. 167 (1976).

[18] Pub.L. 95–95, § 116(a).

[19] Environmental Protection Agency v. California, 426 U.S. 200 (1976).

[20] Pub.L. 95–217, § 60, 61(a).

[21] U.S. v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

[22] See exchange of letters between State of Hawaii Department of Health and U.S. Army Garrison Hawaii, attached hereto as Exhibit 5.

[23] In the Matter of U.S. Army, Fort Wainwright Central Heating & Power Plant, Docket No. CAA–10–99–0121. Administrative Law Judge Susan L. Biro entered the order against the Air Force on April 30, 2002. Section 113 of the Clean Air Act, 42 U.S.C. § 7413, provides, in relevant part, that the Administrator may "issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day," and that in calculating the penalty, the Administrator "shall take into consideration . . . the economic benefit of noncompliance."

• DOD is challenging EPA's authority under CERCLA to oversee cleanups at Federal facilities on the National Priorities List.[24] Specifically, the Air Force has disputed EPA's authority to require enforceable "institutional controls" and other enforceable requirements in CERCLA Records of Decision. "Institutional controls" are legal mechanisms to restrict land or water use, and are often employed to reduce the cost of cleaning up contaminated sites. We understand that this dispute is holding up cleanups at over 20 DOD CERCLA sites.

• DOD is also challenging State authority to require compliance with State institutional control laws. For example, last year DOD testified in opposition to institutional control legislation then pending in Colorado. The pending legislation (which passed without a single "nay" vote and was subsequently enacted into law) created a statutory "environmental covenant" as a mechanism to enforce institutional controls imposed as part of contaminated site cleanups under various environmental laws. DOD argues, inter alia, that State institutional controls do not fall within the scope of RCRA's waiver of Federal sovereign immunity for State requirements respecting the control and abatement of solid waste.[25]

The huge extent of DOD's environmental contamination also demands a regulatory structure that ensures accountability

Accountability is also important because of the environmental impact of military activities. DOD is responsible for far more contaminated sites than any other Federal agency. There are 165 Federal facilities currently listed on the Superfund National Priorities List; 129 of these are DOD facilities.[26] All together, DOD is responsible for addressing over 28,500 potentially contaminated sites across the country.[27] Through fiscal year 2001, DOD had spent almost $25 billion cleaning up sites for which it is responsible.[28] DOD recently estimated that it would take another $14 billion to complete the remediation of environmental contamination at active, realigning and closing sites.[29]

The $14 billion figure is only a small portion of the remaining costs to remediate DOD's environmental contamination. It does not include the cost to remediate thousands of potentially contaminated "Formerly Used Defense Sites" ("FUDS") in the United States and its territories and possessions. FUDS are properties that were formerly owned, leased, possessed, or operated by DOD or its components.[30] While many FUDS contain "run of the mill" environmental contaminants such as solvents, petroleum storage tanks, etc., unexploded ordnance is a big problem at many of these sites. The GAO estimated recently that unexploded ordnance contamination may exist at over 1,600 FUDS.[31]

DOD recently estimated that it may cost $19 billion to clean up contaminated FUDS.[32] However, this figure is likely understated, for two reasons. First, many States have found that DOD's determinations that specific FUDS do not require any cleanup action are frequently mistaken. In 1998, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) conducted a survey of its members regarding "no further action" determinations made by the Army Corps of Engineers. Nearly half of the responding States (19 out of 39) said that they had reason to believe that the Corps had not made sound environmental decisions in

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42 U.S.C. § 7413(d) and (e). Section 302 of the Clean Air Act, 42 U.S.C. § 7602, defines "person" to include "any agency, department, or instrumentality of the United States." Finally, the waiver of Federal sovereign immunity in section 118 of the Clean Air Act, 42 U.S.C. § 7418 states that Federal agencies "shall be subject to . . . all Federal . . . process and sanctions . . . in the same manner, and to the same extent as any nongovernmental entity."

[24] See documents posted on EPA's Federal Facilities Restoration and Reuse Office website at http://epa.gov/swerffrr/whatsnew.htm

[25] Personal knowledge of author.

[26] Information from EPA's Superfund website at *http://www.epa.gov/superfund/sites/query/queryhtm/nplfin1.htm* and from telephone conversation with EPA's Federal Facilities Restoration and Reuse Office.

[27] *See* "Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress," p. 19. This document is available at the following DOD website: http://www.dtic.mil/envirodod/DERP/DERP.htm

[28] *Id.*, p. 21.

[29] *Id.*, pp. 27–28, attached as Exhibit 6. The $14 billion figure combines the total cost-to-complete sums given for active installations in Figure 8 and Base Realignment and Closure Sites in Figure 10 of Exhibit 6.

[30] "Environmental Contamination: Cleanup Actions at Formerly Used Defense Sites," GAO–01–557 (July 2001), p. 1.

[31] *Id.* at 2.

[32] "Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress," p. 126.

making some "no further action" determinations.[33] Six States had conducted their own environmental or health assessments at 66 of the sites the Corps had designated "no further action." These States determined that 32 of the 66 did require cleanup.[34] Contamination at the 32 sites included high levels of PCBs, unexploded ordnance, leaking underground storage tanks, asbestos, and groundwater contamination.[35]

The second reason DOD's cost estimate for completing cleanup of FUDS is likely understated is that DOD has not yet been able to develop reliable cost estimates for cleaning up unexploded ordnance and related contamination. DOD's recent estimates for unexploded ordnance cleanup vary wildly from $14 billion to over $100 billion.[36] There are two causes for DOD's failure to develop reliable cost estimates for range cleanup. First, DOD does not have a consistent cost methodology.[37] The second, and more fundamental reason, is that DOD has very little data on the nature and extent of unexploded ordnance contamination at current and former ranges.[38]

Despite this lack of data, we do know that the costs of detecting and remediating unexploded ordnance contamination are extremely high. For example, through fiscal year 2001, DOD had spent over $37 million investigating and remediating the former Lowry Bombing and Gunnery Range (a/k/a Buckley Field) near Aurora, Colorado, and expected to spend an additional $71 million to complete cleanup of this site.[39] At the Spring Valley site in the District of Columbia, DOD had spent over $24 million through fiscal year 2001, and expected to spend an additional $73 million.[40]

The bottom line is that unexploded ordnance contamination, both at facilities under DOD's jurisdiction and at FUDS represents an environmental problem of huge dimensions. According to a recent GAO report, DOD estimates that approximately 16 million acres of land on transferred ranges are potentially contaminated with unexploded ordnance.[41] "Transferred" ranges are ranges that have been transferred to the management of another Federal agency, or have been transferred out of Federal ownership;[42] they are a large part of the FUDS problem. The costs for cleaning up sites like the Lowry Range and Spring Valley may be dwarfed by the sheer magnitude of the remaining FUDS sites, such as the 288 FUDS projects in California that DOD estimates may cost $2.6 billion to address.[43]

In addition to the obvious explosive hazards, some constituents of explosives and munitions contamination have toxic or potential carcinogenic effects,[44] and can cause groundwater contamination. For example, live-fire training at the Massachusetts Military Reservation (MMR) over several decades has contaminated large amounts of groundwater in the sole source drinking water aquifer for the Cape Cod area. Recently, the Town of Bourne closed half of its drinking water supply wells due to contamination by perchlorate, an explosives-related contaminant that migrated from MMR. Subsequently, DOD spent approximately $2 million to hook the town up to an alternate water supply.[45] Reportedly, explosives contaminants have

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[33] "No Further Action Survey," Association of State and Territorial Solid Waste Management Officials, December 1998, p. 2. Several of the states that responded they did not have any reason to doubt the Corps' determinations commented that they had not assessed the sites themselves. The complete survey is available on ASTSWMO's website at *http://www.astswmo.org/Publications/bookshelf.htm* by clicking on "Federal Facilities" and then on "No Further Action Review Efforts at Formerly Used Defense Sites (NOFA FUDS) December, 1998."

[34] *Id.* at 1.

[35] *Id.*

[36] "DOD Training Range Cleanup Cost Estimates Are Likely Understated," GAO–01–479 (April 2001), pp. 5 and 13.

[37] *Id.* at 4.

[38] *See Id.* at 5; "Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress," Table C–1, showing status of military installations and FUDS with estimated cleanup completion cost estimates exceeding $5 million, attached hereto as Exhibit 7.

[39] Exhibit 7, p. C–1–22.

[40] *Id.* at p. C–1–25.

[41] "DOD Training Range Cleanup Cost Estimates Are Likely Understated," GAO–01–479 (April 2001), p. 11.

[42] *Id.* at 8.

[43] Exhibit 7, pp. C–1–8 to C–1–21.

[44] Fact sheets or public health statements, all published by the Agency for Toxic Substances and Disease Registry, for four common explosives or munitions constituents (DNT, RDX, TNT and white phosphorous), are attached as Exhibit 8. Also included in Exhibit 8 are two EPA documents regarding perchlorate, another common munitions constituent.

[45] "Military Cash Flows for New Water Supply," story by Kevin Dennehy, Cape Cod Times, April 24, 2002, attached as Exhibit 9.

been detected in about 100 groundwater monitoring wells on MMR, and have exceed EPA health advisory limits at 53 of those wells.[46]

DOD's proposed amendments to RCRA, CERCLA and the Clean Air Act are far-reaching, and go far beyond DOD's stated concerns with readiness

DOD has repeatedly stated that its proposed amendments are very narrowly focused.[47] We disagree. As described above, neither the Clean Air Act, RCRA, nor CERCLA has had any adverse impacts on readiness. All three laws have provisions allowing for waivers of their requirements sufficient to address any potential readiness concerns. And the history of Federal agency compliance with environmental requirements suggests that there is no such thing as a "narrow" environmental exemption for Federal facilities. Certainly, when one considers the magnitude of the munitions contamination problem at FUDS and other DOD sites, and the groundwater contamination at the Massachusetts Military Reservation, any change in DOD's obligation to comply with cleanup requirements has the potential for large impacts. But the bottom line is that the language of DOD's proposed amendments would create wide loopholes and jeopardize environmental protection, without any corresponding benefit to readiness.

DOD's amendment to RCRA would likely preempt State and EPA authority over munitions-related and explosives-related wastes at active military bases, closing bases, FUDS, and private contractor sites

Proposed section 2019 would define when munitions, explosives, unexploded ordnance and constituents thereof are "solid wastes" under RCRA, and thus potentially subject to regulation as hazardous wastes.[48] By narrowing this definition, DOD intends to limit the scope of EPA's authority under RCRA, as well as State authority under State hazardous waste laws. The change in the definition of "solid waste" would affect State authority because the term appears in RCRA's waiver of Federal sovereign immunity—the provision of the law that makes DOD subject to State hazardous waste laws. The RCRA waiver of immunity applies to State "requirements respecting the control and abatement of solid waste or hazardous waste disposal and management."[49] Thus, the scope of the waiver will likely be affected by amendments to RCRA's definition of solid waste. And because waivers of immunity are construed extremely narrowly, any ambiguity in the definition of solid waste will likely be construed in the way that results in the narrowest waiver.[50] By re-defining "solid waste" in a very limited fashion, DOD's proposed amendment will likely preempt State authority over munitions, explosives and the like not only at operational ranges, but—contrary to DOD's assertions—also at FUDS, at DOD sites other than ranges, and even at private defense contractor sites.

DOD's proposed amendment to the definition of solid waste provides:

Sec. 2019. Range management and restoration

(a) Definition of Solid Waste.—(1)(A) The term "solid waste," as used in the Solid Waste Disposal Act, as amended (42 U.S.C. 6901 et seq.), includes explosives, unexploded ordnance, munitions, munition fragments, or constituents thereof that——

(i) are or have been deposited, incident to their normal and expected use, on an operational range, and——

(I) are removed from the operational range for reclamation, treatment, disposal, treatment prior to disposal, or storage prior to or in lieu of reclamation, treatment, disposal, or treatment prior to disposal;

(II) are recovered, collected, and then disposed of by burial or landfilling; or

(III) migrate off an operational range and are not addressed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601 et seq.); or

(ii) are deposited, incident to their normal and expected use, off an operational range, and are not promptly rendered safe or retrieved.

(B) The explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof defined as solid waste in subsection (a)(1)(A) shall be sub-

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[46] "Work to Clean Cape Cod Continues as Pentagon Seeks Environmental Exemptions," 5/27/2002 story by Melissa Robinson, reported in Boston Globe Online, 5/29/2002, attached as Exhibit 10.

[47] *See*, e.g., Exhibit 2.

[48] *See* 42 U.S.C. §6903(5) and (27). Section 6903(5) defines "hazardous waste" as "a solid waste, or combination of solid wastes," that exhibits certain characteristics. Section 6903(27) defines "solid waste." Therefore, hazardous wastes are a subset of solid wastes.

[49] 42 U.S.C. §6961(a).

[50] *Department of Energy* v. *Ohio*, 503 U.S. 607 (1992).

ject to the provisions of the Solid Waste Disposal Act, as amended, including but not limited to sections 7002 and 7003, where applicable.

(2) Except as set out in subsection (1), the term "solid waste," as used in the Solid Waste Disposal Act, as amended, does not include explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that——

(A) are used in training military personnel or explosives and munitions emergency response specialists (including training in proper destruction of unused propellant or other munitions);

(B) are used in research, development, testing, and evaluation of military munitions, weapons, or weapon systems;

(C) are or have been deposited, incident to their normal and expected use, on an operational range, except as provided in subsection (a)(1)(A);

(D) are deposited, incident to their normal and expected use, off an operational range, and are promptly rendered safe or retrieved; or

(E) are recovered, collected, and destroyed on-range during range clearance activities at operational ranges, but not including the on-range burial of unexploded ordnance and contaminants when the burial is not a result of product use."

Under section 2019(a)(1), munitions are solid wastes only under the following circumstances: (1) they are or have been deposited, incident to their normal and expected use, on an operational range, and then one of three things happens: they are removed from the range; or are recovered and then buried; or migrate off range and are not addressed under CERCLA; or (2) they are deposited, incident to their normal and expected use, off an operational range, and are not promptly addressed.

Under this definition, munitions that were deposited on an operational range and simply remain there after the range closed or was transferred are not solid wastes, and thus cannot be hazardous wastes. Such residual unexploded ordnance and explosives contamination is precisely the problem at closed, transferring and transferred ranges. Contrary to DOD's assertions that this amendment only affects operating ranges, this amendment would also likely preempt States and EPA from regulating the cleanup of unexploded ordnance and related materials at the 16 million acres of land on closed, transferred, and transferring ranges (i.e., FUDS) that are potentially contaminated with unexploded ordnance. In many cases, this ordnance was deposited on these ranges decades ago.

Proposed section 2019(a) also likely overrides State and EPA authority to address munitions-related environmental contamination that is not on a range at all. To cite just one example, in the normal course of maintaining artillery shells, DOD generates a waste stream from ammunition washout known commonly as "pink water." The water is pink due to the presence of trinitrotoluene (TNT), a constituent of both explosives and munitions (and a possible human carcinogen, according to EPA),[51] in the water. Ammunition washout is not conducted on operational ranges, but has in at least one case led to environmental contamination. At Pueblo Chemical Depot in Colorado, ammunition washout created a plume of TNT-contaminated groundwater that has traveled over two miles, and has gone off the Depot to contaminate drinking water wells nearby. Under section 2019(a)(1)(A), this plume of TNT-contaminated groundwater would not be considered a solid waste (and thus excluded from the scope of the RCRA waiver of immunity), because the explosives constituents have not been deposited on an operational range, nor have they been deposited "incident to their normal and expected use," off an operational range. A similar result would obtain at the Los Alamos National Laboratory (a Department of Energy facility), where explosives constituents have contaminated groundwater approximately 1,000 feet below the ground surface.

Proposed section 2019(a)(2) also exempts from the definition of solid waste explosives and munitions that are used in training or in research, development, testing, and evaluation of military munitions, weapons, or weapon systems. This provision appears to create a wholesale exemption for explosives and munitions. It applies to any facility with such wastes, including private contractor sites and Department of Energy facilities. It arguably even extends to the chemical munitions scheduled for destruction at various military installations around the country.

DOD's proposed amendments to CERCLA are also far-reaching, and also go far beyond DOD's stated concerns with readiness

Proposed section 2019(b) has similarly broad consequences for CERCLA. This provision states:

[51] *See* Exhibit 8.

(b)(1) *Definition of Release.*—(1) The term "release," as used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601 et seq.), includes the deposit off an operational range, or the migration off an operational range, of any explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof.

(2) The term "release," as used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601 et seq.), does not include the deposit or presence on an operational range of any explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that are or have been deposited thereon incident to their normal and expected use.

(3)(A) Notwithstanding the provisions of paragraph (2), nothing in this section affects the authority of the President under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9606(a)) to address an imminent and substantial endangerment to the public health or welfare or the environment, including orders to test and monitor.

(B) Nothing in this section affects the ability of a State or other person to request that the President exercise such authority under section 106(a) of such Act to address an imminent and substantial endangerment to the public health or welfare or the environment.

(4) Nothing in this section affects the authority of the Department to protect the environment, safety, and health on operational ranges.

This provision restricts the definition of "release" in CERCLA by excluding "the deposit or presence on an operational range of any explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that have been deposited thereon incident to their normal and expected use." This provision may restrict EPA's authority to use CERCLA section 106 authorities. CERCLA section 106 authorizes action when the President determines the "may be an imminent and substantial endangerment," Section 2019(b)(3)(A) appears to preserve only 106 authorities for situations that pose an actual "imminent and substantial endangerment." The scope of section 106 authority has been the subject of much litigation, including the impact of the phrase "may be" in section 106.[52]

While section 2019 (b) may preserve a narrowed scope of EPA authority under section 106, its overall impact on cleanup of munitions-related contamination on operational ranges is far from clear. The provision appears to eliminate section 104 removal and remedial authority for munitions-related and explosives-related contamination. It also appears to remove cleanup of such contamination from the scope of CERCLA section 120 interagency agreement for sites on the National Priorities List. This means that EPA will no longer have authority to select (or concur in) remedies for munitions- and explosives-related contamination at NPL sites. This provision may also be read to eliminate the requirement that investigation and cleanup of these contaminants be conducted according to standards that apply to all other CERCLA cleanups. By removing these public involvement, procedural, substantive and technical safeguards, section 2019(b) would severely undermine the goal of achieving cleanups that adequately protect human health and the environment.

The change in the definition of "release" also may narrow the scope of State authority under State superfund-type laws, because it may narrow CERCLA's waiver of immunity. CERCLA's waiver of immunity includes State laws "concerning removal and remedial action."[53] CERCLA's definitions of "removal" and "remedial action" are limited by the definition of "release."[54] Thus, by excluding the "deposit or presence on an operational range of any explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that are or have been deposited thereon incident to their normal and expected use" from the definition of "release," this provision arguably precludes State superfund authority over munitions, etc. on operational ranges.

Read in conjunction with proposed § 2019(b)(1), § 2019(b)(2) also likely precludes existing CERCLA and State authority over munitions-related contamination on closed, transferred, and transferring ranges (i.e., FUDS). This statutory construction follows from the fact that section 2019(b)(2) excludes the both the deposit and the presence of munitions-related contamination on an operational range from the definition of release. Consequently, the presence on a closed, transferring or transferred range of munitions- or explosives-related contamination that was deposited when

[52] See, e.g., *U.S.* v. *Conservation Chemical Co.,* 619 F. Supp. 162, 192 (D.C. Mo. 1985).
[53] 42 U.S.C. § 9620(a)(4).
[54] 42 U.S.C. § 9601(23) and (24).

the range was operational could only be considered a "release" if § 2019(b)(1) specifically included the presence of munitions-related contamination on a non-operational range in its definition of release. However, § 2019(b)(1) is ambiguous in this regard. Its reference to "the presence off an operational range" could be read to mean the presence on land adjacent to an operational range, rather than meaning munitions-related contamination that was originally deposited on an operational range, and remains on the range after the range is no longer operational. With respect to State authority, any ambiguities in a waiver of immunity will be construed in favor of a narrow waiver. Additionally, there are several States whose superfund-type laws are tied to definitions in CERCLA. Amending CERCLA's definition of "release" will effect corresponding changes in these States' authorities.

Finally, by re-defining "solid waste" to exclude munitions constituents, 2019(a)(1) may exclude such constituents from being "hazardous substances." This includes many chemicals that may have carcinogenic or other toxic effects.[55] Because natural resource damages are only available for injuries caused by hazardous substances, this amendment may preclude States from bringing natural resource damage claims for munitions-related contamination.

CONCLUSION

In closing, we do not believe that DOD's far-reaching amendments to RCRA, CERCLA, or the Clean Air Act are warranted. These laws have not impacted readiness, and are not likely to do so. As shown in the preceding portions of our testimony, DOD's proposed amendments to RCRA, CERCLA and the Clean Air Act have little to do with maintaining readiness. They would, however, provide substantial exemptions from environmental requirements. The activities that DOD would exempt from the environmental laws can have significant adverse impacts on human health and the environment. States have historically worked cooperatively with DOD to find solutions to environmental problems at military installations that minimize regulatory burdens while protecting human health and the environment. We would be glad to continue this work with DOD to develop ways to address its readiness concerns within the context of the existing environmental laws.

We would also urge that any proposed legislation on this issue go through a normal legislative process with public hearings before the committees with jurisdiction over the environmental laws. The normal legislative process allows interested parties, including the States—which are the primary implementers and enforcers of the nation's environmental laws—an opportunity to present their views on these matters. Such hearings would allow deliberate consideration of any proposed amendments. As we have shown above, seemingly small amendments to the environmental laws can have large effects, particularly when State authority over Federal agencies is at stake.

RESPONSES OF DANIEL S. MILLER TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Isn't it true that no State has ever litigated to verdict any enforcement action against the United States involving alleged violations at an operational range? If your answer is not an unqualified admission the statement is true, please provide exact citation to every such case, including the date on which the verdict was rendered.

Response. I do not know the answer to this question.

Question 2. Please explain, with as much particularity as you are able, with citation to all relevant laws, regulations and case authorities, your opinion that "proposed section 2019 defines munitions, explosives, unexploded ordinance and related constituents [as] solid waste and thus subject to EPA regulation under RCRA as hazardous waste", given that proposed section 2019 only refers to such material that travels OFF range.

Response. This question reflects minor errors in the transcript of the hearing, and misapprehends my testimony. What I said on July 9 was "Proposed section 2019 defines when munitions, explosives, unexploded ordinance and related constituents are solid wastes and thus subject to EPA regulation under RCRA as hazardous wastes." From the wording of your question and from the wording of proposed section 2019, I infer that you understood me to say that section 2019 defines any munitions, explosives, unexploded ordinance and related constituents that are or have been deposited, incident to their normal and expected use, on an operational range as solid waste. In fact, as I explained at the hearing, under section 2019, munitions, explo-

[55] *See*, e.g., Exhibit 8.

sives and the like can only be solid wastes in extremely limited circumstances. And that is precisely the States' concern.

By substantially narrowing the statutory definition of solid waste, section 2019 may preempt state and EPA authority to regulate the investigation and cleanup of used or fired munitions and related constituents. Such munitions and related constituents pose significant risks to human health and the environment at thousands of former military ranges across the country. In addition to the obvious explosive hazard from unexploded ordnance, these wastes may cause significant soil and groundwater contamination. For example, the *Wall Street Journal* recently reported on widespread perchlorate contamination from various defense and defense contractor facilities.[1]

In addition to the sites mentioned in the Journal article, there is increasing evidence that munitions on active ranges are causing groundwater contamination. Perchlorate from military training activities at Aberdeen Proving Grounds and Massachusetts Military Reservation has contaminated municipal drinking water wells near those bases, forcing closure of the wells.[add cite to newspaper articles] Perchlorate contamination associated with military training activities has been found at other sites as well.[2] Section 2019 would likely preempt states' authority to protect their citizens from groundwater contamination in these cases. The states should not be preempted from taking measures to protect their citizens and their groundwater supplies, nor from requiring measures to reduce or eliminate explosive hazards on lands no longer under military jurisdiction. As discussed in my written statement, and in the answer to question number 4, below, the military has simply provided no evidence that such state authority has or would adversely impact readiness.

My oral statement briefly explained why section 2019 likely preempts state and EPA authority over munitions and related constituents not just at operational ranges, but in nearly all circumstances. I provided a more detailed analysis of this issue in my written testimony, reproduced below:

The change in [RCRA's] definition of "solid waste" would affect state authority because the term appears in RCRA's waiver of Federal sovereign immunity—the provision of the law that makes DOD subject to state hazardous waste laws. The RCRA waiver of immunity applies to state "requirements respecting the control and abatement of solid waste or hazardous waste disposal and management." [42 U.S.C. § 6961] Thus, the scope of the waiver will likely be affected by amendments to RCRA's definition of solid waste. And because waivers of immunity are construed extremely narrowly, any ambiguity in the definition of solid waste will likely be construed in the way that results in the narrowest waiver. [*Department of Energy* v. *Ohio*, 503 U.S. 607 (1992).] By re-defining "solid waste" in a very limited fashion, DOD's proposed amendment will likely preempt state authority over munitions, explosives and the like not only at operational ranges, but—contrary to DOD's assertions—also at FUDS [Formerly Used Defense Sites], at DOD sites other than ranges, and even at private defense contractor sites.

Under section 2019(a)(1), munitions are solid wastes only under the following circumstances: (1) they are or have been deposited, incident to their normal and expected use, on an operational range, and then one of three things happens: they are removed from the range; or are recovered and then buried; or migrate off range and are not addressed under CERCLA; or (2) they are deposited, incident to their normal and expected use, off an operational range, and are not promptly addressed.

Under this definition, munitions that were deposited on an operational range and simply remain there after the range closed or was transferred are not solid wastes, and thus cannot be hazardous wastes. Such residual unexploded ordnance and explosives contamination is precisely the problem at closed, transferring and transferred ranges. Contrary to DOD's assertions that this amendment only affects operating ranges, this amendment would also likely preempt states and EPA from regulating the cleanup of unexploded ordnance and related materials at the 16 million acres of land on closed, transferred, and transferring ranges (i.e., FUDS) that are potentially contaminated with unexploded ordnance. In many cases, this ordnance was deposited on these ranges decades ago.

Proposed section 2019(a) also likely overrides state and EPA authority to address munitions-related environmental contamination that is not on a range at all. To cite just one example, in the normal course of maintaining artillery shells, DOD generates a waste stream from ammunition washout known commonly as "pink water." The water is pink due to the presence of trinitrotoluene (TNT), a constituent of both explosives and munitions (and a possible human carcinogen, according to EPA), in

[1] A copy of the article, which appeared on December 16, 2002, is attached.

[2] See Baltimore Sun article of October 3, 2002, and November 13, 2002 (attached), and Exhibits 9 and 10 of my July written testimony before your committee.

the water. Ammunition washout is not conducted on operational ranges, but has in at least one case led to environmental contamination. At Pueblo Chemical Depot in Colorado, ammunition washout created a plume of TNT-contaminated groundwater that has traveled over two miles, and has gone off the Depot to contaminate drinking water wells nearby. Under section 2019(a)(1)(A), this plume of TNT-contaminated groundwater would not be considered a solid waste (and thus excluded from the scope of the RCRA waiver of immunity), because the explosives constituents have not been deposited on an operational range, nor have they been deposited "incident to their normal and expected use," off an operational range. A similar result would obtain at the Los Alamos National Laboratory (a Department of Energy facility), where explosives constituents have contaminated groundwater approximately 1,000 feet below the ground surface.

(Emphasis in original, footnotes omitted, brackets added.)

Question 3. Isn't the implication of your testimony misleading that "proposed section 2019 defines munitions, explosives, unexploded ordinance and related constituents [as] solid waste and thus subject to EPA regulation under RCRA as hazardous waste", because proposed section 2019 only refers to such material that travels OFF range, and therefore the military would be greatly assisted by this clarification in terms of such material that stays ON an operational range?

Response. As with the previous question, this question implies that I testified section 2019 defines any munitions, explosives, unexploded ordinance and related constituents as solid waste and thus subject to EPA regulation under RCRA as hazardous waste. And as explained in the answer to the previous question, my testimony regarding section 2019 is quite different. Far from defining all, or nearly all, used or fired munitions to be solid wastes, section 2019(a)(1) excludes nearly all used or fired munitions, etc., from the statutory definition of solid waste. This is not a "clarification," but a reversal of existing law.

As noted in my written testimony, section 2019(a)(2) appears to provide a broad exemption for munitions, etc. wholly unrelated to their use on ranges. This provision excludes explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that are used in research, development, testing, and evaluation of military munitions, weapons, or weapon systems. Section 2019(a)(2) appears to exempt not only munitions, etc. that are used in the ways just described, but any munitions of that type. Under section 2019(a)(2), even wastes from the manufacture of explosives are excluded from the definition of solid waste.

To summarize, I interpret section 2019 to exclude from RCRA's statutory definition of solid waste munitions, explosives, unexploded ordnance and related constituents that:

- Have been deposited, incident to their normal and expected use, on an operational range, and remain on an operational range;
- Have been deposited, incident to their normal and expected use, on an operational range, and remain there, even after the range is no longer operational, and even after the range is no longer in Federal ownership (DOD estimates that it has transferred approximately 16 million acres of former ranges contaminated with such munitions out of Federal ownership or to other Federal agencies);
- Have been deposited off an operational range, where the deposit was not incident to their normal and expected use (e.g, contamination from ammunition washout, as described above);
- Have been deposited, incident to their normal and expected use, off an operational range, and are promptly rendered safe or retrieved;
- Migrate off an operational range and are "addressed" under CERCLA; or
- Are of a type that is used in training or research, development, testing and evaluation of military munitions, weapons, or weapon systems.

Together, paragraphs (1) and (2) of section 2019(a) create a 180 degree change from the current law. Presently, discarded military munitions are statutory solid wastes under RCRA. To explain why, a brief explanation of the history of military munitions' status under RCRA is helpful:

- RCRA contains a broad statutory definition of solid waste and hazardous waste. Statutory hazardous wastes area a subset of statutory solid wastes. Statutory hazardous wastes may be subject to RCRA's corrective action (cleanup) authorities and to clean up under RCRA's imminent and substantial endangerment provisions. Statutory solid wastes may be subject to clean up under RCRA's imminent and substantial endangerment provisions.
- RCRA directs the Environmental Protection Agency to define a subset of statutory solid and hazardous wastes as regulatory solid and hazardous wastes. Regulatory hazardous wastes are a subset of regulatory solid wastes, and are subject to the cleanup authorities described above, and are also subject to RCRA's permitting

requirements and the full panoply of RCRA regulations governing the safe generation, storage, treatment, transportation and disposal of hazardous waste.

- In 1979, a Federal district court held that military munitions were not statutory solid wastes. *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646 (D. Puerto Rico 1979).
- In 1992, Congress overturned the Romero-Barcelo decision when it passed the Federal Facility Compliance Act, Pub. L. No. 102–386. In that Act, Congress directed EPA to promulgate regulations defining when military munitions become regulatory hazardous wastes. 42 U.S.C. § 6924(y) Because regulatory hazardous wastes are a subset of statutory solid wastes, this means that military munitions are statutory solid wastes if they meet the statutory definition, i.e., if they have been "discarded." See 42 U.S.C. § 6903(27). In crafting this provision, the Conference Committee rejected a Senate proposal that would have allowed DOD to "self-regulate" munitions under RCRA. H. Conf. Rep. No. 102–886, at 28–29. Thus, in passing the Federal Facility Compliance Act, Congress intended that states and EPA regulate the management of waste munitions.
- In 1995, EPA published its proposed "munitions rule" in the Federal Register. 60 Fed. Reg. 56468. Among other things, EPA proposed that munitions used for their intended purpose (including research, development, testing and training) are not regulatory hazardous wastes. *Id.* at 56492.
- In the proposed munitions rule, EPA also proposed to define when used or fired military munitions would be statutory solid wastes. *Id.* EPA proposed that munitions discharged during military activities at ranges would be statutory solid wastes when the munitions were left in place at the time the range closed or was transferred out of DOD control. EPA also proposed that this provision would terminate upon DOD's promulgation of a rule governing the cleanup of munitions on closed and transferred ranges, and that DOD's rule would supersede all RCRA authority over such munitions. *Id*.
- Some commenters on the proposed rule noted that the proposal to "sunset" regulation of discharged munitions as statutory solid wastes upon promulgation of a DOD rule directly conflicted with the Federal Facility Compliance Act, and that EPA had no authority to preempt state authority to regulate discharged munitions. Commenters also argued that DOD had no authority to promulgate such a rule.
- EPA's final munitions rule contained the proposal that munitions used for their intended purpose are not regulatory hazardous wastes. 62 Fed. Reg. 6654 (Feb. 12, 1997), codified at 40 CFR § 266.202.
- The final munitions rule postponed action on the proposal to define when discharged munitions would be statutory solid wastes, as well as the sunset provision. Id. at 6632. EPA's decision to postpone action was based partly on the comments objecting it had no authority to preempt state authority, and partly on the fact that DOD had not promulgated its "range rule." Id. EPA stated that it would further evaluate the legal arguments, and would also evaluate DOD's proposed range rule; if DOD failed to promulgate the rule, or if EPA found the rule to be insufficiently protective, EPA stated it would be prepared to address the issue under Federal environmental laws. Id. EPA's decision to postpone this provision does not mean that discharged munitions on ranges are not statutory solid wastes; as noted above, under the Federal Facility Compliance Act, if such munitions are discarded, they are statutory solid wastes.
- Later in 1997, DOD published its proposed range rule addressing cleanup of munitions on closed and transferred ranges in the Federal Register. 62 Fed. Reg. 50796 (Sept. 27, 1997). Again, states and others commented that DOD did not have statutory authority to promulgate such a rule, and that in passing the Federal Facility Compliance Act, Congress had intended for states and EPA to oversee cleanup of munitions on closed and transferred ranges.
- In 2000, 24 Attorneys General sent a letter to the Office of Management and Budget, requesting that OMB disapprove DOD's proposed range rule. The Environmental Council of the States also adopted a resolution opposing the proposed rule.
- DOD recalled the proposed rule from OMB in November 2000, and committed to engage the states and EPA to find an acceptable way to manage munitions response actions.[3]

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[3] Over the past 18 months, several states (Colorado, Alaska, California and Illinois) representing State organizations (National Association of Attorneys General, Environmental Council of the States, and the Association of State and Territorial Solid Waste Management Officials), EPA, DOD, and civilian federal agencies have been engaged in discussions to find mutually acceptable ways to conduct munitions response actions at sites other than operational ranges. The charter for this group (the "Munitions Response Committee") states that one of the desired outcomes is development of collaborative decision-making processes for munitions response actions.

Continued

Thus, the current state of the law is that used or fired munitions and related constituents on ranges are statutory solid wastes if they are discarded.

As to whether military readiness would be greatly assisted by enacting section 2019, I do not think that it would. As I stated in my oral and written statements, I am not aware of any instances in which the application of RCRA has adversely impacted readiness.

Question 4. In light of the very compelling testimony of the generals and admiral, which you heard, as to the urgent need for these minor clarifications in the law, and in light of the absence of enforcement actions brought by states involving operational ranges, why do you still oppose the RRPI's RCRA and CERCLA provisions for operational ranges? Would you even oppose these two proposals if there were a 3 or 5 year sunset provision attached?

Response. The short answer is that we oppose these amendments because they likely preempt state and EPA authority to require the cleanup of military munitions and related constituents in virtually all circumstances, with no corresponding benefit to military readiness. We would oppose them even with a sunset provision.

With all due respect to the Generals and the Admiral, nowhere in their testimony did they cite even one instance in which a state or EPA has taken action under CERCLA or RCRA that had any impact on military readiness whatsoever. As far as I am aware, DOD as a whole has failed to cite any cases in which RCRA or CERCLA have adversely impacted readiness. And if such a case ever occurred, both RCRA and CERCLA allow DOD to seek case-by-case exemptions from their requirements.

DOD's entire argument for preempting state and EPA authority under these laws is premised on the fact that some environmental groups and Alaskan Native Tribes filed a citizen suit regarding Ft. Richardson. The State of Alaska is not a party to this suit. According to General Keane's testimony:

The Army at Fort Richardson, Alaska, is currently facing a lawsuit alleging violations of the Clean Water Act, RCRA, and CERCLA associated with firing munitions at Eagle River Flats range. The RCRA allegation is that munitions fired into or onto Eagle River Flats are RCRA statutory solid wastes that present an imminent and substantial endangerment to health or the environment. The CERCLA allegations are that the act of firing munitions onto an operational range and the continued presence of those munitions on the range constitute a release of hazardous substances potentially requiring reporting, characterization, and remediation.

If munitions used for their intended purpose are considered to be statutory solid waste, the Army could be forced to perform corrective action or remediation of Eagle River Flats. Live-fire training during the remediation would be impossible, and the only mortar and artillery impact area at Fort Richardson would be lost to training. The 172d Infantry Brigade would be unable to conduct a large portion of its mission essential live-fire training operations.

If courts agree with the plaintiff, then live-fire training and testing operations at every Army range (more than 400) could be subject to CERCLA response requirements. Further lawsuits could compel the Environmental Protection Agency and state regulators in all U.S. regions to enforce the same standards on other military ranges. These findings would not only dramatically impact the readiness of the 172d Infantry Brigade in Alaska, but the entire Department of Defense.

I disagree with General Keane's testimony in several respects. First, there is no RCRA imminent and substantial endangerment allegation in the Ft. Richardson citizen suit. Plaintiffs in that suit did allege violation of an Alaska statutory provision that prohibits pollution.[4] The cited provision is not part of Alaska's hazardous waste regulatory program; indeed, Alaska does not have a state hazardous waste program, much less an authorized program under RCRA. Plaintiffs in this case have never even alleged that used or fired munitions are a RCRA statutory solid waste.[5] Thus,

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The charter also states that these collaborative processes will (subject to reservation of rights and dispute resolution provisions) afford the states the opportunity to review and approve the adequacy of munitions response actions.

[4] Plaintiff's Amended Complaint for Declaratory and Injunctive Relief, para 29, *Alaska Community Action on Toxics,* v. *United States,* A02–0083 CV, filed June 26, 2002. Plaintiffs' complaint never cites RCRA's imminent and substantial endangerment provision; instead, it cites 42 U.S.C. §6972(a)(1)(A), the RCRA citizen suit provisions authorizing suit against any person "alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter" as a jurisdictional basis for the suit. In paragraph 29, plaintiffs allege that tne Army's violation of Alaska Statutes §46.03.710 constitutes a violation fo RCRA's vaiver of immunity provision, 42 U.S.C. §6961(a). Alaska Statutes §46.03.710 states:" A person may not pollute or add to the pollution of the air, land, subsurface land, or water of the state."

[5] *See* Plaintiffs' Amended Complaint, *supra* note 3.

if this case were decided adversely to the Army, it would not set any precedent regarding RCRA.

Even if General Keane's characterization of the plaintiff's complaint were correct, the remainder of his testimony on this point is mere speculation without any basis in fact. I would agree that if the court in this case held that munitions used for their intended purpose are statutory solid wastes under RCRA or hazardous substances under CERCLA, they would potentially be subject to corrective action or remediation. However, no remediation would be required if the munitions did not pose a risk to human health or the environment. Alaska environmental officials who have been involved in oversight of the CERCLA investigation and cleanup at Ft. Richardson have concluded that, aside from certain white phosphorous contamination that the Army is remediating, the remaining fired munitions at the Eagle River Flats area of Ft. Richardson do not warrant an environmental response at this time.

Assuming that some remediation were required, there is no evidence whatsoever that it would make live-fire training in the Eagle River Flats area impossible. Remedial approaches to contaminated sites are quite varied, and inevitably site-specific. Without knowing the specific details of what the problem is, and what the remedial alternatives are, there is simply no basis for assessing the impacts, if any, of cleanup on training.

States have regulated cleanup of contaminated Department of Energy nuclear weapons facilities and Department of Defense sites for decades. We believe that state and EPA regulators have demonstrated their consistent willingness to resolve differences with regulated Federal officials, and to develop creative approaches that balance defense concerns with environmental protection. But if there were a case where state or EPA regulators believed that environmental contamination at an operation range required remediation to protect human health and the environment, and adverse impacts on readiness could not be avoided, RCRA and CERCLA already allow DOD to seek an exemption from such requirements on the basis of national security.[6]

Question 5. In your written testimony you stated that the likelihood of conflict between RCRA and CERCLA and military readiness "is remote". Are you unfamiliar with the two cases the military is currently facing, and the other cases where RCRA and CERCLA were applied at private skeet ranges? Don't those cases dramatize the urgency of the problem?

Response. I assume that one of the cases you are referring to is the citizen suit filed regarding Ft. Richardson discussed in the previous answer. I don't know what the other case you have in mind is. I am familiar with one case that held fired lead shot at a gun club constituted a solid waste under RCRA. *Connecticut Coastal Fishermen's Association* v. *Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993). I disagree that either of these cases demonstrates an urgent need to preempt state and EPA authority over cleanup of nearly all munitions-related environmental contamination, regardless of whether such contamination is at an active range. If anything, the Remington Arms case suggests precisely the opposite: it was decided nearly 10 years ago, but the Department of Defense has yet to identify a single instance in which RCRA has adversely impacted readiness.

The underlying premise of this question seems to be that if used or fired military munitions are considered statutory solid wastes under RCRA, or hazardous substances under CERCLA, the inevitable consequence will be that states or EPA will impose remedial requirements that will conflict with military readiness. As indicated in the response to the previous question, there is no evidence to suggest this is the case. Cleanup of munitions-related contamination at former military ranges now in private ownership does not impact military readiness in any way. Cleanup of munitions-related contamination at defense contractor sites does not impact mili-

[6] As I noted in my written testimony, these are not burdensome requirements: All that is required is a finding that doing so is necessary for national security or is in the paramount interests of the United States, depending on the particular statute at issue. For example, President Bush recently made such a finding under RCRA exempting the Air Force facility "near Groom Lake, Nevada, from any Federal, State, interstate or local provision respecting the control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information concerning the operating location to any authorized person." [66 Fed. Reg. 50807 (Oct. 4, 2001)] The entire finding consists of three paragraphs. President Clinton made similar findings annually from 1996 through 2000 regarding this same matter to prevent the release of classified information. We understand that to date, the exemption provisions of the Clean Air Act, RCRA and CERCLA have never been invoked because of military readiness concerns."

To the extent the military has found the exemption process burdensome, it appars from General Williams' testimony that that is the result of agency practice, not the requirements of the law. *See* transcript of July 9, 2002 hearing at 22–24.

tary readiness in any way. Yet, the proposed amendments would likely preempt state and/or EPA authority over many of these situations.

The amendments would also likely preempt state and EPA authority over cleanup of munitions-related contamination at current military facilities. For example, as mentioned in my written testimony, it would likely preempt Colorado and New Mexico from regulating the cleanup of explosives-related contamination at the Pueblo Chemical Depot and the Los Alamos National Lab, respectively.[7] In neither case is the state's action adversely impacting readiness.

DOD simply has presented no evidence that application of these laws has ever actually adversely impacted readiness. Even with respect to operational ranges, General Keane's testimony, as previously mentioned, does not describe any instances in which RCRA or CERCLA cleanup requirements have adversely impacted readiness. Instead, he speculates that remedial measures will be required in the Eagle River Flats area of Ft. Richardson, and that those measures would necessarily adversely impact readiness.

Compare General Keane's testimony with that of General Fogelsong:

> UXO and the disposal of residue material (primarily scrap metal) on air-to-ground ranges is one area where we have extensively investigated our practices and policies. UXO and range residue (used targets, inert ordnance, etc.) physically occupy only a small part of any air-to-ground range, but its presence is an increasingly expensive problem. The costs associated with clearing closed ranges have led us to the conclusion that we need to plan and manage for the entire life-cycle of a range.
>
> The Air Force first started clearing ordnance from active ranges in the late 1940's. Active range clearance not only provides for safe target area operations, but also provides airfield-recovery training for our Explosive Ordnance Disposal technicians. Air Force policy requires that active air-to-ground ranges be cleared on a quarterly, annual, and 5-year basis at varying distances from each target. Our currently scheduled UXO and residue removal program, along with modifications to our range-clearing practices, will ensure long-term range sustainability and the safety of personnel on the range. Our ultimate goal is to manage our ranges effectively and efficiently throughout the life-cycle process providing for sustainable operations, safe and effective UXO management and long-term environmental stewardship.

When faced with groundwater contamination problems, environmental regulators often consider "source removal" as part of a comprehensive cleanup strategy. The Air Force's forward-looking range clearance policies could constitute source removal at Air Force ranges where munitions constituents is causing groundwater contamination. Combined with groundwater treatment systems, the Air Force's own sustainable range management practices may be sufficient to address such groundwater contamination. My point here is not to say that the Air Force has developed a "one size fits all" solution to munitions-related contamination at active ranges, but simply to point out that there is no inherent conflict between range use and environmental remediation.

There is, as noted in response to question number 1, increasing evidence that operational military ranges can cause significant groundwater contamination. There is no evidence that addressing this contamination under RCRA or CERCLA will adversely impact readiness. We recognize the importance of maintaining military readiness. But we object to these amendments, which would likely preempt our authority, and that of EPA, in virtually all cases where munitions and related constituents are threatening human health or the environment, even though exercising such authority will seldom, if ever, have any impact on readiness whatsoever. And again, in the event such a conflict does occur, the Department of Defense may avail itself of the exemption provisions that currently exist in CERCLA and RCRA.

Question 6. Isn't it true that the purpose of the 1918 Migratory Bird Treaty Act was to stop the intentional hunting of migratory birds for commercial reasons such as feathers for ladies' hats? The recent D.C. District Court case held that the MBTA

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[7] To quote from my testimony at page 13: At Pueblo chemical Depot in Colorado, ammunition washout created a plume of TNT-contaminated groundwater that has traveled over 2 miles, and has gone off the Depot to contaminate drinking water wells nearby. Under section 2019(a)(1)(A), this plume of TNT-contaminated groundwater would not be considered a solid water (and thus excluded from the scope of the RCRA waiver of immunity), because the explosives constituents have not been deposited on an operational range, nor have they been deposited "incident to their normal and expected use," off an operational range. A similar result would obtain at the Los Alamos National Laboratory (a Department of Energy facility), where explosives constituents have contaminated groundwater approximately 1,000 feet below the ground surface.

as written prohibits both intentional and unintentional harm to migratory birds. Isn't this a perversion of congressional intent? Wouldn't the RRPI merely restore the original intent of the Act?

Response. I believe that this question was erroneously directed to me. I did not testify regarding the Migratory Bird Treaty Act, and do not know the answer to these questions.

http://www.sunspot.net/news/local/harford/bal-te.md.perchlorate14nov14,0,32499.story?coll=bal-local-headlines

Md. on battle line over water pollutant

APG contaminates wells, agencies fight over limit

By Lane Harvey Brown
Sun Staff

November 14, 2002

For weeks, high-level discussions between federal and state environmental officials and the Defense Department have produced no solutions about how to treat a Harford County town's contaminated drinking water.

Military training exercises at Aberdeen Proving Ground, a key center for Army testing and research, have left most of the city of Aberdeen's wells tainted by perchlorate. The chemical, which is used as a propellant, impairs thyroid function and is suspected of contributing to developmental problems in fetuses, infants and young children.

As it negotiates cleanup of Aberdeen's wells, Maryland is being drawn into a national dispute over perchlorate, a saltlike compound detected in ground water in 21 other states from Massachusetts to California.

The major question facing states is this: How much perchlorate can people safely ingest? The Environmental Protection Agency, the Maryland Department of the Environment and the Defense Department have not reached a consensus on the standard to be allowed.

So, states are setting their own advisory levels - with Maryland and Massachusetts having the nation's lowest. The standard is critical in Aberdeen and across the nation, because the lower the level allowed, the higher the cleanup cost. It could push Defense Department spending into the billions of dollars instead of millions.

But without an EPA-determined national limit for perchlorate in drinking water, the military's response has been blunt: No standard, no cleanup.

"The battle line is really being drawn between EPA and DoD," said California lawyer Barry Groveman.

In Aberdeen, a community group that monitors cleanup at APG has written Maryland senators, Gov.-elect Robert L. Ehrlich Jr. and EPA Administrator Christine Todd Whitman, decrying the drawn-out discussions between state and federal officials as "sending the wrong message to the DoD."

The Defense Department argues that the message on perchlorate is simple: Research has not clearly defined a public health hazard.

"I don't think anyone is satisfied with the level of scientific information on perchlorate," said John Paul Woodley Jr., assistant deputy undersecretary of defense for environmental matters.

He was surprised when asked how the military would respond to a cleanup order in Maryland of 1 part per billion, the state's current advisory level.

"I would not expect them to propose anything along those lines," he said. "I would expect us to continue ... discussions about what action, if any, is appropriate under these circumstances."

Protecting citizens

But Robert S. Summers, director of MDE's Water Management Administration, said last week that EPA research led his agency to issue the 1 part per billion advisory level for perchlorate in August, and that there were no plans to revise it.

"Based on EPA work, we think the science is there to say 1 [part per billion] is a safe level," he said.

"We're trying to protect our citizens," Summers said. "We want the Army to clean up the contamination. We don't want these levels to get any worse."

Contamination in Aberdeen's well field ranges from 5 parts to 14 parts per billion.

Asked if the Defense Department would sue the state or appeal a cleanup decision, Woodley said: "I would not speculate on that."

Summers said he hopes it won't come to that.

"We're working with the Environmental Protection Agency and APG to try to come to a resolution," he said. "We haven't achieved that to this point."

EPA appears to be years away from issuing a standard - known as a maximum contaminant level, or MCL - for perchlorate. MCLs are used to define cleanup standards. Right now, the chemical is wending its way through EPA reviews.

But there is wide-ranging disagreement over any figures, which are measured in parts per billion - a hard-to-imagine number for the average person.

One part per billion is equivalent to about one drop of water in an Olympic-size swimming pool, said Will Humble, chief of the environmental health office in the Arizona Department of Health Services.

"It sounds so infinitesimal, but it can be so important," he said. "Every compound has its own toxicity."

An Air Force toxicologist meeting with water utility officials last month in Ontario, Calif., posited 70 parts per billion of perchlorate in drinking water as an acceptable limit; California officials, on the other hand, are considering a limit of 4 parts per billion. Several states, including Arizona, have advisory limits as high as 14 parts per billion.

If Maryland orders a cleanup to 1 part per billion, communities in other states could demand the same treatment level, said Kevin Mayer, a scientist in EPA's Pacific Southwest office.

At any site, the amount of water requiring treatment increases significantly as the maximum contaminant level decreases, Woodley said.

"The lower it gets, exponentially, the costs will increase," he said.

So will the number of sites requiring treatment.

Perchlorate has been used for decades as an oxidizer in jet and rocket fuels. The chemical is also used in the nuclear and space industries, and in fireworks. Only eight states have no known manufacturers or users.

While the Defense Department is not the sole consumer of perchlorate, the explosive salt is widely used by the military to jump-start smoke grenades, jet fuel and other incendiary devices.

In Massachusetts, the military is committed to a $300 million cleanup around Cape Cod's Massachusetts Military Reservation that includes perchlorate remediation, said Joel Feigenbaum, a community college mathematics professor and activist. Perchlorate levels as high as 300 parts per billion have been found in the area's ground water, he said.

In San Bernardino County, east of Los Angeles, one water district has found 820 parts per billion of perchlorate in its wells. The Department of Defense, private industries, a fireworks plant and a landfill have operated in the area.

Perchlorate has been found in 59 municipal water supplies in California, from Sacramento to Southern California, said the EPA's Mayer. He said the contaminant has also been found in Nevada's Lake Mead and the Colorado River, which irrigates more than 90 percent of the nation's winter vegetable crops and supplies water to as many as 20 million residents in Arizona, Nevada and California.

"Statewide, perchlorate's becoming a very serious problem," said Barry Groveman, a Los Angeles lawyer who heads the Perchlorate Task Force, a group formed several months ago that includes water companies, city governments, lawyers and other agencies.

Much more to learn

Much remains to be learned about perchlorate's effect on the human body, and those most vulnerable - fetuses, infants and small children - cannot be safely tested. Impaired thyroid function can cause retardation, hyperactivity and other developmental problems. Regulators and toxicologists say that until more is known, the perchlorate limit should be conservative.

Adding to the dispute is the fact that the studies that discount risks of perchlorate have been funded by the Defense Department, perchorate producers or the Perchlorate Study Group, which is constituted primarily of defense contractors. An Arizona health department study completed in 2000, however, suggested adverse health effects in newborns whose mothers were exposed to perchlorate in drinking water.

"It's a smoking gun; it's a real problem for the military," said Lenny Siegel, director of the Center for Public Environmental Oversight, based in California.

"The fear for the Army is that once they start looking for [perchlorate], they'll find more of it."

Groveman, the Los Angeles lawyer, said a class action lawsuit similar to the one filed by states against tobacco companies could be a way to force the military to act.

He said Defense Department efforts to fight cleanup and dispute safe perchlorate levels are unacceptable.

But Woodley said the military is acting appropriately under the circumstances.

"Apply common sense, don't panic and do the best you can," he said. "That's the policy that we're trying to apply here."

http://www.sunspot.net/news/health/bal-water04,0,4562084.story?coll=bal-local-headlines

From Friday's Sun

Group calling for cleanup of perchlorate in Aberdeen

1 well shut after chemical was detected this week

By Lane Harvey Brown
Sun Staff

October 3, 2002, 10:32 PM EDT

The community watchdog group that monitors environmental cleanup at Aberdeen Proving Ground called on the Defense Department Thursday to authorize an immediate cleanup of chemical contamination found in the town of Aberdeen's wells.

The call was made after tests this week found perchlorate, a chemical used in rocket fuel and explosives, in the town's treated drinking water at a level of 1 part per billion, the state's maximum allowable level.

The test results spurred city officials to shut down one well and halve production at two others.

"The Aberdeen well field is contaminated with perchlorate from military activities, and this contamination must be treated now," the Aberdeen Proving Ground Superfund Citizens Coalition said in a statement.

The Army is in "constant discussions with EPA" about the perchlorate issue, and is very concerned about avoiding public health hazards, John Paul Woodley Jr., assistant deputy undersecretary of Defense for environmental matters, said Thursday. He added that the Environmental Protection Agency has not issued a regulatory standard for perchlorate. "The first question is if the levels that have been found are hazardous to the people who are exposed to it," he said.

EPA spokeswoman Robin Woods said Thursday that it could be five years before a regulatory standard is adopted, but that the agency could alter that schedule.

Steven R. Hirsh, an EPA remedial project manager, said the agency can order a site cleanup without a regulatory standard. Asked whether such a measure is being considered at APG, he said, "Yes, that's a possibility."

Woodley said that if the EPA or the state identified hazards and recommended ways to deal with them, the Department of Defense "would be anxious to avoid a hazardous condition whether there was an order or not."

APG officials acknowledge that the perchlorate is probably the result of training exercises using smoke grenades and explosive devices in the northern corner of the training ground.

Perchlorate was discovered at the installation in March last year, and two still poorly defined "plumes" containing the chemical, ranging from 10 parts per billion to 20 parts per billion, have gravitated to some of Aberdeen's production wells, which are along the post boundary.

Perchlorate interferes with thyroid function and can cause neurological damage to fetuses, newborns and children, experts say. In some cases, prolonged exposure to perchlorate has been linked to thyroid cancer.

Thomas Zoeller, a professor of biology at the University of Massachusetts Amherst, said much remains to be learned about perchlorate. That is why advisory levels such as Maryland's tend to be low, he said.

The city and Army tested the finished water three times this week. One test detected the chemical in the water at 1 part per billion. The two subsequent tests found levels lower than the reporting limit of 1 part per billion.

Randolph C. Robertson, Aberdeen's director of public works, said Thursday he is confident that the city can maintain a safe supply of drinking water by curtailing the flow from the contaminated wells and using more county water.

"The water is safe," he said. "We wouldn't put it out if it weren't."

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Seeping Threat

A Fuel of Cold War Defenses Now Ignites Health Controversy

Perchlorate Runoff Makes Way To Water Supply of Millions; Pentagon Clashes With EPA

Greg Voetsch's Two Tumors

By Peter Waldman

RANCHO CORDOVA, Calif.—For years, Greg and Doris Voetsch felt they were living a suburban dream here on the banks of the American River.

Just 15 miles from downtown Sacramento, they raised four kids on home-grown cherries, pears, cucumbers and string beans, along with salmon and rainbow trout caught in the Sierra-fed waters flowing just beyond their back door. Mr. Voetsch, a landscaper, used tobacco juice, instead of pesticides, to keep the aphids at bay. Snow-melt was their air-conditioning, cooling the hot summer breezes. The cost of living was "almost nothing," Mr. Voetsch says.

But trouble seeped into their paradise. In 1983, 13 years after the family moved here, surgeons removed two tumors, each of a different type of cancer, from Mr. Voetsch's thyroid gland. Shortly after, his two older daughters, both in their 20s at the time, had surgery to treat thyroid-related problems. Last year, his 67-year-old wife, who has had thyroid trouble for years, had a benign brain tumor removed. The couple's daughter-in-law, who grew up nearby, also has thyroid problems. Her son—the Voetsches' grandson—is autistic.

Greg Voetsch

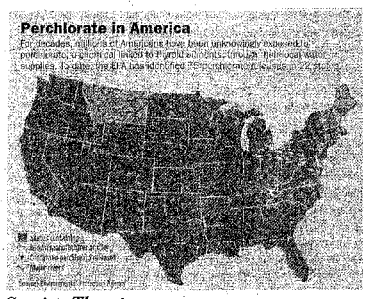
Five years ago, the Voetsches learned that the home they bought in 1970 lies on the edge of a so-called plume of underground water polluted with waste from a nearby missile factory. Among the chemicals found in local drinking wells is perchlorate, the main ingredient of solid rocket fuel and a known toxin. The Voetsches believe it was in their water and, they suspect, their garden soil. "We lived off the land and never thought twice about it," Mr. Voetsch says.

In the human body, perchlorate affects production of thyroid hormones—a phenomenon that the Environmental Protection Agency says can cause thyroid ailments such as Graves' disease and cancer in adults. Fetuses and newborns, the EPA says, are at even greater risk, susceptible to neurological and other developmental damage.

For decades, millions of Americans have been unknowingly exposed to perchlorate through their local water supplies. No one denies that the chemical is toxic. But the level at which it becomes dangerous in drinking water is the subject of a fierce debate that pits the EPA against the Pentagon and its defense-industry allies. As a result, the U.S. is still years away from establishing a nationally enforced standard, and until it does so, a poisonous chemical lingers in the environment in amounts that could still be causing the slow spread of serious disease on a large scale.

To date, the EPA has identified 75 perchlorate releases in 22 states, including Arizona, Texas, Nebraska, Iowa, New York, Maryland and Massachusetts, as well as California. The Colorado River, the main water source for about 15 million homes across the Southwest, contains perchlorate at roughly seven parts per billion—seven times the level that the EPA's National Center for Environmental Assessment says is safe.

Defense-industry dumping is suspected in nearly all these cases, though perchlorate has also been linked to fireworks and other explosives, automobile airbags and Chilean fertilizers, some of which may have been used near the Voetsches' home. The EPA says it will take hundreds of years and cost several billion dollars to clean up the known plumes.



Perchlorate Reaches Water Supply of Millions

The EPA wants suspected water supplies tested nationwide for perchlorate, but the Pentagon, which argues perchlor-

Please Turn to Page A9, Column 1

Continued From First Page

ate isn't dangerous in small doses, is resisting in many cases. Instead, the Pentagon has asked Congress for an exemption from environmental laws covering the cleanup of explosive residues at operational sites.

It's impossible to determine definitively whether perchlorate caused the Voetsches' ailments and similar maladies reported by hundreds of other people in affected areas. California's Department of Health Services is studying local health statistics for correlations between perchlorate levels in local drinking water and rates of thyroid and other disorders associated with the chemical. Eight states have passed advisory limits on perchlorate, ranging from one part per billion in Maryland, Massachusetts and New Mexico, to two ppb in California and 18 ppb in Nevada.

The EPA worries even the smallest traces of perchlorate are dangerous, particularly to infants at risk of neurological damage because thyroid-hormone production is crucial to normal brain development. In January, the agency's national assessment center proposed a draft "reference dose" for perchlorate in drinking water of one part per billion. That recommendation, when finalized after a peer review process, goes to the EPA's Office of Water, which ultimately proposes a national standard after weighing costs and benefits.

"After everything I've seen on perchlorate, I'm a lot more concerned about even subtle deficiencies of thyroid hormone on brain development than I was before," says biologist Thomas Zoeller, an endocrine expert at the University of Massachusetts at Amherst and one of the 17 peer reviewers of the EPA's draft reference-dose report.

Billions in Cleanup Costs

The Pentagon and several of its major contractors, all facing billions of dollars in possible cleanup and liability costs, say perchlorate is perfectly safe in trace amounts. They argue the chemical, an ordinary salt ion similar to nitrate, should be allowed in drinking water in concentrations up to 200 ppb. "The scientific basis for believing there's harm has not been established," says Maureen Koetz, assistant undersecretary of defense for the environment.

That perchlorate is an issue at all is a legacy of the Cold War, when the priorities of containing communism trumped domestic considerations for the environment and public safety. The military started using perchlorate in solid rocket fuel and other propellants in the 1940s. At the time, the chemical wasn't considered very toxic. Millions of tons of it were simply flushed onto the ground, left to flow unimpeded into streams and underground aquifers.

The polluting continued for years after evidence began to mount of the dangers of perchlorate. A three-month investigation by The Wall Street Journal has found that even after California regulators tried to control disposal of the chemical in the 1950s, companies dumped it with impunity. It wasn't until the 1970s, after passage of federal clean-water laws, that the defense industry began trying to contain perchlorate waste for treatment. But by then, the chemical had already begun its long, slow seep into water supplies nationwide.

As late as 1976, in fact, Aerojet-General Corp., operator of the missile plant near the Voetsches' home, built a special, 3,500-foot pipeline to dump toxic waste into unlined earthen pits—directly disobeying a local water-board order issued just months earlier, state documents show. At first, Aerojet told investigators the pipe was just a stopgap measure to bypass a clogged holding pond.

"A 3,500-foot pipeline may not quite be temporary," acknowledges William Phillips, longtime general counsel of Aerojet's parent, GenCorp of Sacramento. But Mr. Phillips and other defense-industry officials say that the contractors' disposal practices were state-of-the-art at the time, particularly for a chemical they didn't—and still don't—consider very harmful. Moreover, the defense suppliers say they followed all orders and guidelines issued by the Pentagon, which owned and managed most of the perchlorate supply and put its own inspectors inside factories to ensure proper handling.

The Pentagon, for its part, says its job is national security, not environmental safety. "We are no different from any other set of individuals who operate in states and localities and follow the laws," says Ms. Koetz, the assistant undersecretary of defense. "We do not consider it our job to get out in front of the health and environmental regulatory agencies in terms of discovering" pollution risks.

"Should someone have connected the dots in 1962, 1972 or 1982? Absolutely," says Kevin Mayer, an EPA Superfund official in San Francisco and the agency's point man on perchlorate. "But it didn't happen. There isn't any one person or one agency that definitively dropped the ball. Everyone did nothing."

That's what upsets people living in perchlorate-polluted areas. Though tests revealed high levels of perchlorate in the Voetsches' neighborhood water as far back as 1963—seven years before they moved in—state water regulators declared local wells safe. The Voetsches joined a class-action lawsuit in 1998, filed in Sacramento state court, accusing Aerojet, Boeing Co. and two local water utilities of negligence and fraud. The defendants contest the allegations, and the case is pending.

"I think they knew it was dangerous and just kept doing it," says Mr. Voetsch, now 68 years old. "There was nobody there to stop them, and nobody was the wiser."

Perchlorate fueled the takeoff of American rocketry. During World War II, the Navy tapped Theodore von Karman, a Hungarian-born aeronautics professor at California Institute of Technology, to develop engines powerful enough to lift planes off the short flight decks of aircraft carriers. He and some other rocket hobbyists from CalTech founded Aerojet in Pasadena, Calif. Their breakthrough: so-called jet-assisted takeoff rockets, fueled by solid perchlorate compounds that were highly charged but stable enough to be handled safely aboard ships.

Perchlorate, dubbed "powdered oxygen," is combusted inside a rocket engine with aluminum powder and a rubber-like polymer to stoke an intense burn. To propel a rocket, the solid fuel must be ground and molded into a particular shape. Over time, the fuel breaks down, requiring continual replacements. That's why, for more than 40 years, tons of perchlorate were routinely flushed from rockets and missiles onto the ground and into water supplies.

Aerojet began manufacturing at a plant in the San Gabriel Valley town of Azusa, Calif., about 40 miles east of downtown Los Angeles. Nearly from the start, it had discharge problems. In 1949, the Los Angeles County engineer warned the company in a letter that dumping its hazardous waste into "cesspools" and "seepage beds" posed an "extreme hazard" to the underground water supply. "I cannot too strongly emphasize the necessity of obtaining a sewer connection in the shortest possible time," pleaded the county engineer, who noted Aerojet was already in violation of local discharge restrictions. Aerojet was never punished, and its Azusa plant was connected to an industrial sewer line in 1952.

Move Out of the City

Hemmed in by the burgeoning Los Angeles suburbs, Aerojet moved most of its rocket operations north to some abandoned gold-dredging fields in Rancho Cordova, about 15 miles east of Sacramento. In 1951, shortly after buying the site, an Aerojet employee calculated that about 1,000 gallons of liquid waste, plus 300 pounds of ammonium perchlorate, would flow into the underground aquifer every day. Most of the waste would have "a deleterious effect on both plant life and the underground water supply," he warned in an internal memo. But ammonium perchlorate might "be beneficial in a sewage stream and possibly be slightly beneficial on plant life," he added.

As in the San Gabriel Valley, Aerojet designed a system in Rancho Cordova to channel waste into unlined leaching ponds, apparently assuming whatever pollutants did reach groundwater would

be diluted to safe levels. But when those designs were circulated for comment to California's water, health, and fish-and-game departments in Sacramento, the regulators unanimously panned the proposed "percolation beds" as posing grave pollution risks to streams and underground aquifers, state documents show.

Officials sought specific toxicity advice on perchlorate from a botany professor at the University of California at Davis. He replied that perchlorate was "known to be toxic to plant life" and was unlikely to break down "in course of percolation through gravel." For treatment, he recommended evaporation in "sealed beds" and "absorption and contact with organic matter."

Today, this so-called biological method is a common way of extracting perchlorate from water. "It's astonishing how right he was," says Mr. Mayer of the EPA.

On May 15, 1952, California's Central Valley Regional Water Pollution Control Board, over Aerojet's objections, issued Resolution No. 127, barring "entry" of perchlorate and eight other chemicals into local groundwater and the nearby American River. That same year, medical researchers published their findings that perchlorate blocks the uptake of essential iodide into the thyroid gland, thus inhibiting thyroid-hormone production.

Neither the medical findings nor the water board's order had much effect. By 1955, regulators were finding perchlorate in local groundwater. Though hampered by primitive test methods and Navy secrecy, a state hydraulic engineer reported that untreated discharges of some 310 pounds a day of perchlorate were being dumped into "abandoned gold dredger pits." The good news, he reported, was that the waste was seeping into the ground more slowly than expected. The bad news, reported a few months later, was that a nondrinking well on Aerojet's property was contaminated with 1,000 ppb of perchlorate, indicating "waste water from the sump is commingling with underlying groundwater."

Mr. Phillips, the GenCorp general counsel, says Aerojet's disposal practices met all safety and regulatory requirements of the day. "You were supposed to put [perchlorate] in these pits," he says. "We thought the pits were impermeable."

In 1957, a national task group on underground waste reported perchlorate contamination had spread over "several square miles" east of Sacramento. The group's report, published in the American Water Works Association Journal, described perchlorate as a "weedicide" toxic to plants at 1,000 to 2,000 ppb. It said the perchlorate plume near Sacramento ranged from 3.5 million to five million ppb. Also that year, some Harvard University researchers, using studies on guinea pigs, found that perchlorate, after passing through the placenta from the mother, depleted thyroid-hormone production in fetuses.

In 1958, the Water Pollution Control Board notified Aerojet that its discharges were "consistently in violation of the board's requirements." At a special briefing for state agencies in 1960, board engineers described Aerojet's operations as a mess, with "four or five major discharges" into a creek feeding the American River and many smaller releases onto the ground. Aerojet, citing security, wouldn't tell regulators all the chemicals it was using, according to regulators' documents from the briefing.

"We pointed out that just because we do not know what is going on in this area, an area of extremely permeable sediments, the board should not give industry a blank check to discharge anything [it] desired to the groundwater basin," a state engineer wrote after the briefing.

The upshot was Resolution 62-21, the board's 1962 order to Aerojet not to discharge anything "deleterious to human, animal, plant, or aquatic life" into local waters. The resolution set maximum discharge levels for 21 chemicals—1,000 ppb for perchlorate—and ordered Aerojet, for the first time, to "disinfect" all waste before it left Aerojet's property.

But this was the year of the Cuban missile crisis, and Aerojet had other concerns. A unit of General Tire at the time, Aerojet was playing a big part in helping the U.S. close the missile gap with the Soviet Union. At the height of the rocket race in the early 1960s, Aerojet's Sacramento County facility employed 22,000 workers in three shifts, seven days a week. In 1962, they helped build and deploy the first solid-fuel intercontinental ballistic missile, the Minuteman I. Because it didn't require hours to load, as liquid-fuel rockets do, the Minuteman is believed to have helped steel President Kennedy's nerve during the Cuban missile crisis.

Aerojet's operations were overseen by 300 to 400 full-time Pentagon inspectors who approved every facet of design, production and waste disposal, says Aerojet's Mr. Phillips. "Had we known we could have done something to keep this [perchlorate contamination] from happening, they would have given it to us," he says. "Everybody involved thought they were doing the right thing."

Burning the Stuff

In 1961, Aerojet had begun burning its excess perchlorate, along with drums of the chlorinated solvent trichloroethylene, or TCE, which is now considered carcinogenic. Still, large quantities of the chemicals continued to go into the ground, according to accounts by former Aerojet employees given to California investigators in a 1979 criminal probe. (That state investigation was dropped in the mid-1980s, when Aerojet agreed to sign a consent decree to clean up its waste.)

In write-ups of those witness accounts obtained by the Journal, several employees described a chemical "sludge" left over after burning that Aerojet would let seep into the ground or would bury in separate pits. Former employees, including one identified as the foreman of Aerojet's chemical-waste-disposal unit from 1963 to 1968, said they dumped hazardous chemicals into a septic lagoon meant for human waste. Witnesses also said many workers continued dumping perchlorate and TCE into "rock piles" and open ponds. (TCE was heavily used to clean missile parts laden with solid rocket fuel.)

Meanwhile, tests of the underground aquifer at the Aerojet site showed steadily rising concentrations of perchlorate—from 18,000 ppb in the mid-1950s to 91,000 ppb in 1979. In the decade after 1955 alone, Aerojet processed roughly 19 million pounds of ammonium perchlorate at "grind station" Line 03, company documents say. The "daily washdown" of the area flowed into unlined ponds.

The water board issued more discharge orders, with little effect. In February 1976, for example, the board granted permission to Aerojet's Cordova Chemical unit to dig an injection well for inserting waste deep underground. The board's order explicitly barred "pollution" and discharging waste to any "surface drainage courses." Yet just three months after that order came out, Cordova built the 3,500-foot pipeline to channel waste straight into an unlined dredger pit.

"That's the worst thing I know about on this whole place," says Aerojet's Mr. Phillips. The general counsel says that Aerojet never hid its perchlorate contamination. He points out that the company notified the water board in the mid-1970s that it detected perchlorate in its groundwater at 50 times the board's allowable limit. No one worried about it then, Mr. Phillips says, because, among other reasons, Aerojet's wells weren't for drinking.

Perchlorate became a drinking-water concern in 1985, when the EPA detected it in wells serving about 42,000 households near Aerojet's original facility in the San Gabriel Valley, near Los Angeles. The agency found concentrations ranging from 110 ppb to 2,600 ppb. But five of the six so-called field blanks—samples of purified water that were also tested to assure data quality—inexplicably tested positive for perchlorate. Flummoxed, EPA reviewers threw out most of the test results as unreliable. (Today, some EPA officials believe those field blanks probably came from Colorado River water or other tainted sources.)

EPA scientists asked the federal Centers for Disease Control in Atlanta for guidance on possible health risks from perchlorate. The response, written by the Agency for Toxic Substances and Disease Registry on Jan. 26, 1986, underscored the same toxicity concerns the Pentagon and EPA are still arguing about 17 years later. The agency "strongly recommended" retesting the San Gabriel wells.

"Although the limited data available does not suggest that several [thousand ppb] of perchlorates would represent an acute threat to public health," the toxic-substance agency letter concluded, "the effects of continued low-level perchlorate ingestion need to be described as soon as possible."

Superfund Sites

Those effects remained undescribed for more than a decade afterward. In 1992, the EPA, citing the 1952 study on perchlorate's effects on thyroid-hormone production, issued its first health assessment of the chemical, proposing an initial reference dose for perchlorate of four ppb in drinking water. By then, Aerojet's facilities in Northern and Southern California had both been named EPA Superfund sites because of contamination by TCE and other known carcinogens. The Sacramento facility, in fact, was treating groundwater for other toxic agents and reinjecting it into the aquifer with 8,000 ppb of perchlorate still in it—with regulators' full assent.

"We did not have any data which indicated that perchlorate had been identified as a contaminant of concern," testified Thomas Pinkos, who oversaw Aerojet's cleanup for the regional water board from 1979 through 1988, in a recent deposition.

After the EPA's 1992 health warning, state officials watched warily as Aerojet's perchlorate plume spread toward drinking wells in Rancho Cordova. At the time, the most-sensitive test equipment could detect perchlorate at levels only above 400 ppb. The defense industry, meanwhile, was fighting the EPA's health assessment, arguing in a 1995 report to the EPA that the reference dose should be 42,000 ppb in drinking water. Aerojet itself grew less cooperative with state officials, regulators say. "Plumes tended to stop at their fences," one quips.

Kevin Mayer

The logjam broke in early 1997, when a California state lab, prodded by residents in Rancho Cordova, developed a new method for measuring perchlorate down to four ppb. With the lower detection limit, the substance quickly turned up in Rancho Cordova's wells at levels reaching 300 ppb.

The Voetsches learned in the media about the thyroid-disrupting contaminant shuttering nearby wells. Mr. Voetsch says he attended several community meetings, following up with various public and private officials to pursue his family's case. But the only person who returned his calls, he says, was a local geographer and Navy vet named Larry Ladd, who has made perchlorate pollution his passion. The Voetsches then joined the class-action lawsuit, led by the law firm that employs Erin Brockovich, the toxic-tort paralegal played by Julia Roberts in the film of the same name. The suit, among several filed over perchlorate contamination, is mired in the courts, and Mr. Voetsch says he hasn't heard from the lawyers in years.

"I'm thoroughly convinced no one wants to know what's going on here," Mr. Voetsch says.

The firm's chief attorney, Edward Masry, says the perchlorate clients haven't been contacted in several years because a judge put a stay on their case, pending legal motions, but should be hearing from the firm shortly.

With more-sensitive tests, perchlorate quickly turned up in several water supplies in Southern California. In 1997, the San Gabriel Valley plume—11 years after its initial discovery—had spread to a five-square-mile area beneath about 250,000 residents, according to the San Gabriel Basin Water Master.

In nearby San Bernardino County, perchlorate plumes prompted closure of dozens of wells, threatening some communities with water shortages. When local Defense Department officials got wind of a plume in Redlands, Calif., they circulated an internal "bellringer" report telling colleagues to keep the information secret. The June 1997 report noted 250,000 residents could be "adversely affected," with "pregnant women and children" among the most at risk. Yet, citing the local outrage at perchlorate's discovery in wells near Sacramento several months earlier, the report warned of "far reaching ramifications when the public learns of the situation." Its conclusion: "Future procurement programs could be adversely affected due to increased environmental costs."

Plumes Spread

In 1997, the Pentagon and several defense contractors, under EPA pressure, launched the first toxicological studies to determine perchlorate's effects at low exposure levels—the same studies that ultimately led to the EPA's reference dose this year. Meanwhile, perchlorate plumes popped up at defense sites all across the country—Texas and Utah in 1998, then Kansas, Missouri, Nebraska, Iowa, West Virginia and Maryland the next year.

When the Metropolitan Water District of Southern California found the chemical in taps in Los Angeles, scientists traced the plume 400 miles up the Colorado River to Lake Mead, above Hoover Dam. From there, they tracked the plume 10 miles westward, up a desert riverbed called the Las Vegas Wash, to Kerr-McGee Corp.'s giant ammonium perchlorate plant in Henderson, Nev.

The Navy built the plant in the 1940s to make perchlorate compounds for the war. Inherited by Kerr-McGee in a 1967 merger, the facility spilled thousands of pounds of perchlorate waste every day through the mid-1970s into unlined evaporation ponds. The chemical leached into shallow groundwater over the years, seeping into the Las Vegas Wash, the main drain into Lake Mead for wastewater coming from Las Vegas.

Perchlorate was detected in Kerr-McGee's groundwater back in the mid-1980s, and it was ignored. The company was then treating the aquifer for the metal chromium-6, and reinjecting high levels of perchlorate-tainted water back underground, say officials of Nevada's Division of Environmental Protection. "The guidance on perchlorate was lacking," says Patrick Corbett, director of environmental affairs for Kerr-McGee, based in Oklahoma City.

Kerr-McGee is spending roughly $70 million to extract perchlorate, too, but is catching only about half the 900 pounds a day seeping into the Las Vegas Wash, EPA officials say. The company, which has filed a lawsuit seeking Pentagon reimbursement for the cleanup costs, says it's adding new systems to capture much more of the perchlorate. Still, so much perchlorate has already entered Lake Mead that the levels below Hoover Dam—all the way out to Los Angeles—have hardly budged in five years, ranging from five to 10 ppb.

'Decades of Dilution'

"It will probably take decades for the dilution effect to flush it all out," says Douglas Zimmerman, an environmental regulator in Nevada.

In addition to slaking thirsts across the Southwest, the Colorado River water irrigates 95% of America's winter lettuce crop, grown in Yuma, Ariz., and California's Imperial Valley. The EPA says it still doesn't know if lettuce and other vegetables accumulate perchlorate from irrigation water, but preliminary indications aren't good. Tests on several vegetable samples from a perchlorate-contaminated farm in Redlands found the plants concentrated perchlorate from local irrigation water by an average factor of 65, according to calculations by Renee Sharp of the Environmental Working Group in Oakland, Calif., one of the few nonprofit groups focused on perchlorate contamination. That means the perchlorate dose in the vegetables was 65 times the amount in the water.

"If people are eating it, on top of drinking it, the EPA will have to lower its proposed drinking-water standard substantially," Ms. Sharp says.

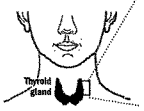
For now, that standard is only a recommendation. Enactment of a national standard will have to wait until either the EPA or the defense establishment prevails. Meanwhile, Aerojet and Lockheed Martin Corp. are already spending hundreds of millions of dollars to extract perchlorate from aquifers they polluted in California, with much of it being reimbursed by the Pentagon.

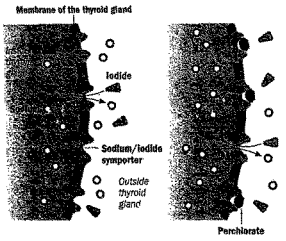
Sandra Lester thinks it's too little, too late to help her. She grew up on Rancho Cordova's perchlorate plume, near the Voetsch family, and fell sick with Graves' disease at age 15. Now 20, she wants to become a large-animal veterinarian, but is still enfeebled by skin problems, muscle pains and other complications of her disease. She blames perchlorate and had joined another class-action suit, but she heard this month that the law firm is dropping her case.

"It doesn't seem like the government cares very much about this problem," she says. "It's not like perchlorate is killing people. It's slow."

Blocking Agent

In the human body, perchlorate inhibits production of thyroid hormones, essential to normal organ development in babies, especially brain development.



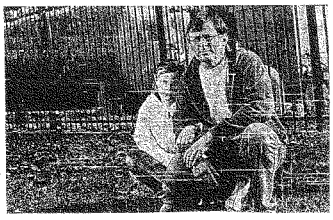


1 Iodide from foods, such as salt, enters the body.

2 Iodide is transported into the thyroid by the sodium/iodide symporter (NIS) as sodium is transported out. The iodide is then used to produce thyroid hormones.

3 If perchlorate is ingested, it blocks the symporter, disrupting the uptake of iodide.

Sources: Environmental Protection Agency; Environmental Working Group



Greg and Doris Voetsch *(left) believe perchlorate made their family sick. Sandra Lesler (bottom left) got thyroid disease at 15. Larry Ladd (bottom), with daughter Melody, pressed California and Acrojet to test for perchlorate in local drinking wells.*

The Debate Over Safety Levels

Perchlorate is one of a newly recognized group of toxins called endocrine disrupters—chemicals such as dioxin and PCBs that can alter hormonal balances and thus impede human reproduction and development.

The debate is over how much perchlorate causes harm, and whether fetuses and infants are more susceptible than adults to perchlorate's effects at very low doses.

The EPA, citing experiments on rats and epidemiological studies in Arizona and California, says perchlorate is dangerous in drinking water at levels above one part per billion. The Pentagon and defense industry, citing human experiments and epidemiological studies in Chile, say perchlorate is safe in drinking water below 200 ppb. Billions of dollars in cleanup and liability costs may hang in the balance, since most perchlorate plumes in the U.S., including the Colorado River, range between four and 100 ppb.

In 1993, several defense contractors, backed by the Pentagon, created the Perchlorate Study Group to research toxicity. The group's "goal," according to an internal document written in 1996 by GenCorp's Aerojet subsidiary, was "to provide EPA with a scientific-based argument to justify a higher [reference dose] and thus a more reasonable remediation standard." The industry group has spent roughly $7 million on toxicity studies.

Yet, as with other contentious toxins such as arsenic and lead, the more information EPA scientists learned about perchlorate, the more they worried about its effects. Their main concern focuses on changes found in the brain size of laboratory rat pups exposed to low doses of perchlorate in utero. Such changes in so-called brain morphometry indicate perchlorate's thyroid effects may cause permanent neurological damage—in rats as well as people, the EPA says, because the thyroid system works similarly in both species.

The Pentagon and its allies say the rat studies, which the industry's study group directed and sponsored, used poor autopsy techniques on the rats. And why trust rat data, they argue, when human data are available? The Pentagon and its allies cite an Oregon study that found small doses of perchlorate, given orally to adult volunteers, had little effect on thyroid-hormone levels.

The EPA says the human study didn't examine the most-sensitive subgroups—pregnant mothers and infants—and was much too brief to measure the effects of long-term exposure.

To counter, the defense establishment cites an epidemiological study of three Chilean villages with varying levels of naturally occurring perchlorate in their drinking water. The study's conclusion: Perchlorate had little effect on the thyroid-hormone levels of newborns and children in the three villages studied.

The EPA prefers a different epidemiological study that it claims shows "strong evidence" of perchlorate's danger to infants. That study found California babies born to mothers exposed to trace amounts of perchlorate in drinking water had lower thyroid-hormone levels at birth than did infants of nonexposed moms. California's Office of Environmental Health Hazard Assessment recently used that study, and other human data, to derive its own "health goal" for perchlorate in drinking water of two ppb.

—*Peter Waldman*

STATEMENT OF STANLEY PHILLIPPE ON BEHALF OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS (ASTSWMO)

Good afternoon. I am Stanley Phillippe and I am the chair of the Federal Facilities Research Subcommittee of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). Thank you for inviting ASTSWMO to testify concerning recent Department of Defense proposed amendments to the Resource Conservation and Recovery Act (RCRA), and to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as those relate to military range activities. ASTSWMO is a non-partisan, non-profit association which represents the collective interests of waste program directors of the nation's States and Territories. Our membership is drawn exclusively from State employees who deal daily with the many management and resource implications of the State waste management and remediation programs they direct. ASTSWMO's membership includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs as well as State cleanup and remedial program managers. Among those are State experts specializing in providing regulatory support to Federal Facilities, primarily in situations of base closure and remediation of Formerly Used Defense Sites. We deal with active military facilities as well, particularly with those industrial-like activities which may require permits under RCRA. As the day-to-day implementers of the State and Federal cleanup programs, we think we can offer a unique perspective to this dialog.

I would also like to commend this committee and the Senate Armed Services Committee for your measured, careful approach to these suggested amendments. Our Association has strongly recommended that any action that Congress might consider along the lines suggested by the Department of Defense first be scrutinized and openly debated in the committees of primary jurisdiction over the environmental laws. We are very glad that the bipartisan support for that consideration has resulted in this Senate hearing and thank you for your careful attention to this very important matter.

I am here today to tell you of our Association's opposition to the amending language for RCRA and CERCLA proposed by the Department of Defense, and to urge that you oppose these changes to these key environmental statutes. But, I am also here to assure you of our Association members' strong and continuing support for ensuring the readiness of our Armed Forces. Despite our criticism of the specific changes DoD has proposed to RCRA and CERCLA, we believe that State regulators have consistently worked with DoD and the Military Services to resolve range-related issues dealing with those statutes, and that together we have found workable solutions in the case of operating, active ranges.

That said, our examination of the proposed legislative April 2002 package DoD has titled the "Readiness and Range Preservation Initiative" leads us to question both the need and wisdom for the proposed changes to RCRA's definition of "solid waste" and to CERCLA's definition of a "release".

- As to the question of the compelling need for such changes, we are unaware of cases where State regulators have adversely impacted readiness by seeking compliance with RCRA. Among the supporting rationale DoD has released with the proposed legislative package, we only found a single reference to possible problems which could come from a citizen suit challenging RCRA compliance at Fort Richardson, Alaska. We have been told there is a similar citizen suit-generated RCRA situation with range use in Puerto Rico. Frankly, on their face, these are not real barriers, but only potential problems of doubtful probability, dependent upon decisions to be made in Federal courts. The absence of any report of existing situations involving adverse RCRA impacts on readiness seems to confirm our belief that normal RCRA regulation has not impeded military training on operational ranges, and is not likely to do so. A report last month from the General Accounting Office focused on encroachment issues facing DoD.[1] This report did not identify RCRA or CERCLA as presenting problems for DoD's training mission. There will be peripheral issues that may arise and several States have worked with military installations to address certain issues that are the result of range use through permits or best practices. For example, open burning of excess propellents left over from live fire may be managed under permit in order to ensure that releases are properly controlled. However, those kinds of activities have no effect on the conduct of the range firing itself.

[1] United States General Accounting Office, "Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges" (GAO–02–614), June 2002.

• As a practical matter, the application of State authority under RCRA to operating ranges would become necessary when a State believed intervention was necessary to protect the public from "imminent and substantial endangerment" as defined in Section 7003 of the statute. Surely, no responsible DoD official would tolerate such a situation. Our experience is that DoD and the Military Services give scrupulous attention to enforcing safety during inherently dangerous live-fire training.

• A more common State interest is the application of RCRA and State hazardous waste statutes to clean up requirements for *closed* and *closing* ranges that have been or will be transferred out of Federal ownership for civilian use. It is our view that these cleanup requirements have nothing to do with current training activities and do not potentially endanger the effectiveness of training. However, the proposed DoD changes to the statutory definitions of "solid waste" and to "releases" would arguably not only affect the application of the statute to operating ranges, but by narrowing the definitions used throughout the rest of the statutes, confuse the application of the definitions in other parts of the statutes. These definitions are critical to issues such as jurisdictional roles and State authority over such cleanups. Our experience is that RCRA definitional issues are very complex, and require close examination. We believe our State legal colleagues, represented here by the National Association of Attorneys General, are best equipped to deal with those arguments, but as the State implementers of hazardous waste and cleanup laws, we believe that this is one of those cases where the first principle is to "do no harm". These suggested changes to RCRA and CERCLA reach beyond DoD's immediate needs and could affect our later jurisdiction over cleanup of unexploded ordnance and other environmental hazards that may have been caused by range use. Instead of seeking exemptions from RCRA and CERCLA, we think DoD and the Military Services should concentrate their efforts on prevention of the migration of munitions and explosive related wastes by pathways that will affect human health and the environment. In the long run, this approach will do much more to meet their needs for sustainable ranges.

• Even if there is a situation where the Department of Defense should reach an absolute barrier caused by RCRA or CERCLA, we would note that there is still extraordinary Presidential authority to suspend application of these statutes for national interests, [i.e., RCRA Section 6001 or CERCLA Section 120(j)(1)] so that essential training activity could be continued. We are not suggesting that use of these authorities should become routine, nor that they be used lightly. Like all extraordinary powers, they must be used with respect and circumspection. But the fact remains that they are available. Congress has already provided remedies for extraordinary circumstances, and if they are insufficient, a much stronger justification needs to be put forth.

Let me close with the thought that the proposed changes to RCRA and CERCLA are not justified by any demonstration that RCRA or CERCLA have adversely impacted readiness, are unnecessary, and certainly may have undesirable consequences for the nation's primary hazardous waste and remediation statutes. I want to reiterate our desire to assist the Department of Defense and Military Services in more practical ways. We will continue to work with them to assist in making effective use of their active range resources, and to improve the likelihood that those ranges will continue to be sustainable into the indefinite future. Like any other citizens, we have an obligation to actively assist our armed forces in improving and maintaining the high level of preparedness required by the times. Their well being and readiness are very important to us, and to all citizens, and we will work actively with their representatives to find ways to make range operations safe and workable.

Thank you for requesting our testimony regarding this important legislation. I would be happy to respond to any questions you might have regarding our views.

United States General Accounting Office
GAO
Report to Congressional Requesters

June 2002

MILITARY TRAINING

DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges

GAO-02-614

Contents

Figure

Abbreviation

DOD Department of Defense

GAO
Accountability * Integrity * Reliability
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Washington, DC 20548

June 11, 2002

The Honorable Dan Burton
Chairman, Committee on Government Reform
House of Representatives

The Honorable Christopher Shays
Chairman, Subcommittee on National Security,
Veterans Affairs, and International Relations
Committee on Government Reform
House of Representatives

Senior Department of Defense and military service officials have testified before Congress that they face increasing difficulties in carrying out realistic training at military installations. According to the officials, there are eight so-called "encroachment"[1] issues that affect or have the potential to affect military training and readiness. The eight encroachment issues are: endangered species habitat on military installations, unexploded ordnance and munitions constituents,[2] competition for radio frequency spectrum, protected marine resources, competition for airspace, air pollution, noise pollution, and urban growth around military installations. Whenever possible, the services work around these issues by modifying the timing, tempo, and location of training, as well as the equipment used. However, defense officials have expressed concern that these workarounds are becoming increasingly difficult and costly and that they compromise the realism essential to effective training.

At your request, we examined (1) the impact that encroachment has had, or is likely to have, on the services' training range capabilities;[3] (2) the

[1] The Department of Defense defines encroachment as the cumulative result of any and all outside influences that inhibit normal military training and testing.

[2] Unexploded ordnance are munitions that have been primed, fused, armed, or otherwise prepared for action, and have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material and remain unexploded either by malfunction, design or any other cause. Munitions constituents consist of such things as propellants, explosives, pyrotechnics, chemical agents, metal parts, and other inert components that can pollute the soil and/or ground water.

[3] We use the term "training ranges" to collectively refer to air ranges, live-fire ranges, ground maneuver ranges, and sea ranges.

effect training range losses have on the services' readiness and costs; and (3) the department's progress in formulating a comprehensive plan for addressing encroachment issues.

This report focuses exclusively on military training ranges in the United States and is our second assessment of encroachment issues and their impact on military training ranges. The first assessment reviewed the effects of encroachment on training ranges outside the continental United States and was performed at the request of the Chairman, Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate.[4] We are also reviewing for your committee how the U.S. Fish and Wildlife Service budgets and allocates its endangered and threatened species (referred to as endangered from here on in the report) program funds and what program activities were emphasized in fiscal year 2001.

In conducting our work, we toured four installations and visited two major commands.[5] We discussed encroachment with officials at each location to hear and observe, first hand, how encroachment had affected their training range capabilities. We also discussed the impact of encroachment on readiness and costs with these officials, and then reviewed key Department of Defense readiness reports, along with cost data from the department's Environmental Quality Program, to further understand how encroachment has affected readiness and costs. Finally, we met with service and Department of Defense officials responsible for developing plans for addressing encroachment issues and discussed with these officials their progress in formulating a comprehensive plan for addressing encroachment issues. A more thorough description of our scope and methodology is in appendix I.

[4] U.S. General Accounting Office, *Military Training: Limitations Exist Overseas but Are Not Reflected in Readiness Reporting,* GAO-02-525 (Washington, D.C.: April 30, 2002).

[5] Installations toured included Fort Lewis, Washington; Marine Corps Base Camp Pendleton, California; Eglin Air Force Base, Florida; and Nellis Air Force Base, Nevada. The major commands reviewed included the U.S. Atlantic Fleet and the U.S. Special Operations Command. These tours were based on recommendations of the service staffs as having conditions representative of the types of encroachment pressures they face. The visit to the U.S. Special Operations Command was included based on the recommendation of the Committee on Government Reform staff because of the command's specialized training requirements and unique encroachment pressures.

We summarized the findings of this review in testimony before the Committee on Government Reform on May 16, 2002.[6]

Results in Brief

Over time, the military services report they have increasingly lost training range capabilities because of encroachment. Each of the four installations and two major commands we visited reported having lost some capabilities in terms of the time training ranges were available or the types of training that could be conducted. For example, Marine Corps Base Camp Pendleton, California, has training limitations related to the use of off-road vehicles and the digging of defensive positions because of the presence of endangered species on its ranges. In addition, Eglin Air Force Base's major target control system suffers from frequency interference from nearby commercial operators, which officials indicate presents a safety issue because the problem can affect data links to weapons. Such constraints limit units' ability to train as they would expect to fight or require workarounds—or adjustments to training events—that can create bad habits and affect performance in combat or, in some instances, prevent training from being accomplished. Service officials believe that population growth around military installations is responsible for much of their past and present encroachment problems, and that higher-than-average population growth around their installations makes further encroachment losses likely.

Despite the loss of some capabilities, service readiness data do not indicate the extent to which encroachment has significantly affected reported training readiness. While encroachment workarounds may affect costs, the services have not documented the overall impact of encroachment on training costs. Training readiness, as reported in official readiness reports, remains high for most units. Our analysis of readiness reports from active duty units in fiscal year 2001 showed that very few units reported being unable to achieve combat-ready status[7] due to inadequate training areas. However, improvements can and should be made to the department's readiness reporting to address training degradation due to encroachment and other factors. At the same time, the

[6] U.S. General Accounting Office, *Military Training: DOD Needs A Comprehensive Plan to Manage Encroachment on Training Ranges*, GAO-02-727T (Washington, D.C.: May 16, 2002).

[7] A unit's readiness is determined by the extent to which it possesses the required resources and training to undertake its wartime missions.

services face difficulties in fully assessing the impact of training ranges on readiness because they have not fully defined their training range requirements and lack information on the training resources available to support those requirements. Service officials also report that encroachment increases training costs, and can provide examples of such costs; however, those costs have not been documented in a comprehensive manner. Funding associated with the Department of Defense's environmental conservation program, which includes activities such as preservation programs and endangered species management, shows only modest gains over the past 6 years, increasing from 1996 to 1998 but then dropping from 1999 to 2001 among all components except for the Army. However, Department of Defense officials acknowledge that budget constraints and other priorities have resulted in a backlog of some activities in this area.

Department of Defense officials recognize the need for a comprehensive plan of administrative actions and legislative proposals to address encroachment issues but have not yet finalized a plan for doing so. The services first presented their encroachment problems to the Senior Readiness Oversight Council[8] in June 2000, but as of April 2002 the department had not yet finalized a comprehensive plan for addressing them due to the transition to the new administration, the events of September 2001, and continuing internal deliberations over how best to address encroachment. Although the department has prepared draft action plans that deal with each encroachment issue separately, the plans are not finalized, and information is not yet available on specific actions planned, time frames for completing them, clear assignment of responsibilities, and funding needed—the elements of a comprehensive plan. The department has also drafted, but has not finalized, an implementing directive meant to serve as the foundation for addressing encroachment issues and one directive each on noise abatement and outreach efforts. In December 2001, the department directed an Integrated Product Team[9] to act as the coordinating body for all encroachment issues, develop a comprehensive set of legislative and regulatory proposals by January 2002, and formulate and manage outreach efforts. A package of legislative proposals, described as clarifications in a department legislative summary, was submitted to the Congress in late April 2002 seeking to modify several specific statutory

[8] Members of the Senior Readiness Oversight Council are identified in appendix II of this report.

[9] Members of the Integrated Product Team are identified in appendix II of this report.

requirements, which Defense Department officials believe will preserve its use of training ranges while protecting the environment. Although time permitted only a cursory consideration of the proposals, they appear to be another step by the department toward developing a comprehensive approach to managing encroachment affecting military training ranges. Progress has also been made in a number of areas by other departmental organizations. For example, the Operational and Environmental Steering Committee for Munitions has been addressing explosive safety and environmental concerns, and the department recently approved a munitions action plan prepared by the committee.

While the Congress considers the department's legislative proposals, we recommend executive action that requires the Department of Defense to finalize a comprehensive plan for managing encroachment issues, develop the ability to report critical encroachment-related training problems, and develop and maintain inventories of its training infrastructure and quantify its training requirements. In comments on a draft of this report, the department substantially concurred with the contents of the report and our recommendations. The department also provided technical clarifications, which we incorporated as appropriate.

Background

The Department of Defense's (DOD) ranges and training areas are used primarily to test weapon systems and train military forces; some facilities are used for both testing and training purposes, while others are limited to one use or the other. This report focuses primarily on facilities used for training purposes. DOD needs ranges and training areas for all levels of training. Required facilities include air ranges for air-to-air, air-to-ground, drop zone, and electronic combat training; live-fire ranges for artillery, armor, small arms, and munitions training; ground maneuver ranges to conduct realistic force-on-force and live-fire training at various unit levels; and sea ranges to conduct ship maneuvers for training.

According to a DOD official, today's concerns about encroachment reflect the cumulative result of a slow but steady increase in problems affecting the use of their facilities. Historically, specific encroachment problems have been addressed at individual ranges, most often on an ad hoc basis. Recently, DOD officials have reported increased limits on and problems with access to and the use of ranges. They believe that the gradual accumulation of these limits and problems increasingly threatens training readiness. DOD officials have identified eight encroachment issues of concern. These issues are:

- The designation of critical habitat under the Endangered Species Act of 1973. DOD believes that critical habitat designations reduce its flexibility to use designated lands for training and put its military mission in jeopardy because, under the act, an agency is required to ensure that its actions do not destroy or adversely modify designated habitat of any endangered species.[10] Currently over 300 federally listed endangered plant and animal species are found on military installations, and more are anticipated. DOD officials maintain that their successful efforts in managing training ranges have resulted in the training ranges becoming havens for at-risk species. According to these officials, some of the finest remaining examples of rare wildlife habitats are now on military lands.

- The application of environmental statutes to military munitions, including unexploded ordnance and munitions constituents. DOD believes that the Environmental Protection Agency could apply environmental statutes to the intended use of military munitions, shutting down or disrupting military training on active ranges. For example, DOD officials note that in 1997 executive action was taken under the Safe Drinking Water Act that essentially terminated live-fire training on the Massachusetts Military Reservation because of unexploded ordnance and munitions constituents leaching into drinking water in the surrounding area. According to DOD officials, uncertainties about future application and enforcement of these statutes limit the department's ability to plan, program, and budget for compliance requirements.

- Competition for frequency spectrum. The growth of consumer communications devices has resulted in pressure from the telecommunications industry for the reallocation of some radio frequency spectrum from federal to non-federal control. According to DOD officials, since 1992 DOD has lost approximately 27 percent of the total frequency spectrum allocated for aircraft telemetry. DOD believes the possible reallocation of spectrum, coupled with an increase in DOD activities that use it, raises concerns about the availability of adequate spectrum to support operations and training. For example, we previously reported that DOD is concerned that an additional reallocation of spectrum in the 1755

[10] The U.S. Fish and Wildlife Service and the National Marine Fisheries Service list species that are at risk of becoming extinct throughout all or a significant portion of their range. For each listed species, the appropriate agency must designate critical habitat for those species. Federal agencies must consult with the agencies on any action that jeopardizes the continued existence of a listed species or could result in the destruction or adverse modification of designated critical habitat.

to 1850 megahertz band could adversely affect space systems, tactical communications, and combat training.[11]

- The requirement to balance ocean resource protection mandates with training needs. DOD officials believe DOD's ability to train can sometimes be limited by marine regulatory laws that require consultation with regulators when a proposed action may affect a protected resource. Defense officials have expressed concern that the process empowers regulators to impose potentially stringent measures to protect the environment from the effects of proposed DOD actions, which can affect DOD's ability to conduct operations and training in the marine environment.

- Competition for airspace. DOD officials have expressed concerns that increased airspace congestion, caused by airline industry demands and the military's need for effective testing and training, limits the ability of pilots to train as they will fight.

- The application of Clean Air Act regulations specifying requirements for air quality. DOD officials believe these regulations can sometimes limit DOD's ability to base equipment and for units to train as they will fight, particularly with smoke, because the act requires controls over emissions commonly generated on defense installations. According to DOD officials, opacity and conformity requirements are the most onerous for the department. DOD officials told us opacity measures the visibility of air emissions and can restrict or prohibit smoke training, mounted maneuvers, and intentional burns to manage vegetation cover. The conformity rules require federal agencies to analyze emissions from proposed projects or activities at federal installations. DOD officials believe that any new or significant change in range operations located in non-attainment areas requires an emissions analysis. If emissions exceed specified thresholds, the increase must be offset by reductions elsewhere.

- The application of environmental laws and regulations mandating noise abatement. DOD officials state that weapon systems are exempt from the Noise Control Act of 1972, but that the department must still assess the impact of noise under the National Environmental Policy Act when

[11] U.S. General Accounting Office, *Defense Spectrum Management: More Analysis Needed to Support Spectrum Use Decisions for the 1755-1850MHz Band*, GAO-01-795 (Washington, D.C.: Aug. 20, 2001).

considering the environmental impact of its activities. As community developments have expanded closer to military installations, concerns over noise from military operations have increased. Defense officials report that pressures from groups at the local, regional, and state levels can serve to restrict or reduce military training.

- Unplanned or incompatible commercial or residential development (urban growth) around training ranges and installations. DOD officials believe encroachment of incompatible civilian activities compromises the effectiveness of their training activities. Incompatible land uses can compromise the health, safety, and welfare of both the military and civilian sectors. DOD officials report that local residents have filed lawsuits because they believe that military operations have impacted their property's value or restricted its use.

To the extent that encroachment adversely affects training readiness, opportunities exist for the problems to be reported in departmental and military service readiness reports. The Global Status of Resources and Training System is the primary means for units to report readiness against designed operational goals. The system's database indicates, at selected points in time, the extent to which units possess the required resources and training to undertake their wartime missions.

In 1994, to improve its readiness assessment capabilities, DOD established two forums—the Senior Readiness Oversight Council and the Joint Monthly Readiness Review—to evaluate readiness from a joint and strategic perspective. DOD is also required under 10 U.S.C. 482 to prepare a quarterly readiness report to Congress that describes readiness problems. DOD bases its quarterly report on briefings to the Senior Readiness Oversight Council. The Senior Readiness Oversight Council is assisted by the Defense Test and Training Steering Group,[12] which advises the council on training range issues. In June 2000, the council directed the steering group to investigate encroachment and develop and recommend a comprehensive plan of action.

The Secretaries of the military departments are responsible for training personnel and for maintaining their respective training ranges and facilities. Within the Office of the Secretary of Defense, the Under

[12] Members of the Defense Test and Training Steering Group are identified in appendix II of this report.

Secretary of Defense for Personnel and Readiness develops policies, plans, and programs to ensure the readiness of the force and provides oversight on training. The Deputy Under Secretary of Defense for Installations and Environment develops policies, plans, and programs for DOD's environmental, safety, and occupational health programs, including compliance with environmental laws, conservation of natural and cultural resources, pollution prevention, and explosive safety. The Director, Operational Test and Evaluation, has oversight responsibility for all major test ranges, manages all joint test and evaluation range investments (including spectrum enhancement), and is also responsible for ensuring that congressionally mandated live-fire test and evaluation is conducted on fully integrated weapon systems.

Encroachment Has Diminished Service Training Range Capabilities

Over time, the impact of encroachment on training ranges has gradually increased. While the effect varies by service and individual installation, in general encroachment has limited the extent to which training ranges are available or the types of training that can be conducted. This limits units' ability to train as they would expect to fight and/or requires units to work around the problem. However, as discussed in the next section, the overall impact on readiness and training costs is not well documented.

Many encroachment issues result from or are exacerbated by population growth and urbanization. DOD is particularly affected because urban growth near 80 percent of its installations exceeds the national average. According to DOD officials, new inhabitants near installations often view military activities as an infringement of their rights, and some groups have organized in an effort to reduce range operations such as aircraft and munitions training. These problems are expected to increase over time.

Examples of How Encroachment Is Affecting Training Capabilities

We visited four installations and two major commands and found that each has lost some capability in terms of (1) the time training ranges were available or (2) the types of activities that could be conducted. We found that the types of encroachment and their impact varied between installations and service organizations.

Marine Corps Base Camp Pendleton, California

Camp Pendleton officials report encroachment problems related to endangered species and their habitat, urbanization, competition for air space, and noise restrictions. As of February 1, 2001, the Fish and Wildlife Service had designated about 10 percent of the installation as critical habitat for endangered species, which limits the use of off-road vehicles and the digging of fighting positions. Restrictions caused by the presence

of endangered species, recreational areas, and topographic and access limitations have reduced the amount of beach available for amphibious assaults and prevented training to doctrinal standards. Airspace restrictions have limited the number of days that weapon systems can be employed, and noise restrictions limit night helicopter operations.

Camp Pendleton officials are trying to limit future constraints imposed by these encroachment issues through an outreach program that maintains open communications with local, state, and national authorities and regulators and local communities to educate them on the military's mission and operations and incorporate their concerns. Also, training events, such as setting up fuel storage areas, are sometimes relocated to other areas of the base when feasible; other exercises, such as bridging operations, have been moved to Marine Corps Air Station Yuma, Arizona.

Fort Lewis and the Yakima Training Center, Washington

Fort Lewis and Yakima Training Center[13] officials report encroachment problems related to noise, air quality, endangered species and their habitat, urbanization, frequency spectrum, and munitions constituents. Due to community noise complaints, Fort Lewis voluntarily ceased certain demolitions training. Air quality regulations have restricted the Army's ability to operate new smoke generators at Fort Lewis. Endangered species habitat considerations have limited off-road vehicle training at Fort Lewis and Yakima and river-crossing operations at Yakima. Maneuvers are restricted in prairie areas at Fort Lewis to preserve an endangered plant and at Yakima to protect western sage grouse habitat. This reduces the types of training that can be conducted by the Interim Brigade Combat Teams[14] based at Fort Lewis. Also, communications equipment used by the teams overlaps with commercial communications networks, creating periodic interference in communications. Finally, although Fort Lewis is situated over an aquifer, and munitions constituents have been found in the water, training has not yet been curtailed at this location.

Fort Lewis officials are trying to mitigate their encroachment problems by (1) developing and maintaining scientifically defensible information that

[13] The Yakima Training Center is a component of Fort Lewis that is used to conduct large-scale maneuver and live-fire operations. Yakima is approximately 180 miles east of Fort Lewis.

[14] Fort Lewis is home to two Interim Brigade Combat Teams being organized around new light armored wheeled vehicles under the Army's Force Transformation program.

can demonstrate the effectiveness of current environmental management; (2) integrating range management with endangered species protection initiatives to preserve critical habitat and training ranges; and (3) conducting an outreach campaign to inform the public of the military's training needs and environmental successes. At Yakima, additional land was purchased recently to increase maneuver space and reduce the environmental impacts of maneuver training on current rangelands. Fort Lewis has moved some demolition training to Yakima. Smoke-generating units must ensure that no smoke can drift off base or obscure Mount Ranier during training. Negotiation between the military and local agencies has alleviated some frequency encroachment problems.

Nellis Air Force Base and the Nevada Test and Training Range, Nevada

Nellis Air Force Base officials report encroachment problems stemming from urbanization and noise. Nellis officials report that because of the tremendous growth south of the base and safety concerns about over-flying urban areas with live munitions, armed aircraft must take off and land from the north. This can cause mission delays for outbound traffic and mission cancellations due to wind effects. They also report that Nellis and the Nevada Test and Training Range[15] together receive about 250 noise-related complaints annually that require adjustments to air operations.

To mitigate encroachment issues, base officials are working to procure 413 acres to avoid safety problems at its live ordnance departure area. To limit the number of noise complaints, base officials said they restrict the use of certain runways, impose speed and altitude restrictions, and require straight-in approaches late at night and early in the morning. They are also strengthening their outreach program to keep the communities around the ranges informed about flight activities.

Eglin Air Force Base, Florida

Eglin Air Force Base officials report encroachment problems involving endangered species habitat, noise restrictions, urban growth, and competition for radio frequency spectrum. Habitat for two endangered species is found on Eglin's ranges, impacting the availability of the ranges during certain times of the year. To help offset complaints about the noise from the explosive ordnance disposal school, smaller bombs may be detonated at certain times. Urban sprawl causes aircraft to change altitudes and direction to avoid commercial towers and noise-sensitive areas. In addition, the base's major target control system suffers from

[15] The Nevada Test and Training Range is a component of the Nellis Range Complex.

frequency interference from nearby commercial operators, presenting a safety issue because the problem can affect data links to weapons.

Eglin officials told us that they have maintained an aggressive encroachment program that has been successful at minimizing training impacts. For example, the base has established an encroachment committee to review requests for use of Eglin land. A very active outreach program meets regularly with local civic leaders to enhance community support for the base. The base has also developed a noise assessment prediction model that can alleviate noise complaints by determining the effects of weather on the noise created by military activities. This allows the base to modify its activities accordingly. To address frequency encroachment, Eglin is trying to narrow the bandwidth of its signals or move to another frequency.

U.S. Atlantic Fleet, Naval Station Norfolk, Virginia

Atlantic Fleet officials report encroachment problems stemming from the presence of endangered species, particularly marine mammals, and airborne noise. Restrictions caused by the presence of marine mammals impact live-fire exercises at sea. Also, no night live-fire training is allowed. Atlantic Fleet officials said that battle group staff must spend large amounts of time consulting with the National Marine Fisheries Service on endangered species mitigation. They noted that Naval Air Station Oceana, Virginia, is the target of frequent noise complaints as a result of aircraft training that includes low-altitude flights and practice carrier landings.

The Atlantic Fleet has a variety of encroachment mitigation programs. The environmental section has developed an extensive report, based on geographic information that shows the ranges of all endangered species in the Virginia-Carolina Exercise Area. This allows the fleet to plan its exercises to avoid harassing the species at risk. Prior to the beginning of live-fire exercises, Navy aircraft and ships must search the training area for 2 hours and then maintain a constant watch for marine mammals during the exercises. If an animal enters the training area, the exercise is suspended until it leaves. The Navy is evaluating construction and location of a Shallow Water Training Range along the east coast of the United States to provide anti-submarine warfare training in a littoral environment. Service officials note that progress has been delayed over an assessment of potential impact to marine mammals related to the definition of "harassment." To reduce noise complaints, the fleet is attempting to establish a training airstrip in a less populated area. The Navy has also established special procedures to deal with noise complaints and damage.

Special Operations Command, MacDill Air Force Base, Florida

The Navy component of the Special Operations Command reports being most directly affected by encroachment from endangered species and urban development. Specifically, a variety of endangered species live on the Navy Special Warfare Command's training areas in California, particularly on Coronado and San Clemente Islands. Due to environmental restrictions, Navy Special Warfare units can no longer practice immediate action drills on Coronado beaches; they cannot use training areas in Coronado for combat swimmer training; and they cannot conduct live-fire and maneuver exercises on much of San Clemente Island during some seasons.

In the past, the Special Operations Command has been able to mitigate deficiencies in local training areas by traveling to alternate training sites. However, recent limitations on the amount of time units can spend away from their home stations have required new solutions. The command is requesting funding for new environmental documentation in its budget to protect assets in California and is integrating its encroachment mitigation efforts with DOD and the services.

Effects of Encroachment Are Expected to Grow

DOD and service officials report that many encroachment issues are related to urbanization around military installations. They noted that most, if not all, encroachment issues such as noise, airspace, endangered species habitat, and air quality, result from population growth and urbanization, and that growth around DOD installations is increasing more than the national average. At the same time, according to a defense official, the increased speed and range of weapon systems are expected to increase training range requirements. For the following reasons, DOD and service officials believe they face increasing encroachment risks in several key areas:

- Critical habitat designation. The Endangered Species Act requires the Fish and Wildlife Service to designate critical habitat for endangered species at the time of listing, or within 12 months if more data about habitat is needed. Defense officials told us that private environmental interest groups have repeatedly challenged the Wildlife Services' failure to designate critical habitat and generally have prevailed, resulting in more and more designations. To illustrate, they noted that the Fish and Wildlife Service recently declined to designate critical habitat for a species at Camp Pendleton, using its authority to exempt land from designation if it finds that the benefits of exclusion outweigh the benefits of designation. They also noted that the Natural Resource Defense Council, a public interest group involved in environmental protection, is currently

challenging the decision in court. Marine Corps officials report that if the Fish and Wildlife Service's position is not upheld, approximately 57 percent of Camp Pendleton's training area could be designated as critical habitat and could face additional restrictions on training. Fish and Wildlife Service officials told us there could be significant increases in habitat designations in coming years.

- Unexploded ordnance and munitions constituents. The application of environmental laws to unexploded munitions and munitions constituents has, to date, affected only one training installation in the continental U.S., the Massachusetts Military Reservation, used primarily by National Guard forces.[16] It remains uncertain whether and to what extent the Environmental Protection Agency will apply the laws to other installations. Environmental Protection Agency officials told us that they were not explicitly monitoring military ranges, but if it were brought to their attention that ordnance was jeopardizing public health and safety at another installation, they would take action to address the situation.

- Frequency spectrum. DOD officials told us that the commercial communications industry has been pressing for access to frequency spectrum currently allocated for federal use, but has stayed its request due to the current national security situation. However, reallocation of some of that spectrum is still under review. An interagency working group, with DOD participation, has been formed and is examining options, including sharing the spectrum and moving DOD operations to other bands. The outcome of these efforts could affect DOD missions, including combat training and satellite operations.

- Airspace congestion. Commercial air traffic growth is expected to result in an increase in passengers from 600 million to an estimated one billion by 2010, increasing the overall demand for airspace volume. Military use of airspace will also increase with the next generation of high-performance weapon systems, standoff munitions, and unmanned aerial vehicles. In many instances, the military's use of airspace is tied directly to its ground infrastructure, which cannot be changed easily. The Federal Aviation Administration is in the process of redesigning the nation's airways to accommodate this growth. DOD is participating in the process to ensure

[16] DOD officials told us that a second installation outside the continental U.S., Fort Richardson, Alaska, is currently subject to a suit alleging environmental violations that, if successful, could severely limit live-fire training.

that its requirements are known early. There is no schedule for completing the redesign, and until the redesign is completed, DOD cannot be certain how its training will be affected.

- Air quality. The Clean Air Act requires federal agencies to analyze the potential effect of proposed projects or activities on air quality. According to DOD officials, installations located in areas that have not met, or have only recently met, the National Ambient Air Quality Standards must work with state or local regulatory agencies to offset any potential emission increases from training activities. This ensures that the air quality of the entire area is not significantly degraded.[17] This may create conflicts with commercial development and could constitute a major impact as competition for air emissions budgets and offsets increases.

- Noise. Noise problems are directly related to the degree that there are people, wildlife, and noise-sensitive land uses (national parks, wilderness, primitive areas, etc.) near military lands and low-level flying routes. Expanding population near military installations, increased use of public lands adjacent to military installations, training with more powerful weapons, and increased night operations could all contribute to a growing number of restrictions on DOD's operations.

Impact of Encroachment on Readiness and Training Costs Is Not Well Reflected in DOD's Reported Data

Service readiness data do not indicate to what extent encroachment has significantly affected training readiness or costs, even though officials in congressional testimonies and other forums cited examples of encroachment at times preventing the services from training as they would like to. At the same time, fully assessing the impact may be difficult because the services lack information on (1) their training range requirements and (2) the training range assets available to support these requirements. Similarly, the services have very limited data indicating the effect of encroachment on operating costs. Even though some service officials point to increasing costs because of training workarounds related to encroachment, the services' data systems do not capture these costs in any comprehensive manner. DOD data, on the other hand, show fluctuations in total budget costs for environmental conservation efforts, with an overall drop in obligations since 1999, except for the Army. DOD

[17] U.S. General Accounting Office, *Air Pollution: Status of Implementation and Issues of the Clean Air Act Amendments of 1990*, GAO/RCED-00-72 (Washington, D.C.: Apr. 17, 2000).

- The designation of critical habitat under the Endangered Species Act of 1973. DOD believes that critical habitat designations reduce its flexibility to use designated lands for training and put its military mission in jeopardy because, under the act, an agency is required to ensure that its actions do not destroy or adversely modify designated habitat of any endangered species.[10] Currently over 300 federally listed endangered plant and animal species are found on military installations, and more are anticipated. DOD officials maintain that their successful efforts in managing training ranges have resulted in the training ranges becoming havens for at-risk species. According to these officials, some of the finest remaining examples of rare wildlife habitats are now on military lands.

- The application of environmental statutes to military munitions, including unexploded ordnance and munitions constituents. DOD believes that the Environmental Protection Agency could apply environmental statutes to the intended use of military munitions, shutting down or disrupting military training on active ranges. For example, DOD officials note that in 1997 executive action was taken under the Safe Drinking Water Act that essentially terminated live-fire training on the Massachusetts Military Reservation because of unexploded ordnance and munitions constituents leaching into drinking water in the surrounding area. According to DOD officials, uncertainties about future application and enforcement of these statutes limit the department's ability to plan, program, and budget for compliance requirements.

- Competition for frequency spectrum. The growth of consumer communications devices has resulted in pressure from the telecommunications industry for the reallocation of some radio frequency spectrum from federal to non-federal control. According to DOD officials, since 1992 DOD has lost approximately 27 percent of the total frequency spectrum allocated for aircraft telemetry. DOD believes the possible reallocation of spectrum, coupled with an increase in DOD activities that use it, raises concerns about the availability of adequate spectrum to support operations and training. For example, we previously reported that DOD is concerned that an additional reallocation of spectrum in the 1755

[10] The U.S. Fish and Wildlife Service and the National Marine Fisheries Service list species that are at risk of becoming extinct throughout all or a significant portion of their range. For each listed species, the appropriate agency must designate critical habitat for those species. Federal agencies must consult with the agencies on any action that jeopardizes the continued existence of a listed species or could result in the destruction or adverse modification of designated critical habitat.

require workarounds.[19] We have long reported on limitations in DOD's readiness reporting system and the need for improvements.[20]

DOD's quarterly readiness reports to the Congress also identify few problems from encroachment. DOD is required to report quarterly to Congress describing readiness problems. We reviewed all reports submitted between April 1999 and December 2001 and found two citations: in the April-June 1999 report, the Navy expressed concerns that encroachment was precluding employment of high-altitude delivery tactics at the Naval Strike Air Warfare Center, Fallon, Nevada; in the October-December 2000 report, DOD noted that the Senior Readiness Oversight Council had convened in June 2000 to address encroachment issues. There was no further mention of encroachment as a readiness problem in reports submitted through December 2001.

Full Assessment of Readiness Impact Limited by Lack of Data on Training Requirements and Inventory of Available Resources

A full assessment of the effects of encroachment on readiness will be limited without better information on the services' training range requirements and on the range resources available to support those requirements. The information is needed to establish a baseline for measuring losses or shortfalls. Each service has, to varying degrees, assessed its training range requirements. But none of them has comprehensively reviewed available range resources to determine whether assets are adequate to meet needs, and none has incorporated an assessment of the extent that other types of training, such as virtual or constructive training,[21] could help offset shortfalls. A DOD report on training lands recognizes the importance of incorporating both approaches to training in their plans.[22]

[19] See GAO-02-525.

[20] See U.S. General Accounting Office, *Military Readiness: Congress Needs Better tools for Effective Oversight*, GAO/TI-NSIAD-98-124 (Washington, D.C.: Mar. 18, 1998); U.S. General Accounting Office, *Military Readiness: Improved Assessment Measures Are Evolving*, GAO/T-NSIAD-96-117 (Washington, D.C.: Mar. 16, 1996); and U.S. General Accounting Office, *Military Readiness: DOD Needs to Develop a More Comprehensive Measurement System*, GAO/NSIAD-95-29 (Washington, D.C.: Oct. 27, 1994).

[21] Virtual training uses simulation to replicate weapon systems and settings. Constructive training uses simulation to replicate units, weapon systems, and terrain.

[22] Department of Defense, *The Need for Ranges and Training Areas* (Mar. 1999).

Each service is responsible for determining its own resource needs for training personnel. According to DOD, the process for identifying range and training area needs is a "top-down" process in which military planners project the amount of training required to achieve military readiness. Planners then formulate training plans using a "strategies-to-tasks" relationship. Once planners have promulgated the guidance, installation commanders establish a "bottom-up" process to ensure that requisite training can be supported at locally available ranges and training areas or, in case of a shortfall, to take action to acquire other assets. When there is not enough rangeland to support the training, the commander examines other training options, such as training aids, devices, simulators, and simulation, or the commander may examine how to conduct live training on the area available to the unit. The impact of a training range shortfall on a unit's training is the commander's judgment. The process is functionally similar among services but keyed to each service's unique mission requirements. Below are short descriptions of the assessments each service carried out to determine its training range requirements.

Air Force

In 2001, the Air Force completed an assessment it had begun 5 years earlier to determine whether it had appropriate training space to ensure readiness. The Air Force believed better resourcing decisions could be made if both the requirements and current asset capabilities were stated more explicitly, with resourcing decisions based on a rigorously derived assessment of gaps. According to the assessment, in order to be defensible, infrastructure requirements must be linked firmly to training requirements, which, in turn, must be linked to operational requirements. To accomplish its assessment, the Air Force identified its aircrew training requirements and compared them to its existing range and airspace capabilities.

The Air Force study found that, nationwide, it has sufficient access to air-to-ground training ranges, albeit with some localized shortages. For example, Pope Air Force Base, North Carolina, home of the 23d Fighter Group, has no local range, and Moody Air Force Base, Georgia, home of the 347th Rescue Wing, has insufficient capacity on its local ranges. This does not mean, however, that the Air Force does not have encroachment issues that need to be dealt with to preserve its air space. As already noted, the Air Force's major training facility, the Air Warfare Center at Nellis Air Force Base, Nevada, has problems with urbanization that restrict aircraft takeoffs with live ordnance.

Navy	The Navy began an assessment of its training range needs in 2001 and hopes to complete the process late in fiscal year 2004. According to Navy officials, the new database should quantify total range capability requirements and each range's contribution to readiness. The officials believe that this should establish a link between training requirements and readiness; formalize the process used to determine training range requirements; better articulate the Navy's training range strategy to DOD, Congress, and the public; and better manage the effects of encroachment.
Marine Corps	In January 2002, the Marine Corps completed an analysis of the extent to which Camp Pendleton's training facilities could support the training requirements of two types of units (a light armored reconnaissance platoon and an artillery battery) and two military specialties (a mortar man and a combat engineer). The analysis identified to what extent the training tasks for each unit or specialty could be conducted to standards in a "continuous" operating scenario (e.g., an amphibious assault and movement to an objective) or in a fragmented manner (tasks completed anywhere on the camp). The analysis found that from 60 to 69 percent of "continuous" tasks and from 75 to 92 percent of the other training tasks could be conducted to standards. A second analysis of four other types of units or military specialties should be completed in June 2002. We were told that the Marine Corps is planning to expand this effort to other installations.
Army	The Army has not conducted a complete analysis of its training requirements, but it did conduct a training capacity analysis of its installations, starting in 1997, that compared available assets and requirements as defined by military planners ("doctrinal" standards). According to the analysis, updated in 2002, many active duty installations do not have sufficient land to support training to doctrinal standards. For example, only 22 percent of active duty stateside installations have enough land to support their light maneuver training needs, and only 42 percent of active duty installations have enough land to support their heavy maneuver training needs.[20] These installations are expected to use workarounds to meet training standards.

[20] Training on light maneuver areas is limited to small units or units having only wheeled vehicles; on heavy maneuver areas training is unrestricted and covers all types of vehicles and equipment, including tracked vehicles.

Other Options Not Considered in the Services' Studies

Although information gleaned from the studies is valuable for planning purposes, we do not believe that the studies provide a complete picture of the service's training range needs. While live training may be preferred, other options also need to be considered. We believe an analysis based solely on live training may overstate an installation's problems and does not provide a complete basis for assessing training range needs or the effects of encroachment.

A more complete assessment of training resources should include assessing the potential for using virtual or constructive simulation technology to augment live training. These alternatives sometimes allow units to train to standards. And while they cannot replace live training and cannot fully eliminate the impact of encroachment, they may help mitigate some training range limitations. By increasing their investments in and use of virtual and constructive simulation training, the services could also mitigate some of the restrictions imposed on live training. In fact, the Army's own guidance recommends doing so and states that a commander's analysis should consider using virtual training or constructive training to partially offset live training requirements (and thus the requirements for land). This is a longstanding issue, one where we have previously cited the need to identify the appropriate mix of live training and simulation technology.[24]

No Shared Inventory of Training Ranges

To the extent that inventories of training ranges do exist, they are not routinely shared with other services (or other organizations such as the Special Operations Command). While DOD officials acknowledge the potential usefulness of such data, there is no directory of DOD-wide training areas, and commanders sometimes learn about capabilities available outside their own jurisdiction by chance. All this makes it extremely difficult for the services to leverage adequate assets that may be available nearby, increasing the risk of inefficiencies, lost time and opportunities, delays, added costs, and reduced training opportunities.

[24] See U.S. General Accounting Office, *Army Training: Various Factors Create Uncertainty About Need for More Land*, GAO/NSIAD-91-103 (Washington, D.C.: Apr. 22, 1991); U.S. General Accounting Office, *Army Training: Computer Simulations Can Improve Common Training in Large Scale Exercises*, GAO/NSIAD-91-67 (Washington, D.C.: Jan. 30, 1991); and U.S. General Accounting Office, *Operation Desert Storm: War Offers Important Insights Into Army and Marine Corps Training Needs*, GAO/NSIAD-92-240 (Washington, D.C.: Aug. 25, 1992).

Although there are examples of services sharing training ranges, these arrangements are generally made through individual initiatives, not through a formal or organized process that easily and quickly identifies all available infrastructure. Navy Special Operations forces only recently learned, for example, that some ranges at the Army's Aberdeen Proving Grounds are accessible from the water—a capability that is a key requirement for Navy team training. Given DOD's increasing emphasis on joint capabilities and operations, having an inventory of defense-wide training assets on all ranges, training or test, would seem to be a logical step toward a more complete assessment of training range capabilities and shortfalls that may need to be addressed.

DOD officials acknowledge that having a DOD-wide database of training assets would also allow a more accurate measurement of Defense-wide restrictions on training and of the cumulative effects of encroachment on training readiness. In fact, an internal study group has suggested developing assessment criteria that could be used to make a programmatic assessment of the complete effects of encroachment on training readiness—something DOD has not done.

Effects on Training Costs Not Well Defined, While Environmental Conservation Costs Have Fluctuated

Encroachment can increase the costs of conducting military training. However, the services have not documented the overall impact of encroachment on training costs. At the same time, DOD's overall environmental conservation funding, which would cover such things as endangered species management, has fluctuated, rising between fiscal years 1996 and 1998 and declining between fiscal years 1999 and 2001, except for the Army.

Impact on Overall Training Costs Not Documented

Officials at each of the locations we visited cited increasing workarounds among the effects of encroachment on training, and many provided examples of additional costs and actions associated with these workarounds. However, none of the officials could provide composite data on the direct or indirect costs they had incurred as a result of encroachment and workarounds. For example, to protect marine mammals during naval gunfire exercises, the Navy uses aircraft and surface vessels to observe the training area and hires marine biologists to help crews spot and protect marine mammals. Marine Corps officials also said that Camp Pendleton units are increasingly using the Marine Corps Air Ground Combat Center, Twentynine Palms, California, to work around training restrictions, and the officials provided estimates of additional travel costs. But again, they could not provide us with aggregate data showing how much their costs had increased. According to DOD officials,

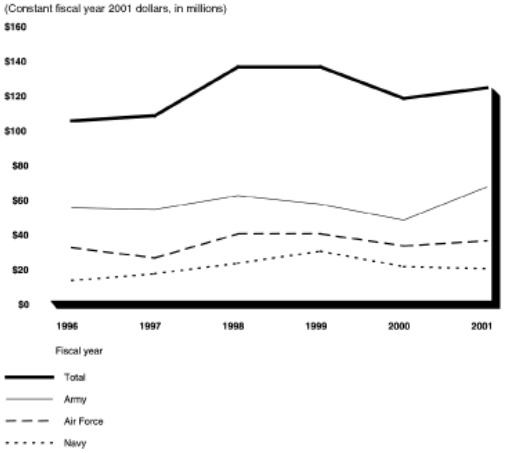
training expenses are paid with operations and maintenance funds, and expenses specifically caused by encroachment are not identified separately from other training expenses.

Environmental Conservation Costs Have Fluctuated, but Without Significant Increase

We examined the services' environmental conservation program obligations for fiscal years 1996-2001 and did not find any large or consistent increases in spending.[25] As shown in figure 1, DOD's spending on this program shows only modest gains over the past 6 years, increasing in 1996-98 but then dropping among all components except for the Army.

[25] DOD's Environmental Conservation Program funds numerous activities, including management and preservation of endangered species, control of invasive species, and inventories of natural and cultural resources.

Figure 1: DOD Environmental Conservation Program Obligations, Fiscal Years 1996-2001



Note: DOD agencies are not shown but are included in the total.

Source: DOD data.

Total DOD conservation program obligations fluctuated, increasing from $105 million in fiscal year 1996 to $136 million in fiscal years 1998 and 1999 and then decreasing to $124 million in fiscal year 2001.[25] Endangered species management and preservation are a part of DOD's conservation program. If the services are performing additional conservation projects, then the additional costs should be reflected in their environmental

[25] For fiscal year 2003, DOD has requested $4 billion for its environmental programs, which consist of environmental restoration, compliance, cleanup at base closure sites, pollution prevention, environmental technology, and conservation.

conservation program obligations. DOD documents attribute the fluctuations in conservation program obligations to increased costs from preparing Integrated Natural Resource Management Plans. An Army environmental official also said that the increase in Army program obligations that occurred between fiscal years 2000 and 2001 was due to the increased costs of preparing the plans. According to DOD officials, the plans are required by the Sikes Act and assist base commanders in conserving and rehabilitating natural resources. DOD officials also acknowledge that budget constraints and other priorities have resulted in some funding backlogs in this area.

Comprehensive Plan for Addressing Encroachment Not Finalized, but Some Action Has Been Taken

DOD officials recognize the need for a comprehensive plan of administrative actions and legislative proposals to address encroachment issues but, except for a package of legislative proposals in late April 2002, have not yet finalized such a plan. In June 2000, the services first presented their encroachment problems to the Senior Readiness Oversight Council, which recognized the need for a comprehensive plan to address encroachment issues. However, as of April 2002, DOD was still developing a plan of administrative actions. The task was first given to a group of subject matter experts, who drafted plans of action for addressing the eight encroachment issues, but the plans are not yet finalized and they contain few implementing details. DOD is also drafting some policy and implementation directives. In December 2001, DOD appointed an Integrated Product Team to coordinate its encroachment mitigation efforts, develop a comprehensive set of legislative and regulatory proposals, and formulate and manage outreach efforts. The team agreed on a tentative set of legislative proposals that could become part of its comprehensive plan. Those legislative proposals were submitted to the Congress in late April 2002 seeking to modify several statutes. The proposed changes, in DOD's view, would preserve its training ranges and protect the environment. Other DOD organizations are also involved in addressing encroachment issues, and they have made some progress.

Actions Needed for a Comprehensive Plan Have Not Been Completed

DOD's Senior Readiness Oversight Council took up the issue of encroachment in June 2000 and tasked its Defense Test and Training Steering Group with investigating the problem and developing a comprehensive plan of action. The steering group formed a Sustainable Range Working Group, comprised of subject matter experts who identified eight encroachment issues and drafted separate action plans for each issue. The plans outlined recommended courses of action, but they did not provide detailed implementation data. The plans were briefed to the

Senior Readiness Oversight Council in November 2000. The council approved the working group's overall findings and recommendations and directed the Test and Training Steering Group to take a number of actions, including coordinating the plans with the services and appropriate agencies and forwarding the results to the council by January 2001. The working group continued its work on encroachment through 2001 but did not forward its results to the council until late November 2001. DOD officials said that the transition to the new administration, the events of September 2001, and continuing internal deliberations delayed their efforts. They also said that formulating possible legislative solutions for some of the problems was difficult and consumed much of their time during 2001.

The working group focused on the eight encroachment issues identified in this report. The group's draft action plans included an overview and analysis of an individual issue and current actions being taken, as well as short-, mid-, and long-term strategies and actions to address the issue. Examples of the types of future strategies and actions identified in the draft plans include the following:

- Enhancing outreach efforts to build and maintain effective working relationships with key stakeholders by making them aware of DOD's need for ranges and airspace, its need to maintain readiness, and its need to build public support for sustaining training ranges. This was an overarching issue for each of the encroachment issues.

- Clarifying the requirements of environmental and natural resource statutes as they apply to DOD training and operations. One proposed action advocates modifying the Sikes Act to permit installations managed under approved Integrated Natural Resource Management Plans to be excluded from critical habitat designations. Another would seek clarification of the term "harassment" as used in the Marine Mammal Protection Act.

- Developing assessment criteria to identify all restrictions and determine the cumulative effect these restrictions are having on readiness training. The criteria would be appropriate for installations, special-use airspace, at-sea training areas, and other military operating areas. The draft plan noted that while many examples of endangered species/critical habitat and land use restrictions are known, a programmatic assessment of the effect these restrictions pose on testing and readiness training has never been done.

- Developing a coordinated plan to obtain data, assess current range conditions, and estimate the environmental impacts of current munitions

use on ranges. DOD would develop range clearance guidance and management procedures on the basis of operational safety and environment constraints associated with the hazards of unexploded ordnance, munitions scrap, target debris, and other associated range scrap.

- Ensuring that any future base realignment and closure decisions thoroughly scrutinize and consider the potential encroachment impact and restrictions on operations and training of recommended base realignment actions.

- Improving coordinated and collaborative efforts between the military and local communities in managing urban growth. Encouraging new and expanded cooperative working relationships between base officials and city planners and other local officials.

A more detailed overview of the working group's recommended courses of action and strategies for addressing each encroachment area is included in appendix III. However, as noted, at the time we ended our review, the draft action plans had not been finalized to provide a comprehensive plan for addressing encroachment. DOD officials told us they consider the plans to be working documents and stressed that many of their concepts remain under review and may be dropped, altered, or deferred, while other proposals may be added. No details were available on overall actions planned, clear assignment of responsibilities, measurable goals and timeframes for accomplishing planned actions, or identification of funding requirements—information that would be needed in a comprehensive plan.

Effective management of encroachment issues on military training ranges has been hindered by the divided management roles, responsibilities, and accountability that exist among several different levels within the military services and the Office of the Secretary of Defense. As discussed previously, the Secretaries of the military departments are responsible for training personnel and for maintaining their respective training ranges and facilities. Within the Office of the Secretary of Defense, the Under Secretary of Defense for Personnel and Readiness, the Deputy Under Secretary of Defense for Installations and Environment, and the Director, Operational Test and Evaluation, are responsible for different aspects of overseeing training ranges and addressing encroachment issues.

DOD's Legislative Proposals to Address Encroachment Issues

In December 2001, the Deputy Secretary of Defense established a senior-level Integrated Product Team to act as the coordinating body for encroachment efforts and to develop a comprehensive set of legislative and regulatory proposals by January 2002. The team agreed on a set of possible legislative proposals for clarifying some encroachment issues, and, after internal coordination deliberations, the proposals were submitted in late April 2002 to the Congress for its consideration.

According to DOD, its legislative proposals seek to clarify the relationship between military training and a number of provisions in various conservation statutes, including the Sikes Act, the Endangered Species Act, the Migratory Bird Treaty Act, and the Marine Mammal Protection Act. Specifically, DOD's proposals would, among other matters:

- Preclude designation under the Endangered Species Act of critical habitat on military lands for which Sikes Act Integrated Natural Resources Management Plans have been completed. At the same time, the Endangered Species Act requirement for consultation between DOD and other agencies on natural resource management issues would be continued.
- Permit DOD to take migratory birds under the Migratory Bird Treat Act without action by the Secretary of the Interior where the taking is in connection with readiness activities. Also, they would require DOD to minimize the taking of migratory birds to the extent practicable without diminishment of military training or other capabilities, as determined by DOD.
- Modify the definition of "harassment" under the Marine Mammal Protection Act as it applies to military readiness activities.[27]
- Modify the conformity provisions of the Clean Air Act. The proposal would maintain the department's obligation to conform its military readiness activities to applicable state implementation plans, but would give DOD

[27] The Marine Mammal Protection Act's definition of "harassment" has been a source of confusion. According to DOD, the statute defines "harassment" in terms of "annoyance" or the "potential to disturb," standards that DOD asserts are difficult to interpret. The statute, 10 U.S.C. 1362, defines the term as any act of pursuit, torment, or annoyance which has the potential to injure or disturb a marine mammal by causing disruption to behavioral patterns such as migration, nursing, breeding, feeding, and sheltering.

3 years to demonstrate conformity. In the meantime, DOD could continue military readiness activities.

- Change the definition of solid waste under the Solid Waste Disposal Act to generally exclude explosives, unexploded ordnance, munitions, munition fragments, or constituents when they are used in military training, research, development, testing and evaluation; when not removed from an operational range; when promptly removed from an off-range location; or when recovered, collected, and destroyed on range at operational ranges. Solid waste would not include buried unexploded ordnance when burial was not a result of product use.

- Provide that "release" under the Comprehensive Environmental Restoration, Compensation, and Liability Act would not include explosives, unexploded ordnance, munitions, munitions fragments, or constituents deposited on an operational range incident to their normal and expected use. The proposal explicitly preserves the President's authority under the act to address an imminent and substantial endangerment to the public health, welfare, or the environment.

- Authorize the military departments to enter into agreements with private conservation organizations concerning lands in the vicinity of military installations to limit incompatible uses or preserve habitat so as to eliminate or relieve environmental restrictions that might potentially restrict or interfere with their military activities.

- Authorize the military departments to convey certain surplus real property having conservation value to state and local governments or nonprofit conservation organizations. In general, transferees would be required to use and maintain the property for conservation purposes in perpetuity.

While time permitted only a cursory consideration of the proposals, they appear to be another step by DOD toward developing a comprehensive approach to managing encroachment affecting military training ranges.

Other Actions Underway

Although DOD has not yet finalized a comprehensive plan of administrative actions for addressing encroachment issues, it has made progress in several areas, in addition to its legislative proposals. It is drafting a directive that establishes the department's policy on Sustainment of Ranges and Operating Areas to serve as the foundation for addressing range sustainability issues. The directive, currently in coordination within DOD, would outline a policy framework for the

services to address encroachment on their ranges. According to a DOD official, this directive will establish range sustainment as a planning and management requirement for all operational ranges and will also direct increased emphasis on outreach and coordination efforts with local communities and stakeholders. In addition, a DOD official reports that the department is currently preparing separate policy directives to establish a unified noise abatement program for the department and to specify the outreach and coordination requirements highlighted in the sustainable ranges directive.

DOD has involved several other defense organizations in the range sustainability issue. Several of these organizations were already addressing specific encroachment issues prior to the services' initial presentation of encroachment problems in June 2000. The Sustainable Ranges Working Group incorporated the strategies already being implemented by these organizations into its plans, and these organizations have continued working on their original mandates. The organizations include the following:

- The DOD Operational and Environmental Executive Steering Committee for Munitions is taking a life-cycle approach to DOD's management and use of munitions. The committee addresses issues associated with the removal of unexploded ordnance at former ranges and the development of weapon systems that avoid environmental problems. This committee recently completed work on a DOD Munitions Action Plan to help the services address safety and environmental concerns related to munitions.

- The Clean Air Act Services Steering Committee reviews emerging regulations and works with the Environmental Protection Agency and the Office of Management and Budget to protect DOD's ability to operate. The committee works to obtain changes in final regulations to accommodate military issues. It has a number of subcommittees that address Clean Air Act issues that impact ranges.

- The DOD Environmental Noise Working Group coordinates technical and policy issues within DOD. The group is responsible for addressing aircraft and ordnance-related environmental noise issues that have a bearing on DOD's ability to carry out its mission requirements.

DOD is also working to place national-level liaisons with key federal agencies that have the potential to affect its range operations. For example, a military officer has been assigned to the Office of the Secretary of the Interior for two years, and DOD would like to assign liaisons at the

Environmental Protection Agency, the Department of Commerce, and the Department of Agriculture. According to DOD officials, these liaisons would represent DOD's interests and would, it is hoped, be able to address and solve range sustainability issues before they become problems.

Conclusions

DOD and the military services have lost training range capabilities and can be expected to experience increased losses in the future absent efforts to mitigate encroachment. The fact that DOD and service officials in congressional testimonies and other forums cite the adverse effects of encroachment on training, while commanders are not reporting any adverse effects, suggests that additional steps are needed to improve the reporting process. Our recent report on training limitations overseas recommended that DOD make improvements in reporting training shortfalls.[28] At the same time, a full assessment of the impact of encroachment on training and readiness will be difficult without more complete data concerning training requirements and available resources. Factors making such assessments difficult include the lack of complete data on training range requirements, failure to consider the potential for alternative training technologies to augment live training, and inadequate inventories of facilities. While the Army, Navy, and Marine Corps are at various stages in collecting this data, DOD needs to ensure that these efforts continue to receive appropriate management attention and are funded and staffed sufficiently to ensure success. The information would also allow DOD to better defend its resource requirements, focus and prioritize its efforts based on the relative importance of land to the services' missions, make better stationing and base closure decisions, and write more effective training plans. DOD has taken some initial steps toward developing a comprehensive plan for addressing encroachment issues. Of particular note are DOD's recently submitted legislative proposals. However, the proposals are only a piece of the comprehensive plan DOD is working toward developing. A plan for other, administrative actions to address encroachment issues remains to be finalized. In finalizing its comprehensive plan, it is important that the department clearly establishes goals and milestones for tracking progress, identifies needed funding to accomplish the tasks, and assigns responsibility for managing and coordinating the department's efforts.

[28] See GAO-02-525.

Recommendations for Executive Action

While the Congress considers the department's legislative proposals, we recommend that the Secretary of Defense (1) require the services to develop and maintain inventories of their training ranges, capacities, and capabilities, and fully quantify their training requirements considering complementary approaches to training; (2) create a DOD data base that identifies all ranges available to the department and what they offer, regardless of service ownership, so that commanders can schedule the best available resources to provide required training; (3) finalize a comprehensive plan for administrative actions that includes goals, timelines, projected costs, and a clear assignment of responsibilities for managing and coordinating the department's efforts to address encroachment issues on military training ranges; and (4) develop a reporting system for range sustainability issues that will allow for the elevation of critical training problems and progress in addressing them to the Senior Readiness Oversight Council for inclusion in Quarterly Readiness Reports to the Congress as appropriate.

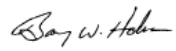
Agency Comments and Our Evaluation

In commenting on a draft of this report, the Deputy Under Secretary of Defense (Readiness) substantially concurred with the substance of the report and recommendations. He indicated that actions were underway or were planned to deal with most of our recommendations. However, he suggested that we modify the focus of our last recommendation pertaining to the development of a reporting system for range sustainability issues. He said that our recommendation should focus on operational readiness degradations (impacts on combat capabilities) that result from encroachment and not merely on the elevation of critical training problems and on the progress in addressing them to the Congress. As noted elsewhere in this report, we recently completed a companion report on training constraints overseas that recommended improvements in readiness reporting; this goes to the heart of the issue raised by DOD. We agree that DOD should give increased attention to how encroachment issues affect operational readiness, and we would expect the department to emphasize this issue in improving its readiness reporting system. The recommendation in this report, however, goes beyond DOD's readiness reporting system. Given the department's often-voiced concerns over the impact of encroachment on its training capabilities, our recommendation in this report addresses the need for a system to foster periodic reporting on critical training problems, such as those resulting from encroachment, and on the progress in addressing them to the Senior Readiness Oversight Council. This would enable the council to report critical training problems, as appropriate, in its Quarterly Readiness Reports to the Congress. Accordingly, we have not changed this recommendation.

The Deputy Under Secretary's comments are included in this report in appendix IV. He also provided technical clarifications, which we incorporated as appropriate.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 5 days after its issue date. At that time, we will send copies of this report to the appropriate congressional committees; the Secretaries of Defense, the Army, the Navy, and the Air Force; and the Director, Office of Management and Budget. We also will make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

Please contact me on (202) 512-8412 if you or your staffs have any questions concerning this report. In addition, Mark Little, Glenn Furbish, James Reid, John Lee, Jason McMahon, John Van Schaik, and Stefano Petrucci contributed to this report.



Barry W. Holman, Director
Defense Capabilities and Management

Appendix I: Scope and Methodology

To identify the impact encroachment has had, or is likely to have, on the military service's training range capabilities in the continental United States, we visited four installations and two major commands. At each installation or command we conducted field interviews and evaluated available data on encroachment issues and how they impact training now, as well as the potential for impacts to increase in the future. The installations we visited were Fort Lewis, Washington; Marine Corps Base Camp Pendleton, California; Eglin Air Force Base, Florida; and Nellis Air Force Base, Nevada. The major commands we visited were the U.S. Atlantic Fleet, Norfolk, Virginia, and the U.S. Special Operations Command, MacDill Air Force Base, Tampa, Florida. The four installations and the U.S. Atlantic Fleet were selected by the service staffs as having conditions representative of the types of encroachment pressures they face, and the U.S. Special Operations Command was selected at the request the Committee on Government Reform staff as having unique encroachment pressures due to its specialized training requirements.[1] We also interviewed officials and received briefings at the service headquarters from officials who are responsible for training and training area management. We discussed their processes for identifying their respective training area needs, and the resources available to support those needs. These officials include the Range and Training Area Management Division, Training and Education Command, Marine Corps Combat Development Command, Quantico, Virginia; the Land Use and Military Construction Branch, Facilities and Services Division, Installations and Logistics Department, Headquarters, U.S. Marine Corps, Arlington, Virginia; Bases and Units Branch, Air Force Office of Civil Engineering, Washington, D.C.; the U.S. Army Forces Command, Fort McPherson, Georgia; Training Directorate, Office of the Army Deputy Chief of Staff for Operations and Plans, Washington, D.C.; and the Fleet Readiness Division, Office of the Deputy Chief of Naval Operations for Logistics, Crystal City, Virginia.

To determine the effect training range losses have on the services' training readiness and costs, we assessed DOD's and the services' training ranges requirements processes and their processes for identifying and managing training readiness problems. Specifically, we gathered data on how the services identify their training area needs, their processes for identifying gaps between their training area needs and available resources, and the

[1] Our review did not include Vieques (Atlantic Fleet Weapons Training Facility), Puerto Rico, because the training constraints involving Vieques are well known.

views of each of these officials on the impact of encroachment on training. This includes officials from the Office of the Under Secretary of Defense for Personnel and Readiness, Washington, D.C.; the Office of the Assistant Under Secretary of Defense for Environmental Quality, Washington, D.C.; the Range and Training Area Management Division, Training and Education Command, Marine Corps Combat Development Command, Quantico, Virginia; the Land Use and Military Construction Branch, Facilities and Services Division, Installations and Logistics Department, Headquarters, U.S. Marine Corps, Arlington, Virginia; the Bases and Units Branch, Air Force Office of Civil Engineering, Washington, D.C.; the U.S. Army Forces Command, Fort McPherson, Georgia; the Training Directorate, Office of the Army Deputy Chief of Staff for Operations and Plans, Washington, D.C.; and the Fleet Readiness Division, Office of the Deputy Chief of Naval Operations for Logistics, Crystal City, Virginia. We reviewed fiscal year 2001 data from the Global Status of Resources and Training System for the Army, Navy, Air Force, and Marine Corps to determine the extent that commanders identify training readiness problems caused by inadequate training ranges. For units that reported low training readiness levels, we examined the specific reasons cited for the lowered training readiness and also reviewed commanders' comments to ascertain whether they attributed any of their training readiness shortfalls to encroachment. We also analyzed cost data from the DOD's Environmental Quality Program for fiscal years 1996 through 2001 to determine if the services were incurring higher costs as a result of environmental encroachment issues. We obtained this data from the Office of the Assistant Deputy Under Secretary of Defense for Environmental Quality. Finally, at each of the installations and major commands we visited, we discussed costs associated with working around encroachment issues and whether these costs, either direct or indirect, are captured in their respective financial data systems.

To determine DOD's progress in formulating a comprehensive plan for addressing encroachment issues, we met with the members of the Sustainable Ranges Working Group who are responsible for drafting DOD's Sustainable Ranges Action Plans. These include officials from the Office of the Under Secretary of Defense for Personnel and Readiness, Washington, D.C.; the Office of the Assistant Under Secretary of Defense for Environmental Quality, Washington, D.C.; the Directorate of Operational Test and Evaluation, Washington D.C.; the Land Use and Military Construction Branch, Facilities and Services Division, Installations and Logistics Department, Headquarters, U.S. Marine Corps, Arlington, Virginia; the Civil Aviation Division, Air Force Directorate of Operations and Training, Washington, D.C.; the Bases and Units Branch,

Air Force Office of Civil Engineering, Washington, D.C.; the Training Directorate, Office of the U.S. Army Deputy Chief of Staff for Operations and Plans, Washington, D.C.; the Office of Conformity and National Environmental Protection Act Documentation, Operational Environmental Compliance and Planning for the Chief of Naval Operations, Washington, D.C.; the Office of Environmental Planning, Chief of Naval Operations, Washington, D.C.; and the Facilities and Services Division, Installations and Logistics Department, Headquarters, U.S. Marine Corps, Arlington, Virginia. We discussed with these officials their analyses of the individual issues, their rationale for selecting each action, milestones or timetables that may exist, if any, and specific budgets for accomplishing each task. To gain the perspective of the regulatory agencies responsible for DOD's proposed action plans, we conducted interviews with senior officials of the Office of Enforcement and Compliance Assurance, Environmental Protection Agency, Washington, D.C., and the Fish and Wildlife Service, Arlington, Virginia.

We performed our review from May 2001 through April 2002 in accordance with generally accepted government auditing standards.

Appendix II: Membership of DOD Encroachment-Related Groups

Table 1: Members of the Senior Readiness Oversight Council

Membership
The Deputy Secretary of Defense
The Chairman, Joint Chiefs of Staff
Chief of Staff, Air Force
The Secretary of the Air Force
Chief of Staff, Army
The Secretary of the Army
Chief of Naval Operations
Commandant of the Marine Corps
The Secretary of the Navy
Under Secretary of Defense for Acquisition, Technology and Logistics
Under Secretary of Defense for Personnel and Readiness
The Under Secretary of Defense Policy
Under Secretary of Defense (Comptroller)

Source: DOD.

Table 2: Members of the Defense Test and Training Steering Group

Membership
Director of Operational Test and Evaluation Directorate
Deputy Under Secretary of Defense (Readiness)
Deputy Under Secretary of Defense (Installations and Environment)
Director of Defense Research and Engineering Directorate
Deputy Director of Development Test and Evaluation for Strategic and Tactical Systems Directorate
Principal Director of Interoperability for Defense Information Systems Agency
Senior Advisor for Defense Threat Reduction Agency
Deputy of Test, Simulation, and Evaluation for Missile Defense Agency
Chief of Technology Assessment Group for Defense Intelligence Agency
Deputy Director of Force Structure Resources and Assessment (J-8) for Joint Staff
Deputy Under Secretary of the Army (Operations Research)
Director of Navy Test, Evaluation and Technology Requirements
Director of Air Force Test and Evaluation Directorate
Executive Director of United States Marine Corps Systems Command
Director of Training Directorate for Office of the Army Deputy Chief of Staff Operations and Plans
Head of Aviation Manpower and Training Programs Branch for Chief of Naval Operations (N789)
Director of Operations and Planning for Deputy Chief of Staff of Air Force for Air and Space Operations
Commanding General of United States Marine Corps Training and Education Command
Deputy Director of Resources and Ranges for Operational Test and Evaluation Directorate
Director of Readiness and Training for Deputy Under Secretary of Defense (Readiness)

Source: DOD.

Table 3: Members of the Integrated Product Team

Membership
Under Secretary of Defense for Personnel and Readiness
Deputy Under Secretary of Defense (Installations and Environment)
Director of Operational Test and Evaluation Directorate
Assistant Secretary of the Army for Installations and Environment
Assistant Secretary of the Navy for Installations and Environment
Assistant Secretary of the Air Force for Installations, Environment, and Logistics
Director of the Army Training Directorate
Director of the Navy Fleet and Battle Group Training Branch
Director of the Air Force Directorate of Operations and Training
Principal Deputy Assistant Secretary of Defense for Legislative Affairs
DOD Deputy General Counsel for Environment and Installations

Source: DOD.

Appendix III: DOD's Draft Sustainable Ranges Action Plans for Addressing Encroachment Issues

Between June 2000 and November 2001, DOD drafted sustainable ranges action plans for addressing range sustainability issues associated with endangered species habitat on military installations, environmental legislation covering unexploded ordnance and munitions, competition for the radio frequency spectrum, protected marine resources, competition for airspace, air pollution, noise pollution, and urban growth around military installations. Each action plan provides an overview and analysis of its respective encroachment issue, along with potential strategies and actions to address the issue. In December 2000, the plans were presented to DOD leadership, who approved the overall findings and recommendations and directed that the proposals be coordinated with the services and appropriate agencies. As of April 2002, the proposals continued to be reviewed and refined within DOD and the services. Consequently, DOD considers these plans working documents and many of the concepts proposed in them may be dropped, altered, or deferred, and other proposals may be added. A short description of each draft action plan, as of August 2001, follows.

Endangered Species Act Action Plan

To address problems related to the presence of endangered species on DOD lands and the requirement to designate critical habitat, the proposed strategy of the draft Endangered Species Act Action Plan was to (1) prevent military training ranges from becoming a home for threatened and endangered species; (2) improve DOD's knowledge of endangered species and the impacts of military activities on those species and species at risk; (3) cultivate better partnerships with the Fish and Wildlife Service and the National Marine Fisheries Service for managing endangered species; (4) negate the need for critical habitat designation; and (5) seek legislative clarification of laws where appropriate. To implement this strategy, the plan proposes to seek clarification of species and habitat issues in the Endangered Species Act. In addition, it proposes working with the Fish and Wildlife Service to implement a policy that Integrated Natural Resource Management Plans qualify as special management plans that negate the need for critical habitat designation. It also proposes establishing a forum for information exchange between DOD, the services, the Fish and Wildlife Service, and the Department of the Interior to improve communication and coordination on endangered species issues; conducting a programmatic assessment of the effect endangered species restrictions have on military testing and training; matching installation mission requirements to endangered species recovery priorities so that installations with lesser mission priorities have greater recovery burdens; and working proactively to prevent the listing of at-risk species. It further proposes to build and expand upon existing partnerships that integrate

DOD biodiversity planning with regional planning so that defense lands do not become a home for threatened and endangered species, improve available information on the impacts to endangered species from military training, and develop policies on the use of land outside installations to meet conservation requirements.

Unexploded Ordnance and Munitions Constituents Action Plan

To address problems related to the application of environmental statutes to unexploded ordnance and munitions constituents on active ranges, the draft Unexploded Ordnance and Munitions Constituents Action Plan proposes a strategy to improve and integrate requirements to develop, test, and use munitions, while ensuring explosives safety and protecting human health, safety, and the environment. To implement this strategy, the plan proposes to develop a DOD munitions expenditure database, work with the regulatory community to develop consistent responses to the environmental issues of unexploded ordnance, and identify funding and resource requirements for the unexploded ordnance mitigation program. This proposal would include a consistent risk assessment methodology to deal with munitions and their constituents on closed, transferring, and transferred ranges; a sustainable range management program that integrates training requirements with environmental and explosive safety requirements; a munitions acquisition plan to minimize undesirable environmental and explosives safety impacts; and a tailored legislative clarification of laws that could apply to military munitions. In addition, the plan proposes to implement public relations efforts to inform the Congress, regulators, and the public about the military's munitions requirements and develop community outreach and educational tools that inform stakeholders and monitor the success of stakeholder involvement. Another proposal calls for collecting scientific data and developing new technologies to identify and reduce the environmental impact of munitions, supporting the assessment of the environmental and human health effects of ordnance disposal, and focusing on the development of bullets and munitions with fewer environmental effects than current ammunition.

Radio Frequency Spectrum Action Plan

To deal with problems caused by the increasing demand and competition for radio frequency spectrum, the draft Radio Frequency Spectrum Action Plan proposes a strategy of policy management and technological innovation. The policy strategy proposes to engage the Congress in developing new laws and policies that maintain DOD's spectrum, while supporting the implementation of the laws that currently protect reserved bandwidth, and to increase funding for the Central Test and Evaluation

Investment Program to leverage existing technologies to improve the use of current bandwidth. Proposed technological innovations include increasing the efficiency of spectrum use by developing new systems to operate at higher spectrum, scheduling of current band usage, and developing band-sharing technologies.

Maritime Sustainability Action Plan

To sustain maritime training capability, the draft Maritime Sustainability Action Plan proposes a strategy of (1) engagement with regulators and legislators, (2) collection of data on marine species and mitigation costs, and (3) legislative and policy changes. Actions proposed include (1) engaging regulators and legislators to further define and enforce marine environmental laws, (2) developing a clearer definition of harassment of endangered species to be applied to DOD activities, (3) initiating an outreach program aimed at ensuring that members of Congress understand the need for continued military training in offshore operating areas and the military's previous record of environmental stewardship, (4) initiating data collection efforts to increase the amount of scientific data available about marine species and their habitats and to gather data on the fiscal and operational impacts of compliance with maritime environmental regulations, (5) incorporating scientific data into exercise planning to minimize impacts on endangered species, (6) developing an acquisition policy that new weapons system use mature technologies to reduce the environmental impacts of testing and training, (7) investigating the use of closed environments (i.e., not the open ocean) for ordnance testing, and (8) minimizing, to the maximum extent possible, the impact of new acoustic sensors and explosives on the marine environment.

National Airspace Redesign Action Plan

To address airspace problems associated with the increased requirements of new generations of weapons and systems and the growing competition with the commercial aviation industry, the draft National Airspace Redesign Action Plan proposes a strategy to ensure that DOD requirements are included in the national airspace redesign process by engaging the Federal Aviation Administration in the process. The objectives of the national airspace redesign process are to maintain system safety; to decrease system delay; and to increase system flexibility, predictability, and user access. DOD's proposed actions to implement this strategy are to form (1) a senior-level policy board on federal aviation to review the scope and progress of DOD activities and develop guidance and processes for the future and (2) an oversight group for DOD and Federal Aviation Administration national airspace system integration.

Air Quality Action Plan

To address air quality issues at the federal, state, and local levels, the draft Air Quality Action Plan proposes a tiered strategy that consists of reviewing emerging regulations and working to obtain changes to final regulations to accommodate military issues. The action plan recommendations rely on engagement and outreach on the part of DOD and the services to prevent future adverse impact on the use of training ranges. The elements of these actions include approaching each specific issue from a position of knowledge, starting at the local level with sound positions and working up through major command and headquarters with federal and state regulators to seek resolution; employing modeling and simulation as necessary; and exploring science and technology initiatives to facilitate future equipment and processes that emit fewer pollutants than legacy equipment.

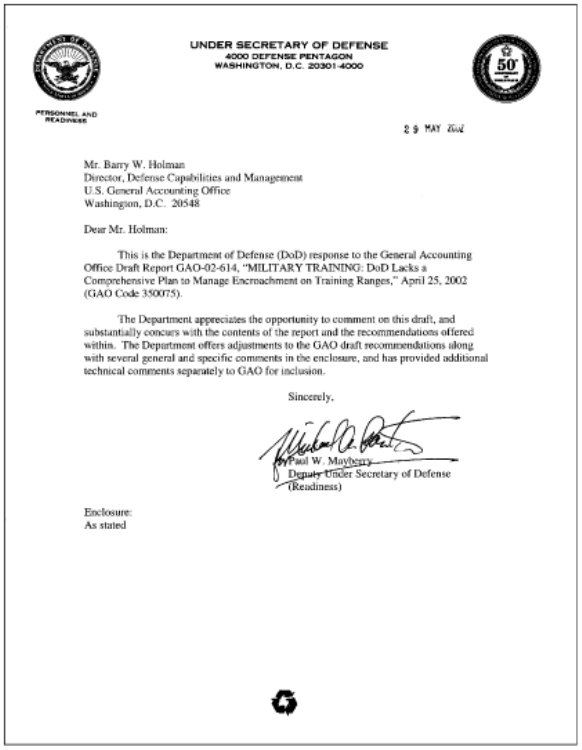
Airborne Noise Action Plan

To respond to noise encroachment, the draft Airborne Noise Action Plan proposes a strategy that will engage other agencies and organizations when they propose restrictions or programs that could impact DOD missions. DOD believes that self-imposed restrictions and concessions by installations often jeopardize their ability to accomplish their training missions. Consequently, it identified actions that would result in two goals: (1) developing a comprehensive integrated noise program and (2) factoring noise into the development and acquisition process.

Urban Growth Action Plan

To address encroachment from urban growth, the draft Urban Growth Action Plan proposes a strategy that will try to influence state and local governments to adopt, implement, and enforce local encroachment prevention plans and programs so that future incompatibilities between civilian growth and military training needs might be avoided. The strategy relies on a series of actions related to public relations and coordinated land use programs to engage local communities. It includes (1) forming a coordinated effort within DOD to build and expand upon existing urban development encroachment partnerships; (2) ensuring installations have effective public outreach plans; (3) requiring each installation and range to implement a comprehensive planning process; (4) expanding the Joint Land Use Study program to address range encroachment; (5) working with local authorities to implement appropriate land use zoning near military installations; and (6) having regional environmental coordinators monitor and advocate for DOD on emerging land use issues.

Appendix IV: Comments from the Department of Defense



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

29 MAY 2002

Mr. Barry W. Holman
Director, Defense Capabilities and Management
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Holman:

This is the Department of Defense (DoD) response to the General Accounting Office Draft Report GAO-02-614, "MILITARY TRAINING: DoD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges," April 25, 2002 (GAO Code 350075).

The Department appreciates the opportunity to comment on this draft, and substantially concurs with the contents of the report and the recommendations offered within. The Department offers adjustments to the GAO draft recommendations along with several general and specific comments in the enclosure, and has provided additional technical comments separately to GAO for inclusion.

Sincerely,

/s/ Paul W. Mayberry
Deputy Under Secretary of Defense
(Readiness)

Enclosure:
As stated

GAO CODE 350075 / GAO-02-614

"MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES"

DEPARTMENT OF DEFENSE COMMENTS TO THE RECOMMENDATIONS

See p. 31.

RECOMMENDATION 1: The GAO recommended that the Secretary of Defense require the Services to develop and maintain inventories of their training ranges, capacities, and capabilities, and fully quantify their training requirements considering complimentary approaches to training. (Page 30/Draft Report)

DoD RESPONSE: Concur. The services have already been tasked with compiling inventories and have made substantial progress in that effort. The services have met and are developing a statement of work in order to contract a firm capable of delivering an enterprise level web-enabled system that will allow cross-service as well as intra-service training use of this inventory data.

See p. 31.

RECOMMENDATION 2: The GAO recommended that the Secretary of Defense create a DoD data base that identifies all ranges available to the Department and what they offer, regardless of Service ownership, so that commanders can schedule the best available resources to provide required training. (Page 30/Draft Report)

DoD RESPONSE: Concur. The enterprise level web-enabled system described above will incorporate this capability. Business rules will be developed in accordance with the needs of each service to maximize the flexibility to utilize other service ranges.

See p. 31.

RECOMMENDATION 3: The GAO recommended that the Secretary of Defense finalize a comprehensive plan for administrative actions that includes goals, timelines, projected costs, and a clear assignment of responsibilities for managing and coordinating the Department's efforts to address encroachment issues on military training ranges. (Page 30/Draft Report)

DoD RESPONSE: Concur. The Department agrees with the need to develop a definitive program to counter encroachment.

See p. 31.

RECOMMENDATION 4: The GAO recommended that the Secretary of Defense develop a reporting system for range sustainability issues that will allow for the elevation of critical training problems and progress in addressing them to the Senior Readiness Oversight Council for inclusion in Quarterly Readiness Reports to the Congress as appropriate. (Page 30/Draft Report)

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DoD RESPONSE: Partially Concur. The GAO recommendation should read: "develop a reporting system with sufficient granularity to routinely capture operational readiness degradations (impacts on combat capabilities) that result from encroachment, not merely documenting instances of encroachment limitations on training. This system will allow for the elevation of critical training problems and progress in addressing them to the Senior Readiness Oversight Council for inclusion in Quarterly Readiness Reports to the Congress as appropriate." The impact on readiness is the critical issue here and not merely the existence of encroachment. While measuring that impact is not a simple process, including it here keeps the readiness focus and supports DoD comment on ongoing readiness reporting improvement efforts.

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RESPONSES OF WILLIAM H. HURD TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Are the emergency exemptions provided in some environmental laws sufficient to address the readiness concerns raised by DoD?

Response. With respect to RCRA and CERCLA, which were the focus on my testimony, I am of the opinion that the emergency exemptions are not sufficient to address the readiness concerns raised by DoD.

Question 2. Please give us your perspective on Mr. Miller's testimony on the viability of Presidential waivers under RCRA and/or CERCLA.

Response. Mr. Miller has expressed the view that the procedures for obtaining Presidential waivers are "not burdensome." I disagree.

To elaborate, Mr. Miller says: "All that is required is a finding that doing so [granting a Presidential exemption] is necessary for national security or is in the paramount interest of the United States." Written Testimony of Daniel S. Miller, p. 4 (emphasis added). Contrary to his suggestion, that legal standard is not a low threshold, but a very high one. Moreover, Presidential findings are not lightly made. A substantial amount of staff work must be performed by the Department of Defense before approaching the President to request such a finding. Mr. Miller ignores that burden. He also ignores the fact that, as Commander-in-Chief, the President must necessarily focus on issues of strategic and global importance. This is especially so in time of national crisis. He should not be required to turn his attention from those weighty concerns in order to give individual base commanders or training officers permission to do their job in an effective manner.

Mr. Miller cites the RCRA exemption process, 42 U.S.C. § 6961(a), as an example of a procedure that he believes supports his position. Written Testimony of Daniel S. Miller, p. 4 n6. But an examination of that statute shows additional reasons why the current process is burdensome and insufficient. First, a Presidential exemption shall not exceed 1 year. At the end of that period, a new 1-year exemption can be made, but only if the President makes a new determination, thereby repeating much of the burden imposed by the original exemption.

Second, in some cases under RCRA, no Presidential exemption can be granted at all. Even where the President determines that the exemption is "in the paramount interest of the United States," the statute says that "[n]o such exemption shall be granted due to a lack of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation." § 6961(a).

In a world where military needs may change overnight, this limitation is altogether unreasonable. The effect of the statute is that training officers and base commanders must predict what their mission will be long in advance of being assigned that mission or even knowing the events that led to that assignment. They must also ascertain how the accomplishment of that mission may be impeded by RCRA, and make a timely request through their chains-of-command for any funds they will need to perform that new mission in a manner that is RCRA-compliant. Similar prescience is also required of all those who prepare military budget requests for transmittal by the President to Congress. Requirements such as these are not merely burdensome; they are impossible.

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