

**ENVIRONMENTAL LAWS: ENCROACHMENT ON  
MILITARY TRAINING?**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON**  
**ENVIRONMENT AND PUBLIC WORKS**  
**UNITED STATES SENATE**  
ONE HUNDRED EIGHTH CONGRESS  
FIRST SESSION

—————  
APRIL 2, 2003  
—————

ON

THE IMPACT OF ENVIRONMENTAL LAWS UPON MILITARY TRAINING  
PROCEDURES AND UPON THE NATION'S DEFENSE SECURITY

Printed for the use of the Senate Committee on Environment and Public Works



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## **ENVIRONMENTAL LAWS: ENCROACHMENT ON MILITARY TRAINING?**

**WEDNESDAY, APRIL 2, 2003**

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

The committee met, pursuant to notice, at 9:32 a.m. in room 406, Senate Dirksen Building, the Hon. James M. Inhofe [chairman of the committee] presiding.

Present: Senators Inhofe, Jeffords, Allard, Wyden, Thomas, Lieberman, Boxer, Crapo, Reid, Murkowski, Cornyn, Warner, and Carper.

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

Senator INHOFE. Good morning. The hearing will come to order. In this time right now of war we are all concerned about the brothers and sisters and sons and daughters that are out there sacrificing their lives and risking their lives for us. For those who embrace the precautionary principle, now is the time to take precautions in the defense of our country in the interest of the lives of our sons and daughters and our sisters and brothers. I do not think anyone doubts that they need and deserve the very best training. Training is what this is all about today.

Yesterday we had a hearing before the Armed Services Subcommittee on Readiness that I used to chair. We talked about this. This is a life and death issue. This is not something to be taken lightly. There are five people who are dead today who would have been alive if they had sufficient live-fire training. It was right after we closed the live-fire training in Vieques that we lost five lives at the Ordora Range in Kuwait.

So this is something that is very serious. I think that we need to treat it that way. I think all sides have acknowledged a legitimate problem here. We have established the fact. The question before us today is what legislation will solve the problem.

Yesterday Senator Pryor suggested a pilot program. Senator Akaka has suggested that the Congress enact part of the request of the Department of Defense. The House Resources Committee Chairman, Richard Pombo, states that the proposals do not go far enough to aid all the citizenry and who feel the pinch of inflexible and ineffective environmental regulations. So where is the balance? We will examine that balance today.

It is important to point out that this issue has been carefully examined. We have studied and studied this thing. My efficient staff

is standing by to put up a chart. As you can see in the chart to my right, there have been at least 12 hearings addressing the problems of encroachment. Those are the dates of those hearings. I have attended every one of those hearings.

*Hearings addressing encroachment in the past 2 years*

1. Senate Armed Services Readiness and Management Support Subcommittee, 20 March 2001
2. House Government Reform Committee, 09 May 2001
3. House Armed Services Military Readiness Subcommittee, 22 May 2001
4. Senate Armed Services Readiness and Management Support Subcommittee, 28 February 2002
5. House Armed Services Military Readiness Subcommittee, 08 March 2002
6. House Government Reform Committee, 16 May 2002
7. Senate Environment and Public Works Committee, 09 June 2002
8. House Resources Subcommittee on Fisheries Conservation, Wildlife, and Oceans 13 June 2002
9. Senate Armed Services Readiness and Management Support Subcommittee, 06 March 2003
10. House Armed Services Military Readiness Subcommittee, 13 March 2003
11. Senate Armed Services Readiness and Management Support Subcommittee, 01 April 2003
12. Senate Environment and Public Works Committee, 02 April 2003

We have talked about it and we have done very little. In fact, last year there were five proposals from the Administration. The only one that was passed was the watered down version of the Migratory Bird Act. The other four were not. The other four, while not exactly as they were before, is what we will be talking about today.

The Clinton Administration recognized these problems as well and took action to solve them. The next chart to my right shows eight actions taken by the Democratic Administration to solve the varying encroachment problems that we established. The DOD merely seeks to continue these initiatives. All of those took place during the Clinton Administration.

There are two types of obstacles that stare us in the face. The first one is the litigious initiatives by extremist groups such as the NRDC and the Center for Biological Diversity. These lawsuits pose a clear and present danger to the training and readiness to our military because they threaten to prevent even the sensible initiatives of the Democratic Administration that were proposed last year.

Then there is the matter of workarounds. That is where you do not take action but you try to work around it. We are very good at workarounds. Workarounds are extraordinary methods of time and costs utilized to approximate achievement of a task in the face of obstacles. We are at a stage where the Department of Defense is working around workarounds as depicted on the next chart. The Department of Defense has testified that these workarounds now amount to a death by a thousand cuts.

*Previous Encroachment Actions*

1. Democrat Congress passes Section 107 of the Federal Facilities Compliance Act 1992 requiring identification of when munitions become hazardous waste
2. Memorandum of Understanding on Implementation of the Endangered Species Act 1994
3. EPA Administrator Carol Browner issues Draft Military Munitions Rule 1995 defining when munitions become hazardous waste
4. President Clinton issues Presidential Determination #95-45 1995 exempting the Air Force's Groom Lake location (Area 51) from solid waste and hazardous waste laws

5. EPA Administrator Carol Browner finalizes Military Munitions Rule 1997 defining when munitions become hazardous waste

6. Secretary of Commerce Norman Y. Mineta and Secretary of Interior Bruce Babbitt 2000 propose amending the Marine Mammal Protection Act's definition of harassment to comport with the recommendations in the reports of the National Research Council

7. Fish and Wildlife Service approves use of Integrated Natural Resource Management 2000 Plans in lieu of designation of critical habitat for the Coastal California Gnatcatcher in final rule

8. Fish and Wildlife Service envisions use of Integrated Natural Resource Management 2000 Plans in lieu of designation of critical habitat for the Arroyo Toad in proposed rule

In conclusion and in the final analysis, we must be mindful of the purpose for which military reservations were reserved and accommodate their purpose. This can be done with a mind to conservation, as the last Administration proved. Let us implement and codify their suggestions to afford the flexibility our military needs, while maintaining our high environmental standards.

We actually have four pieces of legislation. This committee only has jurisdiction over three. It does not have jurisdiction over the Marine Mammal Act. That is a very significant one. I am going to be asking one of our witnesses on the second panel to say a little bit about that even though that is not within the jurisdiction of this committee.

We have the Endangered Species Act. We have the Threatened and Critical Habitat Designations that would prevent the use of land in various areas according to the Arizona court case. There is the Superfund and the RCRA threatened with cleaning up after each training exercise each day. The Clean Air Act is threatened with restrictions on deployment of weapons systems.

Of course, we will talk a little bit about the Marine Mammal Protection Act because I think all four pieces of legislation need to be considered at the same time.

At this time I will turn to the Ranking Minority member, Senator Jeffords.

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

Senator JEFFORDS. Thank you, Mr. Chairman, for convening this hearing today. It is important one.

Like many of my colleagues I am a veteran. I have the greatest respect for those who serve this Nation. I served in the Naval Reserve for 30 years. I was on active duty in the Navy in the 1950's. My ship, the McNair, was the first U.S. military ship to navigate the Suez Canal after the Egyptians took control of the Canal. I am a member of the Veterans of Foreign Wars.

Like every Senator and citizen here today I am concerned about our troops on our military bases in the States and throughout the world. I want them to have every advantage as they prepare for and engage in military combat. But in securing these advantages, I do not intend to place unfair burdens on civilians nor endanger public health or the environment.

As you know, I believe that we should carefully examine any proposals to amend or effectively amend the laws of the jurisdiction of this committee. If we choose to act, this should be the committee that reports measures in our jurisdiction of the Senate.

The proposals we have before us today would permanently alter the implementation of four statutes in our jurisdiction, each complex on its face. Each is interpreted enormous times by the courts through lawsuits brought by citizens as well as the regulated community. Each is implemented through regulations developed in an open public process. As our distinguished colleague, who chairs the Armed Services Committee, observed in a recent hearing in this committee, "These laws have taken years to be put in place." Even when change is proposed during a time when the country is at war, it is this committee's charge to understand the implications of the change in those laws as well as the need for the change, and to weigh the consequences on public health and the environment.

Having chaired the hearing on this subject last July and having listened to each witness, including the generals who testified that day, I must say I was left with an overwhelming sense that the case had not been made for such broad sweeping permanent exemptions of the Department of Defense, its operations, and moth-ball facilities, as well as its private contractors.

It was clear that these proposals extended well beyond the resolution of training impediments. Although it was clear that the reasonable minds of the considerable expertise differed on the interpretation of the language the Department of Defense put forward, I learned that the proposals might well result in offsite consequences that would extend well beyond the term of "training mission" or perhaps the entire war.

For example, the facilities owned by the Department of Defense covers 13 sole-source aquifers. There is the Massachusetts military reservation in Cape Cod. Massachusetts is one such facility.

There are numerous potential toxic effects that may result from the contamination that DOD is seeking to exempt from the hazardous waste laws. Perchlorates used as the primary ingredient in solid propellant for rockets, missiles, and munitions have been found in groundwater in numerous locations where rocket propellants and explosives have been handled. Perchlorates interfere with the iodized uptake in the thyroid gland which can affect a fetus in the newborn and result in changes in behavior, delayed development, and decreased learning capacity.

After the recent publication in the Wall Street Journal article entitled, "Bush Seeks Liability Shield for Perchlorate Pollution," I understand that the Environmental Protection Agency and the Department discussed the need to tighten up that proposal.

I look forward to reviewing those provisions, but I understand that even under these revisions, EPA states, "and citizens will lose their authority to address perchlorates when deposited on an operational range and the EPA's and the State's authority to address mitigation off-range will be limited."

Not only does the Department of Defense handle these and other dangerous substances, but its track record in so doing has admittedly not been a stellar one. I have reviewed one source that lists 22 sites where perchlorate contamination is associated with a Department of Defense owned or operated facility, including four sites in each of the States of California, New Mexico, and Texas.

I have a list of the Department of Defense Superfund sites that is three pages long and lists approximately 130 sites. Even Presi-



dent Bush in his campaign speech in April 2002 said that the Federal Government is considered the Nation's worst polluter. Should we provide legal exemptions to an entity with such less cleanup?

The Environmental Protection Agency certainly appears to be reluctant to blame the environmental laws for impediments for training. Last month, Administrator Whitman testified before this committee that she knew of no example of environmental law interfering with training activities. More recently, she wrote to Secretary Rumsfeld expressing concern that DOD witnesses in the congressional hearing had created an impression that EPA has prevented vital military training.

I quote from her March 10th letter: "When our agencies began working together on environmental issues in 2002, senior DOD officials conceded that EPA statutes and regulations were not presenting a current impediment to training and readiness. Unfortunately, the DOD witnesses failed to clearly distinguish between immediate ongoing problems with environmental laws and hypothetical issues which may or may not materialize leaving, I believe, an erroneous impression of the situation.

"I understand that our EPA witnesses here today will endorse the Department's legislative proposals. Yet, the Administrator's statements clearly question the need especially on a fast-track timetable for these examples. In fact, it is not clear that the Department of Defense is in agreement with the immediacy of the need for these exemptions.

"Since our hearing last July, we have seen no activity on the part of the Department to secure the waivers available under current law. In fact, in a memo dated November 2002, a Defense official discouraged field office attempts to secure waivers available under the Endangered Species Act out of concern that some concessions could run counter to the legislative relief that they are continuing to pursue with Congress."

In addition, other than this memo, we have yet to receive any answer to our inquiries as to why the current Section 7(j) procedure for waivers under the Endangered Species Act is inadequate and has not been utilized. This last month Deputy Secretary of Defense Wolfowitz encouraged employees to identify areas wherein "exceptional cases waivers should be sought under current law."

This leads me to the conclusion that the more constructive dialog following this hearing today might be a dialog about how to implement or perhaps craft the waivers that govern those exceptional cases rather than a dialog focused upon permanent and sweeping statutory changes.

Finally, I would like to address some of the statements and misstatements made about this proposal during the time it has been pending. First, we have frequently read statements that the proposals merely codify existing policies and practices implemented during the previous Administration. If this is true, I once again must question the need for legislation.

However, contrary to these statements, the proposal is fundamentally different from the EPA's Military Munitions Rule. For instance, this proposal would eliminate EPA's ability to respond to emergency situations by limiting its statutory authority to respond

to imminent and substantial endangerment to the health and environment under the Resource Conservation Recovery Act.

EPA's regulation did not eliminate this statutory authority. EPA's regulations did not alter the Agency's ability to address constituents of munitions, like perchlorates. But this proposal does alter that authority.

As for the Department of Endangered Species Act proposal, unlike the Clinton era proposal, the Department of Defense will determine what to do about species on its own lands. The Clinton era proposal was a case-by-case consultation, and the Department's new proposal is an exemption.

I would also like to point out that in many of the examples of the Endangered Species Act problems at the training ranges, such as the examples of the species at the Barry Goldwater Air Force range in Arizona, there has been no designation of critical habitat. So, in fact, if training missions at this range or others were canceled, this apparently was not because of the critical habitat designation.

Fort Richardson in Alaska is an example often cited as support for the proposal. Yet a few facts are often missing from discussion. In previous testimony, Department officials have stated that the Army would be forced to seek an operating permit and to perform corrective action or cleanup of Eagle River Flats. Contrary to the allegations, this lawsuit was brought by the citizens—not EPA.

Also contrary to the allegations the lawsuit does not seek to compel a cleanup. A citizens suit under Superfund cannot the President or EPA to order a cleanup.

We have received testimony that a proposed critical habitat under the Endangered Species Act would cover 57 percent of the base at Camp Pendleton in California. But, in fact, the Fish and Wildlife Service exclude all but 875 acres of Camp Pendleton's approximately 120,000 acres of training land from its final critical habitat designations. That is less than 1 percent of the base.

The list of disputes continues, Mr. Chairman. If nothing else, they highlight the complexity of these issues and our need to examine them carefully. I am concerned that these proposals are too broad and may, in fact, enact unintended harm. In addition, I am concerned that the contamination not cleaned up or prevented by the military will be left for others to address. That includes the industry and citizens alike. Critical habitats not maintained on military lands means compressed habitat requirements on surrounding lands, much of which are owned by private citizens.

I stand ready to work with you, Mr. Chairman.

I would ask that a minority staff memorandum be placed in the record in its entirety.

Senator INHOFE. Without objection.

[The document requested by Senator Jeffords follows:]

MINORITY STAFF MEMORANDUM

TO: Senator Jeffords  
SUBJECT: DOD Hearing on Wed. April 2nd  
DATE: April 3, 2003

This Wednesday April 2, 2003 at 9:30 AM in 406 Dirksen Senate Office Building, the full Committee on Environment and Public Works will hold a hearing on "issues related to military encroachment".

As part of the 2004 Department of Defense Authorization Bill, the DOD submitted the Range Readiness and Preservation Initiative (RPPI). The RPPI creates broad statutory exemptions for “training activities” of the DOD from five environment and resource laws: the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), the Endangered Species Act, and the Marine Mammal Protection Act. All of these laws, with the exception of the Marine Mammal Protection Act, fall under the jurisdiction of the EPW committee.

Because these proposals involve so many aspects of laws that are individually complex, this memo is an annotated bibliography to the many materials enclosed.

*Enclosed Materials*

1. The text of the Range Readiness and Preservation Initiative as it appears in the 2004 Department of Defense Authorization Bill. This is the reference text for all materials. [Range Readiness.pdf]

2. An analysis by the Democratic Staff of the House Commerce Committee on the effects of the RPPI on the laws effected should it become law. This document provides a concise overview of the RPPI on existing law. [House Commerce Committee.pdf]

3. An analysis by multiple environmental organizations on the effects of the RPPI on the laws effected and on the operation of existing programs. [Environmental Analysis of RPPI.doc]

4. A focused analysis on the effects of the RPPI on the Clean Air Act. [Clean Air Act Background.doc]

5. A report by the GAO that concludes the DOD has not provided any evidence that environmental laws have encroached on the military’s ability to conduct training. [GAO Encroachment Report.pdf]

6. Internal comments submitted by EPA to OMB on, among other provisions, its opinion of the RPPI. In its comments, EPA generally opposes the RPPI because it is too broad and because it would pre-empt EPA from enforcing the laws under its jurisdiction. [EPA Comments to OMB.pdf]

7. A letter from the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) opposing the CERCLA and RCRA provisions of the RPPI. [ASTSWMO letter.pdf]

8. A letter from the State and Territorial Air Pollution Program Administrators (STAPPA) opposing the Clean Air provisions of the RPPI. [STAPPA letter.doc]

9. A bipartisan resolution passed by the National Association of Attorneys General opposing the RPPI at their National Conference in March of 2003. [NAGG.doc]

10. A memo sent by Deputy Secretary of Defense Paul Wolfowitz requesting that all branches of the military submit requests to use the existing statutory exemptions in nine environment and resource laws. This request contradicts DOD’s conclusion that the existing exemptions in law do not work and call into question the DOD’s need for the RPPI. [Wolfowitz—memo.pdf]

11. Document Nos. 11, 12, 13, 14, and 15 all concern statements the Department of Defense has made in relation to the Endangered Species Act. #11 presents the reality behind anecdotal stories presented by the DOD in requesting existing statutory exemptions. [Anecdotes.doc]

12. Document No. 12 presents the reality behind DOD’s statements about the legal framework of the ESA. [Misstatement.doc]

13. Document No. 13 provides a table of statements by Fish and Wildlife Service showing that INRMP plans under the SIKES Act are insufficient to protect endangered species. [FWS Review.doc]

14. Document No. 14 shows that FWS has repeatedly granted requests under existing law to exclude land from critical habitat designation. [FWS DOD requests.doc]

15. Document No. 15 outlines the many success stories of FWS working with DOD to protect endangered species. [Success stories.doc]

16. A briefing document on the many false claims DOD has made on the effects of environmental laws on training at Camp Richardson, Alaska. [Camp Richardson.wpd]

17. A briefing document on EPA’s “military munitions rule”. The Administration has claimed that the RPPI would simply codify the existing rule. This document specifies why that is not true and outlines specific differences between the rule and the RPPI. [DOD munitions.wpd]

18. Testimony by Dan Miller, Assistant Attorney General of Colorado, before the House Armed Services Committee on the Attorneys’ General specific concerns on the RPPI’s effect on the State’s authority under CERCLA, RCRA, and the Clean Air Act. [NAAG—2.doc]

19. A series of editorials from newspapers across the country. While there have been editorials written in many more papers, this represents a sample cross-section of the country. Included are editorials from the L.A. Times, The Boston Globe, The Milwaukee Journal Sentinel, The Clarion-Ledger of Jackson Mississippi, The Fayetteville Observer of Fayetteville, NC (home community to Fort Bragg), and the Tucson Citizen. If you wish to see a comprehensive list of editorials please visit the committee's web site: [www.epw.senate.gov](http://www.epw.senate.gov) and look for the hearings links for April 2, 2003—[LA—Times.doc]; [Boston.doc]; [Milwaukee.doc]; [Jackson (MS) Clarion-Ledger Tucson Citizen.html]; [Fayetteville.html].

Senator INHOFE. Thank you, Senator Jeffords.

Even though it is the practice not to have opening statements other than the chairman and the ranking member, I know there is a lot of interest in this. If any of you have opening statements, I would ask you to confine your opening statements to 3 minutes in the order in which you arrived, which was Senators Allard, Thomas, Wyden, Boxer, Lieberman, and Crapo.

Senator Allard, did you have a short opening statement?

**OPENING STATEMENT OF HON. WAYNE ALLARD,  
U.S. SENATOR FROM THE STATE OF COLORADO**

Senator ALLARD. I do have a short one, Mr. Chairman.

First of all, I want to tell you how thankful I am that you are moving forward with this particular issue because I believe it is a problem. The State of Colorado finds itself in the middle of many of these issues. In fact, we have a couple of individuals here today from Colorado that will be testifying.

Unfortunately, I will not be able to stay for this hearing because I will be chairing the subcommittee which will be looking at the environmental management's cleanup of Rocky Flats in Colorado, as well as what is happening in this committee. As you know, and members of this committee know, it is not unusual that we run into this kinds of conflicts.

Again, this is an extremely important hearing. I want to personally welcome those two individuals from Colorado that will be testifying: Ingrid Lindemann, who is a Council Member from Aurora, will be testifying.

I want to welcome also a very good friend of mine and somebody who has worked for me, Douglas Benevento. I have known Doug for over a decade. As always, it is good to see a Cabinet member from Colorado Governor Bill Owen's administration here today. He is head of the Department of Health in Colorado. I believe he, as well as his department, can be very helpful in finding some common sense solutions that this committee faces regarding encroachment on military training sites.

The issue will continue to be a problem. I agree with the State of Colorado that knee jerk reactions happen on both sides when these sensitive subjects are broached. However, I am certain that we can find a solution to the military's problem that will be straightforward and balanced. In addition to that, I think we can apply good science.

My overall goal is to give the military the most flexibility and training that they need to successfully continue their mission. We understand that, I think, in today's environment. I believe that my home State's approach is a good first step in achieving this. I find the correct solution that the Congress needs is the State's input. I thank Mr. Benevento for his testimony.

Again, Mr. Chairman, thank you for holding this hearing.  
 Senator INHOFE. Thank you, Senator Allard.  
 Senator Thomas?

**OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR  
 FROM THE STATE OF WYOMING**

Senator THOMAS. Very briefly, Mr. Chairman. I thank you for having this meeting. I think we should have been dealing with this before. There is no question about it. But now it is obvious that we need to be doing it. I am glad that EPW is considering doing something.

Senator INHOFE. I would interrupt for just a moment. In my opening statement I mentioned that we have had 12 hearings on this but nothing has happened.

Senator THOMAS. That is my point. We are having another hearing, and hopefully something will happen this time. We have to improve the ability for the military needs, of course.

You mentioned that EPW has been working on this, but the fact is lawsuits are what bring this up. If it weren't for lawsuits, we probably would not have all the problems that we do have. The other problem, of course, which I am seeking to deal with that also applies here is that we need to do a little better job of selecting and getting these things in the Endangered Species Act. I don't think we have some in there that really should not be there.

But we have to deal with the encroachment. Certainly the exemptions are temporary and we need to find a way to work this out on a long-term basis. I just cannot believe that we are going to inhibit military training through the Endangered Species Act.

Thank you, sir.

[The prepared statement of Senator Thomas follows:]

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman, I am pleased that the committee is holding today's hearing regarding the encroachment of environmental laws and their impacts on military bases and training facilities.

While I think it's timely for the committee to address this issue, we should not lose sight of the needs of local landowners, public land managers, communities, and State governments who continue to express frustration over the implementation of the Endangered Species Act (ESA). It is my hope that this committee will hold a hearing later this year on proposals, such as the bill I have introduced (S. 369), which seeks to instill some common sense in the ESA process.

With regards to President Bush's proposed "Readiness and Range Preservation Initiative," I believe it's important to point out that the Administration is not trying to take away environmental protections. Rather, what the Administration is trying to do is take a pro-active step to codify current agency practices. This approach relies upon a host of past Administration practices and balances environmental protections with our military's readiness needs.

As the General Accounting Office noted in a 2002 report, "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."

Now more than ever, the Department of Defense needs to adequately train our soldiers for combat. Without multiple opportunities for realistic "live weapons training" our soldiers will be put in harms way. Clearly, changes are needed because environmental groups have filed lawsuits which could potentially hinder or even ban military training.

Chairman Inhofe, I stand committed to working with you on this issue and look forward to hearing from today's panelists.

Senator INHOFE. Thank you, Senator Thomas.  
Senator Wyden?

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

Senator WYDEN. Thank you. Mr. Chairman, for two decades I have enjoyed working with you. I think it is important to shed light on this issue.

But, colleagues, I cannot support forcing the Congress to make a false choice between the readiness of our troops for combat overseas and the health and safety of our citizens here at home. Like Chairman Inhofe, I fully support our troops in combat. That includes the critical training that is needed so that they can be ready for battle.

But the record is absolutely bereft of concrete examples that indicate that exemptions from environmental laws have anything to do with training and readiness. I think it is particularly important, colleagues, that we explore the fact that the major environmental laws already include exemptions for military readiness.

Apparently none of these exemptions have been invoked. There has never been a claim that an exemption was needed under the Endangered Species Act. There has been no exemption under the Clean Air Act. There has not been a claim under the Superfund or RCRA. These laws have been on the books through Vietnam, in Iraq during Desert Storm, in Bosnia, and in Afghanistan.

I am very troubled about the idea that now we are talking about playing Russian roulette with the health and safety of U.S. citizens here at home when it does not seem to be that there has been any significant exercise of laws that are on the books now to protect our troops to ensure military readiness and to guarantee national security.

Mr. Chairman, I think you are performing a great service that we can examine this issue and get into some of the specifics. I always enjoy working with you. I am going to continue to do that. I thank you.

Senator INHOFE. Thank you, Senator Wyden.  
Senator Boxer?

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

Senator BOXER. Thank you, Mr. Chairman.

The military protects us from harm all over the world for which we are eternally gratefully. How sad it would be if our military hurt the health and safety of our citizens here at home by ignoring environmental laws that apply to every other entity in the private and public sectors. How sad it would be if the military ignores polluter pays and leaves our hometowns to pick up the cost of pollution cleanup. This doesn't even seem to me to be consistent with our military who really are, in so many ways, role models for our youngsters and the rest.

I want to give you one quick example in my remaining two-and-a-half minutes about one of my communities which finds itself with a great deal of perchlorate in its water. Perchlorate is a highly toxic explosive salt that was widely used in the 1940's through the

1960's. It is still used in lesser amounts as an oxidizer for solid rocket fuel and ammunition.

Even at low concentrations, perchlorate poses a serious threat to human health. The greatest risks are to pregnant women, babies, and children. More than 20 million Americans drink water contaminated with perchlorate. At least 100 sites in 19 States report perchlorate contamination.

In California alone, perchlorate has been found to contaminant more than 400 water sources in 20 California counties. It is estimated that almost 10 million Californians are currently drinking water contaminated with perchlorate.

The U.S. EPA believes that perchlorate may be present wherever rocket or rocket fuel was made in at least 162 sites in 36 States, most of which was conducted to defense-related activities.

The language in the proposal that we have seen would exempt DOD and its contractors from responsibility for cleaning up and even preventing the spread of perchlorate contamination.

I have a letter from the city of Rialto. I ask unanimous consent to submit it.

Senator INHOFE. Without objection.  
[The referenced letter follows:]



## City of Rialto California

April 1, 2003

Senator Barbara Boxer  
331 Hart Building #112  
Washington, D.C. 20510-0504

Dear Senator Boxer,

We are writing to voice our deep concern about any proposed legislation that would exempt the Department of Defense or its contractors from any past or future ground water contamination responsibility related to the past or future use of perchlorate.

Currently, the City of Rialto, California and several of our surrounding communities is facing a true crisis with regard to the past use of perchlorate by the Department of Defense and its contractors at the Formerly Utilized Defense Sites known as the Rialto Munitions Weapons Storage Facility.

Four different public and private water companies have lost the use of 20 out of our 40 ground water wells which is the only source of water that we have. These wells have tested positive for perchlorate at levels ranging from 6 ppb to over 800 ppb. We have completed our due diligence and found not only was the Department of Defense involved with the use of perchlorate but over 50 potentially responsible parties have used this area to manufacture or to provide storage of weapons under contract to the Department of Defense.

We are suffering the effects of the worst drought in the history of Southern California for over 100 years and have seen the migration of the pollution move at 3 to 6 feet per day as estimated by our regional water quality control board. The water pollution has not only effected our ability to serve water to our customers (over 500,000 people and businesses) but it has effected our regional hospital, it has placed the plans for development and job creation on hold in some instances and is now placing the construction of the I-210 freeway in serious jeopardy because of the high demand for water for dust control.

If any members of Congress believes for a minute that this will not effect the rest of our nation or that in some way the Department of Defense and its contractors are not responsible I would ask you to consider the facts of this issue that include the following:

- 1.) The I-210 freeway will provide much need transportation improvements to the rest of the nation that include the movement of goods and services from the west coast to the east coast of over 30% of all goods.
- 2.) The United States Marine Corp has been involved in the cleanup efforts because of ongoing finds of unexploded ordinance from this former site and some of it's the potential responsible parties.

150 South Palm Avenue, Rialto, California 92376



- 3.) Last week the EPA found another 10,000 lbs of weapons at a site that is so volatile that even the Marine Corps would not touch it.
- 4.) The former site and other former sites such as the Chino Munitions and Weapons storage facility used our local landfills to dispose of perchlorate.
- 5.) Current Department of Defense guidelines call for burning in place old weapons found that contain thousands of pounds perchlorate see the Sacramento Bee July 2002 for destruction at old military installations and weapons.
- 6.) The Mid Valley Landfill received thousands of tons of old debris from several Defense Contractor and former military sites that have seeped into our ground water and continue to raise the pollution levels for perchlorate.
- 7.) We have found rocket motors and casing clearly marked as manufactured by contractors in the City of Rialto with contract numbers linked to specific services in the Department of Defense.

The City of Rialto California is a city with a population of over 95,000 people in an approximate 26.1 square mile area. Our population is made up of over 76% minority population with an average income level of under \$43,600 for a family of four. Our city is clearly an Environmental Justice Community that has received pollution and contamination from all over this nation and it is now affecting our community in a negative way.

Our community must point out to not only Congress but to all elected officials that while we recognize the efforts by our men and women in uniform we as a community are fighting our own war. Our war is trying to provide clean, safe, reliable and affordable drinking water. Our water and our land are two of our strongest assets. The pollution that has occurred was not done by our residents rather it was done by contractors and the Department of Defense. Our residents should not and can not be held responsible for the pollution that was done in support of previous war efforts. If our community does not receive some assistance or gain the financial means to support the required cleanup efforts within the 6 months we will have no choice but to restrict pumping, implement drought conservation plans and stop all future development and job creation.

If any member of Congress, Federal Government Official or concerned citizens would like to visit our city and see the effects from the past damage we would be more than happy to have you come. We urge you to think about the safety of our children, mothers and senior population. Our need for immediate assistance is no less great than the clean safe drinking water that is being provided by our government in other parts this country and the world.

If I can be of further assistance or provide more information, please do not hesitate to contact me at 909-421-7229.

Sincerely,



Bradley L. Baxter  
Director of Public Works

Senator BOXER. I would just like to read a couple of paragraphs in the letter. "Our water and our land are two of our strongest assets. The pollution that has occurred was not done by our residents, but rather done by contractors in the DOD. Our residents should not and cannot be held responsible for the pollution that was done in support of previous war efforts.

"If our community does not receive some assistance or gain the financial means to support the required cleanup, we will have no choice but to restrict pumping, implement drought conservation plans, and stop all future development and job creation."

Mr. Chairman, it is unacceptable that these cities would be abandoned to financial ruin. In closing, I would just say as Senator Wyden has suggested, we have looked at this issue many times.

The GAO testified before the House in 2002 that the military reports a high degree of combat readiness. They saw absolutely no problem with obeying environmental laws.

I hope that we will fight this. I think this is a big setback for our military and our country.

Senator INHOFE. Thank you, Senator Boxer.  
Senator Lieberman?

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

Senator LIEBERMAN. Thank you, Mr. Chairman. As a member of both the Senate Armed Services Committee and this committee, I have studied this matter carefully and concluded that the exemptions from the environmental laws that the Department of Defense seeks are unjustified and the harm that they would do to our natural resources. In fact, public safety is considerable.

I know that some argue and believe that we must choose between a strong defense and a clean environment. I do not. We can protect our environment and protect our security at the same time. In other words, we can defend the red, white, and blue and be green at the same time. In fact, we must do both.

I understand, obviously, and appreciate the heroic work that our men and women in uniform are doing overseas today and the extensive training they must do here at home to get battle ready. Nothing should interfere with that preparedness, or compromise their training. But I conclude that our environmental laws do neither, and in suggesting otherwise I worry that there are some who are trying to dress up or push for major environmental rollbacks in what might be called a national security camouflage.

Ideology and convenience might support the believe that the Nation's security and the health of our environment are naturally at odds. But the evidence that I have seen does not. In fact, Christine Whitman, the EPA Administrator, had her budget hearing before this committee and asserted that in her judgment there is not a single training mission in this country being adversely affected by environmental protection.

If any problem might arise, the current laws do have the flexibility required to allow for the training our soldiers need. Our environmental laws already have many exemptions that the Pentagon has authorized to evoke. In fact, Under Secretary of Defense Paul Wolfowitz recently distributed a memorandum asking the services to seek to invoke those exemptions.

Mr. Chairman, I ask that a copy of that memo be placed in the record.

Senator INHOFE. Without objection.  
[A copy of the document follows:]



DEPUTY SECRETARY OF DEFENSE  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

WR 7 2003

MEMORANDUM FOR THE SECRETARY OF THE ARMY  
THE SECRETARY OF THE NAVY  
THE SECRETARY OF THE AIR FORCE

SUBJECT: Consideration of Requests for Use of Existing Exemptions Under  
Federal Environmental Laws

I commend each of you for your Department's work to protect the air, land, and water resources entrusted to your management. As a direct result of your stewardship, Defense lands exhibit a remarkable degree of biological diversity. Yet, as you know, in a growing number of cases environmental regulation and litigation threaten to limit our continued ability to use these lands and airspace for necessary military training and testing. To date, the Department has worked to protect our military readiness activities without exercising the national security exemption provisions available in many environmental statutes. While I believe we should be commended for our past restraint in this regard, I believe it is time for us to give greater consideration to requesting such exemptions in cases where environmental requirements threaten our continued ability to properly train and equip the men and women of the Armed Forces.

Seven environmental laws authorize the President to exempt Federal agencies from certain legal requirements if he determines it to be in the "paramount interest of the United States": §313(a) of the Clean Water Act; §6001(a) of the Resource Conservation and Recovery Act; §118(b) of the Clean Air Act; §4(b) of the Noise Control Act; §1447(a) of the Public Health Service Act (Safe Drinking Water Act); §106(d)(3) of the Marine Protection, Research, and Sanctuaries Act; and §307(c)(1)(B) of the Coastal Zone Management Act. In addition, two laws authorize the President to exempt the Department of Defense from certain requirements if he determines that doing so is "necessary" for reasons of "national security": §120(j)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act; and §22 of the Toxic Substances Control Act. Similarly, §7(j) of the Endangered Species Act authorizes the Secretary of Defense to direct the Endangered Species Committee to exempt Department of Defense actions that are before the Committee from certain requirements when he finds that such an exemption is "necessary for reasons of national security."

Timely information is needed concerning any proposed environmental restrictions that you believe threaten in a substantial way your ability to ensure the military preparedness of the Armed Forces for which you are responsible. I hereby direct you develop procedures that will ensure that any such cases are brought to DoD's attention sufficiently early in the regulatory or judicial process that the Secretary may act to request (or, in the case of the Endangered Species Act, direct) an appropriately tailored exemption before military preparedness is affected. Any such request from you shall be forwarded to the Deputy Under Secretaries of Defense for Readiness and for Installations and Environment, and shall include the following information:

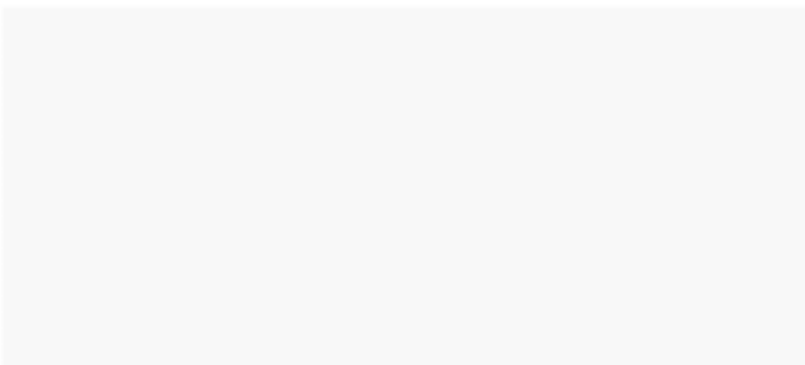
- Identification of the particular environmental restriction that poses the threat to military preparedness, with documentation of the legal issue involved and background information relating to the condition of the natural resource;
- How the particular military training, testing or operational activity would be compromised were the environmental restriction to be imposed. This should include the specific training, testing or operational requirements being affected, and quantification of the impact on readiness;
- Why the military training, testing or operational activity cannot be modified, relocated or rescheduled to avoid the conflict without compromising effectiveness, including quantification of why any alternatives would fail to satisfy the readiness requirement;
- What reasonably practicable efforts have been taken or may be undertaken to mitigate the environmental consequences of proceeding with the planned military training or testing activity; and
- Whether the requested exemption is necessary only for a specified period of time or indefinitely.

It may be that in certain circumstances the time-sensitivity of the request will limit the ability to fully elaborate the above information in the initial request. In such circumstances, the request should be accompanied by the fullest presentation consistent with the exigency of the request, together with a brief explanation of the exigency itself. Full documentation should still be submitted as soon as possible thereafter.

This memorandum is not intended to signal a diminished commitment to the environmental programs that ensure that the natural resources entrusted to our care will remain healthy and available for use by future generations. Any decision to

seek a statutory exemption will remain a high hurdle. Exemption requests will be approved only when the statutory exemption offers a significant measure of relief for the circumstances and the exemption is obtainable in time to meet mission needs.

However, we cannot lose sight of the fact that these testing, training and other military areas and resources have been entrusted to our care—first and foremost—to provide for the realistic training and testing necessary to ensure that our Armed Forces are the best-trained and best-equipped in the world. In the vast majority of cases, we have demonstrated that we are able both to comply with environmental requirements and to conduct necessary military training and testing. In those exceptional cases where we cannot and the law permits us to do so, we owe it to our young men and women to request an appropriate exemption.



Senator LIEBERMAN. Senator Boxer has talked about a specific example in California so I will not talk about that in detail. But it is real.

I will make one final point. The changes being contemplated here are substantial. They are going to have far-reaching effects on a complex combination of environmental and public health laws. Therefore, I think they demand thorough scrutiny in the congressional committee that is most responsible for such consideration, which is this one.

I think it would be inappropriate for my other committee, the Armed Services Committee, to push these changes through without the consent with this committee.

I thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Lieberman.

Senator Crapo?

**OPENING STATEMENT OF HON. MICHAEL D. CRAPO,  
U.S. SENATOR FROM THE STATE OF IDAHO**

Senator CRAPO. Thank you, Mr. Chairman. I have responsibilities on the floor where I am now late. So I am going to submit my statement for the record.

I just wanted to point out that I believe that it is imperative for us to evaluate these critical issues. Many of the statements already made have made it clear that what we are seeking to achieve here is the proper balance between the protection of our national security interests and the protection of our environment.

I am one of those who believes that there is not an immovable or unjustifiable conflict there, and that we can find that balance. I hope that is what the testimony here today will help us do. For the witnesses that I am not going to be able to hear, I want you to know that I have already read most of your testimony and will continue to evaluate this very carefully.

[The prepared statement of Senator Crapo follows:]

STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Mr. Chairman, thank you for holding this hearing. I appreciate your leadership on this issue.

Like much of what is considered in this committee, what we are discussing today touches on multiple issues of importance to the Congress and the American people.

The Readiness and Range Preservation Initiative provisions proposed for the Defense Authorization act for Fiscal Year 2004 are about national defense, the preparedness of our troops, and protection of the environment.

The impact of environmental laws on military preparedness is a serious concern. We must ensure that our soldiers, airmen, sailors, and Marines are able to train as they fight. We must ensure that our military personnel are ready to face any enemy, in any condition.

However, I do not agree that protection of our environment must be at odds with military readiness. While the Department of Defense has a unique mission; it has a strong record of environmental stewardship. I have confidence that as we learn more about the environment, the military will continue to make great strides in protecting it.

One of the criticisms I often hear about our environmental laws is that they create a culture of litigation. They do not meet their intended goal and that, too often, the court is making decisions about the environment rather than environmental professionals. It is my understanding that it is this fear that has prompted the Administration to make this proposal.

Some have suggested that the provisions we are considering today are a sweeping exemption from environmental laws. Others would argue that it is a codification of existing practices, narrowly prescribed to address unique military preparedness circumstances. I hope that this hearing will give us a better understanding of what the Administration is proposing and why it is necessary.

I know that the distinguished Senator from Virginia a strong advocate for the environment and our nation's military has held a number of hearings in the Senate Armed Services Committee on this subject both this year and last. In addition, this committee held a hearing on similar provisions that were proposed as part of the Fiscal Year 2003 Defense Authorization bill.

Clearly, we are all united in support of our armed forces. We want them to have the best training in the world. We also want to protect the environment. As I said, I do not think these are mutually exclusive.

Senator INHOFE. Thank you, Senator Crapo.  
Senator Reid?

**OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR  
FROM THE STATE OF NEVADA**

Senator REID. Thank you, Mr. Chairman.

My colleague from Nevada, John Ensign, now holds the post that you held previously on the Armed Services Committee, the Subcommittee on Readiness and the Armed Services Committee. He has chaired two hearings very ably on the subject of this matter here today. My colleague, John Warner, who is also one of the senior members of this committee, serves as chair of the Armed Services Committee.

I think that committee has done good work, but this is the right venue, in my opinion, for consideration of the Defense Department's proposal. I do not see how anyone could have any concern about that with your background, Mr. Chairman, in the military and all that you have done for the military.

This legislation, this object that we are talking about today, proposes far-reaching and permanent exemptions to four laws directly within this committee's jurisdiction. I have been on this committee since I have been in the Senate. I have been chair on a couple of different occasions and served as chair of various subcommittees.

I have asked the Chairman and Senator Warner to ensure that this committee consider and mark up any proposal to amend these laws. I think you should work with us on that. The expertise and the jurisdiction over this matter resides here and not in the Armed Services Committee.

The central question of this hearing is whether our environmental laws hinder our ability to train our troops to prepare and execute a war. Always important, this question takes on special meaning with our young men and women now engaged in war.

I hope no one in this room stands for impeding the ability to ensure that they have our troops receive the best training possible. Nevada has always been on the forefront of providing for the Nation's defense. We have large military installations there. We have training exercises that go on every day in Nevada.

We watched the Nevada Test Site as a boy. Bleachers were erected so that people could watch the explosions. We did not think a lot about the health and environmental consequences of testing at the time. It was a spectacle to watch. Those bleachers are still there. You can go sit on them if you care to and look at the view those people had many decades ago. Today at that site we are processing expanding of the site. It will become the Nation's premier counter terrorism training center. I support these efforts.

Proponents of the plan to exempt the military for several environmental laws have few concrete examples showing that those laws impede military readiness or that a blanket exclusion would improve readiness. In fact, those laws already provide for a case-by-case exclusion when national security dictates.

There is one broad exclusion that allows for the suspension of any administrative action—environmental or otherwise—in the name of national defense. There are many good reasons to favor case-by-case exclusions over the broad exemptions the Department asks. I want to talk about just one.

We train our top pilots at the Naval Air Station just outside the small rural community of Fallon. In the course of just a few years, 16 children have been diagnosed with leukemia in Fallon. A number of these children have died. The Centers for Disease Control, the agency for toxic substance disease registry, and the State of

Nevada have been searching for environmental clues to the leukemia problem in Fallon. At a hearing that was held there 2 years ago to the day, I heard the parents of those children and others ask for answers to the question of why their kids were sick.

One area of concern was a Naval Air Station where the leaks of JP-8 fuel from the pipeline. Could these leaks have had an impact? What is the impact of air emissions from over flights? We do not conclusively know the answers to these questions. What I do know is that the commanders there can show that they have followed the environmental laws. There have been no exemptions. I know that JP-8 or some other chemical leaked at the site. Federal and State environmental officials would have the authority to clean up it.

I know the Clean Air Act applies to the base and the people in Fallon enjoy the same clean air protection that people in Reno, Sparks, and the rest of Nation enjoy, as it should be.

So I would hope that the Department would look at what has gone on in Fallon that is good. The people have Fallon have the assurance that these protections have always been there.

Senator INHOFE. Thank you, Senator Reid.

Our first panel consists of three people who probably really know this subject. Two of those people appeared before the Senate Armed Services Committee on Readiness yesterday. We have Benedict Cohen, Deputy General Counsel for Environment and Installations for the Department of Defense.

We have J.P. Suarez, Assistant Administrator for Enforcement and Compliance Assurance, of the Environmental Protection Agency. Third is Craig Manson, Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior.

I welcome all of you. We would ask you to submit your entire statement. It will be in the record. Please keep your remarks down to about five or 6 minutes, if you would, please.

Mr. Cohen?

**STATEMENT OF HON. BENEDICT S. COHEN, DEPUTY GENERAL COUNSEL FOR ENVIRONMENT AND INSTALLATIONS, DEPARTMENT OF DEFENSE**

Mr. COHEN. My name is Ben Cohen. I am Deputy General Counsel for Environment and Installations of the Department of the Defense. It is a privilege to be here to discuss the Department's readiness and range preservation initiative.

I would like to try at the outset to define what is and is not at issue in our legislative package. Press accounts suggests that the Department of Defense is on the offensive, seeking sweeping exemptions from the environmental laws. It has been suggested that we seek such exemptions for our closed ranges, our contractors, our non-readiness activities, and our existing cleanup obligations concerning chemicals like perchlorate.

These interpretations do not reflect the Department of Defense's actual intent. We have already revised our proposal to clarify that it has no effect on closed ranges. Working with the Environmental Protection Agency, we have developed further language clarifying that it has no effect on our contractors. We stand ready to work with this committee or anyone else to further clarify the sole focus



of our proposal: the Defense Department's testing, training, and military operations.

In reality, our proposals are strictly defensive in nature, designed to shore up existing State and Federal regulatory policies that are facing courtroom challenges. It is private sector litigants who seek a sweeping change in long-standing environmental policy. They believe that military readiness activities have been drastically under-regulated and they seek through litigation to overturn existing State and Federal regulatory policy, and to impose new and unprecedented burdens on our core military readiness activities.

That, Mr. Chairman, is what is actually at issue in this debate. That regulatory future has arrived for the Navy through private litigation under the Marine Mammal Protection Act. Despite a volatile international situation, and a serious and growing submarine threat to the fleet, the Navy's Antisubmarine Warfare Program is being crippled through litigation.

Last year, in the test LFA case a court cast aside the expert scientific judgment of the regulatory agency that LFA would have negligible impacts on marine mammals. It cast aside as well that Agency's subtle interpretations of its own statute, interpretations validated by the National Academy of Sciences. It cast aside a Navy regulatory compliance program 6 years in the making based on \$10 million worth of cutting edge science.

That future is arriving very rapidly under the Endangered Species Act. A wave of critical habitat litigation is rapidly developing. In the year 2000, critical habitat had been designated for 120 species, just over 10 percent of all those listed. Recently, a single Court order remanded the Interior Department's critical habitat decision for 245 species in Hawaii alone.

One target of this wave of litigation is the Clinton Administration policy allowing our natural resource management plans to serve in lieu of critical habitat. If successful, this challenge would fundamentally alter the way the Interior Department regulates our operational ranges and the way we test and train there.

In April, the Interior Department is required by Court order to revisit the Pendleton and Miramar non-designation decisions that have exempted from critical habitat those two critical West Coast military installations. The Interior Department has testified repeatedly that it believes that developing case law in this area has jeopardized their ability to continue to maintain that exemption.

This regulatory future is also plainly visible in litigation seeking to reverse long-standing State and Federal regulatory policies under the Superfund and solid waste management statutes and to compel unprecedented and far more intrusive regulation of our test and training activities.

The Department of Defense also faces a similar threat to readiness under the Clean Air Act. Although our Clean Air Act proposal is not been driven by litigation, it is similar to the rest of our package in that it would give States and EPA some additional flexibility to pursue their existing preference to accommodate military readiness activities wherever possible.

Through luck and hard work, State regulators in the past have largely been able to accommodate the basing of new weapons systems or the redeployment of existing systems. Our proposal would

make it easier for them to do so. The alternative could be significant delay in basing critical new weapons systems.

The proposals we offer have minor environmental impacts, but significant benefits to readiness. They largely codify existing bipartisan policies that have served both readiness and the environment very well.

I would be pleased to take your questions.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Mr. Cohen.

Mr. Suarez?

**STATEMENT OF HON. J.P. SUAREZ, ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY**

Mr. SUAREZ. Thank you, Mr. Chairman, and members of the committee. Good morning. I appreciate the opportunity to speak with you today on behalf of the U.S. Environmental Protection Agency's position on the proposed National Defense Authorization Act for fiscal year 2004.

We believe that the Administration's proposal appropriately addresses two equally compelling national priorities—military readiness and the protection of human health and the environment. These priorities can both be achieved at the same time. We appreciate the Defense Department's willingness to work with us to craft the proposals before you today.

As you know, the Administration's proposal would make changes to certain pollution control laws that EPA administers and to laws affecting wildlife protection and habitat. I will limit my remarks today to those laws under EPA's jurisdiction.

EPA and the Department of Defense share an important mission, especially obviously in the wake of 9/11—the protection of both our national and environmental security. One holds little value without the other. We believe neither mission should be compromised at the other's expense.

Toward that end, EPA and DOD have for years worked cooperatively toward achieving these goals with tangible benefits to the American people. The bill before this committee is the result of just such collaboration. I would like to highlight for the committee three of the proposed statutory changes that have been developed to facilitate our twin missions vital to the health and security of our Nation.

First, EPA recognizes that military readiness depends on DOD's ability to move assets and materiel around the Nation, perhaps on short notice. Such large-scale movements of people and machines may have impacts on State Implementation Plans, or SIPs, for air quality. Accordingly, EPA and DOD developed proposed changes to the Clean Air Act to allow the Armed Forces to engage in such activities while working toward ensuring that its actions are consistent with the plan's air quality standards.

Under the Administration's proposal, the military would still be obligated to quantify and report its impacts on air quality prior to initiating the readiness activity, would be given 3 years to comply,

but then must come into compliance with the State's implementation plan.

Second, the Administration's bill proposes two changes to the Resource Conservation and Recovery Act, or RCRA, the Nation's solid and hazardous waste law. The bill contains language that would change the statutory definitions of solid waste under RCRA to provide flexibility for DOD regarding the firing of munitions on operational ranges, while clarifying that the definitional changes are not applicable once the range ceases to be operational.

This change is compatible with existing EPA policy and the Military Munitions Rule that has defined EPA's oversight of fired munitions at operational ranges since 1997. The bill specifically maintains the ability of EPA, the States, and citizens to take actions against the Government in the event that munitions or their constituents migrate off-range and may pose an imminent and substantial endangerment to human health or the environment.

The Agencies also have worked together to craft a clear common-sense definition of "range." Under the revised definitions of "solid waste" and "range," the military will have the statutory assurance that EPA will not intervene in the firing of or training with munitions, while the public may rest secure in the knowledge that the EPA, States, and citizens will have the authority to take actions against the Department if munitions pose a threat off-range or after a range is closed.

Third, the Administration's bill proposes analogous changes to the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, also known as the Nation's Superfund law. It would exempt from the definition of "release" under CERCLA, explosives and munitions deposited during normal use while on an operational range.

It is important to note that EPA would retain authority to take action to abate an imminent and substantial endangerment to public health and the environment due to deposit or presence of explosives and munitions on an operational range while still affording the military the flexibility they need in handling the munitions in these ranges.

Indeed, as Mr. Cohen just noted, this Administration has recently developed language clarifying that the proposed changes to the solid waste and Superfund laws apply only to operational ranges under the jurisdiction and control of military services and not to contractors and other third parties.

In conclusion, we believe that the Administration's proposed bill accommodates the concerns of the military, the EPA, and the public. I want to assure this committee that both Administrator Whitman and I support this bill and believe that the bill's provisions will ensure that America's armed forces are able to train, to carry out their national security mission, to train the way they fight, and that the Agency is able to carry out its mission of protecting human health and the environment.

That concludes my prepared remarks. I would be happy to answer any questions.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Mr. Suarez.  
Secretary Manson?

**STATEMENT OF HON. H. CRAIG MANSON, ASSISTANT SECRETARY FOR FISH, WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR**

Mr. MANSON. Good morning, Mr. Chairman. I am Craig Manson, the Assistant Secretary for Fish, Wildlife and Parks in the Department of the Interior. I have responsibility for the United States Fish and Wildlife Service and the National Parks Service. I appreciate the opportunity to testify this morning on this important subject.

Secretary Norton understands the unique nature of the duties and missions of the military and the need to train effectively for military activities. On a personal note, I have seen these issues from both perspectives, having served for more than 30 years in the active duty Air Force, the Air Force Reserve, and the Air National Guard. Many times I have been called upon to advise commanders about compliance with environmental laws, including the Endangered Species Act.

From that experience and my experience as a State regulator in California, I can say that the Department of Defense has been an exemplary steward of the Nation's natural resources. That opinion is shared by Secretary Norton and throughout the Department of the Interior.

Interior's bureaus have actively and successfully sought to work with the Department of Defense to meet the requirements of various natural resources laws without impacting the military's ability to train. My testimony this morning focuses on the proposal concerning the substitution of integrated natural resource management plans, or INRMPs, on military installations for critical habitat under the Endangered Species Act.

At least 300 listed species occur on the Department of Defense managed lands and access limitations due to increased security, the necessity for buffer zones, and good military stewardship, has resulted in some of the finest remaining habitat occurring on military lands.

The Endangered Species Act requires the Fish and Wildlife Service to designate critical habitat for listed species if it is prudent and determinable. Critical habitat designations on Department of Defense lands can impact the ability of the military to prepare and train by imposing additional requirements for consultation under Section 7 of the ESA.

On the other hand, as the then-Director of the U.S. Fish and Wildlife Service, testified before this committee on May 27, 1999, "critical habitat provides little additional protection to most listed species, while it consumes significant amounts of scarce conservation resources."

The Director suggested that instead of the current process for designating critical habitat, and open collaborative environment at the appropriate time would be a more efficient way to conserve and recover species. Integrated Natural Resources Management Plans, known as INRMPs and required under the Sikes Act Improvement Act of 1997 serve as an effective vehicle through which the Depart-

ment of Defense can comprehensive plan for conservation of fish and wildlife species. This planning can address important needs for endangered and other species of fish and wildlife, including the protection of habitat.

The statute requires collaborative engagement and mutual agreement of the Fish and Wildlife Service, the military installation commanders, and the relevant State natural resources agency. The Department of the Interior's policy is to exclude military facilities from critical habitat designations if the facility has an approved INRMP which addresses the species in question. We support the codification of this policy and the range, readiness and preservative initiation.

The INRMP process appears to provide more true conservation benefits to species because it provides for real management action. For example, critical habitat proposed for the purple amole, a plant in California, included significant portions of Camp Roberts and Fort Hunter Liggett. We excluded Camp Roberts from the final designation because it had completed an INRMP which addressed the conservation of this plant. Working with the Department of Defense, we were also able to remove Fort Hunter Liggett, although the INRMP to address the protection of the plant was not yet approved.

The benefits of these military readiness activities to the national defense exceeded the benefit of including the area and the designation, and we, therefore, excluded the property. However, a recent court case in the District of Arizona has clouded part of our policy to exclude military lands from critical habitat based on an INRMP.

The policy is based, in part, on a decision that military lands within approved INRMP and other types of lands with approved management policies do not require special management consideration because they already have adequate management and thus, by definition will not be considered critical habitat. The U.S. District Court in Arizona has ruled that this interpretation is wrong and that, in fact, lands require special management and necessitates their inclusion and not exclusion from critical habitat.

In closing, Mr. Chairman, I believe that the Interior Department and the Defense Department have acted cooperatively to implement natural resources laws passed by Congress, and will continue to explore with our DOD colleagues creative solutions to balance conservation mandates with military readiness.

That concludes my testimony. I would be glad to answer any questions.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Mr. Secretary.

I would ask others to adhere to the 5-minute rule on questions. We do have another panel coming up and we do not have a lot of time.

Let me start off, Mr. Cohen, if I could. You are the expert in this area. As was the case yesterday—and I appreciate your being a witness yesterday at our rather lengthy hearing—it kept coming up about the national security exemption. I would like you to walk us

through the process of getting a national security exemption. Who does it? What time period does it extend?

Mr. COHEN. Yes, sir. Thank you very much. I would like to focus it, if I could, on the statutes that the Department is proposing to amend. First, the Marine Mammal Protection Act does not have any national security exemption.

The Clean Air Act, RCRA, and CERCLA all possess national security exemptions. The RCRA and CERCLA exemptions exist by virtue of Presidential action—the President can act under RCRA or CERCLA in the interest of national security or national defense to exempt on a site-by-site basis, specific DOD facilities—again in the interest of national security.

Under the Clean Air Act, in addition to that site specific mandate, he can exempt categories of equipment. The exemptions under all three Acts, I believe, are renewable 1-year exemptions.

An example of how that is used, actually, is the annual exemption that the President has given for the last several years to a classified site to prevent the disclosure of classified information under RCRA. It involves a fairly lengthy administrative process whereby the military service and the department involved reviews the exemption up to the service Secretary, then to the Secretary's office at DOD, and then to the White House where it is further reviewed and issued.

Senator INHOFE. That is very helpful. So it has to be done by the President and it is good for 1 year.

Mr. COHEN. And it is site specific, sir.

Senator INHOFE. And site specific.

I would like to mention, and I am sure you would agree with this, that administrative actions is the other thing they are talking about, the tool that can be used. However, in using this tool it happens after the problem is already there. It says, "The Secretary shall submit a written notification of action and each significant adverse effect to the head of the executive agency, taking or proposing to take, administrative action. At the same time the Secretary shall transmit a copy."

It goes on and on. It is quite a lengthy process. It comes after the fact. That is the fact I would like to get out.

Mr. COHEN. Yes, sir. Also on that one, 10 U.S.C 20-14 is often cited as the sweeping across cutting ability to get exemptions from anything. I should mention that not does it have to take place at the highest level of every agency, but it would afford us no relief at all in any of the five statutes that we are seeking to amend. In each of those five statutes, it is not the agency's interpretation or action that concerns or concerns us, it is litigation against which 20-14 provides us no defense at all.

Senator INHOFE. Exactly. Very good. Thank you, Mr. Cohen.

Mr. Suarez, it has been referred to several years of statements made by the Administrator. I know what your feelings are. I read from your testimony yesterday that the Administration's bill appropriately takes account of the interest of the American people in military readiness and environmental protection.

What would be your interpretation? What is the position of the Administrator, as you understand her position?

Mr. SUAREZ. Mr. Chairman, I can tell this committee that Governor Whitman fully supports this bill. She believes that having worked with DOD, we have struck an appropriate balance that allows the military the flexibility that they need while at the same time preserving sufficient authorities for EPA to take action to protect public health and the environment.

Senator INHOFE. And I think probably we were saying that those areas that are not within the jurisdiction of the EPA, she would not have been referring to those areas because that is not within her jurisdiction. Here I refer to the Marine Mammal Protection Act and the Endangered Species Act.

Mr. SUAREZ. That is exactly right, Mr. Chairman.

Senator INHOFE. I am concerned about the environment. My wife and I have 19 kids and grandkids. We are very much concerned. I would just like to know according to the EPA will human health and the environment be fully protected under these legislative proposals?

Mr. SUAREZ. Mr. Chairman, we believe that we retain adequate authority under these proposals to protect human health and the environment. I note that we continue to retain authority under CERCLA to address imminent and substantial endangerments under the Safe Drinking Water Act. There is no suggestion that any authority under the Safe Drinking Water Act is to be changed under these proposals. Off an operational range we continue to have authority. We are comfortable with these proposals, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Suarez.

Secretary Manson, as a decorated National Guard Reservist and one who is familiar with all aspects of this, my colleague, Senator Bond, refers to it as the Subcommittee on Fish, Hunting and Drinking. He has talked about the critical habitat designations.

I think it would be helpful for us for you to share with us what the Fish and Wildlife Service's attitudes are toward the critical habitat designations?

Mr. MANSON. The Fish and Wildlife Service has long taken the position that critical habitat designations add very little conservation benefit for species. That was the position taken in the previous Administration and adopted in our Administration as well.

Senator INHOFE. Thank you, Mr. Secretary.

My time has expired, but in the next round I am going to be asking you if there is anything you want to elaborate on regarding imprints. That is a very significant subject.

We are going to on the early bird rule. Senator Wyden?

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

Mr. Cohen, I was very troubled by your comment that your Agency is engaged in a defensive action. It looks to me like an offensive preemptive attack on the Nation's environmental laws. I want to tell you exactly why I feel that way. I looked at your testimony very carefully.

You essentially say in the testimony, "OK, there really isn't a problem with the environmental laws affecting readiness right now." But then you go on to say, "If litigants in the pending cases end up being successful, then at some point down the road military

readiness could be affected. That is why we need to engage in preemptive efforts to change the environmental laws now.”

I want to give you an opportunity to comment on it. That is the way it really looks to this member in the Senate.

Mr. COHEN. Thank you, sir.

The reason why we believe that we are trying to preserve the regulatory status quo, which was the source of my comment that we were sort on the defensive in this, is that we believe we are largely codifying the existing regulatory practices and policies, both of the States and of our Federal regulators.

Senator WYDEN. Are you not concerned about the possibility of future cases? You are not pointing to cases today; are you?

Mr. COHEN. Yes, sir. Actually in a number of instances we are. There is Endangered Species Act litigation, for example, currently pending pursuant to which the Fish and Wildlife Service is going to have to again in just a few days make a decision whether to designate large parts of Camp Pendleton and Miramar as critical habitat. That is ongoing litigation.

Senator WYDEN. But it has not come down against the Department as of today.

Mr. COHEN. Yes, sir.

Senator WYDEN. Mr. Chairman and colleagues, that is the bottom line here. The decisions have not come down against the Department and military readiness as of now. But we are supposed to engage in preemptive action against something that may happen in the future.

What if the decisions do not go against you in the future?

Mr. COHEN. Sir, there are a number of reasons that we think that there is a wave of pending litigation in virtually all of these areas which does present a threat. Reasonable people can differ on this in terms of timing. Philosophically, the Department and the Administration think it is unjustified or unwise to actually wait until there is a train wreck in court and critical national security activities are jeopardized.

Just to give one example, sir. Some very critical training activities which were taking place at an island in the Western Pacific, Farallon de Medinilla, directly in support of Operation Enduring Freedom, were enjoined last year under the Migratory Bird Treaty Act. Congress very responsibly and quickly took action to revise the statute. But the injunction had already been in place for some time.

It is our believe that it is better public policy if we can see these threats clearly emerging and if they are systemic to try to address them proactively.

Senator WYDEN. I think—and extra points for candor, Mr. Cohen—you have defined what this issue is all about. You are concerned about something that may happen in the future. So something ought to be done in a preemptive way now when I, and several of my colleagues, say, “We have had these laws on the books for a long time for a number of conflicts. We do not have the decisions that undermine readiness as of now.”

I think it is very unfortunate that we are talking about preemptive assault on the Nation’s environmental laws when there is no body of evidence indicating that the problems have been seen



under existing kinds of decisions. The future rulings may not go against you, but you have defined the issue at least clearly for me.

I have one last question, if I might. The Umatilla Chemical Weapons Depot in my State is currently in the process of destroying stock piles of nerve gas and other weapons. That its sole function there. No combat or military readiness is going on there. There is considerable interest in my part of the world given the current mission of the Depot that it should not qualify as a type of range where they would be an exemption from environmental laws.

I would like to have your thoughts this morning on that.

Mr. COHEN. Yes, sir. The chemical incineration activities that you are describing, the chemical destruction activities at Umatilla would not be covered. They would not qualify as a military readiness activity.

Senator WYDEN. I am sorry; what did you say?

Mr. COHEN. The chemical demilitarization activities at those facilities would not qualify as a military readiness activity in the definition that we have provided. So it would not be affected by our legislation.

Senator WYDEN. My constituents will be pleased.

I look forward to working with you. My door is open to you when there is evidence of a problem. But to say we are going to toss all these environmental laws aside on the basis of what you characterize as a potential wave of problems does not make sense.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Wyden.

I inadvertently overlooked our ranking Democratic member, Senator Jeffords.

Senator JEFFORDS. Having served on a destroyer and being the gunnery officer, I am well aware of the necessity and need for the ability of the military to practice. However, I do have concerns for what we are talking about today.

Mr. Cohen, I appreciate your sharing with my staff suggested changes to the definition of "operational ranges" to address some concerns regarding inadvertently exempting contractors.

However, as I read the revised definition, "An inactive range last used during World War I could be exempt from cleanup as long as DOD still considers the area to be a range." Is that correct?

Mr. COHEN. Sir, actually that is only one part of a three-part test. The test for when a range is inactive as opposed to closed is that it must be under the jurisdiction, custody, or control of a military department. No. 2, it cannot have been put to an inconsistent use—to a use that is inconsistent with range activities. We could not have built a base hospital on it. It still has to be considered by the Secretary of the military department to be a range.

So there are actually three tests; two of which are objective tests rather than any subjective tests.

Senator JEFFORDS. So the answer is that that one that has not been used since World War I is still a range?

Mr. COHEN. I am sorry. I did not hear you, sir.

Senator JEFFORDS. I referred to the range from World War I that has not been used since then. That is still a range under your definition?

Mr. COHEN. Sir, if it is still under the control, custody, and jurisdiction of the military department, if it has not been put to a use that precludes its future use as a range, and if the Secretary in question still considered it to be a viable potential active range, then it would be a range, sir. An inactive range. The answer to your question would be yes, if those three conditions were met.

Senator JEFFORDS. If you had not built a hospital, then it is still a range?

Mr. COHEN. If we had built a hospital, sir, if we had put it to an inconsistent use, then it could not be an inactive range by definition. So it would fail to meet the three-part test. That test is in existing law. It is in the Military Munitions Rule.

Senator JEFFORDS. Thank you.

Mr. Manson, the U.S. Fish and Wildlife Service's recent report to Congress on the Sikes Act and INRMP's states that, "The Fish and Wildlife Service has established effective partnerships with the military services to facilitate collaborative national resource management on installations while the military continues to successfully carry out its missions."

In your testimony, you have given an example of how the Service has worked with DOD at Fort Hunter Liggett and excluded an area from the critical habitat definition because the Service determined that the adverse impacts to national defense exceeded the benefits that would have resulted from designating the areas as critical habitat.

This seems to be a perfect example of how current law is working with existing authority to accommodate both military preparedness and species protection without requiring an exemption.

If current law provides for exclusions from critical habitat designation, why is this exemption necessary?

Mr. MANSON. Well, Senator, there are a couple of different aspects to this. We do have the ability on a case-by-case basis to weigh benefits of exclusion versus the benefits of inclusion. We have long had a policy, however, of excluding lands where there is an approved INRMP. It seems to me that that is a more prudent policy because we know where there is an approved INRMP that there has been collaboration between the Fish and Wildlife Service, the military, and the State agency.

It seems prudent, in my view, to codify that policy so that it is clear, unambiguous, and not subject to attacks through litigation.

Senator JEFFORDS. Mr. Suarez, the bill would exempt DOD ranges from the information gathering and access requirements of the Superfund and hazardous waste laws. While preserving EPA's superfund emergency authority, I am concerned that the bill would significantly impair EPA's ability to uncover information about emergencies until the toxic waste leeches off-range. Am I appropriately concerned?

Mr. SUAREZ. EPA still has a number of authorities where we could collect information. As I indicated, there are no changes under the Safe Drinking Water Act. We retain the ability to gather information if, in fact, in the example that you referenced in your opening remarks, there were a possibility of a contaminant in the sole source aquifer, EPA would retain the ability to gather informa-

tion to determine if it poses a threat to human health and the environment.

Senator JEFFORDS. Thank you.

Senator INHOFE. Thank you, Senator Jeffords.

Senator Boxer?

Senator BOXER. Thank you. I am going to be very straight from the shoulder. We do not have a problem here. We have the ability of any President of either party to say there is a national security problem and these acts are waived except for Marine Mammal. By the way, I am on the Commerce Committee that has jurisdiction over that. I think we can see that the dolphin are making a contribution to national security. So maybe it is good to protect them.

But the bottom line is this. We do not have a problem. For me to see the Environmental Protection Agency and the Fish and Wildlife Service—who are charged with protecting the environment—sitting here at this table and supporting this, it is deeply distressing, but not surprising. I understand DOD. They want to get out of this thing. I do not agree with them. I think it is a bad thing. If you are really protecting the country you have to protect it here at home. So I think it is a bad thing.

This Administration has the worse environmental record of any I have ever seen. It is just a perfect picture here. My people are really upset about this, Mr. Chairman. We have cities that are struggling to clean up the mess that was made by DOD and its contractors. What is the solution? Not paying to clean up the mess but giving them the bill. These are cities that have Republicans in control. This is not political.

This is personal to those people. These people are going to get cancer because of the perchlorate. People are going to get sick. That is not even a question. And, how about this? Out of the 165 Federal facilities listed on the Superfund National Priorities list, 129 of these are DOD facilities. And you are just going to walk away? Even though Mr. Suarez says, “Oh, the contractors are not off the hook.”

I ask unanimous consent to put in the record an analysis by the Attorneys General of Colorado saying they are absolutely going to let the contractors off the hook.

Senator INHOFE. Without objection.

[Material to be supplied follows:]

Senator Boxer. I just want to say that I am not stunned that you want to back door repeal of environmental laws. That is what I see you are doing from day one. But I am stunned that you take on the State and local people. I will just tell you a few things here.

The National Association of Attorneys General passed a resolution in March opposing DOD’s exemption from environmental laws; are you aware of that, Mr. Suarez, that they have done that?

Mr. SUAREZ. I believe I am, yes.

Senator BOXER. OK. Are you aware that the State and local air pollution regulators oppose DOD’s exemption from environmental laws?

Mr. SUAREZ. I am not familiar with that specific letter.

Senator BOXER. I will send that to you.

Mr. SUAREZ. Thank you, Senator.

Senator BOXER. Are you aware that State and local water quality regulators oppose DOD's exemption from environmental laws?

Mr. SUAREZ. I am not familiar with that letter, Senator.

Senator BOXER. I will send that to you.

The National League of Cities finds that—and I am going to read a letter from one of our later witnesses. Actually it is her testimony. She is a council member from Colorado. "The ramifications of a blanket exemption for military facilities and activities from such laws will be serious and untenable at the local level." Have you seen her testimony?

Mr. SUAREZ. I have not seen her testimony.

Senator BOXER. I will make sure you do.

Mr. SUAREZ. Thank you, Senator.

Senator BOXER. I would ask unanimous consent to enter into the record a statement from the California Department of Toxic Substance Control in opposition to these proposals.

Senator INHOFE. Without objection.

[Material to be supplied follows:]

Senator Boxer. Mr. Chairman, this information details the effects these proposals will have on the people of my State. I urge you, Mr. Suarez, to read those.

I just want to say clearly that this is a problem that does not exist. The GAO said that. Your own Administrator said it. Now she has backed off. But that is her right. She made the statement right here on the budget that there was one example that she find where national security was ever impacted.

So here we are at the Environment Committee. I always considered it the greatest committee because we work so well together. We have made such progress on the environment over the years. Senator Moynihan, may he rest in peace, was one of those leaders. Senator John Chafee was one of those leaders. I won't list all the others.

But I have to say this is a sad day that I would see the Environmental Protection Agency and the Fish and Wildlife Service—charged with the responsibility of protecting the environment and upholding the environmental laws—just in essence urging a giant loophole in our landmark environmental laws.

The people in this country are going to see right through this. They are smart. If they do not see it right away, I am going to make sure that they read all of these letters that came in from their representatives at the water district level, for God's sake. What an awful thing to have—our military that is so great and leading us and saving the word from tyrants, walking away from responsibilities so important. And to have the EPA to support it is beyond me.

Senator INHOFE. Thank you, Senator Boxer.

I will take the prerogative of the chair and only comment as to your partisan allegations—three of the four proposals were put together in the Clinton Administration.

Senator Reid?

Senator BOXER. These are different than the Clinton Administration.

Senator REID. I have talked with Senator Ensign on several occasions because I wanted to alert him, and he already knew that we

have a significant problem. Everything in the Las Vegas Valley drains into what we call the Las Vegas Wash. Also draining into the Las Vegas Wash—only about 1.5 percent of the total drainage—is some very bad stuff coming from the industrial complex we have had there since World War II—perchlorate.

Senator Boxer has spoken about this. Senator Feinstein has been extremely concerned about this. We have 46 sites now that are contaminated with perchlorate around the country. The one we are concerned about, of course, is the one in Nevada that drains into the Colorado River affecting the water in the whole Colorado Basin and affects the 35 million people that Senator Boxer represents.

Senator Ensign indicated that you were going to make sure that any legislation that you proposed—and I say this to you, Mr. Cohen—took care of the 46 perchlorate sites. That is, that the Department of Defense would not in any way through this legislation try to back out of the responsibilities that they have in working to help cleanup these sites dealing with contamination by perchlorate; is that true? Is that what you told Senator Ensign?

Mr. COHEN. Yes, sir; that is right.

Senator REID. Have you worked on that language yet? Has anyone worked on that?

Mr. COHEN. Yes, sir.

Senator REID. Do you have it ready yet?

Mr. COHEN. Actually, sir, it is referenced in my testimony.

Senator REID. This one today? I did not read that.

Mr. COHEN. Sir, we are also happy to stand ready to work with this committee or the Armed Services Committee to make absolutely and unambiguously clear that we are not intending to cover closed sites, formerly used defense sites, our contractors, or any of our activities that take place off an operational range itself.

Senator REID. The 46 perchlorate sites are not all like the one we have in Henderson, Nevada. In Henderson, the perchlorate came as a result of work done by private contractors who were given the blueprint, so to speak, as to what to manufacture by the Defense Department. But there are other sites around the country that are simply defense sites where, for example, they were washing rocket engines and things of that nature, and the perchlorate ran off. That is why they have had to close a number of wells in California because of that contamination.

You understand that perchlorate is a constituent of munitions and is still exempt from Superfund and RCRA; is that right?

Mr. COHEN. Yes, sir; there is not MCL established for it.

Senator REID. Under the new language?

Mr. COHEN. Our new language, sir, is only intended—and we think actually the language achieves this effect—to provide for our operational ranges while they are operational. So to the extent that those 46 sites are closed spaces, closed ranges, or are contractor sites, or result from waste management practices, even on an active range, they would not be affected at all.

Senator REID. OK. Mr. Cohen, what if you have a combination? What if you have an active defense site? You would also exempt that from your new proposal?

Mr. COHEN. Like the Massachusetts Military Reservation, sir, that is a good example of an active site that was resulting from

some perchlorate discharge into a sole source aquifer. That would still be covered because of the Safe Drinking Water Act authorities that are now being used by EPA to have us cleanup that site, to have us address this perchlorate contamination, are not affected at all by our provision.

So what happened at the Massachusetts Military Reservation—all the regulatory actions that EPA took—would still take place. We drafted it very carefully to make sure that there would be no change in the outcome there.

Senator REID. So what you told Senator Ensign is that perchlorate problems around the country, that this proposed legislation of the Department of Defense, would have no bearing on any of those 46 sites?

Mr. COHEN. I believe that is correct, sir.

Senator REID. That is your intention; is that true?

Mr. COHEN. Yes, sir; in that if they are operational ranges, they would be addressed under the Safe Drinking Water Act.

Senator REID. You are not exempting from the Safe Drinking Water Act?

Mr. COHEN. That is correct, sir.

Senator BOXER. Could you yield for a quick question?

Senator REID. Of course.

Senator BOXER. What standard will you clean it up to for perchlorate?

Mr. COHEN. There is currently no promulgated MCL.

Senator BOXER. So what standard will you clean it up? To the State standard?

Mr. COHEN. There would be a site-specific finding or a health assessment or risk assessment about the site. To make that site-specific finding when you do not have a promulgated MCL or a draft reference dose that is final, then the local regulators would simply have to make the best judgment that they could.

Senator INHOFE. The Senator's time has expired.

Senator Cornyn?

**OPENING STATEMENT OF HON. JOHN CORNYN, U.S. SENATOR  
FROM THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman.

I come to this subject with the background of having been Attorney General of the State of Texas for 4 years. I certainly appreciate the importance of vigorous enforcement of our environmental laws, both State and Federal. I am proud of the fact that up until yesterday, I believe, Mr. Chairman, this most recent record of \$35 million in civil penalties for violation of the Clean Water Act, that the State of Texas under my Administration held the previous record for civil penalties for violation of that Act.

I wanted to make that clear. I certainly believe that vigorous enforcement is important. But at the same time I want to make sure that our troops are ready for the job that we have asked them to do. I do not believe that we have to make a choice between people and critters. I do not believe this is a zero sum game.

I believe that we can have a military force that is properly trained and at the same time respect the environment in which we all live. I really reject the notion that some people care about the

environment and other people do not. We all live and breathe and drink the water in the environment we have. I do consider myself very concerned about the environment as well.

Mr. Cohen, perhaps you can address this. I believe this proposal is meant to address the complications associated with lengthy and expensive diversionary litigation and the desire to see that the law be clearly expressed so as to avoid the necessity or the likelihood of litigation interpreting just where the restrictions end and where freedom to train our troops begins.

Would you react to that?

Mr. COHEN. Thank you, sir.

I would like to take the chance to answer that and also to try to put in perspective the suggestion that Congress should wait to act until actual adverse decisions have been handed down.

It is certainly true that this ongoing litigation is a tremendous drain on the resources of both the regulatory agencies, particularly as Judge Manson can attest with respect to the enormous wave of critical habitat litigation that is cresting all over the country, and also for DOD. The fear we have and the concern we have is that at the end of this long, lengthy, and expensive process, there could be imposed crippling restrictions on military readiness that actually have relatively little or no environmental benefit to offset them.

Our view is that it is prudent for Congress to act now and that the risk of Congress acting now is negligible because all we are asking Congress to do is codify existing regulatory policies and practices.

It would be one thing if we were come to Congress and say, "Please radically recast the environmental laws on the off-chance that we might lose a case in a few years." But it is quite different to say, "We have ongoing litigation in many areas across the country that challenges existing law and challenges existing regulatory policies of the State, EPA, and other Federal regulators. Please stabilize this situation and act to clarify and confirm what the law is."

Senator CORNYN. I know there have been some suggestions that this is a purely anticipatory action on the part of the Administration but, in fact, as you may know, at Fort Hood in Texas, which has a large range of 200,000 acres over many decades, that large portions of Fort Hood are restricted from training due to a variety of encroachment factors—endangered species, water, air quality concerns, noise levels—all come into play. The net result is three-fourths of Fort Hood, some 150,000 acres has some sort of restriction that impacts the ability of unit commanders to train forces there.

I might just also point out that the GAO report, which I believe is already part of the record, points out on page eight, that in fact current restrictions on training do affect the preparation and the readiness of our special operations forces—the very same forces who just recently liberated Private Jessica Lynch from an Iraqi Hospital.

But do you find, Mr. Cohen, that the military has also had to work around restrictions? Has that had an impact on training and readiness?

Mr. COHEN. Yes, sir, I think all of our commanders who have testified before Congress have affirmed that the cumulative effect of these workarounds have been very serious. It is our desire to stabilize the situation now.

Senator CORNYN. My time has expired, Mr. Chairman.

[An article submitted for the record by Senator Cornyn follows:]

From the Wall Street Journal, March 27, 2003]

#### BIRDS AND WARRIORS

With U.S. troops risking their lives in Iraq, it's a good time to examine rules at home that make it harder for them to prepare to fight. Congress could start by granting the Pentagon's urgent request to change environmental rules and lawsuits that limit military training.

Consider that about 72 percent of Fort Lewis, Washington, is restricted to troops because it is "critical habitat" for the Northern Spotted Owl—though none live on the base. Or that 22,000 acres of California's Fort Irwin are largely unusable because of the Desert Tortoise. Or that 77 percent of Fort Hood in Texas is restricted at some time during the year because of species and cultural artifacts.

The Barry Goldwater range in Arizona must employ four biologists to chase Sonoran pronghorn antelope and close areas if any are found within five kilometers of a target; 30 percent of the Air Force's live ammunition drops have had to be moved. Environmental lawsuits would put 57 percent of California's Camp Pendleton out of use. That's a home of the Marines.

America's troops have just 25 million acres on which to train (less than 1 percent of the nation) but they must look after 300 threatened or endangered species. These restrictions are taking their toll. A General Accounting Office report last year said the situation "limits units' ability to train as they would expect to fight . . ."

It's not as if the military isn't trying. From 1991–2001, the military spent \$48 billion on environmental programs, sometimes to its own detriment. When the loggerhead shrike was listed endangered in 1977, San Clemente Island had 13 birds. Under the Navy's care the population has grown to 160 (70 in the wild), forcing the Navy in turn to reduce the size of two firing ranges—one by 90 percent, the other by 50 percent.

The reforms sought by the Pentagon aren't large, merely common-sense clarifications of law. Several were first proposed by none other than the Clinton Administration, and not one would exempt the military from its environmental obligations.

For example, under the Endangered Species Act environmental groups can get judges to declare swathes of bases "critical habitat" that are off-limits to real training. The military merely wants more flexibility to design species management plans that still allow for human use of the land. The Marine Mammal Act penalizes anyone who "harasses" marine mammals, and all the military wants is a clear, reasonable definition of mammal harassment. (We assume it's more than a lewd comment.) Other changes include clarification of clean-up at live bases, flexibility in the clean air statute and a fix to the Migratory Bird Treaty Act.

Yet from the howls from green groups, you'd think the Pentagon had decided to bomb Yellowstone. The Natural Resources Defense Council and other enviros claim there is no military readiness problem, as if they're qualified to judge. Wouldn't you rather trust the generals who have to prevail against Republican Guard tanks?

Michigan Democrats Carl Levin and John Dingell have fought these changes, with Mr. Dingell lending his familiar voice of moderation by calling the proposals opportunistic and therefore "despicable." Sounds to us like he's afraid he might have to vote on them. The GOP Congress might as well give him the chance to favor the loggerhead shrike over the 7th Cavalry

Senator INHOFE. Senator Cornyn, in my opening statement we talked about "workarounds." Now we are working around the workarounds.

[Laughter.]

Senator INHOFE. Senator Carper, you are recognized for 5 minutes.



**OPENING STATEMENT OF HON. THOMAS R. CARPER,  
U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator CARPER. Thank you, Mr. Chairman. To our witnesses, I missed your opening statements. As you know, we have a number of hearings going on. Senator Cornyn and I were together at another hearing. I slipped out of that one to come over and say hello to you and to hear what is on your minds and maybe to ask a question or two.

Since I have not heard your testimony, I am just going to ask each of you to take 60 seconds and tell me what you would like me to take out of what each of you have to say.

Mr. Cohen?

Mr. COHEN. Basically the message that the Department of Defense would like to leave with you, sir, is that our legislative package is not a sweeping exemption or a sweeping change in the regulatory status quo. It is designed to stabilize and defense existing regulatory policies of all the States and of prior Administrations here at the Federal level in the face of a rising wave of litigation that is seeking to overturn that regulatory policy.

Senator CARPER. Mr. Suarez?

Mr. SUAREZ. Thank you, Senator Carper. The message that we are here to say is that we support the Administration's bill because we believe that EPA retains the authority necessary in order to protect public health and the environment. The proposal that the military has put forward balances their need for readiness while at the same time preserving our ability to take whatever actions are necessary in order to protect the public on or off an operational range and their drinking water sources.

We are comfortable with the changes and we support them.

Senator CARPER. Mr. Manson?

Mr. MANSON. Thank you, Senator. The position of the Department of the Interior is that with respect to the proposal that relates to critical habitat, the proposal codifies a long-standing policy that the Department has had. It is a prudent policy. It is one that provides a true conservation benefit to species. In fact, perhaps it will provide greater conservation benefits than the current critical habitat process does.

Senator CARPER. Having missed the first part of this hearing, I am not sure what concerns have been raised by others. I understand in the brief exchange I had with Senator Boxer that some concerns have been raised.

Let me just ask you. Just characterize for me what you believe some of the concerns are that are not well founded? What are some of the concerns that you think are more understandable that have been expressed here or outside of this hearing?

Mr. COHEN. Speaking for DOD, our view is that a lot of the people who have read our legislation have taken counsel of their fears and think that we are actually trying to achieve far more than we are. They are concerned that our legislation is designed to exempt our closed sites, formerly used defense sites, our contractors, to let us out of cleanup obligations that we may have when a range closes. Those concerns are not well founded. We try to draft, in the first instance, around them. We are continuing to work with EPA and OMB to clarify that the narrow intent of what we are trying

to do is to safeguard our operational ranges where we do test and training and nothing else.

We are not trying to solve all of the world's problems or all of DOD's problems. We are simply focused in this package on our military readiness activities and not the whole scope of what we do and certainly not the scope of what we did at our closed ranges.

I am hopeful that we will be able to address that concern and focus people's attention on what we are trying to do. Reasonable people can differ on what we are actually trying to do. But we do want the debate to be focused on that rather than onsite issues.

The other concern that was expressed was that existing legislation already had waivers and exemptions that we could take advantage of. So why have we not used those? DOD's view is that those are site specific and time limited. Where we can show that there is a systemic problem, or would be a systemic problem if litigation comes out the wrong way, it is inappropriate for us to rely onsite specific, time limited, exemptions when that clearly was not Congress' intent when it enacted them.

Senator CARPER. Thank you. Gentlemen?

Mr. SUAREZ. Senator, as I understand the concerns, it is that EPA will lose its ability to take action where necessary and will essentially exempt the military from their obligations to clean up under our environmental laws.

We have worked very closely with the military and DOD in looking at their proposal, and indeed redrafting it on a number of occasions and proposing even further clarifying language to make clear, as Mr. Cohen has indicated, that what they are asking for is narrowly tailored. In fact, EPA retains the ability to take action where necessary to protect the threat to the public health and the environment.

If there were a message that I want people to understand, it is that EPA is not abandoning its obligations, nor is it allowing DOD a free pass. Rather, we are balancing their interest with our need to protect the public. We think this bill provides that appropriate balance.

Senator CARPER. Mr. Manson?

Mr. MANSON. I think one concern that people have that is not well founded is that somehow habitat will be left unprotected and also that the Fish and Wildlife Service somehow will not be involved in future decisions concerning habitat.

In fact, the process using the Integrated Natural Resources Management Plan is a collaborative process that requires the agreement and the participation of the Fish and Wildlife Service and an INRMP cannot be approved without the agreement of the Fish and Wildlife Service. The Service will continue to be involved. Habitat will continue to be afforded the protections that is necessary for the conservation of species.

Senator CARPER. My time has expired.

Let me just say, if I could, Mr. Chairman, thinking back on some of the jobs that I have had in the past, I was a Naval flight officer and spent about 23 years of my life on active reserve and reserve duty. I have flown to a lot of bases around the world in that job.

As former Governor and chief executive officer of our State, I was privileged to be the commander-in-chief for the Delaware Army and

Air National Guard. I have some experience from that perspective in running our own agency that dealt with natural resources and environmental control. I thought a great deal about protecting our air, our water, and our ground.

In closing, we as the Federal Government expect other people and other businesses around this country to be good standards of the environment. I learned a long time ago as a Navy ROTC midshipman that one of the hallmarks of leadership is leadership by example. It is just important as we go down this road to make sure that we not only preach a good message, but that we also demonstrate by our own example good leadership for others to follow.

Thank you.

Senator INHOFE. Thank you, Senator Carper.

We are going to go to our next panel. But before you do, since you went a minute over, let me get one more minute in here.

You can answer this, Mr. Suarez, for the record. I need to find out what the status of the consent agreement is on the Tar Creek feasibility study. Would you get back with me sometime today or tomorrow on that? I would appreciate it.

[Material to be supplied follows:]

Senator Inhofe. Last, I really felt it is necessary after what Senator Boxer had implied by being partisan in these efforts, in terms of the Marine Mammal Protection Act, the imprints, the RCRA, and Superfund—are these not essentially the same as came forth in the Clinton Administration? Do any of you want to respond to that?

Mr. COHEN. Most of our Marine Mammal Protection Act proposal codifies policies—in one instance a 20-year-old policy of NOAA, and in another instance a policy that was arrived at during the Clinton Administration embodied in regulation in which they also put forward as a proposed change to the Marine Mammal Protection Act itself.

We also try to add to the MMPA a national security waiver. We think that every environmental statute should have one. With respect to the ESA, what our proposal seeks to do is, as Judge Manson has pointed out, to codify a policy that was adopted during the Clinton Administration with respect to INRMPS. With respect to RCRA and CERCLA, what we are trying to do is basically codify the existing regulatory policy of EPA and the States, a policy that they followed not only during the Clinton Administration, but ever since RCRA and CERCLA were enacted.

Senator INHOFE. Do the other of you agree with the statement of Mr. Cohen?

Mr. SUAREZ. Mr. Chairman, I would concur as to the EPA Munitions Policy Rule. This proposal largely serves to codify that policy that has been in place since 1997.

Mr. MANSON. I concur, Mr. Chairman, as to the ESA provision.

Senator INHOFE. Thank you. I appreciate your time. We really did not want to go this long. We will excuse you and ask the second panel to be seated.

We have Frank Gaffey, President and CEO, the Center for Security Policy; Barry Homan, Director, Defense Infrastructure Issues, GAO; Dan Miller, First Assistant Attorney General, Natural Resources and Environment Section, Colorado Department of Law;

Douglas Benevento, Executive Director, Colorado Department of Public Health and Environment; and Jamie Clark, Senior Vice President for Conservation Programs, National Wildlife Federation.

These last two appeared before us yesterday and we appreciate your coming back again today. We have Ingrid Lindemann, Council Member, Aurora, Colorado, National League of cities Advisory Council; and Bonner Cohen, Senior Fellow, Lexington Institute.

Mr. Benevento, I appreciate your being here. The last time you were sitting on this side of the table advising Senator Allard. It is nice to have all of you from Colorado.

What we would like to do is to give you a full 5 minutes for an opening statement. I regret that we cannot do better than that. That is what we will have to live with.

We will start with Frank Gaffney. Mr. Gaffney?

**STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT AND CEO,  
CENTER FOR SECURITY POLICY**

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

I would like to preface my remarks by expressing my personal appreciation and I am sure that of all the men and women in uniform for your extraordinary leadership on issues bearing on their readiness for combat.

I can think of no one who has devoted themselves more tirelessly and more courageously than you have to tackling decisions that may at some point determine whether those who serve have been properly trained. You do so, of course, because you appreciate that the difference can seem inconsequential at the time of the training.

But it can prove determinative—even literally as you said earlier in your opening statement a matter of life and death in combat situations. I think you deserve particular recognition for your efforts to ensure that Atlantic-based U.S. forces continue to be able to be able to and experience as part of their training the closest thing to actual combat conditions: large-scale, live-fire combined arms exercises.

In my judgment, it is nothing less than a travesty that short-sighted political considerations have been allowed to trump long-standing—and abiding—national security requirements, thereby denying the American military future use of its only facility in the Atlantic dedicated to this purpose: the Island of Vieques.

Today as we witness American servicemen and women risking their lives for our safety and security, it is simply unfathomable that we would stint in any way on assuring theirs.

The harrowing experience is being televised hourly from the battlefields of Iraq. The sorts of threats our troops are encountering there, in Afghanistan, and other theaters in the world on terror. The manifest need for adaptability in the face of unexpected forms of energy action all underscore the necessity of affording the maximum latitude to conduct realistic training to those charged with preparing our troops for war.

As you know, Mr. Chairman, I had the privilege of working early in my career for the late Senator Henry M. Jackson of Washington State. In his capacity as Chairman of the Senate Energy and Resources Committee, Scoop was the principle author of and prime

mover behind the National Environmental Protection Act and numerous other legislative initiatives aimed at protecting our habitat.

Like you, Scoop was also committed to the national security of the United States. I believe he would be horrified at the situation that confronts our military today. As a result of environmental legislation, regulations, and as we have been talking about this morning, judicial rulings run amok. In fact, I am confident that were Senator Jackson still with us, he would be joining you in supporting at least the modest redress the Defense Department seeks in the form of the proposed 2003 Readiness and Range Preservation Initiative now before the Congress.

If anything, I would respectfully suggest that far more relief is needed than that called for in these minimalist proposals especially in the time of war. We should return the training ranges and facilities our Government and people have dedicated to the military's use to their fullest necessary utilization.

By failing to do so we are clearly subordinating national security to what is under present and foreseeable circumstances in excessive and currently insupportable regard for the habitats of certain so-called endangered species.

One of our military's finest leaders, Lieutenant General Edward Hanlon, Jr., of the U.S. Marine Corps, spoke for all those in uniform when he testified in May 2001 before the House Armed Services Committee in his capacity at that time as Commanding General of Camp Pendleton. He said:

"Our ability to train effectively is being slowly eroded by encroachment on many fronts. Urbanization, increasing environmental restrictions, and increasing civilian demands for airspace, land, sea space, and radio frequencies threaten the long-term, sustained use of Marine Corps bases and ranges. Encroachment is a serious and growing challenge. Solutions are possible—we must achieve the necessary and right balance between military readiness, encroachment pressures, and stewardship responsibilities."

Mr. Chairman, the 2003 Readiness and Range Preservation Initiative does strike a balance. I fear, frankly, that it favors too much the status quo concerning environmental protection at the expense of military training and the consequent ability of our service personnel to survive and prevail in combat.

We hear a lot of talk about supporting our troops. This really is a test case. I hope that the Congress will, at an absolute minimum, provide the relief envisioned in this legislative initiative. I would urge the members of this committee, however, to give serious consideration as well to further steps that can materially contribute to the realism and utility of our military training exercises and, therefore, to the likelihood that our loved ones in uniform will be able to conduct their missions safely and successfully.

I would be happy to answer any questions.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Mr. Gaffney.

Mr. Holman?

**STATEMENT OF BARRY W. HOLMAN, DIRECTOR, DEFENSE  
INFRASTRUCTURE ISSUES, GENERAL ACCOUNTING OFFICE**

Mr. HOLMAN. Thank you, Mr. Chairman. I am pleased to be here today to discuss the results of our work dealing with encroachment and its impact on military training. My testimony is largely built on the work we completed last year reviewing the effects of encroachment here in the United States. We also completed similar work examining training overseas.

Today I will briefly highlight our findings regarding the impact of encroachment on training range capabilities, DOD's efforts to document the effects of encroachment on readiness and cost, and DOD's progress in dealing with encroachment over all.

Let me say that we have identified numerous examples where encroachment has affected some training range capabilities requiring, as you mentioned earlier, workarounds or adjustments to training events and, in some cases, limited training. The potential problem with workarounds is they lack realism and can lead to practices and tactics that are contrary to those that are used in combat. Military officials, both stateside and abroad, have told us that encroachment at times limits the time that training ranges are available, the types of training that can be conducted, and makes it difficult to train as they intend to fight. Service officials believe that urban and population growth are primarily responsible or root causes for encroachment in the United States and are likely to cause more training range losses in the future. DOD is particularly affected in this regard since growth around many of its installations exceeds the national average.

Despite DOD and service concerns about the effects of encroachment on training, we found last year that DOD readiness reports did not indicate the extent to which encroachment was adversely affecting training, readiness, and cost. In fact, at the time we did our review most readiness reports showed that units had a high state of readiness and they were largely silent on the issue of encroachment.

However, let me add that we do not believe the absence of data in these reports concerning encroachment should be viewed simply as "no data, no problem." Rather, it may suggest insufficient emphasis on fully assessing and reporting on the magnitude of encroachment problems and its effects. Moreover, I should also add that it probably also reflects the very strong can-do attitude of our fine military forces.

While unit readiness reports have typically not focused on problems of encroachment, I want to add that we recently noted where DOD's quarterly readiness reports to the Congress for the period ending in December of last year, did indicate an encroachment problem affecting Air Force flight training. The report noted that training range encroachment combined with environmental concerns were placing increasing pressure on the Air Force's ability to provide effective and realistic training. It went on to state that cancellations were becoming a more common occurrence and may soon adversely impact the quality of training provided.

We have previously reported that improvements in readiness reporting can and should be made to show any shortfalls in training. However, DOD's ability to fully assess the effects of encroachment

on training limitations and their overall impact on training capabilities will be limited without more complete baseline data on training range requirements, capabilities, and limitations.

This certainly will not replace other steps needed to deal with encroachment, but they are important steps to help better define the magnitude of encroachment problems now and provide trend data for future use.

While it is widely recognized that encroachment results in workarounds that increase training costs, these costs are not easily or readily aggregated to measure their full effect. In a January 2003 report on training range issues, the U.S. Special Operations Command noted that the services lacked a reporting system to document the impact of encroachment or track the cost of workarounds to either manpower or funds. It noted the usefulness of such data as an indicator of the level of effort required to meet readiness requirements and in considering alternate workaround solutions.

While DOD's plans for dealing with encroachment are still evolving, we noted that DOD has taken a number of actions in the past year to improve its management framework for dealing with encroachment besides the legislative proposals that are being discussed today.

For example, DOD has issued a range sustainment directive to establish policy and assign responsibilities for sustainment of test and training ranges. It has also issued new guidance on updating and preparing Integrated Natural Resource Management Plans, approving coordination with the Fish and Wildlife Service, and with State agencies.

The Department has also indicated plans to take a more proactive outreach role in working with local governments and other organizations. While DOD has made some progress in addressing individual encroachment issues, more work will be required to improve the data available to fully identify and report on the effects of encroachment and develop a comprehensive plan for dealing with those effects as we recommended in our report last year.

As you may be aware, Mr. Chairman, Section 366 of the Defense Authorization Act for fiscal year 2003 requires DOD to issue a series of yearly reports to the Congress dealing with encroachment issues, beginning with this year and a requirement for GAO to review those reports.

The first of those reports was required to be submitted along with the President's budget for fiscal year 2004. That report was to describe DOD's progress in developing a comprehensive plan to use existing authorities to address training constraints on the use of military lands, marine areas, and air space, in the United States and overseas. To date, those reports have not been issued.

Mr. Chairman, that concludes my statement.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Mr. Holman.

We are honored to have the distinguished chairman of the Senate Armed Services Committee and the most ranking member of

this committee. Senator Warner, would you care to make some comments?

Senator WARNER. You know full well my views on this. I strongly support the efforts being undertaken by the chair. They will also be undertaken in the Armed Services Committee. We will hopefully address this issue in the Senate and get the relief that we need.

Senator INHOFE. Thank you, Senator Warner. It is our intention to do that. I commented in my opening statement that we have had 12 hearings on this in the past. We just end up doing workarounds, and work around workarounds. Nothing gets done. It is my intention—and I am sure yours—that we get something done now. People should be sensitive to the problem that is out there and what is going on in Iraq.

Senator WARNER. Yes, they only need to see our brave young men and women fighting. It should have been handled a long time ago.

Senator INHOFE. It should have been.  
Mr. Miller?

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

Mr. MILLER. Thank you, Mr. Chairman. I am appearing here today on behalf of Attorney General Ken Salazar of Colorado. I am also submitting a detailed written statement on behalf of 15 Attorneys General and a resolution opposing the Department of Defense's proposed amendments to RCRA, CERCLA, and the Clean Air Act that the National Association of Attorneys General passed at its last meeting.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Mr. MILLER. I am only going to address those three statutes in my testimony today.

First, we absolutely support the goal of maintaining the readiness of our Nation's military. There is simply no question that the men and women of the Armed Forces need to have all appropriate training to ensure that they can do their jobs.

At the same time, we strongly support the environmental laws. We recognize that military training activities can adversely affect human health and the environment. We think, as others have testified today, that furthering military readiness and protecting the environment are compatible goals.

The environmental laws, though, are complex and carefully balanced. They should not be amended unless there is a demonstrated problem. This is particularly true given the environmental impact of DOD's activities.

I would say that in considering DOD's proposals, we need to answer three questions. First, are there any real conflicts between RCRA, CERCLA, the Clean Air Act, and military readiness? Second, in the event of a conflict, are the existing statutes sufficiently flexible to resolve it in a manner that preserves military readiness? Third, what exactly do these proposed amendments do?



Regarding the first question, DOD has not identified a single instance in which any of these statutes have adversely impacted readiness. We are not aware of any such instances. EPA Administrator Christine Whitman recently testified that she was not aware of a single training mission anywhere in the country that was being held up because of these laws. Absent any demonstrated conflicts, we do not believe that the proposed amendments are necessary.

Second, if there is a conflict, each of these three statutes allows the President to exempt the Department of Defense from the environmental requirements. DOD has never invoked any of these exemptions for military readiness needs.

The exemptions allow flexibility to ensure readiness in the unlikely event of a conflict, while ensuring accountability in the vast majority of cases where there is no conflict. So again, in our view, there is no need for further legislative action.

As to the third question, DOD has stated that its amendments merely codify EPA's Military Munitions Rule and that they apply only to operating military ranges. We disagree. All the Munitions Rule says is that DOD does not have to get a RCRA permit for using its ranges.

The fired munitions constituents are still subject to RCRA clean-up authority in appropriate cases. The Munitions Rule does not preempt State authority under RCRA and the Munitions Rule does not affect EPA or State authority onsite other than operating ranges.

Unlike the Munitions Rule, DOD's proposed amendments to RCRA and CERCLA amend jurisdictional definitions in both of these statutes. These definitions determine the reach of both EPA and State authority under these laws. So, unlike the Munitions Rule, Section 2019 likely preempts State, EPA, and RCRA authority to address an imminent and substantial endangerment posed by munitions from munitions constituents from an operational range.

Unlike the Munitions Rule, Section 2019 also likely precludes States and EPA from requiring DOD to address munitions-related contamination at former ranges now in private ownership, military sites other than ranges, sites owned by other Federal agencies, and even private defense contractor sites. And, unlike the Munitions Rule, Section 2019 creates a broad exemption from munitions constituents such as perchlorate and TNT.

What is at stake here? DOD estimates that there are 16 million acres of land on closed ranges that are potentially contaminated with unexploited ordnance. Much of this land is privately owned, like the Lowry Bombing Range in Colorado, a 60,000 acre site where the land use is rapidly changing from cattle grazing to schools and subdivisions. DOD's amendments would likely preempt Colorado from regulating the ongoing Federal cleanup of this range.

There are also many sites around the country contaminated with chemical constituents of munitions or explosives. These constituents include perchlorate, TNT, and RDX, and may have toxic or potential carcinogenic effects. Perchlorate has contaminated public water supplies near the Massachusetts Military Reservation, the Aberdeen Proving Grounds in Maryland, and surface and ground-

water at hundreds of government and private defense contractor sites around the country. DOD's amendments would impact State and EPA authority at many of these sites.

The States have responsibly balanced environmental protection and military needs in regulating military facilities for decades. There is simply no basis to preempt their authority to protect the health of their citizens and environment, especially given the availability of the exemptions under current law.

We would urge you to reject DOD's proposed amendments.

Senator INHOFE. Your time has expired, Mr. Miller.

Thank you very much.

Mr. Benevento, thank you for coming back again today for more.

**STATEMENT OF DOUGLAS BENEVENTO, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**

Mr. BENEVENTO. Thank you, sir. My name is Doug Benevento, and I am the Executive Director of the Colorado Department of Public Health and Environment. In that position I am the State's top environmental regulator. I oversee our air, water, solid waste, and hazardous waste program as well as all of our public health programs.

I believe that the suggestions of DOD can be implemented in a fashion that would protect the environment and ensure that the States have the ability they need to oversee cleanups and to dictate cleanups where necessary, and also ensure that the environment can be protected.

Having said that, I have some drafting suggestions with respect to the proposal from DOD that I would like to share with the committee. First, with respect to RCRA, what I would recommend is that instead of the way DOD has drafted it, where they are changing current definitions, to basically write an exemption into RCRA for active and inactive ranges.

As opposed to the operational range concept that DOD has shared, we know what an active range is and we know what an inactive range is. If you exempt those for the time that they have those definitions, I think that would not be harmful to the environmental and it would solve the problem that DOD has identified to us.

With respect to inactive ranges, there may be some controversy surrounding exempting inactive ranges. My understanding is that these are ranges that potentially still could be used in the future and that the military feels that they need to keep available.

Therefore, what I would recommend is that there perhaps be some public process on inactive ranges, where every few years they would have to go and look at inactive ranges to determine if, in fact, they are still necessary, that they remain inactive, they go to active, or if they should go to clean up status.

I would limit the exemption with tight language so that we all understand what we are exempting and what we are not exempting.

I would also have a provision in there for some sort of groundwater monitoring. My understanding is that the concerns that have been raised, the biggest threats are groundwater contamination.

That contamination then migrates offsite. I think where appropriate—and you could really pick out the areas where you feel the threat of groundwater contamination is greatest from constitutions of munitions, there could be some proactive monitoring to ensure that if there was an imminent threat of a release offsite, that could be addressed.

Finally, on these sites it would be helpful if DOD at all times would just maintain good records. It makes the cleanup of the site much cheaper and quicker as it goes to clean up. At the Lowry Bombing Range, which Mr. Miller mentioned, one of the issues that we had to deal with the military on was where are the munitions. We could not quite identify from the records where they were. We had to do a very expensive investigation. It just saves time on the back end if record keeping is good.

With respect to CERCLA, I would just make the same comment to apply the CERCLA waiver to active and inactive ranges. By so doing, I think you could solve many of the problems.

Finally, with respect to the Clean Air Act, this is the one area that I think poses the greatest difficulty for States and for the military to deal with. What you are dealing with are potential offsite releases.

These releases can be mitigated in different ways. One possible consideration for the committee would be just to give an exemption to military readiness activities from the Clean Air Act, and then require offsets on nonmilitary readiness activities in the air shed and other DOD activities in the air shed.

You could also dictate that EPA amend their natural events policy which does exclude certain events from being counted against an area for a NAAQS violation. It also requires certain outreach to the community and certain other mitigation activities.

Obviously all of these do not absolutely solve the problem, I think from the environmental perspective or the State perspective, but I think it brings you very close.

Thank you.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you.

Senator WARNER. Could I just make an observation?

Senator INHOFE. Of course.

Senator WARNER. I think those are constructive thoughts that should be carefully reviewed.

What is the procedure by which you are now operating on to get those views to the Department of Defense? Have you consulted with them?

Mr. BENEVENTO. Yes, sir. I have spoken both with your staff on the Armed Services Committee and Mr. Cohen. We have been trading ideas back and forth. After talking with Mr. Cohen, it is very clear what he is trying to accomplish. I think it can be accomplished with some of the thoughts I have shared with you.

Their language, I think, has been misinterpreted slightly.

Senator WARNER. I think you have answered the question I wanted. We are here to help the Senator and myself.

Are your views consistent with those of the Governor?

Mr. BENEVENTO. Yes.

Senator INHOFE. Thank you, Senator Warner.

Ms. Clark, I also thank you for returning today after yesterday's lengthy meeting.

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

Ms. CLARK. Thank you. Good morning, Mr. Chairman, and members of the committee. I am here this morning to testify on why exempting the Defense Department from key provisions of the Endangered Species Act would be a serious mistake.

Prior to arriving at the National Wildlife Federation in 2001, I served for 13 years at the U.S. Fish and Wildlife Service, with the last four as Director of the Agency. Before my time at the Service, I held a variety of positions with the military, including the Natural and Cultural Resources Program Manager for the national Guard Bureau, and the Fish and Wildlife Administrator for the Department of the Army.

During my tenure at the Fish and Wildlife Service, and in the Defense Department, DOD routinely worked with the wildlife agency experts to comply with environmental laws and conserve imperiled wildlife while achieving military readiness.

This approach of working through compliance issues on an installation-by-installation basis really does work. As DOD themselves have acknowledged, our Armed Forces are as prepared today as they have ever been in their history. Their state of readiness has been achieved without broad sweeping exemptions from environmental laws.

The Defense Department's proposed ESA exemptions suffers from three basic flaws: First, DOD's exemption would eliminate a key tool for conserving endangered species. Their proposal would effectively eliminate the potential for critical habitat designations on defense lands, thus eliminating many of the consultations that have enabled DOD to look before they leap into potentially harmful training exercises.

Second, an exemption from the Endangered Species Act is truly unnecessary. Three provisions of current law already provide the flexibility needed to balance military readiness and species conservation.

Section 7(a)(2) of the Act provides Defense with the opportunity to negotiate locally tailored solutions in consultation with the Service's wildlife experts. Section 4(b)(2) of the Act obliges the Services to—and they do—exclude any area from critical habitat designation if they determine that the benefits of exclusion outweigh the benefits of inclusion in specifying the area.

Contrary to earlier testimony, the flexibility of this provision has not been compromised by any court rulings. Section 7(j) of the Act says an exemption must be granted—and I emphasize must—for an activity if the Secretary of Defense finds an exemption is needed for reasons of national security.

It is really unfortunate, Mr. Chairman, that this debate has relied so heavily on anecdotes in an attempt to show the Defense

agencies have not been able to balance military readiness and conservation objectives.

In a June 2002 report on encroachment, the GAO looked into many of the anecdotes. It found that Defense agencies have never inventoried their training resources, plan for their training needs, or performed any in-depth analysis of civilian encroachment on readiness activities.

Without any real evidence that environmental laws are at fault for any presumed readiness gaps, DOD has no basis for requesting wholesale exemptions from this important statute.

The third reason why enacting Defense's proposed ESA changes would be a huge mistake is because the current approach, developing solutions at the local level rather than relying on broad national exemptions, has really worked. Integrated Natural Resource Management Plans have done well and I do believe can provide a substitute for critical habitat on military lands.

The challenge, however, is for the military and whether they can adhere to specific criteria that would need to be contained in the plan. One, this plan must contribute to the conservation of the species under consideration. Two, it must provide assurances, both financial and administrative, that the conservation management strategies will be implemented. Three, it must provide assurances, scientific assurances, adaptive management requirements, and biological monitoring that the conservation strategies will be effective.

If all of these criteria are met, and an appropriate structured enforcement mechanism for INRMPs are in place, then I believe the Services should exercise their flexibility under the balancing provisions of the Act and exclude those military lands covered by the plan from critical habitat designation.

There has been a lot of talk about INRMPs from a level of generalness. I would recommend to the committee the Department of Defense's Inspector General report and evaluation of integrated plans that was done in October 2002. I think you will find that there is a lot left to be worked out between the Services and the Defense Department about the capability and quality of the plans to date.

With the ongoing war in Iraq and continuing threats of terrorism, no one can dismiss the importance of military readiness. However, there is no justification for Defense to retreat from their environmental stewardship commitments at home. I know there are concerns and even conflicts between training needs and sustainable natural resources conservation.

But Congress should pay close attention to those who are crafting solutions at the installation level, and reject the Pentagon's efforts to undermine these solutions with broad-based exemptions to the Endangered Species Act.

Thank you, Mr. Chairman.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Ms. Clark.

Ms. Lindemann?

**STATEMENT OF INGRID LINDEMANN, COUNCIL MEMBER, AURORA, COLORADO, NATIONAL LEAGUE OF CITIES ADVISORY COUNCIL**

Ms. LINDEMANN. Mr. Chairman. I am a Council Member in Aurora, Colorado. A couple of people have mentioned the Lowry Bombing Range. I wanted to tell you that my drinking water reservoir is surrounded by the Lowry Bombing Range. So we do have some specific concerns.

I also represent the National League of Cities. I am the Advisory Council representative to the Energy, Environment, and Natural Resources Committee for NLC. I have also spent most of my adult life as a military spouse.

I am here today to testify on behalf of NLC and the 18,000 cities and towns across America. We are speaking to the Defense Department's proposed changes in the environmental laws.

The concerns of the Nation's cities and towns are the proposed exemptions from RCRA, Superfund, and the Clean Air Act. I would like to make clear at the outset that the municipal elected officials who comprise the National League of Cities, support effective testing and training of the men and women who serve in our Armed Forces, to ensure that they are the best equipped and best prepared in the world. But we do not believe it is necessary or appropriate to accomplish this goal at the expense of nonmilitary citizens.

NLC's National Municipal Policy calls on Federal facilities to comply with Federal and State environmental and health and safety laws, and to be subject to the enforcement provisions of such statutes. The ramifications of a blanket exemption for military facilities and activities from such laws will be serious and untenable at the local government level.

Again, I can speak from local experience. We have two closed military installations within our city—the former Lowry Air Force Base, and Fitzsimmons Army Medical Center. We have dealt with these issues. In fact, we still have some land on the former Lowry Air Force Base that is not yet cleaned. So I understand the issues.

The Clean Air Act imposes health based air quality standards. While there may be no legal requirements in the amendments to either the State or local governments to seek offsets to the air pollution caused by military activities, the community is still going to be stuck. The air problems are there and the health consequences for our people will be there. The exemptions alone do not do us any good.

The exemptions from RCRA are equally problematical in part of their impact on the appropriate disposal and/or cleanup of hazardous waste. But equally important is the potential impact on sources of drinking water. As I already mentioned to me, my community is really affected.

It is estimated that there are 16 million acres of transferred ranges around the country which are potentially contaminated by unexploded ordnance. We believe that the citizens and municipalities affected by such contamination should not have their health compromised because of an exempted defense installation, nor should they be required to bear the burden of cleanup costs or the costs of finding alternative sources of drinking water.

Many of the things that I was going to say have already been mentioned. I would just like to say that we believe the amendments proposed by the Defense Department are unnecessary. It was stated by Secretary of Defense Paul Wolfowitz that in a vast majority of cases we have demonstrated that we are able both to comply with environmental requirements and conduct necessary military training and testing.

I believe that the communities have always worked with our military. They are very important to us both as to the defense of our country and economically for the communities. I think we should be able to work this out.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Thank you, Ms. Lindemann.

**STATEMENT OF BONNER COHEN, SENIOR FELLOW,  
LEXINGTON INSTITUTE**

Mr. COHEN. Thank you very much, Mr. Chairman. I, too, would like to express my appreciation for your holding this hearing on a matter of great interest and a matter of great seriousness to all of us.

I would ask that my full statement be placed in the record in its entirety.

Senator INHOFE. Without objection, so ordered.

Mr. COHEN. In recent years, primarily as a result of litigation, a host of environmental laws designed to do such noble things as protect endangered species and safeguard marine mammals, have been applied to military installations throughout the United States. There they have come increasingly in conflict with the military's role to train soldier's for their deadly business of battle.

Everyone in this room knows that the military has a unique mission, one that requires the highest state of readiness to prevent the needless loss of young lives. The Department of Defense has come to Capitol Hill with a package of requests. It has done so because it has 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 certain environmental statutes, we can both protect the environment and protect the lives of those who are serving in uniform.

Let me briefly mention two environmental laws that I think exemplify the kinds of problems we are facing. One is the Marine Mammal Protection Act which does not come under the jurisdiction of this committee but which I think underscores the nature of the problem.

The Marine Mammal Protection Act's definition of harassment has been the 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. These are vague standards which have been applied inconsistently and have lead to increased confusion.

Both the Clinton and the Bush Administrations have sought to refine that definition. But unfortunately efforts by the National Marine Fishery Service to solve that problem have not proved adequate.

In 2001, the Navy, the National Marine Fishery Service, and the U.S. Fish and Wildlife Service, developed a definition of harassment which all three agencies could accept. In line with the recommendation put forward by the National Resource Council, it defines harassment as applied to military readiness activities to mean death, injury, and biological significant effects, including disruption of migration, feeding, breeding, and nursing.

Until the law is amended to clarify the definition of harassment, the Navy and the National Marine Fishery Service will be subject to lawsuits on the application of the term. Indeed, several groups have already announced their intention to do so.

As a result, the Navy's low frequency active sonar, a key defense against quiet diesel submarines launched by such states as Iran, North Korea, and China, has been put on hold. Indeed deployment of this vitally important weapons system has been delayed by 6 years.

What is the nature of the environmental problem we are looking at here? Worldwide all activities undertaken by the Department of Defense account for fewer than 10 deaths or injuries of marine mammals—and we are talking mostly about whales—annually, as compared with 4,800 deaths annually resulting from commercial fishing.

I think the Pentagon's request for clarification of this law to apply a biologically sound definition to the word "harassment" is just the kind of thing that can continue to provide for the defense of marine mammals and, at the same time, allow the United States Navy to do the job it has been assigned.

We now turn briefly to the Endangered Species Act. The Department of Defense maintains over 25 million acres of land and 425 installations in the United States to harbor over 300 endangered species. As Secretary Manson pointed out in the first panel, the Department of Defense is, in fact, an exemplary steward of lands under its jurisdiction.

Senator INHOFE. Dr. Cohen, let me interrupt for a moment. Your time has expired but since I am the only one up here, I will begin the questions and ask you to address the Endangered Species Act.

Mr. COHEN. OK, fine. I will pick up right where I left off.

Unfortunately, it is the very superb nature of the stewardship of the Department of Defense that has led to the problems that we are now encountering. Applying the endangered species provisions pertaining to critical habitat on military installation is leading to a wave of litigation that is besetting the military.

You mentioned in your opening remarks—and you repeated that several times during the course of today's hearing—that in attempting to deal with the Endangered Species Act provisions the military has been forced to have workarounds. Workarounds, for instance, to protect the red-cockaded woodpecker in Camp Lejeune, North Carolina, the golden-cheeked warbler in Fort Hood, Texas, and others.



Workarounds in training are one thing. Workarounds in the real world of combat are quite something else. There are no workarounds in Iraq. There are no workarounds in Afghanistan. And there will be no workarounds in future conflicts where American soldiers will be engaged.

The key problem here, Mr. Chairman, is the concept of critical habitat as written under the Endangered Species Act. 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 has been designated, those lands must be used for species recovery.

All of this, I think, Mr. Chairman, is unnecessary because as Secretary Manson and others have pointed out, the existing Integrated Natural Resource Management Plans, as required by the Sikes Act, provide just the kind of protection for endangered species that we think is appropriate.

Indeed, in many respects I think it is far superior to what the Endangered Species Act does simply because it involves far less convoluted regulations and is far more science based and involves a cooperative effort between the Department of Defense, the U.S. Fish and Wildlife Service, and State environmental and wildlife agencies.

Senator INHOFE. Dr. Cohen, we are going to have to cut it off right there. I appreciate your participation. We have questions to ask other members.

Just for the record and so that others know, would you tell us what your background is in the environment and your credentials?

Mr. COHEN. Yes, I am a Senior Fellow at the Lexington Institute in Arlington, Virginia. My Ph.D. is in international relations. I have written extensively over the past 20 years on both defense and environmental related issues. I was privileged to testify before this hearing last summer on this same issue.

Senator INHOFE. Thank you very much, Dr. Cohen.

I will start off with Mr. Gaffney.

Mr. Gaffney, you have heard two of the witnesses state that there is not a problem. What do you think about that?

Mr. GAFFNEY. I am frankly bemused about this, Mr. Chairman. It seems to me that one does not have to go very far into the actual military training regimen to discover that there are any number of problems.

I think my colleague from the GAO has put it as delicately as you can. It may not be adequately documented, but it smacks you in the face as you are talking with the people who actually have to run these training facilities, whether it is the requirement that tracked vehicles, or other vehicles for that matter, stay on roads. Or that people not dig foxholes in large areas. Or that seals approaching the beach or other amphibious forces use only certain channels and only in a line.

These are the sorts of things that are not just workarounds. I believe, as the Defense Department can tell you, can impose negative training on the forces that can be prejudicial to their survival in combat.

To hear Senator Wyden, for example, talk about this thing as being sort of a coming problem, maybe, reminds me of the old story about the guy falling off a 20-story building and being asked at the tenth floor how he is doing. Well, if he gives you an honest answer, he is not doing very well. But he has not hit the ground yet.

So the question here, Mr. Chairman, is: Are you going to apply a common sense approach to this—as I think clearly you are being encouraged to do from your colleague and chairman in the Armed Services Committee. If you are, I think it is clear that relief is needed. The question is: Is this the relief all that is required? Is this all you can get through? I leave that for you to judge.

But it certainly seems to me that at a minimum this sort of redress is in order in light of the real world limitations we are seeing on the training of our troops.

Senator INHOFE. Thank you, Mr. Gaffney.

Let me just share this with you. Ms. Lindemann and many of you from your perspective cannot be aware of this because you have not been exposed to it. But I served as the chairman of the Readiness Committee of the Senate Armed Services Committee for a number of years. We had our hearing yesterday before that Subcommittee.

I can tell you. This is a crisis. Now, if you do not believe that live-fire training is necessary and in your heart you do not think that is really necessary, then No. 1, you probably never served in the military service. No. 2, you have not watched to see the drastic effects of losing our live ranges. Someone mentioned Vieques. Now that is a done deal. We allowed a bunch of terrorists to throw us off of property that we owned so we can no longer train people there.

I mentioned the Ordora Range that four Americans lost their lives. The accident report is very specific when it says they lost their lives because they had inadequate live-fire training. They had inert training. They other training. But they did not have that.

Now, what domino effect that has on all the rest? We are running out of places to train. I have been to Cape Wrath. They are not going to let us stay there for an indefinite period of time. They are already talking about cutting us off. Coppa de Lauden in Southern Sardinia. They have the same problem there. Okinawa.

That is why this is so serious. As I mentioned, this is a life or death situation. I have to get that out and into the record.

Ms. Clark, first of all, even though I disagree with you on some things, I do thank you for coming back for more today. I would like to ask you if you have had somewhat of a Scott Ritter conversion. In your background you ran the Fish and Wildlife Service. At that time you were not a fan of the critical habitat designations.

First of all, I want to attribute to you a quote—and thank you for doing that because it was not long ago that you made this quote. This contradicts some of the other comments that have been made.

You said, “The DOD has been really terrific stewards of the environment.” Do you stand by that statement?

Ms. CLARK. I do.

Senator INHOFE. During the time that you were heading up the Fish and Wildlife Service, I think there were 250 species that were

designated as threatened or endangered under ESA, but had made critical habitat designations of only two; is that correct?

Ms. CLARK. When I left the Agency as Director, there were over 1,200 species listed as either threatened or endangered, Mr. Chairman. I do not remember the number, but only a fraction of those did have critical habitat designated. I would agree with that statement.

Senator INHOFE. Yes, 9 percent of them did.

Ms. CLARK. I do not have the exact numbers. I am sure those facts are in the record. But I would say that a fraction of them had critical habitat designated.

Senator INHOFE. All right. Is your position still the same today in terms of INRMPs as it was when you were in the Fish and Wildlife Service?

Ms. CLARK. Mr. Chairman, if I could, I would try to connect some dots here. There has been an incredible amount of discussion about what I have said or not said, or what the previous Administration did or did not do. So if you will indulge me, I will try to connect dots.

Do I believe that Integrated Natural Resource Management Plans can provide the needs for conservation of listed species? Absolutely. But not all INRMPs are created equally. Again, I would really suggest that the committee look at the Inspector General's own report for the Defense Department that talks about the quality of INRMPs—the coordination between the Department and Defense and the Fish and Wildlife Service and where there is some need for tightening up.

I signed a MOU with Defense during my time as Director that tried to lay out those procedures. I think a lot of the mechanisms are in place to work this out. I am not at all judging that.

There is a lot of conversation about litigation and whether or not critical habitat is good or bad or what the previous Administration said. Is there a lot of frustration surrounding the designation of critical habitat? Absolutely. I worked, as did others in the previous Administration, with then late Senator Chafee when he chaired this committee, to try to find ways to reevaluate and deal with the critical habitat issue.

It hardly matters what you do for species if you do not take care of their habitat. But the issue surrounding critical habitat is one of timing. It is one of substance. It is one of resources. The Fish and Wildlife Service, under my time as Director and even previous to that, made a conscious decision to put more resources into adding species to the list—protecting species that were on the brink of extension rather than doing the habitat.

Senator INHOFE. I appreciate that. I was just getting back to the designations and what had happened during the time that you were there. I think you have answered that question.

Ms. CLARK. OK.

Senator INHOFE. Mr. Benevento, I think we have three people here from Colorado. You all totally agree with each other. It is like this panel up here. You can love each other and disagree.

Mr. Miller says there is no problem. What do you think?

Mr. BENEVENTO. Well, first of all, I think I would rely upon the military to sort of outline the scope of the problem for me. I think

they have done that. I trust their judgment. But I think what is trying to happen here is that before there is a problem, you want to try to resolve it. I think it can be resolved through some careful draftings so that there are limited exemptions for the military to do the training they feel is necessary and still retain State and EPA authority for cleanup once they are no longer using the property.

Senator INHOFE. Ms. Clark, I just want to ask you a question. You made a statement that the readiness is better than it has ever been before. I cannot really agree with that. Our troops our better. They are well trained. But some of the training has been sadly missing in terms of live-fire training and in terms of integrated training as we had on the Island of Vieques. There is no substitute for that. I have yet to find one military expert that would disagree with my statement.

I can tell you that these young people want the very best training. They deserve the very best training. But right now it is not the very best training.

Dr. Cohen, the Marine Mammal Protection Act is not within the purview of this committee but is within the purview of legislation that we are considering from the Senate Armed Services Committee. We are not sure where some of these are going to be marked up.

But yesterday we had Dr. Ketten before us. Do you know who that is?

Mr. COHEN. I know the name.

Senator INHOFE. She is certainly qualified. She made the statement that there is there has been no proof at all of significant harm from the use of sonar. This has been a subject of one of these pieces of legislation. What do you think professionally about that statement?

Mr. COHEN. Well, first of all, she is very highly qualified to make that judgment. It is most unfortunate for the military readiness of this Nation that as a result of the controversy surrounding the protection of the military mammals as a result of all this, this program, as I said earlier, has been delayed for 6 years. These are the kinds of things that I do not think we can allow to continue.

General John Keane, Vice Chief of Staff of the United States Army testified on Capitol Hill recently and pointed out, in referring to the Endangered Act, but it equally applies to the Marine Mammal Protection Act, that the military is facing a train wreck with respect to the issues that we are talking about today. I think the task at hand is to decide whether we are going to prevent that train wreck, or whether we are going to wait until that train wreck happens before we do something.

Senator INHOFE. It is a good story, yes.

Mr. GAFFNEY. Mr. Chairman, may I just make a related point?

Senator INHOFE. Yes, go ahead.

Mr. GAFFNEY. Just on this question of delay, and the whole issue that we have touched on several times in the course of the hearings on litigation, there was a very, I think, illuminating article in the New York Times back on August 28, 2001. I know you will remember this episode because of your keen interest in missile defense.

This reported on an initiative taken by a number of environmental groups to seek through a lawsuit to delay the construction of a missile defense facility in Alaska. Senator Murkowski was here earlier. I know she is familiar with this story.

One of the participants, a plaintiff in the lawsuit was Melanie Dutchen who was described in the New York Times as an Anchorage activist with Greenpeace who said, "Obviously the hope of this litigation is that delay will lead to cancellation." She went on to say, "That is what we always hope for in these suits."

I believe this is sort of an instructive insight into why the Defense Department is concerned, not only about the circumstances that you personally observed, in terms of limitations and impediments to training, but the train wreck that is coming. It is not something that is coming up by accident.

It is coming about, I believe, by people, at least some of whom, have very little interest in the readiness of our military. While they may dress up their current view as support for our troops in Afghanistan and so on, it does come down, I think, to an agenda that is quite hostile, at least in some people's cases, to the military having the tools, the technology, and the training that it needs to have to do the job.

Senator INHOFE. I know that we have 1 minute to go in this room. By unanimous consent we will have to vacate it at that time.

I do have a couple of consent requests. One is that any member be able to include extraneous material, reports, and statements in the record, as well as our witnesses.

[Material to be supplied follows:]

Senator Inhofe. As you have the floor right now, Mr. Gaffney, are you familiar with this sonar issue? Let me just see if anyone on the panel disagrees of my interpretation of it.

We could be put in a position right now, depending on how certain litigation comes out, where our ships that depend on a low frequency sonar to detect silent diesel engines on submarines which are used by Iran, by China, and many of the countries they trade with, where we could in reality have 5,000 American sailors on an aircraft carrier unable to use that sonar to detect the presence of a diesel submarine just because of the harm that all the experts say do not really take place to the whales.

Are any of you familiar with that particular issue?

Mr. GAFFNEY. Mr. Chairman, I am somewhat familiar with it. I think it is important to understand that when we talk about the proliferation of weapons of mass destruction, one of the things that is rarely included in that list is precisely the one you are talking about—the proliferation of diesel submarines. They are very silent, very capable, very stealthy weapons that are now being proliferated by the Russians, by the Chinese, and by others.

They do indeed have the ability, without improvements to our antisubmarine warfare capabilities like the ones you are talking about, to penetrate even the most sophisticated screens we currently have, and get at ships like our aircraft carriers with devastating effect.

Senator INHOFE. Mr. Gaffney and all of our witnesses, I thank you very much. It is 12 o'clock o'clock. We are adjourned.

[Whereupon, at 12 o'clock p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF BENEDICT S. COHEN, DEPUTY GENERAL COUNSEL (ENVIRONMENT AND INSTALLATIONS), U.S. DEPARTMENT OF DEFENSE

#### INTRODUCTION

Mr. Chairman and distinguished members of this committee, I appreciate the opportunity to discuss with you the very important issue of sustaining our test and training capabilities, and the legislative proposal that the Administration has put forward in support of that objective. In these remarks I would like particularly to address some of the comments and criticisms offered concerning these legislative proposals

#### *Addressing Encroachment*

We have only recently begun to realize that a broad array of encroachment pressures at our operational ranges are increasingly constraining our ability to conduct the testing and training that we must do to maintain our technological superiority and combat readiness. Given World events today, we know that our forces and our weaponry must be more diverse and flexible than ever before. Unfortunately, this comes at the same time that our ranges are under escalating demands to sustain the diverse operations required today, and that will be increasingly required in the future.

This current predicament has come about as a cumulative result of a slow but steady process involving many factors. Because external pressures are increasing, the adverse impacts to readiness are growing. Yet future testing and training needs will only further exacerbate these issues, as the speed and range of our weaponry and the number of training scenarios increase in response to real-world situations our forces will face when deployed. We must therefore begin to address these issues in a much more comprehensive and systematic fashion and understand that they will not be resolved overnight, but will require a sustained effort.

#### *Environmental Stewardship*

Before I address our comprehensive strategy, let me first emphasize our position concerning environmental stewardship. Congress has set aside 25 million acres of land some 1.1 percent of the total land area in the United States. These lands were entrusted to the Department of Defense (DoD) to use efficiently and to care for properly. In executing these responsibilities we are committed to more than just compliance with the applicable laws and regulations. We are committed to protecting, preserving, and, when required, restoring, and enhancing the quality of the environment.

- We are investing in pollution prevention technologies to minimize or reduce pollution in the first place. Cleanup is far more costly than prevention.
- We are managing endangered and threatened species, and all of our natural resources, through integrated natural resource planning.
- We are cleaning up contamination from past practices on our installations and are building a whole new program to address unexploded ordnance on our closed, transferring, and transferred ranges.

#### *Balance*

The American people have entrusted these 25 million acres to our care. Yet, in many cases, these lands that were once "in the middle of nowhere" are now surrounded by homes, industrial parks, retail malls, and interstate highways.

On a daily basis our installation and range managers are confronted with a myriad of challenges urban sprawl, noise, air quality, air space, frequency spectrum, endangered species, marine mammals, and unexploded ordnance. Incompatible development outside our fence-lines is changing military flight paths for approaches and take-offs to patterns that are not militarily realistic results that lead to negative training and potential harm to our pilots. With over 300 threatened and endangered species on DoD lands, nearly every major military installation and range has one or more endangered species, and for many species, these DoD lands are often the last refuge. Critical habitat designations for an ever increasing number of threatened or endangered species limit our access to and use of thousands of acres at many of our training and test ranges. The long-term prognosis is for this problem to intensify as new species are continually added to the threatened and endangered list.

Much too often these many encroachment challenges bring about unintended consequences to our readiness mission. This issue of encroachment is not going away. Nor is our responsibility to “train as we fight.”

2003 READINESS AND RANGE PRESERVATION INITIATIVE (RRPI)

*Overview*

DoD’s primary mission is maintaining our Nation’s military readiness, today and into the future. DoD is also fully committed to high-quality environmental stewardship and the protection of natural resources on its lands. However, expanding restrictions on training and test ranges are limiting realistic preparations for combat and therefore our ability to maintain the readiness of America’s military forces.

Last year, the Administration submitted to Congress an eight-provision legislative package, the Readiness and Range Preservation Initiative (RRPI). Congress enacted three of those provisions as part of the National Defense Authorization Act for Fiscal Year 2003. Two of the enacted provisions allow us to cooperate more effectively with local and State governments, as well as private entities, to plan for growth surrounding our training ranges by allowing us to work toward preserving habitat for imperiled species and assuring development and land uses that are compatible with our training and testing activities on our installations.

Under the third provision, Congress provided the Department a regulatory exemption under the Migratory Bird Treaty Act for the incidental taking of migratory birds during military readiness activities. We are grateful to Congress for these provisions, and especially for addressing the serious readiness concerns raised by recent judicial expansion of the prohibitions under the Migratory Bird Treaty Act. I am pleased to inform this committee that as a direct result of your legislation, Air Force B-1 and B-52 bombers, forward deployed to Anderson Air Force Base, Guam, are performing dry run training exercises over the Navy’s Bombing Range at Farallon de Medinilla in the Commonwealth of the Northern Mariana Islands.

Last year, Congress also began consideration of the other five elements of our Readiness and Range Preservation Initiative. These five proposals remain essential to range sustainment and are as important this year as they were last year maybe more so. The five provisions submitted this year reaffirm the principle that military lands, marine areas, and airspace exist to ensure military preparedness, while ensuring that the Department of Defense remains fully committed to its stewardship responsibilities. These five remaining provisions:

- Authorize use of Integrated Natural Resource Management Plans in appropriate circumstances as a substitute for critical habitat designation;
- Reform obsolete and unscientific elements of the Marine Mammal Protection Act, such as the definition of “harassment,” and add a national security exemption to that statute;
- Modestly extend the allowable time for military readiness activities like bed-down of new weapons systems to comply with Clean Air Act; and
- Limit regulation of munitions on operational ranges under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA), if and only if those munitions and their associated constituents remain there, and only while the range remains operational.

Before discussing the specific elements of our proposal, I would like to address some overarching issues. A consistent theme in criticisms of our proposal is that it would bestow a sweeping or blanket exemption for the Defense Department from the Nation’s environmental laws.<sup>1</sup> No element of this allegation is accurate.

<sup>1</sup>See, e.g., The New York Times, March 22, 2003 (“[T]he Defense Department has asked Congress to approve a program that would broadly exempt military bases and some operations from environmental regulation”); statement of Philip Clapp, President, the National Environmental Trust, March 5, 2003 (“The Bush Administration is blatantly exploiting the war to exempt military bases all over the country from environmental laws designed to protect public health”); Julie Cart, Los Angeles Times, “Military Seeks an Exemption of its Own”, March 19, 2003 (“[T]he Pentagon is asking Congress to exempt military installations from environmental laws protecting marine mammals and endangered species and requiring the cleanup of potentially toxic weapons sites”); Eric Pianin, The Washington Post, “Environmental Exemptions Sought” (“[T]he Bush Administration this week asked Congress to exempt the Defense Department from a broad array of environmental laws governing air pollution, toxic waste dumps, endangered species, and marine mammals”); John Stanton, Congress Daily AM, March 6, 2003 (“The Bush Administration’s Defense Department reauthorization proposal includes a raft of exemptions from environmental laws long sought by the Pentagon, including endangered species protections and air quality rules”); Natural Resources Defense Council website, March 12, 2003 (“[t]he Department of Defense (DoD) seeks immunity from five fundamental Federal laws”); CQ Weekly,

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First, our 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 nor the operation of industrial activities, or the construction or demolition of such facilities.” Our initiative thus is not applicable to the Defense Department activities that have traditionally been of greatest concern to state and Federal regulators. It does address only uniquely military activities what DoD does that is unlike any other governmental or private activity. DoD is, and will remain, subject to precisely the same regulatory requirements as the private sector when we perform the same types of activities as the private sector. We seek alternative forms of regulation only for the things we do that have no private-sector analogue: military readiness activities.

Moreover, our initiative largely affects environmental regulations that don’t apply to the private sector or that disproportionately impact DoD:

- Endangered Species Act “critical habitat” designation has limited regulatory consequences on private lands, but can have crippling legal consequences for military bases.
- Under the Marine Mammal Protection Act, the private sector’s Incidental Take Reduction Plans give commercial fisheries the flexibility to take significant numbers of marine mammal each year, but are unavailable to DoD whose critical defense activities are being halted despite far fewer marine mammal deaths or injuries a year.
- The Clean Air Act’s “conformity” requirement applies only to Federal agencies, not the private sector.

Our proposals therefore are of the same nature as the relief Congress afforded us last year under the Migratory Bird Treaty Act, which environmental groups are unable to enforce against private parties but, as a result of a 2000 circuit court decision were able and willing to enforce, in wartime, against vital military readiness activities of the Department of Defense.

Nor does our initiative “exempt” even our readiness activities from the environmental laws; rather, it clarifies and confirms existing regulatory policies that recognize the unique nature of our activities. It codifies and extends EPA’s existing Military Munitions Rule; confirms the prior Administration’s policy on Integrated Natural Resource Management Plans and critical habitat; codifies the prior Administration’s policy on “harassment” under the Marine Mammal Protection Act; ratifies longstanding state and Federal policy concerning regulation under RCRA and CERCLA of our operational ranges; and gives states and DoD temporary flexibility under the Clean Air Act. Our proposals are, again, of the same nature as the relief Congress provided us under the Migratory Bird Treaty Act last year, which codified the prior Administration’s position on DoD’s obligations under the Migratory Bird Treaty Act.

Ironically, the alternative proposed by many of our critics invocation of existing statutory emergency authority would fully exempt DoD from the waived statutory requirements for however long the exemption lasted, a more far-reaching solution than the alternative forms of regulation we propose.

Accordingly, our proposals are neither sweeping nor exemptive; to the contrary, it is our critics who urge us to rely on wholesale, repeated use of emergency exemptions for routine, ongoing readiness activities that could easily be accommodated by minor clarifications and changes to existing law.

#### *Existing emergency authorities*

As noted above, many of our critics state that existing exemptions in the environmental laws and the consultative process in 10 U.S.C. 2014 render the Defense Department’s initiative unnecessary.

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.

- The Marine Mammal Protection Act, like the Migratory Bird Treaty Act the Congress amended last year, has no national security exemption.
- 10 U.S.C.014, which allows a delay of at most 5 days in regulatory actions significantly affecting military readiness, is a valuable insurance policy for certain circumstances, but allows insufficient time to resolve disputes of any complexity. The Marine Corps’ negotiations with the Fish and Wildlife Service over excluding portions of Camp Pendleton from designation as critical habitat took months. More to

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March 8, 2003, “The Pentagon’s Exemption Wish List” (“The Defense Department has asked Congress to exempt military activities from a range of environmental laws”).



the point, Section 2014 merely codifies the inherent ability of cabinet members to consult with each other and appeal to the President. Since it does not address the underlying statutes giving rise to the dispute, it does nothing for readiness in circumstances where the underlying statute itself not an agency's exercise of discretion is the source of the readiness problem. This is particularly relevant to our RRPI proposal because none of the five amendments we propose have been occasioned by the actions of state or Federal regulators. Four of the five proposed amendments (RCRA, CERCLA, MMPA, and ESA), like the MBTA amendment Congress passed last year, were occasioned by private litigants seeking to overturn Federal regulatory policy and compel Federal regulators to impose crippling restrictions on our readiness activities. The fifth, our Clean Air Act amendment, was proposed because DoD and EPA concluded that the Act's "general conformity" provision unnecessarily restricted the flexibility of DoD, state, and Federal regulators to accommodate military readiness activities into applicable air pollution control schemes. Section 2014, therefore, although useful in some circumstances, would be of no use in addressing the critical readiness issues that our five RRPI initiatives address.

- Most of the environmental statutes with emergency exemptions clearly envisage that they will be used in rare circumstances, as a last resort, and only for brief periods.

- Under these statutes, the decision to grant an exemption is vested in the President, under the highest possible standard: "the paramount interest of the United States," a standard understood to involve exceptionally grave threats to national survival. The exemptions are also usually limited to renewable periods of a year (or in some cases as much as 3 years for certain requirements).

- The ESA's section 7(j) exemption process, which differs significantly from typical emergency exemptions, allows the Secretary of Defense to direct the Endangered Species Committee to exempt agency actions in the interest of national security. However, the Endangered Species Committee process has given rise to procedural litigation in the past, potentially limiting its usefulness especially in exigent circumstances. In addition, because it applies only to agency actions rather than to ranges themselves, any exemption secured by the Department would be of limited duration and benefit: because military testing and training evolve continuously, such an exemption would lose its usefulness over time as the nature of DoD actions on the range evolved.

- The exemption authorities do not work well in addressing those degradations in readiness that result from the cumulative, incremental effects of many different regulatory requirements and actions over time (as opposed to a single major action).

- Moreover, readiness is maintained by thousands of discrete test and training activities at hundreds of locations. Many of these are being adversely affected by environmental provisions. Maintaining military readiness through use of emergency exemptions would therefore involve issuing and renewing scores or even hundreds of Presidential certifications annually.

- And although a discrete activity (e.g., a particular carrier battle group exercise) might only rarely rise to the extraordinary level of a "paramount national interest," it is clearly intolerable to allow all activities that do not individually rise to that level to be compromised or ended by overregulation.

- Finally, to allow continued unchecked degradation of readiness until an external event like Pearl Harbor or September 11 caused the President to invoke the exemption would mean that our military forces would go into battle having received degraded training, with weapons that had received degraded testing and evaluation. Only the testing and training that occurred after the emergency exemption was granted would be fully realistic and effective.

The Defense Department believes that it is unacceptable as a matter of public policy for indispensable readiness activities to require repeated invocation of emergency authority particularly when narrow clarifications of the underlying regulatory statutes would enable both essential readiness activities and the protection of the environment to continue. Congress would never tolerate a situation in which another activity vital to the Nation, like the practice of medicine, was only permitted to go forward through the repeated use of emergency exemptions.

That having been said, I should make clear that the Department of Defense is in no way philosophically opposed to the use of national security waivers or exemptions where necessary. We believe that every environmental statute should have a well-crafted exemption, as an insurance policy, though we continue to hope that we will seldom be required to have recourse to them. In this regard, I would like to address the March 7, 2003 Memorandum from Deputy Secretary Wolfowitz to the Secretaries of the Military Departments concerning the process by which the Department will evaluate the use of existing exemptions under Federal environmental laws. As DoD has repeatedly testified, our efforts to address encroachment are

multifaceted, and our RRPI legislative proposals are only one element of them. Other aspects of encroachment will be addressed through collaborative efforts with our state and Federal regulators, such as the drafting of the MBTA regulation mandated by Congress last year. Still others can be addressed through improvements in the internal policies and processes of the Defense Department itself.

The Deputy Secretary's memorandum falls into this last category improvements in our own internal processes. It addresses a critical shortcoming in our ability to efficiently and thoughtfully consider the use of these existing exemption authorities: the absence of an articulated process for developing and considering proposed exemptions. Accordingly, Dr. Wolfowitz directed the military departments to develop procedures to ensure timely evaluation of the full range of relevant considerations. Importantly, the Deputy Secretary required that proposals for exemption include, among other things, specific, quantified evidence of the impact of the regulation proposed for exemption on readiness; an explanation of the reason the readiness activity cannot be modified, relocated, or rescheduled to avoid conflict with the regulation without compromising readiness; and the reasonably practical efforts available to mitigate the environmental consequences of proceeding with the training or testing activity in question. These substantial evidentiary requirements are hardly an invitation for extensive use of exemption authority, and they certainly belie claims that the Defense Department has issued a call to the field to produce candidates for exemptions. As the memorandum states:

"This memorandum is not intended to signal a diminished commitment to the environmental programs that ensure that the natural resources entrusted to our care will remain healthy and available for use by future generations. Any decision to seek a statutory exemption will remain a high hurdle."

The memorandum itself is a direct result of the response to our legislative initiative last year. The most frequently heard comment on our RRPI proposal at that time was that the Defense Department was seeking new legislative flexibility without having explored the flexibility inherent in existing law.<sup>2</sup> Although our review of our proposals has persuaded us that existing emergency exemptions cannot adequately substitute for them, for the reasons I have outlined previously, we did take this criticism to heart. We responded not by seeking a specific test case to provide an easy answer to our critics, but rather by attempting to articulate both a process and criteria to guide our use of these authorities. The memorandum has been in development for almost a year, and was painstakingly reviewed at every level of the Department. I can assure that no one in the Department of Defense will lightly pursue or endorse the use of these extraordinary measures.

#### *Specific Proposals*

This year's proposals do include some clarifications and modifications based on events since last year. Of the five, the Endangered Species Act (ESA) and Clean Air Act provisions are unchanged. Let me address the changed provisions first.

#### *RCRA and CERCLA*

The legislation would codify and confirm the longstanding regulatory policy of EPA and every state concerning regulation of munitions use on operational ranges under RCRA and CERCLA. It would confirm that military munitions are subject to EPA's 1997 Military Munitions Rule while on range, and that cleanup of operational ranges is not required so long as material stays on the range. If such material moves off range, it still must be addressed promptly under existing environmental laws. Moreover, if munitions constituents cause an imminent and substantial endangerment on range, EPA will retain its current authority to address it on range under CERCLA section 106. (Our legislation explicitly reaffirms EPA's section 106 authority.) The legislation similarly does not modify the overlapping protections of the Safe Drinking Water Act, NEPA, and the ESA against environmentally harmful

<sup>2</sup>See, e.g., testimony of the Hon. Jamie Rappaport Clark before the Senate Environment and Public Works Committee Hearing on S. 2225 and the Readiness and Range Preservation Initiative, July 9, 2002 ("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"); Jeffrey Ruch, Public Employees for Environmental Responsibility, C-SPAN interview, January 16, 2003 ("Virtually all these environmental laws have national security exemptions. These national security exemptions allow the Pentagon to suspend the application of environmental laws, if they can articulate a reason. They should actually spend some time using the leeway that's allowed in existing law, before suspending them."); Gordon Lubold, Marine Corps Times, "Endangered Species vs. Military Training" ("National security waivers are the appropriate way for the Pentagon to get the flexibility it needs to do training, he said [quoting Michael Jasny, senior policy analyst with the Natural Resources Defense Council]").

activities at operational military bases. The legislation has no effect whatsoever on DoD's cleanup obligations under RCRA or CERCLA at Formerly Used Defense Sites, closed ranges, ranges that close in the future, or waste management practices involving munitions even on operational ranges (such as so-called OB/OD activities).<sup>3</sup>

The core of our concern is to protect against litigation the longstanding, uniform regulatory policy that (1) use of munitions for testing and training on an operational range is not a waste management activity or the trigger for cleanup requirements, and (2) that the appropriate trigger for DoD to address the environmental consequences of such routine test and training uses involving discharge of munitions is (a) when the range closes, (b) when munitions or their elements migrate or threaten to migrate off-range, or (c) when munitions or their elements create an imminent and substantial endangerment on-range. The legislation clarifies and confirms the applicability of EPA's CERCLA section 106 authority to on-range threats to health or the environment, and likewise clarifies and confirms the applicability of both RCRA and CERCLA to migration of munitions constituents off-range. I should note, however, that in one respect, our RCRA and CERCLA proposals do extend rather than codify existing policy. Under existing law, in the event of off-range migration, DoD could potentially be subject to overlapping or even conflicting clean-up directives secured by different regulators or private parties under RCRA and CERCLA. To avoid this risk, our proposal integrates and rationalizes the applicability of the two statutes to off-range migration by providing that should such migration occur, DoD and EPA will have the opportunity to address it under CERCLA sections 104 and 106, respectively, but that should they fail to do so RCRA authorities will apply, including but not limited to citizen suits under section 7002 and EPA's emergency authority under section 7003. This provision is analogous to 40 C.F.R. 266.202(d) of the Military Munitions Rule, which provides that a round that lands off-range is *not* a solid waste for purposes of RCRA corrective action or emergency authorities "if [it] is promptly rendered safe and/or retrieved," but otherwise is subject to such authorities.

This legislation is needed because of RCRA's broad definition of "solid waste," and because states possess broad authority to adopt more stringent RCRA regulations than EPA (enforceable both by the states and by environmental plaintiffs). EPA therefore has quite limited ability to afford DoD regulatory relief under RCRA. Similarly, the broad statutory definition of "release" under CERCLA may also limit EPA's ability to afford DoD regulatory relief. And the President's site-specific, annually renewable waiver (under a paramount national interest standard in RCRA and a national security standard in CERCLA) is inapt for the reasons discussed above.

Although its environmental impacts are negligible, the effect of this proposal on readiness could be profound. Environmental plaintiffs have filed suit at Fort Richardson, Alaska, alleging violations of CERCLA and Alaska anti-pollution law applicable under RCRA. If successful, plaintiffs could potentially force remediation of the Eagle River Flats impact area and preclude live-fire training at the only mortar and artillery impact area at Fort Richardson and dramatically degrading readiness of the 172d Infantry Brigade, the largest infantry brigade in the Army. If successful, the Fort Richardson litigation could set a precedent fundamentally affecting military training and testing at virtually every test and training range.

Our proposed amendments to RCRA and CERCLA have been slightly revised to make it absolutely unambiguous that they do not affect our cleanup obligations on closed ranges. Last year some misinterpreted our proposal to apply to closed ranges. We included new language to clarify that our proposals have no effect whatsoever on our legal obligations with respect to clean up of closed bases, or of bases that close in the future. If there is a way to make this point even clearer, we would be delighted to do so.<sup>4</sup>

In addition, we have revised a provision in last year's bill designed to ensure that our proposal did not alter EPA's existing protective authority in section 106 of the Superfund law. This year's version is therefore even clearer that, notwithstanding anything in our proposal, EPA retains the authority to take any action necessary

<sup>3</sup>In this context I should mention that for those areas, other than operational ranges, which require action, the Department has established, with representatives from the US Environmental Protection Agency, Federal Land Managers, States, and Tribes, a Munitions Response Committee. The primary goal of the committee is to define a collaborative decisionmaking process that ensures each party's rights and respective responsibilities are respected. This approach will allow coordination and, where appropriate, integration of the applicable statutory and administrative authorities under Federal and state environmental laws. This approach ensures that action will be taken within an agreed upon approach when operational ranges are closed in the future.

<sup>4</sup>In this regard, EPA and DoD have recently developed a further language change designed to underscore this point, which we would be happy to provide to the committee.

to prevent endangerment of public health or the environment in the event such risk arose as a result of use of munitions on an operational range.

*Contractor and Off-Range Liability.* Finally, I'm pleased to inform the committee that EPA and DoD have further changes to suggest to the proposal to address concerns raised by some earlier testimony and comments on our proposals. The language DoD submitted to Congress largely tracks existing exclusions in the Military Munitions Rule, including 40 C.F.R. 266.202(a)(1)(i) and (ii), which provide that munitions used for training military personnel or explosives and munitions emergency response specialists, or for research, development, test, and evaluation (RDT&E) of military munitions, are not solid waste for purposes of RCRA. In the existing Military Munitions Rule, these exclusions are not limited to munitions training or RDT&E activities that occur on operational ranges; in fact, they apply to such activities anywhere they occur, on or off such ranges. Some commentators have suggested that DoD, by codifying these aspects of the Military Munitions Rule, was seeking to exclude itself and its contractors from RCRA regulation for off-range activities.

As I have mentioned, the Military Munitions Rule adopted by EPA under the prior Administration already fully excludes those activities (though not the resulting waste stream generated by them) from RCRA regulation; DoD supported that policy in 1997 and continues to support it today. Nevertheless, our Readiness and Range Preservation Initiative is not intended to codify all the circumstances in which munitions use is properly excluded from RCRA regulation. Rather, it is intended to address one emerging threat to our operational ranges. Accordingly, EPA and DoD have identified two language changes that we believe will set this issue to rest.

First, in section 2019(a)(2)(A) and (B), the two provisions drawn from the Military Munitions Rule's exemption of munitions training and RDT&E, we would support the addition of the words "on an operational range" at the end of each section, thereby clarifying that these provisions, unlike their analogues in the Military Munitions Rule, do not apply to such activities outside operational ranges.<sup>5</sup> Second, the Department submitted as a separate part of our proposed Defense authorization a number of general definitions, including a definition of "operational range." In that proposed definition, it was explicitly stated that inactive operational ranges must be under the jurisdiction, custody, or control of the Department, but this was not explicitly stated for active operational ranges. To address any possible concern that as a result of this definition the Department's RCRA/CERCLA RRPI provision might be read to apply to "active ranges" controlled by our contractors, EPA and DoD would fully support a change that clarified that the requirement of DoD jurisdiction, custody, or control applied to both active and inactive ranges.<sup>6</sup>

DoD is pleased to have been able to address some of the concerns that we have heard concerning this proposal and stands ready to clarify our intent as necessary as Congress continues its consideration of these proposals.

*Perchlorate and RRPI.* I would also like to take the opportunity to address some other concerns about these provisions that in DoD's view do not warrant revision of the legislation. First, some observers have expressed concern that our RRPI legislation could intentionally or unintentionally affect our financial liability or cleanup responsibilities with respect to perchlorate. Nothing in either RRPI or our defense authorization as a whole would affect our financial, cleanup, or operational obligations with respect to perchlorate.

- As discussed above, nothing in our legislative program alters the financial, cleanup, or operational responsibilities of our contractors, or of DoD with respect to our contractors, either regarding perchlorate or any other chemical.

- Nothing in our legislative program alters our financial, cleanup, or operational responsibilities with respect to our closed ranges, Formerly Used Defense Sites, or ranges that may close in the future, either regarding perchlorate or any other chemical.

<sup>5</sup>The new provisions would thus read: "(2) Except as set out in subparagraph (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) on an operational range; (B) are used in research, development, testing, and evaluation of military munitions, weapons, or weapon systems on an operational range;"

<sup>6</sup>The provision would thus read: "The term 'operational range' means a range that is under the jurisdiction, custody, or control of the Secretary concerned and (A) is used for range activities, or (B) is not currently being used for range activities, but that is still considered by the Secretary concerned to be a range and has not been put to a new use that is incompatible with range activities."

- Nothing in our legislative program affects the Safe Drinking Water Act, which provides that EPA “upon receipt of information that a contaminant which is present or is likely to enter a public water system or an underground source of drinking water may present an imminent and substantial endangerment to the health of persons may take such actions as [EPA] may deem necessary to protect the health of such persons,” enforceable by civil penalties of up to \$15,000 a day. 42 U.S.C. 300i(a). EPA used this Safe Drinking Water order authority to impose a cease-fire on the Massachusetts Military Reservation to address groundwater contamination from perchlorate, and nothing in our proposal would alter the events that have played out there. Because this Safe Drinking Water Act authority is not limited to CERCLA “releases” or off-range migration, it clearly empowers EPA to issue orders to address endangerment either on-range or off-range, and to address possible contamination before it migrates off-range.

- DoD is also committed to being proactive in addressing perchlorate. On November 13, 2002 DoD issued a perchlorate assessment policy authorizing assessment “if there is a reasonable basis to suspect both a potential presence of perchlorate and a pathway on installation[s] where it could threaten public health.”

*Delayed Response to Spreading Contamination.* Some commentators have expressed concern that our RRPI proposal would create a legal regime that barred regulators from addressing contamination until it reached the fence lines of our ranges, or that it at least reflects a DoD policy to defer any action until that point. As the above discussion makes clear, EPA’s continuing authority under the Safe Drinking Water Act to prevent likely contamination clearly empowers the Agency to act before contamination leaves DoD ranges. In addition, nothing in our legislative program affects EPA’s authority under Section 106 of CERCLA to “issu[e] such orders as may be necessary to protect public health and welfare and the environment” whenever it “determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.” Such orders are judicially enforceable. Because EPA’s sweeping section 106 authority covers not only actual but “threatened release,” our proposal would therefore clearly enable EPA to address groundwater contamination before the contamination leaves DoD land which is also the objective of DoD’s existing management policies. Section 106 would also clearly cover on-range threats. Finally, States and citizens exercising RCRA authority under our RRPI RCRA provision addressing off-range migration could potentially use that authority to enforce on-range measures necessary to redress the migration where appropriate. Under RRPI, our range fence lines would not become Chinese walls excluding regulatory action either before or after off-range migration occurred. Finally, it is most definitely not DoD policy to defer action on groundwater contamination until it reaches the fence lines of our operational ranges, when it will be far more difficult and expensive to address.

In addition, I should mention the recently completed DoD Directive, “Sustainment of Ranges and Operating Areas”, which was signed by the Deputy Secretary of Defense for immediate implementation on January 10, 2003. This DoDD was developed as part of our overall comprehensive range sustainment strategy.

The Deputy Secretary of Defense tasked the development of this new directive with this guidance:

” The Directive should assign responsibilities for range sustainability and require the Services to issue implementing directives, which specifically focus on long-term sustainability. Further, it should embrace ‘working outside the fence’ as an overall management approach, and emphasize the importance of partnerships with regulators, the public, and land owners.”

In fulfilling these requirements, this Directive provides capstone-level guidance to DoD and the Services on overall policy for test and training range sustainment planning, management, coordination and outreach. As a Capstone, it is intended to serve as a guide in the development or revision of other directives with applicability to range sustainment.

Most importantly, the directive provides that range planning and management will identify range requirements for both training and testing, identify encroachment concerns and other inhibiting factors to the ranges, and develop responsive plans to address conflicts. It also calls for functionally integrated decisionmaking operator, environmental, legal and other installation/range offices or staffs. Coordination and outreach on sustainment issues that include off-range stakeholders is also directed, with a goal of promoting understanding of range management and use decisions and working with outside groups to consider their concerns and work cooperative to address shared concerns.

*Active vs. Inactive Ranges.* Some commentators have criticized the application of our RCRA and CERCLA provisions to both the active and the inactive categories of operational ranges, suggesting that it will motivate DoD to retain ranges that are never used and should be closed as nominally “inactive” ranges to defer cleanup costs. This policy question was addressed in section 266.201 of EPA’s 1997 Military Munitions Rule, which established a three-part test designed to prevent such manipulation: “inactive ranges” must be “still under military control and considered by the military to be potential range area, and [must] not [have] been put to a new use that is incompatible with range activities.” This test is codified in the definition of “operational range” that the Department is proposing, as discussed above.

We believe that this test will appropriately limit DoD’s discretion in characterizing ranges as “inactive” but still “operational,” while not providing DoD with excessive incentives to close inactive ranges. Our range sustainment policy initiative is based on the recognition that DoD will not easily acquire new range lands in the future, even though modern precision munitions and weapons systems, with their longer ranges, require increasing training areas. Existing range lands must therefore be appropriately but not excessively husbanded for future needs. DoD believes that the policy embodied in the Military Munitions Rule and our proposed “operational range” definition strikes the correct balance.

I should also mention that DoD is taking action, in response to congressional direction, to make visible our range inventory. This is being done in two ways. First, in response to requirements in Section 311 of the fiscal year 2002 National Defense Authorization Act, DoD will make publicly available by May 31st of this year an initial inventory of former ranges and other areas which may require a munitions response action. We are now working with EPA, the Federal Land Managers, the States, and affected Tribes to ensure this list is as comprehensive as possible. This list will include Formerly Used Defense Sites, BRAC installations, and also, most important to the discussion today, a list of closed ranges on active installations. And second, in response to the requirements of Section 366 of the fiscal year 2003 National Defense Authorization Act, DoD is developing a list of operational ranges which will include a delineation of active and inactive ranges. Together, these lists will enable an accounting of all areas for which we are concerned about in this discussion.

#### *Marine Mammal Protection Act*

Although I realize this committee is not centrally concerned with the Marine Mammal Protection Act (MMPA), I would like to take a moment to discuss it for purposes of completeness. This year’s MMPA proposal includes some new provisions. This year’s proposal, like last year’s, would amend the term “harassment” in the MMPA, which currently focuses on the mere “potential” to injure or disturb marine mammals.

Our initiative adopts verbatim a reform proposal developed during the prior Administration by the Commerce, Interior, and Defense Departments and applies it to military readiness activities. That proposal espoused a recommendation by the National Research Council (NRC) that the currently overbroad definition of “harassment” of marine mammals which includes “annoyance” or “potential to disturb” be focused on biologically significant effects. As recently as 1999, the National Marine Fisheries Service (NMFS) asserted that under the sweeping language of the existing statutory definition harassment “is presumed to occur when marine mammals react to the generated sounds or visual cues” in other words, whenever a marine mammal notices and reacts to an activity, no matter how transient or benign the reaction. As the NRC study found, “If [this] interpretation of the law for level—harassment (detectable changes in behavior) were applied to shipping 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.”

Under the prior Administration, NMFS subsequently began applying the NRC’s more scientific, effects-based definition. But environmental groups have challenged this regulatory construction as inconsistent with the statute. As you may know, the Navy and the National Oceanic and Atmospheric Administration suffered an important setback last year involving a vital anti-submarine warfare sensor SURTASS LFA, a towed array emitting low-frequency sonar that is critical in detecting ultra-quiet diesel-electric submarines while they are still at a safe distance from our vessels. In the SURTASS LFA litigation environmental groups successfully challenged the new policy as inconsistent with the sweeping statutory standard, putting at risk NMFS’ regulatory policy, clearly substantiating the need to clarify the existing statutory definition of harassment that we identified in our legislative package last year.

Second, this year's language will address new concerns resulting from the District Court's ruling in the SURTASS LFA case, which highlighted a number of structural deficiencies in application of the MMPA to military readiness activities that require legislative change. In addition to ruling against NOAA's regulatory interpretation of "harassment," the Court ruled against NOAA's longstanding application of the MMPA's "small numbers" requirement. The National Research Council has recommended that this provision be deleted as not scientifically based. Elimination of this requirement, which Congress has previously acknowledged is "incapable of quantification," would instead appropriately focus impact determinations on the scientifically based "negligible impacts" standard. In addition, the litigation highlighted the difficulty in identifying a "specific geographical region" for permits applied to military readiness activities. Given the migratory nature of marine mammals, varying biological and bathymetric features in the environment they occupy, and the worldwide nature of naval operations, this requirement is extremely difficult to define as a legal matter. Our proposal would have no effect on NOAA's responsibility to satisfy itself that our activities would have "negligible impacts" a finding that necessarily entails full consideration of the location and timing of our readiness activities. It would, however, prevent critical readiness activities that have been validated by such scientific review from being impeded by technical legal issues of defining "regions".

The last change we are proposing, a national security exemption process, also derives from feedback the Defense Department received from environmental advocates last year after we submitted our proposal, as I discussed above. Although DoD continues to believe that predicating essential military training, testing, and operations on repeated invocations of emergency authority is unacceptable as a matter of public policy, we do believe that every environmental statute should have such authority as an insurance policy. The comments we received last year highlighted the fact that the MMPA does not currently contain such emergency authority, so this year's submission does include a waiver mechanism. Like the Endangered Species Act, our proposal would allow the Secretary of Defense, after conferring with the Secretaries of Commerce or Interior, as appropriate, to waive MMPA provisions for actions or categories of actions when required by national security. This provision is not a substitute for the other clarifications we have proposed to the MMPA, but rather a failsafe mechanism in the event of emergency.

The only substantive changes are those described above. The reason that the text is so much more extensive than last year's version is that last year's version was drafted as a freestanding part of title 10 the Defense Department title rather than an amendment to the text of the MMPA itself. This year, because we were making several changes, we concluded that as a drafting matter we should include our changes in the MMPA itself. That necessitated a lot more language, largely just re-citing existing MMPA language that we are not otherwise modifying.

The environmental impacts of our proposed reforms would be minimal. Although our initiative would exclude transient, biologically insignificant effects from regulation, the MMPA would remain in full effect for biologically significant effects not only death or injury but also disruption of significant activities. The Defense Department could neither harm marine mammals nor disrupt their biologically significant activities without obtaining authorization from FWS or NMFS, as appropriate.

Nor does our initiative depart from the precautionary premise of the MMPA. The Precautionary Principle holds that regulators should proceed conservatively in the face of scientific uncertainty over environmental effects. But our initiative embodies a conservative, science-based approach validated by the National Research Council. By defining as "harassment" any readiness activities that "injure or have the significant potential to injure," or "disturb or are likely to disturb," our initiative includes a margin of safety fully consistent with the Precautionary Principle. The alternative is the existing grossly overbroad, unscientific definition of harassment, which sweeps in any activity having the "potential to disturb." As the National Research Council found, such sweeping overbreadth is unscientific and not mandated by the Precautionary Principle.

Enforcement, mitigation, and monitoring, with exactly the same degree of transparency, will continue unchanged for naval activities likely to disturb biologically significant activities. Indeed, during the prior Administration's development of our proposed language, both the Interior Department and the Justice Department expressed the view that the vagueness of the existing definition of harassment was making it difficult to enforce, and that the proposed language would facilitate prosecution of violations. The current enforcement, mitigation and monitoring affected by our initiative would be that directed toward biologically insignificant effects i.e., that which by definition does not contribute to marine mammal welfare. Nor will our initiative engender more debate: it will merely shift debate to where it should

be, over biologically significant activities not over the nebulous “potential to disturb” standard rejected by the prior Administration, NMFS, and the National Research Council.

The Defense Department already exercises extraordinary care in its maritime programs: all DoD activities worldwide result in fewer than 10 deaths or injuries annually (as opposed to 4800 deaths annually from commercial fishing activities). And DoD currently funds much of the most significant research on marine mammals, and will continue this research in future.

Although the environmental effects of our MMPA reforms will be negligible, their readiness implications are profound. Application of the current hair-trigger definition of “harassment” has profoundly affected both vital R&D efforts and training. Navy operations are expeditionary in nature, which means world events often require planning exercises on short notice. To date, the Navy has been able to avoid the delay and burden of applying for a take permit only by curtailing and/or dumbing down training and research/testing. For 6 years, the Navy has been working on research to develop a suite of new sensors and tactics (the Littoral Advanced Warfare Development Program, or LWAD) to reduce the threat to the fleet posed by ultraquiet diesel submarines operating in the littorals and shallow seas like the Persian Gulf, the Straits of Hormuz, the South China Sea, and the Taiwan Strait. These submarines are widely distributed in the world’s navies, including “Axis of Evil” countries such as Iran and North Korea and potentially hostile great powers. In the 6 years that the program has operated, over 75 percent of the tests have been impacted by environmental considerations. In the last 3 years, 9 of 10 tests have been affected. One was canceled entirely, and 17 different projects have been scaled back.

#### *Endangered Species Act*

Our Endangered Species Act provision is unchanged from last year. The legislation would confirm the prior Administration’s decision that an Integrated Natural Resources Management Plan (INRMP) may in appropriate circumstances obviate the need to designate critical habitat on military installations. These plans for conserving natural resources on military property, required by the Sikes Act, are developed in cooperation with state wildlife agencies, the U.S. Fish and Wildlife Service, and the public. In most cases they offer comparable or better protection for the species because they consider the base’s environment holistically, rather than using a species-by-species analysis. The prior Administration’s decision that INRMPs may adequately provide for appropriate endangered species habitat management is being challenged in court by environmental groups, who cite Ninth Circuit caselaw suggesting that other habitat management programs provided an insufficient basis for the Fish and Wildlife Service to avoid designating Critical Habitat. These groups claim that no INRMP, no matter how protective, can ever substitute for critical habitat designation. This legislation would confirm and insulate the Fish and Wildlife Service’s policy from such challenges.

Both the prior and current Administrations have affirmed the use of INRMPs as a basis for possible exclusion from critical habitat. Such plans are required to provide for fish and wildlife management, land management, forest management, and fish and wildlife-oriented recreation; fish and wildlife habitat enhancement; wetland protection, enhancement, and restoration; establishment of specific natural resource management goals, objectives, and timeframes; and enforcement of natural resource laws and regulations. And unlike the process for designation of critical habitat, INRMPs assure a role for state regulators. Furthermore, INRMPs must be reviewed by the parties on a regular basis, but not less than every 5 years, providing a continuing opportunity for FWS input.

By contrast, in 1999, the Fish and Wildlife Service stated in a Notice of Proposed Rulemaking that “we have long believed that, in most circumstances, the designation of ‘official’ critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources’ . [W]e have long believed that separate protection of critical habitat is duplicative for most species.”

Our provision does not automatically eliminate critical habitat designation, precisely because under the Sikes Act, the statute giving rise to INRMPs, the Fish & Wildlife Service is given approval authority over those elements of the INRMP under its jurisdiction. This authority guarantees the Fish & Wildlife Service the authority to make a case-by-case determination concerning the adequacy of our INRMPs as a substitute for critical habitat designation. And if the Fish & Wildlife Service does not approve the INRMP, our provision will not apply to protect the base from critical habitat designation.

Our legislation explicitly requires that the Defense Department continue to consult with the Fish and Wildlife Service and the National Marine Fisheries Service



under Section 7 of the Endangered Species Act (ESA); the other provisions of the ESA, as well as other environmental statutes such as the National Environmental Policy Act, would continue to apply, as well.

The Defense Department's proposal has vital implications for readiness. Absent this policy, courts, based on complaints filed by environmental litigants, compelled the Fish and Wildlife Service to re-evaluate "not prudent" findings for many critical habitat determinations, and as a result FWS proposed to designate over 50 percent of the 12,000-acre Marine Corps Air Station (MCAS) Miramar and over 56 percent of the 125,000-acre Marine Corps Base (MCB) Camp Pendleton. Prior to adoption of this policy, 72 percent of Fort Lewis and 40 percent of the Chocolate Mountains Aerial Gunnery Range were designated as critical habitat for various species, and analogous habitat restrictions were imposed on 33 percent of Fort Hood. These are vital installations.

Unlike Sikes Act INRMPs, critical habitat designation can impose rigid limitations on military use of bases, denying commanders the flexibility to manage their lands for the benefit of both readiness and endangered species.

#### *Clean Air Act General Conformity Amendment*

Our Clean Air Act amendment is unchanged since last year. The legislation would provide more flexibility for the Defense Department in ensuring that emissions from its military training and testing are consistent with State Implementation Plans under the Clean Air Act by allowing DoD and the states a slightly longer period to accommodate or offset emissions from military readiness activities.

The Clean Air Act's "general conformity" requirement, applicable only to Federal agencies, has repeatedly threatened deployment of new weapons systems and base closure/realignment despite the fact that relatively minor levels of emissions were involved.

- The planned realignment of F-14s from NAS Miramar to NAS Lemoore in California would only have been possible because of the fortuity that neighboring Castle Air Force Base in the same airshed had closed, thereby creating offsets.
- The same fortuity enabled the homebasing of new F/A-18 E/Fs at NAS Lemoore.
- The realignment of F/A-18 C/Ds from Cecil Field, Florida, to NAS Oceana in Virginia was made possible only by the fortuity that Virginia was in the midst of revising its Implementation Plan and was able to accommodate the new emissions. The Hampton Roads area in which Oceana is located will likely impose more stringent limits on ozone in the future, thus reducing the state's flexibility.

As these near-misses demonstrate, under the existing requirement there is limited flexibility to accommodate readiness needs, and DoD is barred from even beginning to take readiness actions until the requirement is satisfied.

Our proposal does not exempt DoD from conforming to applicable requirements; it merely allows DoD more time a 3-year period to find offsetting reductions. And this period does not apply to "any activities," but rather to the narrow category of military readiness activities, which characteristically generate relatively small amounts of emissions typically less than 0.5 percent of total emissions in air regions.

The Clean Air Act permits the President to issue renewable 1-year waivers for individual Federal sources upon a paramount national interest finding, or to issue renewable 3-year regulations waiving the Act's requirements for weaponry, aircraft, vehicles, or other uniquely military equipment upon a paramount national interest finding. Use of such time-limited authorities in the context of activities that are (a) ongoing indefinitely, and (b) largely cumulative in effect would be difficult under a paramount interest standard, and would require needless revisiting of the issue annually or triennially.

This provision is vitally needed to protect readiness. The more efficient and powerful engines that are being designed and built for virtually all new weapons systems will burn hotter and therefore emit more NO<sub>x</sub> than the legacy systems they are replacing, even though they will also typically emit lower levels of VOCs and CO. Without greater flexibility, the conformity requirement could be a significant obstacle to basing military aircraft in any Southern California location, as well as a potentially serious factor for the siting of the Joint Strike Fighter and the Marine Corps' Advanced Amphibious Assault Vehicle.

#### *Quantification of Encroachment*

The final issue that I wish to raise as a part of today's hearing concerns our ability to better quantify how encroachment affects our test and training mission. This has been an on-going criticism of our legislative effort as well as our broader range sustainment strategy a concern raised as part of GAO's report on encroachment

dated April 25, 2002.<sup>7</sup> Because of these concerns and as part of the National Defense Authorization Act for Fiscal Year 2003, Congress directed the Secretary of Defense to develop a plan to address training constraints caused by limitations on use of our land, sea, and air resources.

As part of this requirement, DoD has recognized the need for better supporting data to substantiate our requests for encroachment relief. In response, the Under Secretary for Personnel and Readiness, has recently asked the Secretary of each military department to develop and submit specific information, to include:

- An assessment of the current and future training requirements of their respective Service;
- A report on implementation of a Service range inventory system;
- An evaluation of the adequacy of current Service resources to meet both current and future training requirements in the United States and overseas;
- A comprehensive plan to address operational constraints resulting in adverse training impacts caused by limitations on the use of, or access to, land, water, air and spectrum that are available or needed in the United States and overseas for training; and
- A report on, or specific plans for, designation of an office within each of the military departments that will have lead responsibility for overseeing implementation of the plan.

#### *Conclusion*

In closing Mr. Chairman, let me emphasize that modern warfare is a “come as you are” affair. There is no time to get ready. We must be prepared to defend our country wherever and whenever necessary. While we want to train as we fight, in reality our soldiers, sailors, airmen and Marines fight as they train. The consequences for them, and therefore for all of us, could not be more momentous.

DoD is committed to sustaining U.S. test and training capabilities in a manner that fully satisfies that military readiness mission while also continuing to provide exemplary stewardship of the lands and natural resources in our trust.

Mr. Chairmen, we sincerely appreciate your support on these important readiness issues. I look forward to working with you on our Readiness and Range Preservation legislation.

Thank you.

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#### RESPONSES OF BENEDICT S. COHEN TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

*Question 1.* For the record, about how much time would you say you have spent working on this issue?

Response. I would estimate that I have spent hundreds, if not thousands, of hours on the issues presented by the RRPI. However, it has not been only my time that has been involved in working on this important initiative, but also the time of an almost inestimable number of personnel, military and civilian, throughout the Department of Defense and the military departments. Here in Washington, numerous DOD offices have people working on RRPI, as do each of the military departments. Our people attend frequent intra-DOD working group meetings, and work in the interagency process to address the concerns of other agencies within the Federal family regarding our RRPI proposals. They have met frequently with members and staff on Capitol Hill, as well as providing information and engaging in outreach efforts with State, local and tribal representatives, nongovernmental organizations, and private citizens. In developing the proposals, we have sought information from the military operators to ensure that the proposals met their readiness needs. In many of these cases, requests for information, often generated in response to questions from congressional members and staff, must be pushed down to the individual installations for response. I could only guess at the time dedicated to this proposal by the individual installations.

*Question 2.* Please describe for me the intent of the DOD here. All sorts of nefarious intents have been alleged. Is that true?

Response. Our intent is to sustain military test and training activities in a way that ensures our military can provide overwhelming force when engaged in combat actions. We also accept that a vital part of this sustainment is protection of human

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<sup>7</sup>Although some commentators have mischaracterized the GAO report as stating that encroachment has had no impact on military readiness, the report itself explicitly states that encroachment is having demonstrable adverse effects on readiness.

health and the environment. We believe we can do both—effectively for our military and our natural resources and effectively for the taxpayer.

*Question 3.* Please detail your interactions with stakeholders on this issue.

Response. The Services and DOD have worked with a wide range stakeholders with a goal to ensure that the RRPI proposal effectively balances the imperative of military readiness with our obligations for environmental protection. In order to achieve this goal, DOD has entered into dialog with a variety of stakeholders to identify mutual issues and workable solutions.

With respect to the specific proposals of the RRPI, DOD has had numerous meetings with each Federal agency with special expertise or responsibility for the resource implicated by the RRPI. We have made myriad modifications to our proposals in order to accommodate their important and legitimate interests. We significantly modified our proposal regarding Clean Air Act conformity requirements in order to address concerns raised by the Environmental Protection Agency and to ensure that State Clean Air Act implementation programs are not jeopardized by DOD emissions resulting from our military readiness activities. We also modified our RRPI proposal as it relates to RCRA and CERCLA based on EPA and other stakeholder inputs. We drafted our provisions related to the Endangered Species Act and the Marine Mammal Protection Act in close consultation with the Department of the Interior and the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. The results were proposals that facilitate important readiness considerations and are supported by those agencies.

We have reached out to the States. We have spoken to various organizations that represent State interests, to include the Environmental Council of States (ECOS) and the Association of State and Territorial Solid Waste Management Officials (ATSWMO). In addition, we have had discussions with representatives of individual States that have expressed concern over the RRPI proposal, to include discussions with officials in Colorado, Florida, Texas, Alaska, California, and many others. Also, as I noted in my testimony, for “other than operational ranges” that require clean-up, the Department has established a Munitions Response Committee that includes partners from the U.S. Environmental Protection Agency, Federal Land Managers, States, and Tribes. Although this committee deals with other than operational ranges, we have discussed our RRPI proposal with members of the committee, and have made modifications based on input to ensure that it is clear that our RRPI proposals only apply to operational ranges, not those that have closed, transferred, or are transferring.

DOD is partnering with land trust organizations and State and local governments to find ways to create buffer zones and habitat critical to threatened and endangered species adjoining our test and training ranges. DOD has conducted a national workshop with these organizations and is in the process of implementing the two land provisions that were passed as part of RRPI by last year’s Congress.

As a member of the “Pulling Together Initiative,” DOD has pooled resources with other conservation partners to launch coordinated efforts to control invasive weeds that damage habitat and increase erosion and fire hazards.

The U.S. Navy has joint environmental research initiatives with the Woods Hole Oceanographic Institute, Scripps Institution of Oceanography, Cornell University, the University of Washington, the University of Hawaii, and Oregon State University to address maritime and marine mammal issues related to Navy testing and training operations.

DOD continues to work with local communities on current clean-up initiatives underway at military sites across the U.S. DOD intends to meet its obligations to clean up contamination from past practices and continue our strong pollution prevention and environmental compliance programs. In this fiscal year alone, the environmental budget for DOD will be \$4 billion.

DOD also meets on a regular basis with representatives from the national environmental groups at settings like the “Brown Bag” lunch discussions sponsored by the Endangered Species Coalition and the Sierra Club.

*Question 4.* Have you been working on refining the language? Please be sure to submit for the record the latest versions, complete with changes.

Response. Yes. As noted in the answer to the previous question, we have made numerous revisions to the language in order to address stakeholder issues. EPA and DOD have jointly completely revised our RCRA and CERCLA provisions to delete provisions addressing any issues beyond our key concern, test and training on operational ranges (attached). This revised language makes it unmistakably clear that our proposal has no effect whatsoever on; closed ranges, or ranges that close in the future; DOD’s contractors’ activities, or DOD’s financial obligations to its contractors or any other third parties; DOD’s non-readiness activities, either on-range or off-

range (including disposal of munitions by such methods as open burn/open detonation, burial, or landfilling); or State and EPA regulatory authority over DOD activities (including military readiness activities) under the Safe Drinking Water Act.

Moreover, DOD remains engaged in extensive dialog with numerous State regulators over the intent underlying our proposals and future changes that might be helpful in clarifying that intent. We will keep the committee apprised of the results of these continuing discussions.

*Question 5.* You have been open to constructive criticism, haven't you?

Response. I believe DOD's aggressive outreach efforts and our demonstrated willingness to adjust our proposal based on stakeholder input places our openness to constructive criticism beyond question.

*Question 6.* What, if any, plans do you have to continue this work?

Response. We believe the focused proposals we have made in the RRPI are an important step in our effort to protect military ranges and readiness activities from encroachment. Even if the RRPI becomes law, more work remains to be done. DOD is looking beyond just legislative fixes for encroachment issues. We are in the process of evaluating all of the circumstances that create problems for our test and training ranges. Some of these may be solved with administrative or regulatory changes. We are working with the military services, other Federal agencies, tribes, States and local communities to find ways to better balance military, community and environmental needs. DOD is also developing a suite of internal policy and procedure adjustments, the capstone of which is a new DOD Directive recently signed by the Deputy Secretary of Defense to ensure long-range, sustainable approaches to range management. In addition, we intend to strengthen and empower management structures to deal with range issues. We also have taken a pro-active role to protect bases from urbanization effects by working with local planning and zoning organizations and other stakeholders. Finally, DOD is also planning to address the long-term sustainment process by reaching out to and involving other stakeholders. We must improve the understanding of readiness needs among affected groups, such as State and local governments and non-government organizations. We must establish dialog and form partnerships with these groups to reach our common goals. This will enable us to take a proactive stance against encroachment and protect our bases into the future.

*Question 7.* Please describe what military statutes provide in the way of emergency exemptions to these laws? Isn't there one that provides 5 days of relief? How effective would that be?

Response. Seven environmental laws authorize the President to exempt Federal agencies from certain legal requirements if he determines it to be in the "paramount interest of the United States." (Clean Water Act; Resource Conservation and Recovery Act; Clean Air Act; Noise Control Act; Safe Drinking Water Act; Marine Protection, Research, and Sanctuaries Act; Coastal Zone Management Act) Two environmental laws allow the President to exempt DOD from certain requirements if he determines that doing so is "necessary for reasons of national security." (Comprehensive Environmental Response, Compensation, and Liability Act; Toxic Substances Control Act). The Endangered Species Act authorizes the Secretary of Defense to direct the Endangered Species Committee to exempt DOD actions that are before the Committee from certain requirements when he finds that the exemption is "necessary for reasons of national security." Other environmental statutes, including most notably the Marine Mammal Protection Act and the National Environmental Policy Act, contain no national security exemption, even for wartime.

10 USC 2014, to which you refer, allows a delay of at most 5 days in regulatory actions significantly affecting military readiness. I detailed in my testimony why, although useful, neither this provision, nor those contained in environmental statutes, are a substitute for the focused proposals of the RRPI. We do not believe it is good public policy to use exemptions for what is an ongoing day-to-day issue for our military trainers. We need to fix the root cause of the issue.

*Question 8.* Isn't the point here that you need these changes for routine operations to prepare for the emergency situations BEFORE the emergency situations present themselves?

Response. That is exactly right. To allow routine test and training activities to be degraded in quality until an emergency occurs ensures that the troops we dispatch to deal with the emergency do so on the basis of compromised, suboptimal training. Only the follow-on forces we send after them will have the benefit of such an emergency exemption; for them, it will come too late.

Moreover, I do want to clarify the word "routine." Our proposals would cover only military readiness activities, many of which may occur on a routine basis. But the RRPI does not cover all day-to-day activities engaged in by the military. Our pro-

posal only applies to a narrow category of activities, i.e., “military readiness activities.” Military readiness activities do not include activities on closed ranges or ranges that close in the future. Nor are the routine installation operating support functions (e.g., water treatment facilities, motor pools, industrial activities, construction or demolition) included in the definition of “military readiness activities.” As I stated in my testimony, our initiative is not applicable to the Defense Department activities that have traditionally been of greatest concern to State and Federal regulators. It does address only uniquely military activities-what DOD does that is unlike any other governmental or private activity.

*Question 9.* Governor Whitman has testified that, “We have been working very closely with the Department of Defense, and I don’t believe that there is a training mission anywhere in the country that is being held up or not taking place because of an environmental protection regulation,” and “[A]t this point in time I am not aware of any particular area where environmental protection regulations are preventing desired training.”

Why do you believe that the environmental legislation proposed by the Department of Defense should be enacted when you also apparently believe there is no instance where it is needed?

I want to be clear that as Chairman of the Environment and Public Works Committee and as a father of four and a grandfather of eleven, I am quite mindful of our nation’s future and want to continue the improvement in the health of our environment, which EPA statistics show.

Response. DOD faces ever increasing challenges from the cumulative effect of urbanization and the increasing application of environmental restrictions on military readiness activities. Although DOD has so far been able to find “work-arounds” to most restrictions, availability and fidelity of training have suffered. Our flexibility to continue to do these “work-arounds” is quickly diminishing. For example, our young men and women often must be sent farther and farther from their home station to complete training because they cannot accomplish training at their home station due to environmental restrictions. As you pointed out in a previous question, our intent is to plan ahead, to be prepared before an emergency presents itself.

Lawsuits from private entities currently underway do have the ability to dramatically affect our ability to continue training and we want to ensure that those types of actions do not stop our military readiness activities.

Because external pressures are increasing, the adverse impacts to readiness are growing. Yet future testing and training needs will, only further exacerbate these issues, as the speed and range of our weaponry and the number of training scenarios increase in response to real-world situations our forces will face when deployed. We must therefore begin to address these issues in a much more comprehensive and systematic fashion and understand that they will not be resolved overnight, but will require a sustained effort.

*Question 10.* Will human health and the environment be fully protected under this legislative proposal?

Response. Yes. Each of our proposals has been designed to ensure that adverse impacts will be minimal. As we have often pointed out, our proposals are not blanket exemptions from environmental law. Rather, they are narrow and targeted. They apply only to military readiness activities, preserve regulatory ability to take protective action when human health or the environment is endangered, and do not eliminate DOD’s current obligations for environmental compliance or cleanup.

*Question 11.* EPA has worked closely with DOD on these proposals. Are you absolutely convinced that these proposals are necessary to fully accommodate America’s military readiness?

Response. Yes.

*Question 12.* What authorities will EPA have to ensure that the environment is clean under Superfund?

Response. EPA, the States, and citizens reserve their current ability to enforce compliance/cleanup under CWA and the SDWA on operational ranges to protect the health of the public. RPPI does not affect that. Current legal requirements and obligations under CERCLA/RCRA/CWA and the SDWA are maintained for all contaminants that migrate off operational ranges. If DOD does not preclude or address the migration, the EPA, the States, and citizens retain their current rights to enforce compliance/cleanup to also protect the health of the public in this case.

*Question 13.* What authorities will EPA have to ensure that the environment is clean under the Resource Conservation and Recovery Act—RCRA?

Response. EPA, the States, and citizens reserve their current ability to enforce compliance/cleanup under CWA and the SDWA on operational ranges to protect the health of the public. RPPI does not affect that. Current legal requirements and obli-

gations under CERCLA/RCRA/CWA and the SDWA are maintained for all contaminants that migrate off operational ranges. If DOD does not preclude or address the migration, the EPA, the States, and citizens retain their current rights to enforce compliance/cleanup to protect the health of the public in this case.

*Question 14.* As a former State legislator I want to assure you that I am quite cognizant of States' rights. What is the status of States' rights under this proposal? Do States maintain protections under this proposal? What, if any, rights do States lose under this proposal?

Response. States will maintain protections under each element of the RRPI, and in crafting the RRPI the Department of Defense was careful to minimize the impacts the proposal would have on a State's rights to enforce environmental requirements. The RCRA/CERCLA provision is a codification of current EPA and State policy concerning regulation of munitions used on operational ranges. It simply confirms that military munitions are subject to EPA's 1997 Military Munitions Rule, and that the use of munitions for testing and training is not, by itself, a trigger for cleanup requirements on operational ranges, unless contamination moves off range. The provision does not apply to closed ranges, and it also preserves EPA and State rights to respond to cases of imminent endangerment under RCRA and CERCLA, and to protect sources of drinking water under the Safe Drinking Water Act.

Under our proposal for the Clean Air Act, our provision serves only to give military readiness activities a modest extension of time to conform to State Implementation Plans. It does not exempt our activities from compliance, and it ensures that States are not penalized during the time DOD is finding offsets for increased emissions from readiness activities.

Our proposal under the Endangered Species Act does not affect the current requirement that Integrated Natural Resources Management Plans must be prepared in cooperation with the Secretary of the Interior and State fish and wildlife agencies and be approved by both.

*Question 15.* I am also a former Mayor. What is the status of cities' rights under this proposal? Do cities maintain protections under this proposal? What, if any, rights do cities lose under this proposal?

Response. As with States, cities' protections and rights are maintained by this proposal. As we've noted previously, the RRPI does not exempt DOD activities from any provision of environmental law.

*Question 16.* Will States lose any tools available to them for cleanup?

Response. No. DOD believes that under existing law, military testing and training on operational ranges is neither a waste management activity under RCRA or a release under CERCLA. Our proposals confirm this interpretation. Therefore, neither EPA, nor the States, nor citizens will lose any tools for cleanup that are available to them now.

*Question 17.* Who is authorized to clean up sites when there is a threat of "imminent and substantial endangerment"—States or the Federal Government or both?

Response. The Federal Government and the States have environmental laws that apply to imminent and substantial endangerment of human health or the environment.

*Question 18.* I know Senator McCain has concerns that there may be a loss of funding for cleanup if these legislative proposals are enacted. Is there any truth to that? Will EPA change its allocations of funds if these proposals are enacted?

Response. Although we defer to EPA concerning its program funding allocation, nothing in RRPI requires or would even imply any change in DOD or EPA cleanup funding levels or allocation.

*Question 19.* Is it fair to characterize the subsection (a) as requiring DOD to estimate and report to the State emissions from proposed military training activities? Does subsection (a) also provide DOD with a 3-year window of flexibility?

Response. Yes. Section 2018(a) requires DOD to estimate the emissions of any covered criteria pollutants or precursors from proposed military readiness activities covered by Clean Air Act (CAA) Section 176(c), and to inform State air quality regulators of those covered emissions before engaging in the activity. Section 2018(a) would also modify existing law to provide military readiness activities up to 3 years to demonstrate conformity with the State Implementation Plan (SIP) from the date they begin.

*Question 20.* Is it fair to characterize subsections (b) through (e) as holding States harmless for emissions from military readiness activities?

Response. Yes. Under subsections (b) through (e) State air programs will not be penalized for any failure to attain or maintain the national ambient air quality

standards (NAAQS) that is solely due to a military readiness activity's extension of time to meet general conformity requirements.

*Question 21.* Are cities also held harmless?

Response. The hold harmless provisions of Sections 2018(b)–(e) apply to any SIP for any nonattainment or maintenance area under the CAA that involves a covered military readiness activity. To the extent that a city is located in such a non-attainment or maintenance area, or develops and implements the affected SIP for the area, it will be held harmless as well: neither the city nor any other sources will be required to compensate for the temporary increase in DOD emissions.

*Question 22.* Some States and some cities have expressed the concern that they will bear an additional burden upon enactment of these legislative proposals. Is there any truth to that burden-shifting argument?

Response. It is not clear to me how it can be argued that the RRPI shifts any burden to States or cities. As we've often pointed out, the RRPI does not exempt DOD's military readiness activities from any requirements of environmental law. Of the RRPI proposals, only one proposal (CAA) may result in small increases in pollution, and then only for a limited period of time. Even here, the proposal is careful to ensure that States are held harmless for these small increases in emissions.

*Question 23.* Is there any truth to the argument that under these proposals we are accomplishing the universally accepted goal of supporting our Armed Forces at the "expense of our nonmilitary citizens," as Councilmember Lindeman from Aurora, Colorado, states in her testimony?

Response. No. To the contrary, the proposals are very narrow in scope and largely codify longstanding policies of State and Federal environmental protection agencies. We have worked closely with these agencies to ensure that the RRPI balances military readiness with environmental protection.

*Question 24.* Councilmember Lindeman characterizes these proposals as "blanket exemptions" from environmental laws. Is that a fair characterization?

Response. Although often repeated, the suggestion that the RRPI is a "blanket exemption" is simply not accurate. DOD will continue to comply with the same environmental laws as private organizations when engaged in the same activities. With respect to DOD's unique readiness activities, the RRPI initiative does not "exempt" them; rather, it clarifies and confirms existing regulatory policies that recognize the unique nature of our activities. It codifies and extends EPA's existing Military Munitions Rule; confirms the prior Administration's policy on Integrated Natural Resource Management Plans and critical habitat; codifies the prior Administration's policy on "harassment" under the Marine Mammal Protection Act; ratifies longstanding State and Federal policy concerning regulation under RCRA and CERCLA of our operational ranges; and gives States and DOD temporary flexibility under the Clean Air Act.

*Question 25.* I want the experts at EPA to put any unwarranted fears to rest once and for all—Are the ramifications from these proposals "serious," "untenable," and do they pose "significant potential for adverse public health effects in cities with respect to air, drinking water, and management of hazardous waste," as Councilmember Lindemann states in testimony, or does this rhetoric not match the reality of the proposal?

Response. EPA supports our RRPI initiative. I do not believe the Department would have EPA support if RRPI presented a significant threat to public health.

*Question 26.* Can you tell me why a 3-year window of flexibility might be appropriate, as opposed to 1 year or 8 years, for example? Is this a reasonable amount of time to offset emissions that might result from the deployment of new weapons systems and /or realignment of force strength?

Response. The 3-year window of flexibility resulted from a compromise urged by EPA in early 2002. DOD originally proposed a 5-year window of flexibility because that is generally how long it takes from proposal to receipt of funding and approval to begin construction of major MILCON projects. Major MILCON projects, such as a baghouse to capture air emissions, are sometimes needed to make military readiness activities conform to the SIP. Similarly, the 3 years may be needed to obtain funding of emission credits or other emission offsets. We believe that the additional 3 years from the date the activity begins will be an adequate period of additional time to work with local, State, and Federal regulators and others to demonstrate positive conformity for new weapons systems or realignments.

*Question 27.* What do you think of the suggestions that we accommodate concerns that this window is too much time and thus represents too many emissions by going with two and one half years or 2 years instead of 3 years?

Response. As discussed above, DOD has already compromised by shortening the desired window of flexibility by 2 years. Three years is a reasonable period. Anything less would not provide sufficient lead time to plan, fund, and construct any MILCON projects needed to bring military readiness activities into conformity with a SIP. Considering that the vast majority of mobile and fugitive sources of problematic emissions in a given air quality area are non-military, and their operations are unregulated by CAA Section 176(c), emissions from existing and new military readiness activities are not a root cause of areas failing to attain or maintain the NAAQS. Military readiness activity emissions in a given non-attainment or maintenance air quality area are generally miniscule in comparison to all other sources of the same pollutant.

*Question 28.* Councilmember Lindemann poses a rhetorical question in her testimony that I would like to have answered in reality.

She states, "Contamination, and subsequent closure, of sources of drinking water by military ordnance constituents such as perchlorate, RDX and TNT have already occurred in Maryland and Massachusetts—under current law. What will happen in these municipalities if the Department of Defense is exempted from the relevant statutes?"

Response. There will be no change. There is no request by DOD for any exemption from the Safe Drinking Water Act, the law that protects drinking water sources. The basis for USEPA's action at the Massachusetts Military Reservation will be unchanged.

*Question 29.* What is the answer to her question? What would have happened in those situations if these legislative proposals had been enacted at that time? Would things have proceeded differently?

Response. No. Things would not have proceeded differently. These legislative proposals have no effect on the Safe Drinking Water Act or on any contamination that presents a threat to human health.

*Question 30* (Note: The following was mistakenly numbered as a separate question. Actual Question/Answer in #31). Councilmember Lindemann makes another rhetorical point in her testimony that I would like to have answered in reality.

*Question 31.* Councilwoman Lindemann makes another rhetorical point in her testimony that I would like to have answered in reality.

She characterizes this proposal as exempting military facilities from CERCLA remediation requirements, thereby halting the cleanup of the sites and preventing any effective opportunity for redevelopment and economic stability in the surrounding community. She makes the case that the economy is thus jeopardized. Is there any truth to that assertion?

Response. No. No CERCLA remediation requirements are affected by our legislative package. Defense Environmental Response Program (DERP) sites and Base Realignment and Closure (BRAC) sites will not be affected by the legislation.

*Question 32.* Concern has been raised about the usage of the term "constituents thereof" in conjunction with the list "explosives, unexploded ordnance, munitions, munitions fragments." What, if any, is the effect of using the term "constituents thereof"?

Response. The use of the term "constituents thereof" is two-fold. First, the intent of RRPI is to codify existing EPA and State policy that the use of military munitions on operational ranges does not trigger the waste management requirements of RCRA or the cleanup obligations of CERCLA as long as the munitions, including all of the byproducts of the use of munitions (i.e., their constituents) remain on the range. This clarification of policy would be of little value if it applied only to components of munitions (explosives, unexploded ordnance, munitions and munitions fragments) and not to the chemical byproducts of the use of munitions, which otherwise might fall within the definition of a hazardous waste or hazardous substance. Second, the inclusion of the term "constituents" ensures that if the byproducts of munitions use leave our ranges, for example, by migrating in groundwater, they are subject to RCRA or CERCLA or both.

*Question 33.* Do the legislative proposals in any way, either directly or by implication, affect the Safe Drinking Water Act over which this committee has jurisdiction?

Response. No.

*Question 34.* Mr. Benevento on the second panel has shown himself to be thoughtful and analytical in some of his suggestions. He has suggested that we make explicit in the statutory language that this legislation in no way impacts the Safe Drinking Water Act. Even if this language were redundant, wouldn't it be a good idea as a means of reassuring States and cities? Would you agree to this suggestion?

Response. DOD would have no objection to such a clarification.



*Question 35.* The “Military Munitions Rule” which I have in my hand was proposed in 1995 by then-EPA Administrator Carol Browner during the Clinton/Gore Administration. The same cast of characters finalized the rule in 1997. The rule itself was mandated by a Democrat-controlled Congress in 1992 legislation called the Federal Facilities Compliance Act.

Some have suggested that merely codifying the Military Munitions Rule the work of the Democrats—would be a massively roll back of environmental law and would constitute a sweeping exemption. Could this allegation be true?

Response. The request for clarification of language in RCRA and CERCLA are basically codifications of the Military Munitions Rule and do not represent “a massive roll back” of environmental laws. We believe the Rule represents a reasonable approach that accommodates both the imperative of military training and the need for environmental protection.

*Question 36.* The allegation is that there is a whole host of implications associated with codifying the rule, such as State sovereign immunity, et cetera. Can you comment on this allegation?

Response. The Military Munitions Rule has been adopted by a large majority of States. The Rule was promulgated by EPA in 1997 after extensive consultation with the States. We do not believe codifying the Rule implicates State sovereign immunity. The RRPI does not subject the States to regulation or to legal action. To the contrary, it applies to the Department of Defense and establishes how DOD will be regulated in its conduct of military readiness activities. The RRPI simply reaffirms Congress’ original intent that test and training with munitions on operational ranges does not constitute a waste management activity under RCRA or a “release” under CERCLA, and is thereby not appropriately regulated under those States by either the Federal Government of the States.

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RESPONSES OF BENEDICT S. COHEN TO ADDITIONAL QUESTIONS FROM SENATOR GRAHAM

*Question 37.* How many acres of land or water (surface waters and ocean waters) will be affected by the proposed exemptions?

Response. As indicated in my testimony, DOD is not seeking exemptions from environmental laws. Further, some of the elements of our initiative are not geographic in nature, that is, they apply to activities rather than to specific places or facilities so it is not possible to determine the number of acres that may be affected with any degree of precision. For example, our proposal related to Clean Air Act conformity would apply to new military readiness activities at any installations where they may occur. Similarly, our proposal for a modified definition of “harassment” under the Marine Mammal Protection Act would apply to activities wherever they occur under the coverage of the Act.

Two elements of our initiative that do apply specifically to military lands are the provision related to Integrated Natural Resources Management Plans (INRMPs) and the provision related to munitions use on operational ranges. The INRMP proposal would apply only to DOD installations with approved INRMPs. This provision is not an exemption from the Endangered Species Act. Rather, it provides that DOD lands that are covered by an INRMP that has been approved by the Secretary of the Interior as adequately addressing special management considerations related to endangered species will not require designation as critical habitat. If the Secretary of the Interior were to find that an installation INRMP did not provide adequate protection for the species, she would not be precluded from designating critical habitat.

The proposals related to munitions use would apply only at operational ranges for those test and training activities which use military munitions. The Services are currently compiling detailed inventories of all their operational training ranges using a common inventory framework to ensure reporting consistency across the Services. We intend to submit this inventory with the 2005 Budget as specified by Congress.

*Question 38.* Has the Department of Defense compiled a list of installations that will be exempted under the provisions of the proposal? If so, I would like to review a copy. If not, when do expect to compile such a list?

Response. Not provided to the committee.

*Question 39.* Has the Department of Defense investigated whether or not environmental contamination exists at these sites in order to create a catalog? I would like to review this information if it is available.

Assuming that contamination exists, what are the plans for cleanup of these installations? Have any public health assessments been done to ascertain the impact of the CERCLA/RCRA/CAA exemptions to the health of communities on and near bases?

Response. Contamination on operational ranges is addressed under the Defense Environmental Restoration Program and installation-specific restoration programs. Known contamination sites are reported to Congress annually in the Department's Defense Environmental Quality Program Annual Report to Congress. Currently, it is not always possible to determine whether a reported contamination site is located on an operational range or on some other portion of an installation. The Department, however, recently began an intensive effort to identify the full range of factors affecting range sustainability, one of which is the need to address environmental contamination migrating from operational ranges or threatening drinking water sources. Additionally, § 313 of the National Defense Authorization Act for Fiscal Year 2002 (P.L. 107-107) requires the Department to provide to Congress information concerning the projected cost to remediate unexploded ordnance, discarded military munitions, and munitions constituents at all operational ranges. This information will be provided to Congress as soon as it becomes available.

Known contamination migrating from operational ranges or otherwise threatening drinking water sources or human health has been—and continues to be—addressed under the Defense Environmental Restoration Program and installation-specific restoration plans (although the reported information concerning these sites has not always made it possible to determine easily whether a site is located on an operational range or elsewhere on an installation). In the future, we expect our range sustainment efforts will produce information that will enable us to determine readily whether a contamination problem emanates from an operational range.

With respect to the provisions of the RRPI related to the CAA, they relate primarily to military readiness activities that will occur in the future, such as missions realigned to bases from bases closed under BRAC (Base Realignment And Closure). As part of the realignment process, the military department that is the proponent of the action will analyze CAA impacts as part of its assessment of the environmental consequences of the action pursuant to the National Environmental Policy Act.

*Question 40.* Has the military made any attempt to use the existing exemptions in the environmental laws or any attempts to clarify their process? If not, why?

Response. The Department of Defense has not used the exemptions in the environmental laws to military readiness activities, and for the reasons I outlined in my testimony, we do not believe existing exemptions are well suited for use in the context of on-going military readiness activities. Nevertheless, one of the most frequently heard comments on our RRPI proposal is that the Defense Department is seeking new legislative flexibility without having explored the flexibility inherent in existing law. Although we are convinced that existing emergency exemptions cannot adequately substitute for our proposals, we did take this criticism to heart, and the Department is developing procedures to use existing exemptions in the appropriate circumstances.

In this regard, I would like to address the March 7, 2003 Memorandum from Deputy Wolfowitz to the Secretaries of the Military Departments concerning the process by which the Department will evaluate the use of existing exemptions under Federal environmental laws. As DOD has repeatedly testified, our efforts to address encroachment are multifaceted, and our legislative proposals are only one element of them. Other aspects of encroachment will be addressed through collaborative efforts with our State and Federal regulators, such as the drafting of the MBTA regulation mandated by Congress last year. Still others can be addressed through improvements in the internal policies and processes of the Defense Department itself.

The Deputy Secretary's memorandum falls into this last category—improvements in our own internal processes. It addresses a critical shortcoming in our ability to efficiently and thoughtfully consider the use of these existing exemption authorities: the absence of an articulated process for developing and considering proposed exemptions. Accordingly, Dr. Wolfowitz directed the military departments to develop procedures to ensure timely evaluation of the full range of relevant considerations. Importantly, the Deputy Secretary required that proposals for exemption include, among other things, specific, quantified evidence of the impact of the regulation proposed for exemption on readiness; an explanation of the reason the readiness activity cannot be modified, relocated, or rescheduled to avoid conflict with the regulation without compromising readiness; and the reasonably practical efforts available to mitigate the environmental consequences of proceeding with the training or testing activity in question.

*Question 41.* There are a number of instances in which the military has worked in collaboration with local stakeholders to produce win-win solutions at installations for species protection and military readiness on a case-by-case basis. Yet a November 24, 2002, cover memo from the Secretary of the Navy with policy guidance from the Secretary and another cover memo from the Deputy Commandant of the Marines seems to be an attempt to centralize at the Pentagon all decisionmaking on proposed critical habitat designations and other ESA actions and to forbid locally negotiated ESA solutions tailored to local conditions. The Secretary's cover memo states ". . . concessions could run counter to the legislative relief we are continuing to pursue with Congress." A cynic might say that this has the appearance of an attempt to manufacture conflict between the military and implementation of the ESA. What is your explanation of the November 24 memo? Why should problem solving with the local community be discouraged?

Response. The November 24 memorandum is consistent with DOD's goal of establishing a comprehensive and coordinated approach to addressing encroachment, including the effects of environmental regulation, on our training and testing. Collaborative agreements at the local and installation level have always been, and will continue to be, how such issues are resolved. DOD does not intend to try to centralize this process. However, it is important that the parties consider the broader implications of potential agreements, and that such agreements be consistent with broader DOD policy. While most mutual agreements reached between military installations and regulators on ESA issues satisfy the interests of both parties, not all have considered the potential implications on readiness due to training work-arounds, which are at the core of DOD's concerns over the incremental degradations to readiness due to encroachment. The Secretary of the Navy's forwarding memo advises that local installation commitments that exceed the requirements of the Endangered Species Act need to be carefully assessed to ensure that they cumulatively don't adversely impact the Navy's Title 10 obligations to ensure readiness.

*Question 42.* What is the percentage of encroachment caused by environmental laws? What is the percentage of the encroachment caused by sprawl and urban suburban development?

Response. While I cannot offer a complete answer, I can provide an example. A March 2003 U.S. Marine Corps study of encroachment at Camp Pendleton, California, found that restrictions relating to threatened or endangered species or to wetlands have the biggest impact on training there out of a variety of encroachment factors studied. This study found that 53 percent of restrictions associated with non-firing field training tasks at Camp Pendleton were caused by these two environmental factors. So current environmental law and regulation certainly are significant encroachment factors.

But I would like to answer your question in broader terms. DOD believes that the root cause of most encroachment on military ranges is increasing development and urbanization, which in turn increases competition for natural resources and conflicts between existing military activities and the encroaching development. Many of the environmental problems we face on our ranges are the result of expanding human activity, outside the fence-line, as well as decreasing natural habitat in surrounding areas. Because DOD ranges have been generally very successful in protecting habitat and natural resources, they have in many cases become defacto refuges for endangered species in a region. DOD accepts its role to protect and preserve our national heritage and natural resources, and we will continue to fully satisfy our environmental obligations, to include endangered species protection. However, DOD also needs these ranges to conduct its primary mission of preparing our armed forces for battle. Our proposal to use INRMPs in lieu of critical habitat designation is intended to increase flexibility to test and train while still preserving species and their natural environments.

*Question 43.* How many acres of land does the Army, Navy, Air Force and Marine lease to nonmilitary entities for any activity not directly related to military operations such as grazing leases, energy leases, business park leases, logging leases, airports (and/or their extensions), highways and other transportation leases, etc? Can you also supply this committee with the percentage of lands (based on the total number of land acres) such leases encompass?

Response. Many of our ranges work with NGO's, surrounding communities, businesses and other interests to provide access to DOD lands for a variety of purposes. In addition to the uses you cite, some DOD lands are made available for farming, hunting and fishing, public communications facilities, wastewater treatment areas, State parks, and myriad other uses that benefit the surrounding regions. I cannot give you a specific answer as to the number of acres involved or the percentage of DOD lands such uses encompass without a substantial and expensive data-collection

activity. It is important to keep in mind that as a rule, leases or other agreements with outside parties are only allowed when they do not conflict with the military mission. More importantly, I want to be quite clear that the RRPI reforms we advocate apply only to military readiness activities. None of the non-readiness activities on DOD lands that you describe would be benefited in any way by our proposals.

*Question 44.* The Department of Defense's rationale for requesting exemption from environmental laws is that the compliance with such laws negatively affects military readiness. Given that, I was surprised to see that the fiscal year 2004 budget request cut funding for environmental programs by approximately \$400 million. Is it your understanding that the budget cut was made in anticipation of receiving exemptions?

Response. No, the fiscal year 2004 Budget Request was not made anticipating passage of the RRPI. The reduction in the funding request for environmental programs in each of the environmental program elements as based on reasons entirely unrelated to RRPI.

- Restoration: The RCRA/CERCLA provisions of the RRPI would apply only to operational ranges and therefore would have no impact on Defense Environmental Restoration Program requirements or environmental liability.

- BRAC: The fiscal year 2004 budget request for the total fiscal year 2004 BRAC program (including environmental and caretaker costs) represents a 34 percent reduction from fiscal year 2003. When considering BRAC environmental costs only, the planned value of the '04 program (\$412.0 million) represents a 24 percent reduction from fiscal year 2003 (\$540.2 million). A significant portion of the difference is attributed to revenues anticipated from land sales of base closure properties, thus reducing the 2004 budget request.

- Compliance and Pollution Prevention: The Department's Compliance and Pollution Prevention "must fund" policy remains unchanged—DOD Components must fund their environmental requirements at a level to ensure compliance with legally mandated standards. The President's Budget request for compliance does account for all legally mandated requirements. The Department's total requirement is reduced for Fiscal Year 21104 because the DOD Components have completed several expensive, long-term programs. Examples of actions completed include:

- The Navy completed buying and installing pulpers and shredders on ships to reduce discharges at sea;

- The Navy's requirement to fund the UXO removal at Kaho'olawe ended in fiscal year 2003;

- The Military Departments finished an effort to fix a number of drinking water systems;

- All of the Military Departments have implemented "pharmacies" to reduce the use of hazardous materials;

- All the Military Departments have met the last Toxic Release Inventory reduction goal and 2001 is the baseline for a new reduction goal (only now can they identify where they need to make reductions and the associated investments will be in fiscal year 2005 and fiscal year 2006); and

- All of the DOD Components are reducing compliance costs each year through Pollution Prevention and Environmental Management Systems.

*Question 45.* Has the Department of Defense done any kind of assessment to ascertain the impact of military training and, by extension, exemptions on drinking water supplies?

Response. Groundwater impact assessments have been done, particularly at ranges of particular sensitivity or concern, such as the Massachusetts Military Reservation, among others. An effort is underway to do a more systematic assessment of potential drinking water issues. As part of its fiscal year 2004 Defense Planning Guidance, the Department has initiated an effort to assess potential hazards from off-range munitions and begin remediation by fiscal year 2008. This will include characterization of potential areas of munitions contamination, as well as consideration of hydrology and potential issues associated with drinking water supplies.

*Question 46.* The National Policy Dialogue on Military Munitions, composed of a variety of stakeholders, resulted in several DOD directives and produced a focused, joint effort by the Department and the Armed Forces to identify and manage the environmental challenges facing military training, weapons testing, and disposal practices related to munitions. Why then has the Department of Defense decided to pursue legislation first rather than pursuing the recommendations of the National Policy Dialogue on Military Munitions?

Response. The Department is pursuing the recommendations of the National Policy Dialogue, which resulted in Departmental directives and instructions on improving management of munitions from "cradle to grave."

The Department continues the process of fully implementing the Munitions Action Plan that resulted from the Munitions Dialogue. The Operational and Environmental Executive Steering Committee for Munitions (OEESCM) continues to meet with senior leadership's participation and guidance. The many goals in the Munitions Action Plan are being implemented by numerous subcommittees who regularly report progress to the OEESCM full committee.

The overall Range Readiness and Sustainment Initiative has multiple pieces, of which the legislation is but one.

*Question 47.* Last year, Congress rejected DOD's proposals for new exemptions from public health and environmental laws. However, Congress did require the Department to "develop a comprehensive plan for using existing authorities available . . . to address training constraints," including "an assessment of current and future training range requirements" and "an evaluation of the adequacy of current resources." Congress also required the Secretary of Defense to submit a report describing progress made, including the plan for using existing authorities and an inventory of existing training ranges and their capabilities. What is the status of the comprehensive plan? What is the status of the progress report and range inventory? When can Congress expect to be presented with these reports?

Response. Satisfying the requirements of Section 366 of the Bob Stump National Defense Authorization Act for fiscal year 2003 (P.L. 107-314) is a high priority for the Department of Defense. First, as noted in my response to question 39, the Department is developing processes for the use of existing exemptions under Federal environmental laws. The March 7, 2003, Memorandum from Deputy Secretary Wolfowitz directs the Secretaries of the Military Departments to develop procedures to ensure timely evaluation of proposals for exemptions, considering the full range of relevant considerations, including the readiness impact of the environmental requirement from which an exemption is sought as well as reasonably practical measures which may be taken to mitigate the environmental impacts of proceeding with the readiness activity.

Further, DOD has extensive efforts underway to better characterize encroachment and its effects on our ability to meet current and future training requirements; these efforts, however, will require some time to complete. In January, each service was tasked to complete a comprehensive response to Section 366 no later than November 15, 2003. The Office of the Secretary of Defense will compile a final Department report to be submitted to Congress with the President's fiscal year 2005 Budget request early in calendar year 2004. This comprehensive report will address each of the Congress's Section 366 areas of concern:

- Training Range Sustainment Plan: Each of the Services was directed to assess current and future training range requirements; to evaluate the adequacy of existing training resources to meet these requirements; and to develop a comprehensive approach to resolving identified issues or deficiencies.
- Encroachment Impact Reporting: Service and OSD efforts to quantify encroachment effects on our installations and ranges are underway. The Services have been directed to include explicit data on encroachment effects in their reports.
- Training Range Inventory: The Services presently are completing detailed inventories of all their operational training ranges. The Department is developing the common inventory framework and the data definitions needed to ensure reporting consistency across the Services.

Characterizing accurately the effects of encroachment on military ranges and developing a balanced and comprehensive plan to mitigate encroachment effects on military readiness are complex undertakings. The information being developed is of great importance, both to answer Congress's request and as a baseline for the Department's long-term range-sustainment effort.

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RESPONSES OF BENEDICT S. COHEN TO ADDITIONAL QUESTIONS FROM SENATOR  
JEFFORDS

*Question 48.* Has any training range experienced encroachment on training as a result of the requirements of the Clean Air Act? If so, what bases and by what percent of training capability was training at that facility impaired?

Response. To date, individual conformity determinations have been addressed on a case-by-case each resolved in a different manner. The planned realignment of F-14s from NAS to NAS Lemoore in California was only possible because of the fortuity that neighboring Castle Air Force Base in the same air shed had closed, creating emissions offsets. The same coincidence enabled the home basing of new F/A-18E/Fs at NAS Lemoore. The realignment of F/A-18 C/Ds from Cecil Field, Florida to NAS Oceana in Virginia was made possible only because Virginia happened

to be in the midst of revising its Implementation Plan and was able to accommodate the new emissions. As these near misses demonstrate, under the requirement there is limited flexibility to accommodate readiness needs and DOD is barred from even beginning to take readiness actions until the requirement is satisfied. In these examples, the ability to come home base these aircraft at the desired locations was dependent upon the right set of circumstances, not on existing flexibility in the law.

In addition, most of our readiness activities in non-attainment areas preceded the Act and its subsequent amendments. As long as those pre-existing and continuing activities remain relatively unchanged the Act's General Conformity prohibition does not apply. However, any significant changes in those continuing and recurring activities potentially fall within the proscriptions of the Act's General Conformity provision. For example, most of the weapons systems currently being operated in non-attainment areas were operating in those areas long before (in some instances for decades) the General Conformity requirement was enacted as part of the Act's Amendments of 1990. Thus, if we had no need to keep our forces modern our activities might never be adversely impacted by the current Act.

However, when we must replace aging legacy systems (e.g., aircraft, vehicles, or equipment) in a given non-attainment or maintenance area with new ones, the Act strictly prohibits us from replacing even one weapon system, such as replacing an F-15C with an F-22, without first demonstrating that the entire action—replacing all the F-15Cs with F-22s at that installation—conforms to the State Implementation Plan (SIP). Thus, while the current Act has not yet adversely impacted our continuing and recurring activities, we anticipate that our modernization will be adversely impacted by the Act without the proposed extension of time to comply.

*Question 49.* Have any public health assessments been done to ascertain the impact of the CERCLA/RCRA/CAA exemptions to the health of communities on and near bases?

Response. Because there is no effect on ongoing environmental cleanup programs or on environmental compliance programs, there will be no impact to health or the environment from the RRPI legislative request. Known contamination migrating from operational ranges or otherwise threatening drinking water sources or human health has been—and would continue to be—addressed under the Defense Environmental Restoration Program and installation-specific restoration plans. In the future, we expect our range sustainment efforts will produce information that will enable us to determine readily whether a contamination problem emanates from an operational range.

With respect to the provisions of the RRPI related to the CAA, they relate primarily to military readiness activities that will occur in the future, such as missions realigned to bases from bases closed under BRAC. As part of the realignment process, the military department that is the proponent of the action will analyze CAA impacts as part of its assessment of the environmental consequences of the action pursuant to the National Environmental Policy Act. However, as noted by EPA Administrator Carol Browner in a June 17, 1997 letter to Secretary of Defense William Cohen “. . . Defense sources are a small part of the air quality problem. . . .” Therefore, we do not anticipate that the limited extension provided by the RRPI to the CAA conformity requirement will significantly impact neighboring communities.

*Question 50.* Your agency has sought to rationalize the need for Clean Air Act exemptions. In one case, DOD has asserted that air quality regulations prohibit training with graphite smoke at Fort Irwin, California. In actuality, however, such graphite smoke is created by trailer-mounted generators that are classified as mobile sources under the Clean Air Act, meaning they are not the purview of air quality regulators. Please comment on this discrepancy.

Response. The Ft. Irwin example was used as an example of the impact of Endangered Species Act requirements on readiness and training, not Clean Air Act restrictions. At Ft. Irwin, the US Fish and Wildlife Service (USFWS) is concerned about the potential dietary and respiratory impact of graphite smoke on the desert tortoise. The Army will not be able to use graphite smoke until studies are accomplished to show the effects on desert tortoise. The USFWS and Ft. Irwin have exchanged information on studies required. To date, protocols governing the studies have not been established.

*Question 51.* What does the phrase “under the jurisdiction, custody or control of the Secretary” mean in DOD's proposed definition of range? Must the range be on land owned by the United States, or can a range be under the jurisdiction, custody or control of the Secretary if it is not on land owned by the United States? Provide citations to any cases, statutes, or regulations that you rely on in answering this question.

Response. The term “jurisdiction, custody, or control” is a term of art from the world of Federal real property law and flows from the requirements relating to real property accountability that Federal property managers face. All Federal property is owned by, and title is in, the United States; it is not owned by any particular agency; the agency only manages the property. When we refer to land being owned by, for example, the Air Force, we are really speaking in shorthand and referring to real property accountability, not ownership.

The term “jurisdiction, custody, or control” is an expansive term, applying to any property under the jurisdiction, or custody, or control of the Secretary concerned. This means that it could apply to leased property, i.e., privately owned land that we are using under a lease or other similar legal agreement. It would also apply to lands, such as national forest lands or refuge lands, that have been withdrawn for military use. Such lands continue to be under the jurisdiction of the original agency (USDA or DOI), but are currently under the jurisdiction, custody, and control of the DOD. The language “jurisdiction, custody, or control” was used in defining the term “operational range” in 10 U.S.C. sec. 2710, which directs the Secretary of Defense to develop an inventory of defense sites containing unexploded ordnance, discarded munitions, or munitions constituents. It is also used in DOD Directive 3200.15 in defining the term “operational range” for purposes of establishing DOD’s policy on range sustainment.

This language is designed to capture all lands used by DOD for ranges, but only while those lands are so used. For instance, private land leased land to DOD for use as an operational range would be covered by this definition, but only so long as the land continued to be leased by DOD and used as an operational range in accordance with the definition. As soon as it ceases to meet the requirements of the definition—under the jurisdiction, custody, or control of the Secretary concerned and either used for range activities or still be considered to be a range and not to an incompatible use—it ceases to be an operational range by operation of law. So, although range need not necessarily be owned by the U.S., it does have to be under our jurisdiction, custody, or control in accordance with some legal agreement.

*Question 52.* Please provide a citation to the administrative or statutory authority under which the Secretary designates land or water on a range.

Response. Title 10, United States Code, § 3013, 5013, and 8013, gives the Secretaries of the Military Departments the responsibility and authority to carry out various functions, subject to the authority, direction and control of the Secretary of Defense. These functions include ensuring the training of personnel. In carrying out their training and other functions, the Secretaries are authorized to acquire real property, construct facilities, and formulate and execute policies and programs. The Federal Government has always taken the position that the ability to acquire and designate areas as training ranges is inherent in these responsibilities and functions.

*Question 53.* Which specific DOD facilities will be affected by the suggested legislative changes? In addition, utilizing the definition of “operational range” in the bill, provide a list of all operational ranges under the jurisdiction, custody or control of the Secretary. For each range, provide:

- the location and size of the range;
- documentation of the administrative or legislative decision designating the range;
- a notation that the range is currently being used, or the date on which it was last used; and
- information as to whether any portion of any range is located above a wellhead protection area designated by a State pursuant to the Safe Drinking Water Act, or has been designated by the Administrator of the EPA as a sole or principal drinking water source.

Response. All operational DOD ranges and training areas used for readiness activities will be affected or potentially affected by the proposed RRPI changes.

DOD currently lacks a complete inventory of ranges and their environmental issues—a concern raised as part of GAO’s report on encroachment dated April 25, 2002. Because of these concern and as part of the National Defense Authorization Act for Fiscal Year 2003, Congress directed the Secretary of Defense to develop a plan to address training constraints caused by limitations on use of our land, sea, and air resources.

DOD is in the process of developing a more accurate and complete answer to the number, location and size of the operational ranges in the DOD inventory. The services have all been preparing a complete inventory of their ranges over the past year. Based on this information, DOD is compiling an overall DOD range inventory that will put the range numbers for all the services into common terms. This inventory

information will be part of a report to Congress due in early 2004. This report will include:

- An assessment of the current and future training requirements of their respective Service;

- A report on implementation of a Service range inventory system;

- An evaluation of the adequacy of current Service resources to meet both current and future training requirements in the United States and overseas;

- A comprehensive plan to address operational constraints resulting in adverse training impacts caused by limitations on the use of, or access to, land, water, air and spectrum that are available or needed in the United States and overseas for training; and

- A report on, or specific plans for, designation of an office within each of the military departments that will have lead responsibility for overseeing implementation of the plan.

The Department's report will respond to a number of the factual inquiries in your question.

*Question 54.* Can you tell the Committee what the DOD budget request for INRMP development and, most importantly, implementation is for 2004?

Response. DOD does not break out INRMP development and implementation cost projections from its overall budget requests for Natural Resource programs. However, as required by the Sikes Act, we do track how much is spent on INRMP implementation and include that information for previous fiscal years in our Environmental Quality Annual Report to Congress. For fiscal year 2100, our investment in INRMP implementation was \$40 million. In fiscal year 2001 it was \$43 million. The fiscal year 2002 report is currently being prepared and should be final in the near future. For conservation (natural and cultural resource) programs overall, the Department has requested \$143 million for fiscal year 2004.

*Question 55.* Can you identify the military facilities and the species that the DOD proposal, if enacted, would impact:

Response. DOD lands host over 300 species on the Endangered Species list, spread among a large number of installations. While our proposal will only apply to species with designated critical habitat, now a relatively small proportion of the 300 on our lands, the number of such designations is projected to increase dramatically in coming years. This proposal is therefore perhaps most significant in terms of future decisions. We do not believe the proposals will adversely impact any species; instead we will continue to effectively manage designated T&E species under approved INRMPs as opposed to critical habitat designation at ranges that qualify for this approach.

*Question 56.* EPA estimates that 60,000+ people are dying prematurely annually from fine particulate pollution. What share of that pollution inventory comes from military facilities?

Response. As former EPA Administrator Browner said:

[I]t is clear that military training activities are actually among the smallest sources of PM<sub>2.5</sub> in areas likely to have a fine particle problem. While military activities contribute some primary PM<sub>2.5</sub>, secondary particles such as sulfates are by far the largest component of PM<sub>2.5</sub>. The major sources of fine particles include sulfates from power plants and nitrate from power plants and other large combustion sources.

.. Defense sources are a small part of the air quality problem and provide a unique and critical need for the Nations' security. Letter from Carol Browner, Administrator, Environmental Protection Agency, to William Cohen, Secretary of Defense 2-3 (Jun 17, 1997).

With respect to our Clean Air Act proposal, any new emissions the legislation would temporarily authorize are typically less than .5 percent of the total emissions in air regions.

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RESPONSES OF BENEDICT S. COHEN TO ADDITIONAL QUESTIONS FROM SENATOR  
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*Question 57.* Repeatedly you argue that environmental provisions have reduced military readiness. But, you have been unable to provide examples where these laws have actually hampered military readiness. You have given some examples in California where training activities had to be modified to accommodate endangered species. Modification of practices does not necessarily impact our readiness. Evidence that DOD has had to modify its behavior is not the issue. The issue is specific evidence that our military readiness has been compromised. I have yet to see that evi-



dence. GAO has yet to see that evidence. Where are the data to support your claims?

Response. As I stated in my testimony, DOD needs to better quantify how encroachment affects our test and training mission, and we are actively working to develop a mechanism to quantify training constraints caused by limitations on use of land, air, and sea resources. However, there is a significant body of evidence that readiness is being adversely impacted. GAO has recognized this fact. While it is true that GAO raised a concern regarding DOD's ability to precisely quantify readiness impacts, it is important to clarify that its report explicitly states that encroachment is having demonstrable adverse effects on readiness.

Critical habitat designation under the Endangered Species Act also has vital implications for readiness. One instance in which the damaging effects of training modifications on training has recently been very precisely quantified and documented is Marine Corps training at Camp Pendleton in California, where "modification of practices" has very clearly degraded training. Marines who trained at Marine Corps Base (MCB) Camp Pendleton in the 1970's and 1980's report that restrictions on training have increased markedly and that today's training is much less realistic. The study completed in March 2003 validates these observations and found that, because of encroachment on maneuver corridors, training areas and landing beaches, a Marine Battalion Landing Team could only complete about 68 percent of the Marine Corps' combat training standards, for non-firing tasks at Camp Pendleton. Courts, based on complaints filed by environmental litigants, compelled the Fish and Wildlife Service to re-evaluate "not prudent" findings or many critical habitat determinations, and as a result FWS proposed to designate over 56 percent of the 125,000-acre Camp Pendleton and over 50 percent of the 12,000-acre Marine Corps Air Station (MCAS) Miramar. 72 percent of Fort Lewis and 40 percent of the Chocolate Mountains Aerial Gunnery Range were designated as critical habitat for various species, and analogous habitat restrictions were imposed on 33 percent of Fort Hood. At Fort Hood, our use of 150,000 acres of training land for training purposes is restricted because of the requirement to protect habitat from any damage and the seasonal presence of threatened and endangered species. At the Goldwater range in Arizona, the Air Force already redirects or cancels numerous live-drop missions every year to avoid jeopardizing the Sonoran Pronghorn even though critical habitat has not yet been designated there. In calendar year 2001, 32 percent of scheduled live-ordnance training missions at the Goldwater range were canceled or relocated to less-optimum training targets. The use of less-optimum targets results in degraded training. Designation of critical habitat for the pronghorn on the range would further extend these restrictions on training and could lead to fighter pilots with inadequate skills to safely accomplish potential bombing missions.

DOD has relied upon more frequent and extensive "work-arounds," which go beyond being an inconvenience to fundamentally undercut the realism and quality of training. Among the many examples:

- Aircrews taking off, recovering or dropping ordnance from non-tactical altitudes; examples include Naval Air Station Oceana, Virginia, plus many other installations;
- Navy ships not being able to use their sonar equipment during key training events, including training and testing activities;
- Soldiers not actually digging fighting positions or equipment emplacements during basic and intermediate training (Fort Hood and Camp Pendleton are only two of many thus restricted);
- In Hawaii, endangered species restrictions and NEPA-based litigation at the Army's Makua Valley Military Reservation mean that local units cannot meet training requirements. Specifically, units of the 25th Infantry Division (Light) have to travel to mainland ranges to complete Combined Arms Live-fire Exercises. As a result, other Hawaii-based DOD components; Marine Corps, Army Reserve and National Guard, have no access to Makua.

*Question 58.* Why do you need these waivers when all of these laws have provisions that specifically exempt military activities in the case of national security?

Response. A number of environmental statutes contain no wartime waivers at all, such as the Marine Mammal Protection Act and the Migratory Bird Treaty Act. However, even for those environmental laws with an exemption, most statutes envisage that the national security exemptions are to be rarely utilized. Invocation of an exemption is characteristically to be based on "the paramount interests" of the United States—an exceptionally high standard. Further, most national security exemptions in current environmental laws provide relief that is brief in duration and focuses on individual activities, facilities, or pollution sources. Such exemptions are ill-suited to ongoing, widespread actions, including many categories of military readiness activities that individually would not meet the requisite standard for an ex-

emption, but which are cumulatively essential to maintaining military readiness. The readiness activities we are concerned with are not “one-time” exceptional events, but part of the day-to-day training regimen for our forces.

*Question 59.* We have long heard that this administration is a defender of State and local rights. However the DOD exemption proposals are opposed by a wide variety of State and local organizations.

Is it correct that the National Association of Attorneys General passed a resolution in March opposing DOD’s exemptions from environmental laws?

Response. That is correct. However, the resolution assumed a number of things about our legislation that DOD did not in fact intend, including a suggestion that the RRPI would preempt State and EPA authority over a broad range of sites or activities, including DOD non-readiness activities, DOE facilities, defense contractor sites, and up to 16 million acres of former ranges. In reality, the RRPI provisions related to munitions apply only to test and training at operational ranges under the jurisdiction, custody, or control of the Department of Defense. In any case, the Department and EPA have subsequently completely revised our military munitions proposal in consultation with State officials to clarify the limited scope of our legislation (attached). To the best of our knowledge, neither NAAG nor any other State officials’ organization has expressed views on this new language.

*Question 60.* Is it correct that the State and local air pollution regulators oppose DOD’s exemptions from environmental laws?

Response. You are correct that STAPPA-ALAPCO has expressed concerns about our Clean Air Act proposal. This concern is based on the assumption that the Department can use Section 118 of the Clean Air Act to ask for an exemption based on “paramount interest of the United States to do so”. The Department believes that it is not good public policy to ask for exemptions to permit necessary activities for military readiness. We believe that it is more prudent to address the root problem. Again, opposition is also based on the assertion that DOD seeks to exempt itself from environmental laws, and that opposition is also misplaced. Although I made the statement in my written testimony that DOD does not seek, and the RRPI proposal does not contain, provisions for exemptions from environmental laws, it bears repeating here.

*Question 61.* Is it correct that the State and local water quality regulators oppose DOD’s exemptions from environmental laws?

Response. We are aware that officers of the Association of Metropolitan Water Agencies, American Water Works Association, National Association of Water Companies, and the Association of California Water Agencies signed a letter in opposition to certain provisions of the RRPI. Again, however, we believe that this opposition is based on assumptions about RRPI that DOD does not intend. For example, their concern that human health and environmental affects would have to occur beyond the boundaries of an operational range before response action could be taken does not reflect DOD’s intentions. As noted in answers to previous questions, Federal and State authority to act to protect drinking water sources under the Safe Drinking Water Act are completely unaffected. Similarly, the RRPI expressly preserves EPA’s authority to respond to imminent and substantial endangerment issues from munitions and constituents on range pursuant to CERCLA section 106. DOD is actively engaged in an ongoing dialog with these and other stakeholders to clarify our intentions, and is revising our proposal to address their concerns.

*Question 62.* Is it correct that Ingrid Lindemann, Councilmember from Aurora, Colorado, and representative of the National League of Cities finds that “the ramifications of a blanket exemption for military facilities and activities from such laws will be serious and untenable at the local level”?

Response. Ms. Lindemann testified to that effect before this Committee. For many of the same reasons noted in the previous three responses, we believe she has misunderstood the scope and intent of the RRPI. In addition to my responses to the previous questions, it bears special note that Ms. Lindemann’s written testimony suggests her belief that the RRPI proposals related to RCRA and CERCLA would apply to ranges that have been transferred. In fact, she makes special note that our RCRA proposal would impact munitions disposal and cleanup at an estimated 16 million acres of transferred ranges around the country. This provision does not apply to transferred ranges. This is clearly not the impact of the RRPI proposal since it specifically applies only to ranges currently under the jurisdiction, custody and control of DOD, not to ranges that have transferred out of DOD control.

*Question 63.* Does it concern the DOD that there is widespread local and State opposition to DOD’s proposed exemptions?

Response. DOD is very concerned that there is opposition to our proposal. A measure of our concern is the public outreach effort we have undertaken regarding the

RRPI initiative. We believe that engaging in dialog with stakeholders regarding the purpose of the initiative will serve to convince those interested in both the environment and national defense that the RRPI is a narrow, targeted and reasonable approach to balancing military readiness and environmental protection. In addition, as noted above, DOD and EPA are extensively revising several of our proposals to address these concerns. DOD has been gratified by increasing State and local support for our proposals.

*Question 64.* The DOD exemption proposal before us would exempt DOD from many of the environmental laws and regulations that apply to the private sector. Is this administration abandoning the longstanding policy that the Federal Government, including DOD, should be held to the same environmental enforcement standards, enforcement and rules as the private sector?

Response. DOD is subject to all Federal environmental laws. The changes we seek would not affect DOD compliance with environmental laws in the management of its infrastructure or industrial operations that are similar to those of private companies. For example, DOD will continue to comply with all applicable environmental laws in the way that it runs its sewage treatment plants, paint booths, management of industrial hazardous wastes, etc. And DOD will continue all environmental cleanup programs. The military also has a unique responsibility to prepare for and win armed conflicts—an activity unlike any private organization, State, or local government—and has land specially set aside to test and train for that purpose. The changes we propose are narrowly focused on that testing and training, i.e., on “military readiness activities.”

Further, not only are the activities that the RRPI focuses on unique to the military, the majority of the environmental requirements that RRPI addresses do not impact the private sector in the same manner as they affect Federal agencies, such as DOD. The conformity requirements of the Clean Air Act have no private sector equivalent. Critical habitat designation under the ESA can have mission-stopping impacts on military installations, but has more limited consequences on private lands. The flexibility given to commercial fisheries through Incidental Take Reduction Plans under the Marine Mammal Protection Act is not available to DOD.

*Question 65.* At how many current, and at how many former DOD sites across the Nation are Superfund or RCRA being used to manage cleanup?

Response. The Defense Environmental Restoration Program (DERP) contains 24,869 sites at active and BRAC installations and 4,827 Formerly Used Defense Sites (FUDS). 2,307 sites are in the Military Munitions Response Program (MMRP) category of the DERP. 616 MMRP sites are at active and BRAC installations and 1,691 are FUDS. The Department’s five environmental restoration accounts (Army, Navy, Air Force, FUDS and Defense-wide) and the BRAC account are the source of funding for cleanup requirements at these sites. The Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) proposals contained in the Department’s Readiness and Range Preservation Initiative (RRPI) only apply to operational ranges and, if enacted, will not have any impact on DOD’s current DERP cleanup requirements.

*Question 66.* How many of these sites have perchlorate contamination?

Response. There are no DOD sites under CERCLA 106 orders for perchlorate. However, DOD is concerned and is studying the perchlorate issue.

*Question 67.* At how many current, and at how many former, DOD sites is the Safe Drinking Water Act being used to manage cleanups?

Response. The only site where SDWA is being used to manage a cleanup is at the Massachusetts Military Reservation on Cape Cod, Massachusetts.

*Question 68.* At how many of the current, and at how many of the former, Superfund and RCRA sites would partial or total cleanup be waived were the recommendations before us now already in place?

Response. None.

*Question 69.* At how many sites is EPA using its imminent and substantial endangerment authority to oversee CERCLA cleanups? How many of these are DOD sites? How many of these sites have perchlorate contamination? How many of these sites are DOD perchlorate contamination sites?

Response. EPA has never issued a unilateral administrative order pursuant to CERCLA Section 106 (EPA’s imminent and substantial endangerment authority) to a DOD facility. We must defer to EPA regarding the number of such orders it has issued for non-DOD facilities.

## RESPONSES OF BENEDICT S. COHEN TO ADDITIONAL QUESTIONS FROM SENATOR REID

*Question 70.* Is it DOD's position that DOD is bound by State safe drinking water standards where there is no Federal standard in place? Specifically, is DOD bound by a State safe drinking water standard for perchlorate even if no Federal safe drinking water standard has been promulgated?

Response. The answer to both of these questions is yes.

*Question 71.* As you know, the environmental laws within the jurisdiction of the Senate Environment Committee and amended by the Department's proposal each contain case-by-case exemption procedures. Please list each case involving a Nevada operational range (as currently defined by the Department) where such exemptions have been sought under each of these laws (i.e., CAA, RCRA, CERCLA, and ESA), the reason for the request, and the disposition of the request.

Response. No exemptions have been sought under either the CAA, CERCLA, or the ESA. Section 6961 (a) of RCRA provides that the President of the United States can 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." Since 1998, Presidents Clinton and Bush have annually exempted the United States Air Force's operating location near Groom Lake, Nevada, from any Federal, State, interstate, or local provision respecting control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information to any unauthorized persons.

Presidents Clinton and Bush have found that it is in the paramount interest of the United States to exempt the facility (the subject of litigation in *Kasza v. Browner* (D. Nev. CV-S-94795-PMP) and *Frost v. Perry* (D. Nev. CV-S-94-714-PMP)), from any applicable requirement for the disclosure to unauthorized persons of classified information concerning that operating location. The Presidential orders have stated that nothing contained therein is intended to: (a) imply that in the absence of such a Presidential exemption, RCRA, or any other provision of law, permits or requires disclosure of classified information to unauthorized persons; or (b) limit the applicability or enforcement of any requirement of law applicable to the Air Force's operating location near Groom Lake, Nevada, except those provisions, if any, that would require the disclosure of classified information.

This annual exemption is an excellent illustration of the serious limitations of exemptions. Because of one lower court decision which both the Clinton and Bush Administrations regarded as clearly erroneous, a decision memorandum must annually be sent up the chain through the Chief of Staff of the Air Force to the Secretary of the Air Force, then through the Defense Department General Counsel to the Deputy Secretary of Defense, then to the National Security Advisor, and the Counsel to the President, and finally to the President. Such a cumbersome, months-long process is obviously completely inadequate to safeguard widespread, ongoing test and training activities that occur on virtually every active range.

*Question 72.* The Clean Air Act exemptions sought by the Department would remove clean air protections for at least 3 years for communities surrounding operational ranges, a term which it appears is within the discretion of the Department to modify or expansively interpret to include ranges not in current operation. It further provides that Department air emissions newly exempt under the proposal need not be offset by other pollution sources, thereby assuring a net increase of emissions localized around operational ranges. Please explain what measures the Department intends to take to protect the communities surrounding those facilities from harmful exposure to ozone, particulate matter, carbon monoxide and the other criteria air pollutants.

Response. The Department is not seeking to remove existing Clean Air Act protections. Nor does the proposal alter the ultimate obligation on the part of the DOD installation to conform its military readiness activities to the SIP. The legislation only provides an extension of time to demonstrate that conformity. Well over 90 percent of the sources of criteria pollutant emissions in a given non-attainment or maintenance area are usually private or non-Federal sources not subject to CAA Sec. 176(c)'s conformity provision. The DOD therefore has limited ability to protect surrounding communities from the major source of harmful air emissions. With respect to our own emissions, Clinton Administration EPA Administrator Carol Browner recently affirmed that "Defense sources are a small part of the air quality problem . . ." Letter from Carol Browner, Administrator, Environmental Protection Agency, to William Cohen, Secretary of Defense 2-3 (Jun 17, 1997). Your concern over emissions associated with "ranges not in current operation" is misplaced since military test and training activities that might generate emissions will by definition not occur on such inactive ranges; should other military readiness activities

besides test and training occur on such inactive ranges, they would characteristically result in the range being transferred from inactive range status to non-range status. (This is because one of the tests for an inactive range is that it cannot have been put to a use inconsistent with future use as a range.) Finally, the environmental planning processes required by the National Environmental Policy Act (NEPA) will still be implemented for new military readiness activities, and that NEPA process will identify those opportunities that the installation will have to mitigate or reduce its air pollutant emissions.

*Question 73.* The small community of Fallon, Nevada, is currently the subject of the first government-led cancer cluster investigation in over 20 years. In the past several years, 16 children have fallen ill with leukemia. Three children have died.

A. Under the Department's proposal, is it the case that the Fallon Naval Air Station would be exempt from Clean Air Act compliance for at least three years?

B. How would the Department propose to assure that residents of Fallon are not exposed to harmful levels of air pollution from the Air Station during that time period?

C. Similarly, is it the case that under the Department's proposal, contamination from the Kinder-Morgan jet fuel pipeline would similarly be exempt from regulation under RCRA and cleanup under CERCLA?

If you do not believe that exemptions would apply in cases A, B, or C, please provide the rationale—based on the specific language of the Department's proposal—which would ensure that these laws applied to activities at the Air Station.

Response. A. Our CAA provision does not apply to emissions associated with non-military readiness activities like construction, power generation, wastewater treatment, industrial processes, or even activities in direct support of military readiness like aircraft fueling and maintenance. DOD's proposal provides the following definition of "military readiness activities":

The term "military readiness activities" includes all training and operations that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. The term does not include the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities; storage, schools, housing, motor pools, laundries, morale, welfare and recreation activities, shops, avid mess halls, nor the operation of industrial activities, or the construction or demolition of such facilities.

In addition, no existing military readiness activity at Fallon is subject to our proposal. The RRPI Clean Air Act provision provides "[i]n all cases in which the [conformity] requirements of section 176(c) of the Clean Air Act would have applied to proposed military readiness activities, the Department shall not be prohibited from engaging in such military readiness activities, but shall . . . ensure that military readiness activities conform with the requirements of section 176(c) within 3 years of the date new activities begin." (emphasis added). Only new military readiness activities would receive a temporary grace period for compliance with one provision of the Act. Finally, our proposal does not modify any provision of the Clean Air Act other than the conformity provision of section 176(c). All other provisions are unaffected; if an activity requires an air permit, must undergo new source review, or meet any other requirement of the CAA other than conformity, that requirement must still be met.

B. As described above, the range of activities at NAS Fallon that would be subject to our provision is quite small. Indeed, unless and until new activities occur at Fallon, no activities there would be covered, and there would be no increase in emissions attributable to our provision. Even should new military readiness activities occur, they are likely to generate only small increases in emissions, as discussed elsewhere in my testimony. As Carol Browner, Administrator of EPA during the Clinton Administration, has noted, "Defense sources are a small part of the air quality problem." Letter from Carol Browner, Administrator, Environmental Protection Agency, to William Cohen, Secretary of Defense 2-3 (Jun 17, 1997)

C. It is not the case that the Kinder-Morgan jet fuel pipeline will be exempt from regulation under our proposed revisions to RCRA and CERCLA. Our RCRA and CERCLA provisions apply only to "military readiness activities." As noted above, such activities do not include "the routine operation of installation operating support functions, such as . . . the operation of industrial activities . . ." The operation of a fuel pipeline clearly falls outside the scope of the definition of a "military readiness activity" such language.

*Question 74.* As you may know, the 1,375 square mile Nevada Test Site has been a critical facility,—for the training of our military and the testing of weapons. The site was first established in 1940 as the Las Vegas Bombing and Gunnery Range.

In 1950, the search for a continental U.S. site for nuclear testing led to the establishment of the Nevada Test Site by President Truman in roughly the same location. From 1951 to 1992, approximately 928 nuclear and related tests were conducted at NTS.

Following the moratorium on nuclear testing in 1992, the site has continued to be critical to the training of our military personnel and testing of munitions. The NTS also hosts a Hazardous Materials Spill center where chemicals and other toxic substances are released into the air and ground to test their behavior and cleanup methods. Further, NTS hosts a facility for the testing and cleanup of biological contaminants. Finally, the NTS is now one of the nation's premier training centers for counter-terrorism in the United States.

On a recent visit to NTS, officials indicated that NTS has no difficulties conducting its operations within the confines of the current environmental laws and the case-by-case exemption procedures those laws afford. NTS obtains permits under the CAA and other laws to conduct its training and testing of munitions and chemicals. When endangered desert tortoises are discovered on NTS, they are relocated.

Perhaps more than any other site in the nation—considering its nuclear, chemical and biological testing history and its extensive training activity—NTS conducts a broad range of activities that implicate the environmental laws that are the subject of the Department of Defense proposal, yet has demonstrated its ability to use the exemptions provided within them to enable training and testing to continue unhindered. That ability is not a function of the remoteness of the NTS, as the exemptions relate to activities conducted on the site.

If a facility like NTS can conduct such a broad range of activities within the ambit of the environmental laws the Department would amend in the name of readiness, why is the Department unable to replicate the NTS example at its other facilities? Has the Department sought the assistance of NTS officials in assisting at other operational ranges?

Response. The Department does not seek to exempt its readiness activities from environmental laws; rather, it seeks to clarify and confirm existing regulatory policies that recognize the unique nature of our activities. The RRPI proposal codifies and extends EPA's existing Military Munitions Rule; confirms the prior Administration's policy on Integrated Natural Resource Management Plans and critical habitat; codifies the prior Administration's policy on "harassment" under the Marine Mammal Protection Act; ratifies longstanding State and Federal policy concerning regulation under RCRA and CERCLA of our operational ranges; and gives States and DOD temporary flexibility under the Clean Air Act. The proposals are of the same nature as the relief Congress provided under the Migratory Bird Treaty Act last year, which codified the prior Administration's position on DOD's obligations under the Migratory Bird Treaty Act. The Department is, and will remain, subject to precisely the same regulatory requirements as the private sector when we perform the same types of activities as the private sector. We seek alternative forms of regulation only for the things we do that have no private sector analogue: military readiness activities.

Specifically with respect to NTS, the Department is proud of the strong environmental program there and the success it has achieved in accomplishing its military mission while protecting the environment. The Department strongly believes that NTS, like other installations, would face critical problems executing its vital military mission were, for example, the Fish and Wildlife Service compelled by litigation to designate critical habitat on the facility notwithstanding its excellent Integrated Natural Resource Management Plan; or were litigants able to secure court decisions that the test and training on the facility were actually waste management activities under RCRA or "releases" under CERCLA, triggering crippling regulatory requirements; or State and Federal officials denied the flexibility under the Clean Air Act to temporarily accommodate modest emissions increases resulting from new military readiness activities. Our RRPI proposals simply seek to assure that these destructive outcomes, which are already threatening bases across the country, do not occur at NTS or elsewhere.

*Question 75.* The Department's RCRA proposal at section 2019(a)(2)(D) provides that constituents of munitions are not solid wastes if they "are deposited, incident to their normal and expected use, of an operation range, and are promptly rendered safe or retrieved."

A. Is the standard "promptly rendered safe or retrieved" a legal term of art or otherwise defined in environmental law or other Federal laws?

B. If not, what does this term mean?

C. Who will determine whether a munition or constituent thereof has been rendered "promptly rendered safe or retrieved"? What role, if any, does the Department

anticipate for the expert agency in these matters—EPA—to have over making this judgment?

D. Does a munition, etc., need to originate from an operational range to be covered by the exclusion envisioned in section 2019(a)(2)(D)?

Response. A. Yes, this standard is taken from EPA's Military Munitions Rule, which states "a used or fired munition is a solid waste . . . if the munition lands off-range and is not promptly rendered safe and/or retrieved." 40 C.F.R. 266.202(d). The Munitions Rule was adopted by the Clinton Administration in 1997 after extensive consultation among Federal agencies, State regulators, and other stakeholders. The rule has subsequently been adopted by over 30 States.

B. See A above.

C. The status of off-range fired munitions is an explosives safety determination. The fact that the item may have malfunctioned in the course of its use raises concerns first for the safety of the public and the technicians whose job it is to eliminate the explosives safety hazard. The Military Munitions Rule explicitly acknowledges the role that explosives or munitions emergency response personnel and the Department of Defense have under such circumstances. See 40 CFR 260.10; 262.10(i); 266.201; 262.20(f); 263.10(e); 264. 1 (g)(8)(i)(D); and 265. 1 (c)(1 1)(i)(D). Likewise, the National Contingency Plan recognizes DOD as the "removal response authority with respect to incidents involving DOD military weapons and munitions or weapons and munitions under the jurisdiction, custody, or control of DOD." 40 CFR 300.120(d). In each instance, the determination as to explosives safety matters rests with DOD, while EPA provides regulatory oversight.

D. As the portion of our proposal you have quoted above states the munitions must be, "deposited . . . off an operational range." Characteristically, such munitions would also originate on-range, in the sense that the source of the munition—e.g., a rifle, artillery piece, or aircraft would be on-range at the time the munition was fired. However, this provision would also apply were the platform for the munition delivery was off-range at the time of firing. For example, if naval gunfire from a ship located off-range landed outside the range that was its target, this provision would nevertheless apply were the munition promptly rendered safe or retrieved. This would also be the case if a long-range stand-off munition were fired from and off-range aircraft and landed outside the range that was its intended target.

As noted above, this treatment of off-range munitions was adopted by EPA under the Clinton Administration and has subsequently been adopted by a large majority of the States. It would therefore continue to apply to our ranges and munitions whether or not our RRPI proposal is adopted.

*Question 76.* The Department's RCRA proposal at section 2019(a)(3) provides "(3) Nothing in paragraphs (1) and (2) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munition fragments, or constituents thereof that have been deposited on an operational range once the range ceases to be an operational range."

What standards and process does the Department use and apply to determine whether a range ceases to be "operational"? Please provide me with a list of examples of ranges that were declared by the Department to be no longer operational.

Response. Although the precise details of the processes applied by each military department to determine whether a range is no longer an operational range may differ, the basic underlying standard is as represented by the legislative proposal of the Department to define "operational range". That definition requires that a range be used for range activities or, if not currently used for range activities, be capable of being and intended to be used for range activities; it also requires that the range be under the jurisdiction, custody, or control of the Secretary concerned. If an operational range is put to a use that is incompatible with range activities or if it leaves DOD control, it ceases to be an operational range. Because the term "operational range" is relatively new, there is no example of a range being declared as non-operational. There are, however, numerous examples of ranges being closed, which is the prior terminology used when an operational range ceased to be an operational range. In recent times, many of those ranges were the result of base realignment and closure actions, such as the artillery range at the former Fort Ord in California. Other ranges were closed due to their no longer being either necessary because of changes in mission or viable because of encroachment. Many of these ranges qualify as Formerly Used Defense Sites (FUDS) because they were closed many years ago.

*Question 77.* The Department's RCRA proposal at section 2019(a)(3) provides "(3) Nothing in paragraphs (1) and (2) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munition fragments, or constituents

thereof that have been deposited on an operational range once the range ceases to be an operational range.”

Should the Department face a significant contamination problem at an operational range that it no longer needs to maintain for training and readiness (or other DOD purpose), what incentive does the Department have to declare that range non-operational and thereby trigger cleanup responsibility under RCRA?

Response. Both the existing Military Munitions Rule definition of “inactive range” and our proposed statutory definition of that term provide a strong incentive for DOD not to maintain unneeded inactive ranges, since those definitions require the Department to avoid any current use of the land that would be inconsistent with its future use as a range. EPA and DOD carefully considered this issue during the promulgation of the MMR under the Clinton Administration, and concluded that the MMR’s three-part test for when a range was inactive was a sufficient safeguard against unnecessarily maintaining ranges in inactive status to avoid incurring cleanup costs.

By the same token, your question presumes that DOD has little, or no obligation or incentive to clean up contamination on inactive ranges. DOD policy reflects our understanding that it is more cost-effective to clean up contamination on both active and inactive ranges before it has migrated than to wait until it crosses the range boundary. As part of its fiscal year 2004 Defense Planning Guidance, the Department has initiated an effort to assess potential hazards from off-range munitions and begin remediation by fiscal year 2008. This will include characterization of potential areas of munitions contamination, as well as consideration of hydrology and potential areas associated with drinking water supplies. Our RRPI proposal explicitly waives its protections in the event of off-range migration of munitions constituents, providing a powerful incentive for the Department to proactively cleanup ranges to prevent such migration and the loss of the RRPI protections. These incentives are powerfully reinforced by existing State and Federal authority under the Safe Drinking Water Act (SDWA), which the RRPI does not affect. Under Section 300i of the SDWA, EPA may issue such orders as it deems necessary to protect against not only actual but also “likely” contamination of drinking water sources, as the Agency has done at Massachusetts Military Reservation. Finally, RRPI preserves EPA’s similar order authority under Section 106 of CERCLA. All of these authorities and policies provide powerful incentives for DOD to assess and cleanup contamination on even inactive ranges.

*Question 78.* The Department’s RCRA proposal at section 2019(a)(3) provides “(3) Nothing in paragraphs (1) and (2) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munition fragments, or constituents thereof that have been deposited on an operational range once the range ceases to be an operational range.”

Would there be any way to legally complete the Department to declare the site nonoperational and thereby trigger cleanup responsibility under RCRA?

Response. DOD believes that litigants could not force the Department to designate a range as nonoperational. However, as discussed below, citizens, EPA, and States and localities could compel cleanup, even of an operational range, where contamination was threatened. Moreover, EPA would retain the right to use the existing inter-agency process if it believed DOD was improperly categorizing a range as inactive to avoid cleanup costs.

*Question 79.* The Department’s RCRA proposal at section 2019(a)(3) provides “(3) Nothing in paragraphs (1) and (2) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munition fragments, or constituents thereof that have been deposited on an operational range once the range ceases to be an operational range.”

Could a community surrounding such a facility legally compel in any manner the cleanup of that site?

Response. Under our RRPI proposal, a community or citizen could invoke RCRA remedies to address any contamination migrating off-range that presented an imminent and substantial threat to them which DOD was not addressing under CERCLA.

*Question 80.* Similarly, the Department’s CERCLA proposal excludes from the definition of release—the legal trigger for action under CERCLA—“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 and remain thereon.”

Should an operational range posing contamination problems become unnecessary or unable to be used for training and readiness (or other DOD purpose), what incentive would the Department have to declare that range non-operational and thereby trigger cleanup responsibility under CERCLA?



Response. Please see my answer to Question 77. The same incentives would exist in this case as well.

*Question 81.* Similarly, the Department's CERCLA proposal excludes from the definition of release—the legal trigger for action under CERCLA—“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 and remain thereon.”

Would they be any way to legally compel the Department to declare the site non-operational and thereby trigger for force cleanup responsibility under CERCLA?

Response. Please see my answer to Question 78.

*Question 82.* Similarly, the Department's CERCLA proposal excludes from the definition of release the legal trigger for action under CERCLA—“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 and remain thereon.”

Could a community surrounding such a facility legally compel in any manner the cleanup of that site?

Response. Please see my answer to Question 79.

*Question 83.* Please describe the Department's definition of “operational range,” the authority for such definition, and what constraints—if any—exist on the Department modifying this definition.

Response. The proposed definition of “operational range” is taken from the already enacted definition of the term in 10 U.S.C. 2710. The definition in 10 U.S.C. 2710 was designed specifically for that section and, in transposing the definition to apply to all of Title 10, it was necessary to slightly alter it to make reference to the “Secretaries concerned” because operational ranges are real estate under the jurisdiction, custody, and control of the Military Departments.

The proposal was recently further revised to move the requirement that a range be “under the jurisdiction, custody, or control” to the beginning of the definition so that this important qualification would apply to both active and inactive ranges, rather than the original version which only had the qualifier apply to inactive ranges. It was not the intent of the Defense Department to have “under the jurisdiction, custody, or control” apply only to inactive ranges, and the U.S. Environmental Protection Agency noted that the original language would allow the definition to apply to privately controlled active ranges. Since it is the intention of the Defense Department that the definition only apply to DOD ranges and not to those of any private entity, such as a Defense contractor, we rearranged the wording to ensure there was no confusion. As currently proposed, the language clearly provides that an operational range must, in all instances, be under the jurisdiction, custody, or control of the Defense Department. This excludes the possibility of a private entity claiming that a range under its control is an operational range.

As background, the term “operational range” was developed within the Defense Department to allow us to clearly delineate the difference between our ranges and all other property. In the past, various terms had been applied to refer to various types of properties, primarily in the context of the presence of unexploded ordnance (UXO). Such terms included “active range,” “inactive range,” “closed range,” “transferred range,” and “transferring range.” These terms were not particularly accurate and had the significant defect that they only referred to lands that are or once were ranges. It happens that UXO can be located on many types of properties and many of those properties were never ranges. It was the desire of the Defense Department to ensure that in discussing the subject of UXO, we included all locations where it might be located, not just ranges and former ranges. So it was our intention to adopt terms that would make a clear distinction between those lands currently used as ranges and all other properties, whether those properties were former ranges or not and without regard to whether those properties were still military lands.

*Question 84.* Under the Department's proposal, what authority would exist to address perchlorate contamination of groundwater before contaminated groundwater emanated from the confines of an operational range? If there are other such authorities, may they be invoked by States or by concerned citizens?

Response. The Department of Defense is committed to addressing any contamination that poses an unacceptable risk to human health and the environment. If, for any reason, perchlorate in the groundwater within the confines of an operational range poses an imminent and substantial danger to the public health or welfare, the DOD has the responsibility to take appropriate action under section 104(a)(1) of CERCLA. Additionally, under the Safe Drinking Water Act (SDWA), the EPA Administrator is empowered to take action necessary to protect the public health from an imminent and substantial endangerment created by a contaminant that is

present in, or likely to enter, an underground source of drinking water. EPA has used the latter authority in issuing an order at the Massachusetts Military Reservation to address perchlorate contamination in the groundwater.

*Question 85.* In questioning during the hearing, Senator Inhofe indicated that the exemptions in our environmental laws must be granted by the President. You seemed to agree with him in that assessment. Is there any reason why the President couldn't delegate this responsibility to a lower official?

Response. I believe the President could delegate his authority in accordance with title 3 United States Code, sections 301 and 302. Nevertheless, even a delegation of all such authorities to the Secretary of Defense does not satisfy the concerns addressed by the RRPI initiative. Most national security exemptions in current environmental laws provide relief that is brief in duration and focused on individual activities, facilities, or pollution sources. Such exemptions are ill-suited to ongoing, widespread actions, such as military readiness activities that are long-term, continuous, and ubiquitous—such as the live-fire test and training that occurs at virtually all our ranges.

*Question 86.* Please provide each example where P.L. 105–85 has been invoked by the Secretary of Defense. That law gives the Secretary of Defense the general authority to suspend any administrative action that would have significant adverse effect on the military readiness of any of the armed forces . . . “10 U.S.C. Sec 2014

Response. The Secretary has never invoked this authority, for two reasons. First, the provision largely codifies the inherent ability executive branch officials have always possessed to consult concerning proposed actions and, in the event of unresolved disputes, to alleviate such disputes for resolution. The Defense Department engages in such consultation on a daily basis, as it did prior to enactment of this authority. The specific innovation included in Section 2014 has proven of limited use because it permits DOD to suspend other agencies' administrative actions for at the most 5 days. Experience has shown that resolution or elevation of disputes of any complexity cannot be accomplished on such a time schedule. For example, DOD's work with the Interior Department to resolve disputes over proposed critical habitat designation at Camp Pendleton and at NAS Miramar consumed months of work at all levels of both agencies.

*Question 87.* You noted in testimony before the committee that 10 U.S.C. Sec 2014 provides the Department no defense in litigation. Please provide a list of active litigation concerning the laws the department seeks to amend and a brief summary describing its subject. With respect to resolved litigation, please describe the disposition of that litigation. (You indicated in your testimony that no litigation thus far has been resolved against the Department.) Please distinguish between litigation brought under each of the four environmental laws (CAA, RCRA, CERCLA, and ESA) implicated by the Department's proposal (and in EPW operations under other authorities (State law, local land use law, etc.) and for the purpose of limiting noise and munitions training.

Response. In response to an inquiry from the Chairman of the Committee on Government Reform, the Department of Justice prepared case summaries of actions brought against the Department of Defense under various environmental statutes (attached). As you know, the Department of Justice represents Federal agencies in litigation brought against them. We have referred these summaries to the military departments for their review and assessment to determine how the RRPI would impact their outcome, and for supplementation as appropriate.

*Question 88.* Please provide a list of each Defense Department operational and non-operational range site, Formerly Used Defense Site (FUDS), joint contractor-DOD owned sites where perchlorate production and/or contamination exists. What estimate, if any, has DOD conducted concerning the cleanup costs of such contamination?

Response. Efforts to survey for perchlorate occurrence are described in EPA's Perchlorate Environmental Contamination: Toxicological Review and Risk Characterization, dated 16 Jan 02. The document is available at the following web site:

<http://cfpub.epa.gov/ncea/cfm/recordsdisplay.cfm?deid=24002> Figure 1–3 identifies locations of specific perchlorate manufacturers or other users identified through responses to EPA Information Requests from current manufacturers and through investigations by State and local authorities, and Figure 1–4 identifies locations of reported environmental releases of perchlorate to groundwater, surface water, or soil. Table 1–1 shows occurrences and potential sources of perchlorate releases to the environment as of November 2001, including DOD locations. Cleanup costs will depend upon the cleanup standards established by State or Federal regulatory agencies, and could reach billions of dollars, representing a significant portion of the DOD budget.

EPA's assessment guidance does not establish cleanup standards. The 1999 Interim assessment guidance specifically recommends that "risk assessors and risk managers continue to use the standing provisional RfD range of 0.0001 to 0.0005 mg/kg-day for perchlorate related assessment activities." In absence of site specific risk assessment factors, this provisional RfD range can be converted to a preliminary remediation goal of 4–18 ppb, and is a screening tool and/or point of departure in performing site-specific risk assessment activities. For example, at cleanups conducted pursuant to CERCLA, the NCP (40 CFR 300.430(e) (2) (i)) states, "Preliminary remediation goals should be modified, as necessary, as more information becomes available through the RI/FS." Under CERCLA, risk managers consider other factors in determining remediation requirements, such as cost, effectiveness, community acceptance, protectiveness, and implementability of remedial alternatives. Thus, for completed pathways of exposure, results of the site-specific risk assessment are used to establish acceptable exposure levels for a site, and are evaluated along with other factors in the NCP in selecting remedial alternatives. The preliminary nature of the RfD and the process for considering perchlorate for regulation under the Safe Drinking Water Act leave uncertainty for current response actions. Under these circumstances, it is appropriate for remediation managers to carefully consider focusing their efforts on cost-effective measures to disrupt human exposure pathways to mitigate human health risk while development of regulatory standards proceeds. [from EPA's Q&As: [http://www.epa.gov/swerffrr/documents/perchlorate\\_qa.htm](http://www.epa.gov/swerffrr/documents/perchlorate_qa.htm)]

*Question 89.* In its June 2002, report entitled: Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges, the General Accounting Office found that "DOD officials believe that encroachment of incompatible civilian activities compromises the effectiveness of their training activities . . . 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." GAO at 8. Several complaints made by the Department to the GAO involved non-environmental related matters (or matters not addressed in the Department's proposal) such as competition for frequency spectrum, noise abatement requirements, and incompatible nearby land uses. GAO highlighted that "[m]any encroachment issues result from or are exacerbated by population growth and urbanization." GAO at 9. And that "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." Id.

What provisions of the Department's proposal would affect local land use decisions made surrounding operational ranges? Would the Department's proposal limit the population growth near operational ranges? If so, how?

Response. No provisions of this year's proposal would affect local land use decisions. However, last year Congress passed two provisions which were concerned with land use. One of those provisions gives DOD the authority to enter into third party partnerships with either nongovernment organizations or State and local governments for the purposes of creating conservation easements around our training ranges. The second allows the Department to convey excess DOD land to a conservation organization or local entity for the purposes of conservation.

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STATEMENT OF HON. JOHN PETER SUAREZ, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. Chairman and members of the committee: Thank you for inviting me to speak with you today on behalf of the U.S. Environmental Protection Agency (EPA) about the Administration's proposed National Defense Authorization Act of Fiscal Year 2004. We believe the proposed bill appropriately addresses two important national priorities: military readiness and the protection of human health and the environment. These priorities can both be achieved at the same time, and we appreciate the Defense Department's willingness to work with us to craft the proposals before you today.

As you know, the proposed bill would make changes to certain pollution control laws that EPA administers and to laws concerning wildlife protection and habitat preservation, which are the province of other Federal agencies. I'll confine my remarks here today to the laws under EPA's jurisdiction.

In the wake of September 11th, we understand more than ever the importance of military readiness in combating traditional and emerging foes. Both EPA and

DoD leadership recognize the vital importance of both the mission of protecting human health and the environment and the mission of protecting national security. Both believe that neither mission should be sacrificed at

the expense of the other. Toward that end, EPA and DoD have for years worked cooperatively toward achieving these goals, with tangible benefits to the American people.

The bill before this committee is the result of just such collaboration. Together, the two agencies resolved key issues in a way that allows the Services to continue to "train the way they fight," while protecting the health of our citizens and safeguarding our natural resources. Indeed, we have recently reached agreement with DoD on language clarifying that the proposed changes to solid waste and Superfund laws apply only to operational ranges under the jurisdiction and control of the military services. The Administration has cleared this language and intends to send it to Congress in the near future. This action underscores the Administration's interest in keeping any changes limited and sharply focused.

Today, I would like to highlight for the committee several of these proposed statutory changes the two agencies developed to facilitate our twin missions.

Proposed changes to the Clean Air Act provide the armed forces with needed flexibility, while protecting air quality

EPA recognizes that military readiness depends on DoD's ability to move assets and materiel around the Nation perhaps on short notice. Such large-scale movements of people and machines may have impacts on State Implementation Plans (or SIPs) for air quality.

Accordingly, EPA and DoD developed proposed changes to the Clean Air Act's SIP provisions to allow the armed forces to engage in such activities while working toward ensuring that its actions are consistent with a SIP's air quality standards. Under the proposed bill, the armed forces would still be obliged to quantify and report their impacts on air quality prior to initiating the readiness activity, but would be given 3 years to ensure that their actions are consistent with a given state's SIP. We believe this compromise effectively addresses military readiness concerns, while ensuring timely compliance with air quality standards.

*Proposed changes to RCRA will allow flexible and appropriate munitions oversight*

The Administration's bill also proposes two changes to the Resource Conservation and Recovery Act, or RCRA, the nation's solid and hazardous waste law. First, the bill contains language that would change the statutory definition of "solid waste" under RCRA to provide flexibility for DoD regarding the firing of munitions on operational ranges, while clarifying that the definitional exemptions are not applicable once the range ceases to be operational. This change comports with existing EPA policy and the Military Munitions Rule that have defined EPA's oversight of fired munitions at operational ranges since 1997. The bill specifically maintains the ability of EPA, the states and citizens to take actions against the U.S. Government in accordance with the law in the event that munitions or their constituents migrate off-range and may pose an imminent and substantial endangerment to human health or the environment, if such materials are not addressed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Second, the agencies worked together to craft a clear, common-sense definition of "range." Under the revised definitions of "solid waste" and "range," the armed forces will have statutory assurance that EPA will not intervene in the firing of or training with munitions, while the public may rest secure in the knowledge that EPA, states and citizens have authority to take action against the U.S. Government in accordance with the law if munitions pose a threat off-range or after a range is closed.

The history of interaction between EPA and DOD demonstrates that the two can work together effectively to achieve their respective missions, and this should instill confidence that the two agencies will continue to work together well to carry out those missions under the proposed legislation. EPA has in only one instance found it necessary to take an enforcement action that resulted in the cessation of live fire training at a military base namely, at the Massachusetts Military Reservation (MMR) on Cape Cod, Massachusetts. There, EPA took action under the Safe Drinking Water Act when it determined that the groundwater aquifer underlying MMR, the sole source of drinking water for hundreds of thousands of Cape Cod residents, was threatened with contamination and only after efforts to support voluntary action failed to stop the spread of contamination. Today at MMR, EPA is overseeing cleanup work to ensure that the drinking water supply for Cape Cod residents meets all relevant standards now and in the future. In response to EPA's decisions, the Defense Department shifted some of this training to another facility and limited its training at MMR to using small arms, as well as other training without using explosives, propellants and pyrotechnics.

*Analogous changes to CERCLA will preserve the Agency's Superfund authority to address contamination which presents an imminent and substantial endangerment*

The Administration's bill proposes analogous changes to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as the Superfund law. It would exempt from the definition of "release" under CERCLA explosives and munitions deposited during normal use while on an operational range. It is important to note that EPA would retain authority to take action to abate an imminent and substantial endangerment to public health and the environment due to the deposit or presence of explosives and munitions on an operational range. As with the proposed changes to RCRA, the change to CERCLA affords flexibility to the armed forces in handling munitions at operational ranges, but ensures that EPA has the ability to act when necessary to address the most important public health and environmental concerns.

*Ongoing collaboration on munitions*

Meanwhile, EPA continues to collaborate with DoD and state and tribal regulators to develop a new approach to cleaning up ordnance, explosives and munitions at non-operational ranges throughout the United States. This new approach, an expected product of the Munitions Response Committee (MRC), is designed to work within the framework of existing Federal and state authorities. Under the new process, Military Departments, EPA, Federal Land Managers, and the states and tribes will coordinate, where appropriate, and integrate their respective statutory and administrative authorities under Federal and state environmental laws. The development of Federal, state and tribal partnerships and public participation will be key characteristics of the new process. We believe that the proposed bill complements the partnerships we are building through the Munitions Response Committee and will help the Agency ensure that munitions at both operational and non-operational ranges are subject to sound environmental management.

*The new proposal would authorize the transfer of obsolete vessels for use as artificial reefs*

The bill would also authorize the Secretary of the Navy to transfer certain vessels for use as artificial reefs, but retain key environmental safeguards under CERCLA, RCRA and the Toxic Substances Control Act (TSCA). These ships are often contaminated with asbestos and polychlorinated biphenyls (PCBs). EPA is working closely with the Maritime Administration to determine if and when reefing is appropriate, and to find suitable ship-scraping facilities at home or abroad to dispose of obsolete ships in a safe and environmentally sound manner.

*Proposed changes in wetlands mitigation banking*

One other environmental provision of the bill deserves mention here. It would allow military departments to use military construction funds to make payments to wetlands mitigation banking programs and consolidated user sites when the Department is engaged in an activity that may adversely affect a wetland. A wetlands mitigation bank is typically a privately owned site in many instances, prior converted crop land where wetlands are restored. Wetlands mitigation banks have enjoyed increasing acceptance and success since the mid-1990's, and the new bill would simply clarify that military funds could be used for this purpose.

*Conclusion*

Working together, EPA and DOD have developed a legislative proposal that addresses the concerns of the armed forces about future applications of EPA's statutes and regulations, while at the same time preserving the Agency's ability to protect public health and the environment. In the context of MMR, for example, EPA would still have the authority to protect the drinking water from imminent and substantial endangerment under the provisions of the proposed bill.

Similarly, the proposed legislation would codify the so-called "munitions rule" under RCRA an existing EPA regulation that sets forth the conditions under which EPA and the states can respond under RCRA to environmental threats at both operating and closed military ranges. The proposed legislation also states clearly that EPA is authorized under CERCLA section 106 to address imminent and substantial environmental threats at both operating and closed ranges.

In conclusion, both the Administrator and I support this bill. We believe that it appropriately takes account of the interests of the American people in military readiness and in environmental protection. I am confident that DoD and EPA can work together within the framework of the proposed law to ensure that America's armed forces are able to train to carry out their national security mission and that the Agency is able to carry out its mission of protecting human health and the environment.

This concludes my prepared remarks. Thank you for the opportunity to present EPA's views. At this time, I would be happy to answer any questions you may have.

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RESPONSES OF JOHN P. SUAREZ TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

*Question 1.* Mr. Suarez, I was pleased to meet you yesterday, and I look forward to working with you in the future. For my first question of you I would like you to reconcile some testimony for me.

You have testified that Governor Whitman and indeed EPA as an entity supports the President's military encroachment legislative request. You testified that, "[T]he Administration's bill appropriately takes account of the interests of the American people in military readiness and in environmental protection. I am confident that DoD and EPA can work together within the framework of the proposed law to ensure that America's armed forces are able to train to carry out their national security mission and that the Agency is able to carry out its mission of protecting human health and the environment."

At the same time, Governor Whitman's testified that, "We have been working very closely with the Department of Defense, and I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of an environmental protection regulation," and "[A]t this point in time I am not aware of any particular area where environmental protection regulations are preventing desired training."

Why do you believe that the environmental legislation proposed by the Department of Defense should be enacted when you also apparently believe there is no instance where it is needed?

Response. When Defense Department officials approached EPA in early 2002 to discuss draft legislation, they recognized that EPA's enforcement of the statutes and regulations it administers was not presenting a current impediment to training and readiness. Instead they indicated that their concerns were about possible future applications of EPA requirements, including legal challenges to the nation's training and readiness activities. Working together, we developed legislative language to ensure that America's armed forces are able to train effectively and that our health and environment are protected in the process.

*Question 2.* I want to be clear that as Chairman of this Environment and Public Works Committee and as a father of four and a grandfather of eleven, I am quite mindful of our nation's future and want to continue the improvement in the health of our environment, which EPA statistics show.

Mr. Suarez, according to EPA, will human health and the environment be fully protected under this legislative proposal?

Response. The Administration's fiscal year 2004 Defense Reauthorization Bill promotes future military readiness without jeopardizing public health and environmental protection under EPA's laws. The EPA's fundamental environmental protections for air, water and waste remain in place. We can still exercise enforcement authority to protect human health and the environment. While a few provisions of EPA's laws have been modified, the reauthorization bill does not represent a "sweeping exemption" from our environmental requirements.

Under the proposed bill EPA retains authority under both CERCLA and the Safe Drinking Water Act to address conditions that may pose an imminent and substantial endangerment to human health or the environment.

*Question 3.* In this time of war, and as someone who has served in the Army and someone who has for some years served as Chairman of the Readiness Subcommittee of the Senate Armed Services Committee, and I want to assure the American people that I share with them a concern for our troops in combat.

Mr. Suarez, have you worked closely with DoD on these proposals and are you absolutely convinced that these proposals are necessary to fully accommodate America's military readiness?

Response. I believe the proposed bill appropriately addresses two equally compelling national priorities: military readiness and the protection of human health and the environment.

*Question 4.* What authorities will EPA have to ensure that the environment is clean under Superfund?

Response. The bill explicitly preserves EPA's Superfund authority under CERCLA §106 to order an abatement of any imminent and substantial endangerment created by munitions used for their intended purpose on an operational range. For munitions that migrate off-range or munitions not used for their intended purpose or, indeed, for releases of other hazardous substances, pollutants and contaminants EPA

retains all of its CERCLA response authorities. The same is true for munitions on closed ranges.

*Question 5.* What authorities will EPA have to ensure that the environment is clean under the Resource Conservation and Recovery Act RCRA?

Response. The bill provides a limited RCRA exemption only for military munitions used for their intended purpose on an operational range. Nevertheless, such munitions will be subject to all RCRA authorities, if they are recovered, collected and then disposed of by burial or landfilling or if they migrate off the operational range and are not addressed by a Superfund response action. This provision does not apply to munitions on closed ranges. All other waste handling activities will be subject to the usual RCRA requirements.

*Question 6.* As a former State legislator I want to assure: What is the status of States' rights under this proposal? Do States maintain protections under this proposal? What, if any, rights do States lose under this proposal?

Response. Under the proposal, States would retain rights under environmental laws, with limited exceptions as described below. States would retain authorities under RCRA and CERCLA for munitions that are handled as waste on operational ranges. The bill specifically maintains the ability of States and citizens to take actions against the military in the event that munitions or their constituents migrate off-range and may pose an imminent and substantial endangerment to human health or the environment, if such materials are not addressed by a response action under CERCLA. The proposal has no effect on closed ranges, or ranges that close in the future. The proposed changes to the Clean Air Act's SIP provisions still require the military to quantify and report its impacts on air quality to States, but would give the military 3 years to ensure that its actions are consistent with a given State's SIP.

The proposed change to the statutory definition of solid waste under RCRA would remove State imminent hazard authority under RCRA or State hazardous waste laws over environmental contamination caused by explosives, ordnance, munitions or unexploded ordnance (UXO) on operational ranges used for their intended purpose and which remain on the range. In addition, the proposed legislation would provide for removal to Federal court of CAA and SDWA penalty actions brought by States against Federal agencies.

*Question 7.* What is the status of cities' rights under this proposal? Do cities maintain protections under this proposal? What, if any, rights do cities lose under this proposal?

Response. Under the proposal, cities also would retain rights under environmental laws, with limited exceptions. The bill specifically maintains the ability of States and citizens, including cities, to take actions against the military in the event that munitions or their constituents migrate off-range and may pose an imminent and substantial endangerment to human health or the environment, if such materials are not addressed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The bill has no effect on cities' legal authorities on closed ranges. Cities would no longer have imminent hazard authority under RCRA or State hazardous waste laws over environmental contamination caused by explosives, ordnance, munitions or unexploded ordnance (UXO) on operational ranges used for their intended purpose and which remain on the range.

*Question 8.* Will States lose any tools available to them for cleanup?

Response. Please see the answer to Question 6, above.

*Question 9.* Who is authorized to clean up sites when there is a threat of "imminent and substantial endangerment" States or the Federal Government or both?

Response. Both EPA and States are authorized under the imminent and substantial endangerment provisions of a variety of State and Federal anti-pollution laws to compel cleanup of sites where conditions may pose a threat of imminent and substantial endangerment.

*Question 10.* I know Senator McCain has concerns that there may a loss of funding for cleanup if these legislative proposals are enacted. Is there any truth to that? Will EPA change its allocation of funds if these proposals are enacted?

Response. DOD is in a better position to address any impact these legislative proposals might have on DOD funding for cleanup of DOD sites. The legislative proposals would not likely, however, have a significant impact on how EPA allocates cleanup funds.

*Question 11.* Let us run through the 5 subsections of the CAA proposal for one moment. Is it fair to characterize the subsection (a) as requiring DoD to estimate and report to the State emissions from the proposed military training activities?

Response. Yes, in the version of the legislation to which you are referring, the Department of Defense would have had to estimate and report to the State.

*Question 12.* Does subsection (a) also provide DoD with a 3-year window of flexibility?

Response. Yes, under this version of the bill DoD would have been provided with a 3-year window of flexibility.

*Question 13.* Is it fair to characterize subsections (b) thru (e) as holding the State harmless for emissions from military readiness activities? Are cities also held harmless?

Response. Yes, both cities and States would have been held harmless.

*Question 14.* Some States and some cities have expressed the concern that they will bear an additional burden upon enactment of these legislative proposals. Is there any truth to that burden-shifting argument?

Response. We do not believe that this legislation, if enacted, would place greater burdens on States and cities. For example, the proposed changes to the Clean Air Act would give the military flexibility to move people and materiel around the country, without first having to demonstrate compliance with air quality requirements. Ultimately, however, DoD would have to comply fully with air quality requirements.

*Question 15.* Is there any truth to the argument that under these proposals we are accomplishing the universally accepted goal of supporting our Armed Forces at the "expense of our non-military citizens," as Councilmember Lindeman from Aurora, Colorado states in her testimony?

Response. The proposed legislation, in our view, strikes an appropriate balance between ensuring military readiness and environmental protection. The legislation, if enacted, would preserve essential authorities for EPA to protect human health and the environment.

*Question 16.* Councilmember Lindeman characterizes these proposals as "blanket exemptions" from environmental laws. Is that a fair characterization?

Response. No. As indicated above, the proposed provisions to the Clean Air Act provide extensions to certain deadlines but ultimately require compliance with air quality requirements. The proposed changes to RCRA and CERCLA are limited to the application of those laws to munitions used for their intended purpose on an operational range, and that remain on an operational range. EPA retains its full authorities with respect to a broad range of other DoD activities.

*Question 17.* I want the experts at EPA to put any unwarranted fears to rest once and for all. Are the ramifications from these proposals "serious," "untenable," and do they pose "significant potential for adverse public health effects in cities with respect to air, drinking water, and management of hazardous waste," as Councilmember Lindeman states in testimony, or does this rhetoric not match the reality of the proposal?

Response. We respect the concerns expressed by Councilmember Lindeman, as well as others, regarding the effects of the proposed legislation. EPA has worked with the Department of Defense and others within the Administration to ensure that the proposed legislation, if enacted, would have few, if any, adverse effects on public health and the environment. We believe that the proposed legislation would preserve EPA's essential authorities to protect public health and the environment.

*Question 18.* Mr. Suarez, in working with DoD on this proposal, can you tell me from EPA's perspective why a 3-year window of flexibility might be appropriate, as opposed to 1 year or 8 years, for example? Is this a reasonable amount of time to offset emissions that might result from the deployment of new weapons systems and/or realignment of force strength?

Response. After discussions with the DoD and other departments, we concluded that a 3-year window of flexibility would have been the appropriate option for ensuring that the military could accomplish their training and move military equipment in a way that minimizes air quality impacts while ensuring readiness. A time line of less than 3 years might not have given the military adequate time to account for the added emissions generated by the movement of troops and/or equipment. We considered extending the flexibility to 5 years, but determined that the length of time (or longer time periods) may not have matched up well with the deadlines for achieving and maintaining clean air.

*Question 19.* What do you think of the suggestion that we accommodate concerns that this window is too much time and thus represents too many emissions by going with two and a half years or 2 years instead of 3 years?

Response. As stated in the preceding answer, we believe that 3 years would have been the appropriate length of time.



*Question 20.* Councilmember Lindemann poses a rhetorical question in her testimony that I would like to have answered in reality.

She states, "Contamination, and subsequent closure, of sources of drinking water by military ordnance constituents such as perchlorate, RDX and TNT have already occurred in Maryland and Massachusetts under current law. What will happen in these municipalities if the Department of Defense is exempted from the relevant environmental statutes?"

What is the answer to her question? What would have happened in those situations if these legislative proposals had been enacted at that time? Would things have proceeded differently?

Response. The proposed bill does not alter EPA's authorities under the Safe Drinking Water Act authorities EPA has used in the past to address drinking water contamination at the Massachusetts Military Reservation (Cape Cod, Massachusetts), for example.

*Question 21.* Councilmember Lindemann makes another rhetorical point in her testimony that I would like to have answered in reality. She characterizes this proposal as exempting military facilities from CERCLA remediation requirements, thereby halting the cleanup of the sites and preventing any effective opportunity for redevelopment and economic sustainability in the surrounding community. She makes the case that the economy is thus jeopardized. Is there any truth to that assertion?

Response. We believe that the proposed legislation would not have significant impacts on opportunities for redevelopment and economic sustainability. The CERCLA provisions would affect only munitions used for their intended purpose on an operational range, meaning that DoD is continuing to use the land for military readiness activities. The CERCLA provisions would NOT affect DoD's obligation to remediate contamination off of operational ranges or on ranges that are no longer operational.

*Question 22.* Concern has been raised about the usage of the term "constituents thereof" in conjunction with the list "explosives, unexploded ordnance, munitions, munitions fragments." What, if any, is the effect of using the term "constituents thereof?"

Response. As EPA understands it, if the term "constituents thereof" is not included then an operational range would remain potentially subject to RCRA or CERCLA authorities based on the premise that once the constituents of the explosives, unexploded ordnance, munitions or munitions fragments become separated they are no longer "explosives, unexploded ordnance, munitions or munitions fragments" and, arguably no longer covered by these legislative proposals.

*Question 23.* Do the legislative proposals in any way, either directly or by implication, affect the Safe Drinking Water Act over which this committee has jurisdiction?

Response. No.

*Question 24.* Mr. Benvenuto on the next panel has shown himself to be thoughtful and analytical in some of his suggestions. He has suggested that we make explicit in the statutory language that this legislation in no way impacts the Safe Drinking Water Act. Even if this language were redundant, wouldn't it be a good idea as a means of reassuring States and cities? Would EPA agree to this suggestion?

Response. EPA does not believe it is necessary to include a specific reference to the Safe Drinking Water Act (SDWA) in this legislative proposal. We would recommend providing the assurance to States and citizens in the accompanying legislative history instead of adding redundant language to the statute.

*Question 25.* The "Military Munitions Rule" which I have in my hand was proposed in 1995 by then EPA Administrator Carol Browner during the Clinton/Gore Administration. The same cast of characters finalized the rule in 1997. The rule itself was mandated by a Democrat-controlled Congress in 1992 legislation called the Federal Facilities Compliance Act.

Some have suggested that merely codifying the Military Munitions Rule the work of the Democrats would be a massively [sic] roll back of environmental law and would constitute a sweeping exemption. Could this allegation be true?

The allegation is that there are a whole host of implications associated with codifying the rule, such as State sovereign immunity, etc. Can you comment on this allegation?

Response. As I testified before the Senate Environment and Public Works Committee: "We believe the proposed bill appropriately addresses two important national priorities: military readiness and the protection of human health and the environment. These priorities can both be achieved at the same time, and we appreciate the Defense Department's willingness to work with us to craft the proposals before you today." We believe the proposed changes to the law are limited and sharply focused.

## RESPONSES OF JOHN P. SUAREZ TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

*Question 1.* The Administration has testified that the bill would not affect the nation's ability to address perchlorate in groundwater because EPA would retain its "imminent and substantial endangerment" authority under both Superfund and the Safe Drinking Water Act. Am I correct that those emergency authorities cannot be invoked by either States or concerned citizens?

Response. Yes, neither citizens nor States may take action under Section 1431 of the Safe Drinking Water Act (SDWA) to abate an imminent and substantial hazard. Nevertheless, any person (including citizens and States) may commence an action under Section 1449 of the SDWA against anyone who is alleged to be in violation of any SDWA requirement.

*Question 2.* Am I correct that EPA's military munitions regulation does not (1) alter the statutory definition of "solid waste", (2) limit EPA's statutory authority to respond to "imminent and substantial endangerments" under RCRA 7003, (3) narrow the scope of RCRA's 6001 sovereign immunity provision, and thus does not affect the ability of States to enforce their own hazardous waste laws, (4) alter the scope of the citizen suit provision of RCRA 7002, or (5) alter the rule governing the cleanup of hazardous constituents from military munitions?

Response. That is correct.

*Question 3.* Under this proposal, toxic waste from military munitions that leach off an operational range would remain subject to the Federal hazardous waste laws only if they are not "addressed under Superfund." Please explain what "addressed" means, whether EPA or DOD would be responsible for making such a determination and the process they would follow?

Response. It is our understanding that an off range release would be "addressed under Superfund" if the release is the subject of a response action under CERCLA. Generally, Executive Order 12580 delegates the President's CERCLA response authority to DOD for releases on or from a facility under the jurisdiction, custody or control of DOD. Therefore, DOD would determine whether to initiate a response action.

## RESPONSES OF JOHN P. SUAREZ TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

*Question 1.* Why does the DoD need these waivers when all of these laws have provisions that specifically exempt military activities in the case of national security?

Response. DoD has stated that wholesale, repeated use of emergency exemptions for routine, ongoing readiness activities make little sense given that such activities could easily be accommodated by minor clarifications and changes to existing law.

*Question 2.* When you testified before us on April 2, you stated that you were unaware that State and local air regulators were opposed to DOD's proposed exemptions.

What efforts has this administration made to reach out to, and solicit the input of, the local and State regulators concerning these proposals?

To which local and State representatives did this administration reach out? Did the administration's efforts include outreach to the State and Territorial Air Pollution Program Administrators?

Did the Administration's efforts include outreach to the States' Attorneys General?

Did the administration's efforts include outreach to the State and local solid and hazardous waste program managers?

Did the administration's efforts include outreach to the League of Cities?

Response. EPA did not manage the comment-gathering process on this proposed legislation. We submit that such questions may be better addressed to DoD.

*Question 3.* The DoD exemption proposal before us would exempt DoD from many of the environmental laws and regulations that apply to the private sector. Is this administration abandoning the long-standing policy that the Federal Government, including DoD, should be held to the same environmental enforcement standards, enforcement and rules as the private sector?

Response. No, this Administration remains fully committed to the principle that Federal facilities should be held to the same standards as the private sector.

*Question 4.* In your testimony before this committee you asserted that EPA fully supports DoD's request for exemptions from RCRA and CERCLA as reflected in Section 2019 of the Readiness and Range Preservation Initiative (RRPI). However, is

it not correct that in EPA's official comments to OMB on the DOD proposal, EPA stated that: "EPA opposes this section"?

Did EPA in its official comments to OMB also state that one of these reasons is because current laws and regulations already address DoD's concerns?

Did EPA in its official comments to OMB also state that EPA's 1997 Military Rule substantially addresses the concerns raised by DoD?

Did EPA in its official comments to OMB also state that the RCRA and CERCLA language "eliminates" the ability of a State or other person to request that the President exercise his authority under section 106(a) to address an "imminent and substantial endangerment to health or welfare or the environment"?

And, third, is it correct that EPA in its official comments to OMB also opposed this proposal because "it fails to provide for the rights of States and citizens to address imminent and substantial endangerment issues at Federal facilities"?

Am I correct that EPA took the position in its official comments to OMB on the DOD proposals on RCRA and CERCLA that "an across the board exemption for potentially hundreds of 'operational ranges' is too sweeping"?

Response. EPA's comments pertain to a draft version of the proposed legislation that was substantially changed in large measure, a result of interagency dialog between DoD and EPA in the final Administration proposal to Congress.

*Question 5.* According to EPA's official comments to OMB, under the DOD proposal, EPA and States would have to "wait for human health and environmental effects to occur beyond the boundaries of the operational range before the Agency or State could take action." In other words, EPA and States would have to wait until perchlorate migrated off an active range and contaminated drinking water before it could undertake clean-up activities. While many believe that the proposal is broader than the administration asserts, even were the administration's interpretation correct, it would seem that it does not make sense to wait for perchlorate or other contaminants to migrate off of an active range and actually contaminate drinking water or harm people before taking action to prevent the spread of the contamination. EPA's official comments to DOD's proposal state that DoD's proposed policy "ignores the substantial benefits, including reduced cost to respond, that could be generated under RCRA/CERCLA response prior to contamination migrating off an operational range." In fact, it has long been EPA's policy to try and stop the spread of contamination instead of just waiting to clean it up after it occurs. Has EPA changed its policy regarding drinking water protection?

Response. No, EPA has not changed its policy regarding drinking water protection. Indeed, the Administration's proposal leaves the Safe Drinking Water Act untouched. We believe that EPA would retain sufficient authorities under the proposed legislation to protect human health and the environment.

*Question 6.* There are numerous hazardous waste sites across the Nation, such as the Aerojet site near Sacramento, where perchlorate is being cleaned up using Superfund. Since this proposal would exempt DoD ranges from CERCLA, won't this bill restrict EPA's ability to remedy perchlorate contamination under CERCLA? Please explain.

Response. The Aerojet site near Sacramento, California is not an "operational range," as that term was defined in the proposed readiness legislation. Accordingly, none of the proposed legislative changes would apply to the Aerojet site, and current law will continue to control.

The proposed legislation expressly preserves EPA's authority to take action under CERCLA §106 for munitions that pose an imminent and substantial endangerment on an operational range. Under the bill, the remainder of EPA's CERCLA remedial authorities for munitions on operational ranges are simply postponed until after a range ceases to be operational.

*Question 7.* Although you assert that the modifications to RCRA and CERCLA will not hamper cleanup of perchlorate, is it not correct that CERCLA and RCRA are the laws that govern cleanup of hazardous waste sites?

Response. It is correct that CERCLA and RCRA are two of the laws that govern cleanup of hazardous waste sites. The proposed bill leaves untouched EPA's authority under the Safe Drinking Water Act. EPA has used this authority to order investigation of and evaluation of treatment technologies for perchlorate at the Massachusetts Military Reservation on Cape Cod.

*Question 8.* At how many current, and at how many former, DoD sites across the Nation are Superfund or RCRA being used to manage cleanup?

Response. The fiscal year 2002 Defense Environmental Response Program Report (DERP) to Congress identifies 3,479 installations under DERP (page B-3). According to this report there are 1,745 active and closing installations with cleanup work and 1,734 Formerly Used Defense Sites (FUDS).

*Question 9.* How many of these sites have perchlorate contamination?

Response. Attached is a list of 29 DoD facilities with known perchlorate releases. Also attached is a list of private facilities which may include some former Defense sites. Because PRP searches are still ongoing at a number of sites and because liability has not been established for all the private party sites, at this time EPA cannot precisely identify which ones may have the Department of Defense as a potentially responsible party. [Note: documents are retained in committee files.]

*Question 10.* At how many current, and at how many former, Department of Defense (DoD) sites is the Safe Drinking Water Act (SDWA) being used to manage cleanups?

At how many of the current, and at how many of the former, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and Resource Conservation and Recovery Act (RCRA) sites would partial or total cleanup be waived were the recommendations before us now already in place?

At how many sites is the EPA using its imminent and substantial endangerment authority to oversee CERCLA cleanups? How many of these are DoD sites? How many of these sites have perchlorate contamination? How many of these sites are DoD perchlorate contamination sites?

Response. The following numbers have been gathered from various EPA data bases and from the various EPA Regions and offices. There are many bodies that are involved in the enforcement of these statutes, including the States, EPA and the Department of Justice. The information requested may not have been comprehensively maintained or recorded and, therefore, the numbers may not reflect all possible incidents.

Clean ups have been managed under the SDWA at only one DoD facility. EPA issued the Massachusetts Military Reservation (MMR) unilateral orders under Section 1431 of the SDWA on three separate occasions. The orders issued to MMR also relied on EPA's imminent and substantial endangerment authorities under RCRA.

The records of Superfund and RCRA sites that have undergone partial or total cleanups do not reveal whether the proposed legislative exemptions would effectively waive those cleanups. The proposal draws a distinction between munitions deposited an operational range incident to their normal and expected use and munitions handled in other ways. In any event, the proposed legislation would postpone, not waive, DoD's obligation to clean up munitions deposited on operational ranges incident to their normal and expected use.

There are a number of sites at which EPA has used its imminent and substantial endangerment authority under CERCLA §106 to oversee cleanups. As maintained in CERCLIS, EPA's online data base for CERCLA actions, approximately 153 sites have received unilateral orders under CERCLA §106, including 151 private party sites and 2 Federal facility sites. No unilateral orders under CERCLA §106 have been issued to a DoD facility. Perchlorate has not been named as a contaminant in the records of these sites.

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STATEMENT OF CRAIG MANSON, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Subcommittee, I am Craig Manson, Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior (Department). I am pleased to appear before you today to discuss the role of the Department of the Interior in implementing Federal natural resource laws and our continuing working relationship with the Department of Defense (DoD) on natural resource issues. My statement will address the Fish and Wildlife Service's responsibilities and authorities under the Endangered Species Act (ESA), the Sikes Act, and the Marine Mammal Protection Act (MMPA). These laws reflect our Nation's long-standing commitment to the conservation of our natural resources for the benefit of future generations.

The Department interacts with Department of Defense activities through its bureaus, including the U.S. Fish and Wildlife Service, the Bureau of Land Management, and the National Park Service. The Fish and Wildlife Service strives to insure flexibility in meeting our joint responsibilities under the various natural resource laws without impacting the military's ability to train its personnel. I believe that the Fish and Wildlife Service and the military have done a commendable job at working together to strike a balance between our legal responsibilities and the Armed Forces' duty to be both protectors of our National Security and stewards of our natural heritage. I also acknowledge that more can be done. I will address both our successes and challenges as I discuss issues associated with the applicable laws.

### *Endangered Species Act*

The ESA was passed in 1973 to conserve vulnerable plant and animal species that, despite other conservation laws, were in danger of extinction.

DoD has a critically important role to play in the conservation of many rare plants and animals. At least 300 species listed as threatened or endangered occur on DoD-managed lands. DoD manages approximately 25 million acres on more than 425 major military installations throughout the United States. Access limitations due to security considerations and the need for safety buffer zones have sheltered many military lands from development pressures and large-scale habitat loss. As a result, some of the finest remaining examples of rare wildlife habitats exist on military lands.

The Fish and Wildlife Service has strived to establish good relationships with DoD that enable the military to carry out its mission of protecting our country while also ensuring the conservation of ESA-listed species on land it manages. Some outstanding examples of these partnerships are included at the end of my statement.

### *Candidate Conservation*

Conserving species before they need protection under the ESA is easier, more efficient, and poses fewer challenges to Federal agencies, including the military. In partnership with DoD and NatureServe, the Fish and Wildlife Service is developing a list of all at risk, non-federally listed species that may be found on or near military lands. This partnership project was developed by the military agencies, and demonstrates their interest in working with the Fish and Wildlife Service to benefit species.

The term “species at risk” is a term used by NatureServe for a native species that is either a candidate for listing or is considered by NatureServe and the Network of Natural Heritage Programs to be “imperiled” or “critically imperiled.” In NatureServe’s use of the term, “Species at risk” refers to species that are presumed extinct, historical, critically imperiled, imperiled, and vulnerable (GX, GH, G1, G2, G3 ranks, respectively). Although the Fish and Wildlife Service generally means the same thing when we use the term “species at risk,” we use the term as a descriptive, illustrative term for those species that may warrant conservation to prevent the need to list under the ESA. A ranking of G1, G2, or G3 indicates those kind of species. “Imperiled” and “critically imperiled” are defined by NatureServe as terms referring to G1 and G2 ranked species.

Once a species at risk is identified based on a mutual priority between the DoD installation and the FWS office, the Fish and Wildlife Service works with DoD to develop and implement conservation recommendations for the relevant activity. DOD working on a particular “species at risk” is based on a mutual priority between the DOD installation and FWS office.

In addition to this local and regional cooperation, Fish and Wildlife Service and DoD personnel have been meeting quarterly for several years in an “Endangered Species Roundtable.” This informal session allows for open discussion and can lead to the referral of particularly difficult issues to headquarters for guidance or resolution. The group also reviews the Sikes Act and Integrated Natural Resource Management Plan (INRMP) development and implementation as they pertain to endangered species management.

### *Challenges*

Even with these successful partnerships, we acknowledge that there have been challenges in resolving endangered species conservation and the military mission at some DoD bases and facilities. For example, 18 threatened or endangered species occur on Camp Pendleton, a Marine Corps Base in California. For some of these species, like the tidewater goby, the base harbors the only known remaining populations. Preventing potential conflicts between endangered species conservation and Camp Pendleton’s primary military mission continually challenges the creativity of both the Fish and Wildlife Service and the base leadership.

Section 7(j) of the ESA provides a national security exemption that DoD can invoke in cases where National Security would be unacceptably compromised by conservation responsibilities. This exemption has never been invoked by DoD, a fact that speaks very well to the creativity of our military and natural resource professionals. However, it is apparent that we must avoid penalizing the military for having done positive things for conservation of species and we must not unfairly shift the burden of species protection to the military. Additionally, in some cases, issues arise because of differing perceptions between our respective agencies about the effects of the provisions of the ESA. Finally, I must note that many of the challenges presented to the military under the ESA are similarly faced by other Federal agen-

cies and private landowners. We look forward to continuing to work with the DoD to clarify these issues and build upon the relationship we have established.

*Recent Court Decision on Definitional Exclusions from Critical Habitat*

Integrated Natural Resource Management Plans (INRMPs) are planning documents that allow the military to implement landscape-level management of its natural resources while coordinating with various stakeholders. The Department of the Interior initiated a policy in the previous Administration, which we have continued, to exclude military facilities from critical habitat if there was an approved INRMP for that facility which addressed the species in question. However, a recent court case has cast doubt on our ability to continue this practice.

The policy is based on the definition of critical habitat which states, in part:

. . . the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;

The exclusion policy was based on a decision that military lands with an approved INRMP, and other types of land with approved management policies, did not require special management consideration because they already had adequate management and, thus, by definition would not be considered critical habitat.

However, the U.S. District Court in Arizona has ruled, in a case relating to Forest Service lands (*Center for Biological Diversity v. Norton*), that this interpretation is wrong, and the fact that lands require special management necessitates their inclusion in, not exclusion from, critical habitat. The Court went on to say that the government's interpretation amounted to our inserting the word "additional" into the statute (between "require" and "management"), and that only Congress can so revise the definition.

While the implications of this decision go far beyond military lands, we felt it important to advise the committee of it and the cloud it casts over our continued ability to exclude military lands with approved INRMPs from critical habitat. We believe this adds additional weight to the Administration's proposal for a statutory exclusion.

To avoid possible confusion in light of the Court's ruling, we would suggest striking the words "provides the 'special management considerations or protection' required under the Endangered Species Act (16 U.S.C. 1532(5)(A)) and" from the proposed new section 2017(a) of the Administration's Readiness and Range Preservation Initiative. While that phrase is consistent with our interpretation of the law, it could cause future litigation problems due to the Court's ruling that the necessity for "special management considerations or protection" requires that land to be included, not excluded, from critical habitat. This change would leave the section with an unambiguous statement that completion of an INRMP for the species in question precludes designation of critical habitat at that facility.

*Recent Critical Habitat Actions*

The ESA portion of the Administration's proposal addresses critical habitat designations. The Department has been able to address a number of DoD concerns over critical habitat designations.

Critical habitat proposed for the purple amole, a plant, in California included significant portions of Camp Roberts and Fort Hunter Liggett. Camp Roberts had a completed INRMP which addressed conservation of this plant, and we excluded it from the critical habitat designation on this basis.

While Fort Hunter Liggett was developing an INRMP to address the plant, it did not have the plan completed at the time we had to make the decision on the critical habitat designation. However, the Department of Defense had provided us with detailed comments on the adverse impacts to military readiness that would result from the proposed designation, and these justified removing the Fort from the critical habitat under section 4(b)(2) of the ESA. We determined that the benefits of excluding the area exceeded the benefits of inclusion, in that the adverse impacts to national defense exceeded the benefits that would result from designating the area as critical habitat.

Although not the basis for our decision, the fact that Fort Hunter Liggett had a statutory obligation to complete its INRMP, and to include the plant within that plan, provided us with an additional comfort level for that exclusion.

*Sikes Act and Integrated Natural Resource Management Plans*

In fiscal year 2002, the Fish and Wildlife Service and state fish and wildlife agencies assisted in development, review, and/or implementation of INRMPs for 225 military installations in the United States.

INRMPs serve as an effective vehicle through which DoD and the Military Services can comprehensively plan for conservation of fish and wildlife species. This planning has the potential to address important needs for resident endangered species, including the protection of habitat.

We are committed to improving and expanding our existing partnerships with DoD, the Army, the Navy, the Air Force, and the Marine Corps. We look forward to opportunities to increase the utility of INRMPs as tools to maximize the potential benefits of DoD lands to fish and wildlife conservation while ensuring effective training of our troops.

#### *Marine Mammal Protection Act*

The Marine Mammal Protection Act of 1972 established a Federal responsibility, shared by the Secretaries of the Interior and Commerce, for the management and conservation of marine mammals. The Department of the Interior is responsible for sea otters, walrus, polar bears, dugongs, and manatees, while the Department of Commerce is responsible for cetaceans and pinnipeds, other than walrus, including seals, whales and dolphins. In 1994, Congress enacted a number of amendments to the statute. One of the provisions, with broad applicability throughout the Act, added the definition of "harassment" as an element of the Act's take provisions.

Over the last several years, the Fish and Wildlife Service has worked diligently with the National Marine Fisheries Service (NMFS), the Marine Mammal Commission (MMC), the United States Navy, and Alaska Natives to develop proposals that enhance marine mammal conservation, and provide greater certainty to the regulated public regarding certain areas of the existing law. During this process, revisions to the definition of harassment were considered to address a number of concerns, including those expressed by the Navy. The text of this proposed amendment to the definition of harassment is contained in Administration's Range Readiness and Preservation initiative in a way that only applies to DoD military readiness activities.

We note that this same language applying to all entities, in addition to other important proposals related to the MMPA, are contained in the Administration's comprehensive legislative proposal to reauthorize and amend the Marine Mammal Protection Act. This MMPA reauthorization proposal was transmitted to Congress at the end of February. The Department strongly supports enacting this comprehensive legislative proposal, which will address the concerns of the Navy regarding harassment.

The Administration's Range Readiness and Preservation initiative contains two other provisions related to the MMPA an incidental take provision related to military readiness activities, and a national defense exemption. Because the Department of Commerce has the most interaction with DoD regarding these particular MMPA issues, we will defer to their comments on these provisions.

#### *Conclusion*

In closing, Mr. Chairman, I believe both the Department of the Interior and DoD have acted cooperatively to implement natural resource conservation laws passed by Congress. We are aware of the challenges that have arisen during this endeavor. The Department is prepared to explore and craft creative solutions to balance our conservation mandates with military readiness. We look forward to continue work with the Department of Defense on this vitally important matter.

This concludes my testimony. I appreciate the opportunity to appear today before the committee, and I would be pleased to answer any questions you have.

#### ATTACHMENT

##### EXAMPLES: FWS-DOI COOPERATION IN ENDANGERED SPECIES CONSERVATION

*United States Air Force Academy, Colorado.*—The U.S. Air Force Academy recognized the value of long-range planning when it commissioned a baseline study of small mammals in 1994. The survey aided the Air Force in identifying the presence of the Preble's meadow jumping mouse, which at the time was a candidate for listing. A species receives protection under the ESA when it is listed as endangered or threatened. In order to help DOD agencies plan their activities, the Fish and Wildlife Service shares information on listing candidates and upcoming listing actions. As a result, the Academy entered into a partnership with the Colorado Natural Heritage Program to study the mouse and provide information for management and conservation strategies.

When the jumping mouse was listed as threatened in 1998, the Fish and Wildlife Service took steps to ensure that the Academy would be a full partner in the species'

management and recovery. The Academy's natural resources manager is a member of the Science Advisory Team, a group of scientists and managers dedicated to compiling the best science available to support the conservation of the mouse throughout its range. An Academy representative also holds a position on the executive committee for a habitat conservation plan (HCP) under development for El Paso County, Colorado. Through the HCP process, the Academy will coordinate with non-Federal entities in the development of regional conservation strategies for the mouse. In addition, at the request of the Fish and Wildlife Service, the Academy's natural resources manager is representing the Air Force on the Preble's Meadow Jumping Mouse Recovery Team, which is charged with developing a plan to restore the species to a secure status. The Air Force also initiated a programmatic formal consultation under section 7 of the ESA for its Preble's meadow jumping mouse conservation management plan and conservation agreement. The biological opinion provided by the Fish and Wildlife Service on the Academy's conservation management plan significantly reduced the regulatory burden on both the Academy and the Fish and Wildlife Service by removing the need for section 7 consultations for each instance of regular maintenance.

*Camp Pendleton, California.*—In 1999, substantial areas of Camp Pendleton were included in proposed designations of critical habitat for 5 of the 18 listed species that are present on the base. The Fish and Wildlife Service was able to work within the provisions of the ESA to avoid designating critical habitat on the training areas within Camp Pendleton.

The ESA requires the Fish and Wildlife Service to determine whether designation of critical habitat is prudent and determinable. Under sections 4(b)(2) of the ESA, the Secretary of the Interior can exclude areas from critical habitat designations when economic or policy interests outweigh the expected benefits of designation. The Fish and Wildlife Service has used military readiness as a reason to exclude training areas from critical habitat designations many times now.

For example, the 1999 proposals for critical habitat on Camp Pendleton would have designated over 50 percent of the base as critical habitat for listed species, including the California gnatcatcher, the Tidewater goby, the Riverside fairy shrimp, the San Diego fairy shrimp, and the arroyo toad. As a result of the exclusion process discussed above, the Fish and Wildlife Service was able to exclude most of Camp Pendleton from the designated critical habitat due to Marine Corps concerns about the effects the designations could have on military training critical to national security. The land area currently designated as critical habitat on Camp Pendleton encompasses less than 4 percent of the 125,000 acre, over half of which is located on land leased by the State, rather than the base proper.

*Fort Hood, Texas.*—Under the section 7(a)(2) of the ESA, Federal agencies are required to consult with the Fish and Wildlife Service to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitats. A good example of this process occurred recently at Fort Hood. As one of the largest heavy artillery training sites in the country, it conducts live weapons fire and aviation training and houses more than 500 tanks. Much of the 220,000-acre base resembles barren, scorched battlefields with ruts as deep as trenches. However, it also contains essential nesting habitat for two endangered songbirds, the golden-cheeked warbler and black-capped vireo. Fort Hood is balancing its military mission with environmental stewardship.

As part of its responsibility under the ESA, the post manages 66,000 acres, more than 25 percent of the land on base, for the recovery of these two endangered species. The post also provides a haven to wintering bald eagles, occasional visiting whooping cranes, peregrine falcons, and other rare plant and animal species.

The Army entered into an interagency consultation with the Fish and Wildlife Service under section 7 of the ESA. In 1993, the Fish and Wildlife Service issued a "no jeopardy" Biological Opinion (BO). Following the issuance of the BO, Fort Hood contracted with the Nature Conservancy of Texas for further research and monitoring of the birds. In conjunction with Fish and Wildlife Service and Army biologists, Conservancy researchers are compiling the most comprehensive body of information on the birds to date. Fort Hood has followed the requirements of the 1993 BO (including a version amended in 2000) and has funded valuable research and management strategies that can be applied to warbler and vireo issues range-wide. The birds are benefiting from our partnership with the Garrison Commander and base natural resources staff.

*Fort Bragg, North Carolina.*—For listed species, recovery is the ultimate goal. Section 7(a)(1) of the ESA directs Federal agencies to use their statutory authorities to fulfill this goal. The Sandhills region of North and South Carolina supports the largest population of red-cockaded woodpeckers (RCW) in the United States. Fort



Bragg is the only Federal authority managing lands in that region for the recovery of RCWs. The area around Fort Bragg is being rapidly developed, and if critical tracts are not protected soon, they will be lost to the woodpecker. Loss of these lands due to development also would limit Fort Bragg's ability to sustain current and future military training. In response, the Army launched a Private Lands Initiative with The Nature Conservancy and other partners to purchase land or conservation easements from willing sellers. The lands will not only become available for red-cockaded woodpecker recovery, but also for compatible military training activities and recreation.

*Fort McCoy, Wisconsin.*—Fort McCoy encompasses 59,750 acres and is home to a diversity of vegetation, including wild lupine, which is the only known food plant for larvae of the endangered Karner blue butterfly. Since 1990, when the installation discovered Karner blues on its land, military training and the butterflies have coexisted and thrived. Fort McCoy officials began coordinating with the Fish and Wildlife Service on the impact of both military and non-military activities affecting the Karner blue butterfly in 1992. In early 1994, the Fish and Wildlife Service issued Fort McCoy a no-jeopardy BO that included “reasonable and prudent measures” and “terms and conditions,” both as provided under the ESA. As part of an effort to fulfill those terms, Fort McCoy submitted a draft Karner Blue Butterfly Conservation Plan to the Fish and Wildlife Service in 1995. The plan outlined the direction Fort McCoy would take to manage its lands for the butterfly while allowing for the successful completion of the installation's military training mission. The final conservation plan was completed in 1997. Fort McCoy has been able to comply with the ESA while having only minimal impact on military training.

*Pearl Harbor, Hawaii.*—A Navy team recently created some critical mudflat habitats for endangered waterbirds on the shores of Pearl Harbor. These mudflats are home to a number of Hawaiian waterbirds, including four endangered species and a variety of migratory birds. The site is a small pond within a unit of the Pearl Harbor National Wildlife Refuge. While the underlying land and water is owned by the Navy, the refuge is managed by the Fish and Wildlife Service. Over the years, the pond has provided decreasing value to waterbirds because of the increasing growth of invasive plants and weeds. Fish and Wildlife Service staff had attempted to create clear spaces by changing the water levels, but it wasn't enough to make the area suitable habitat for waterbirds. Additional work with heavy equipment was needed to create conditions favorable for wildlife.

In August 2000, a Navy Seabee unit answered the Refuge Manager's request for help and at the same time benefited from some real-life training. Two Seabee heavy equipment operators maneuvered a bulldozer and grader to sculpt the bottom of the pond. Putting their Navy engineering skills to work in this training exercise, they reshaped mudflats for endangered Hawaiian stilts and constructed a drainage system according to a refuge restoration plan. This project was just one example of the Navy's strong partnership with the Fish and Wildlife Service's national wildlife refuge in Pearl Harbor. For years, sailors and their families also have volunteered numerous weekend hours creating new habitats and clearing away trash and excess vegetation at the refuge.

*Air Force in Alaska and Peregrine Falcon Recovery.*—Since the early 1980's, the Air Force has worked with the Fish and Wildlife Service to minimize or eliminate impacts of Air Force activities on peregrine falcons in Alaska. Through the section 7 consultation process, the Air Force and the Fish and Wildlife Service identified major peregrine nesting areas in proposed Air Force training locations. Much of this training involves very low-level and high-speed flights, a combination with the potential to disturb many wildlife species, including nesting peregrine falcons. The Air Force agreed to a protective “no-fly” zone of 2 miles horizontal distance and 2,000 feet above the nest level in these dense nesting areas. Additionally, the Air Force is monitoring several nearby peregrine populations that fall outside the protected areas. This monitoring effort, which has continued since 1995, shows that the protective zones appear to provide adequate protection in the densest nesting areas and that the incidental loss of nestlings outside these zones is below the levels originally anticipated. Rather than making a minimal effort to comply with the ESA, the Air Force actively pursued programs to promote peregrine recovery, which helped make it possible to remove this magnificent bird from the threatened and endangered species list in 1999.

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RESPONSES OF H. CRAIG MANSON TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

*Question 1.* Wouldn't you agree, as was noted by at least two Federal courts in their rulings and indicated on the chart to my right, that the United States Fish

and Wildlife Service—regardless of which party is administering the Service—has long held the policy position that critical habitat designations are unhelpful, duplicative, and unnecessary?

Response. I believe that is a valid characterization of the agency's position.

*Question 2.* Isn't it also empirically true, as was noted by at least two Federal courts in their rulings, that although the United States Fish and Wildlife Service must designate critical habitat once a species is listed, "the FWS has typically put off doing so until forced to do so by court order?"

Response. While this is true, I believe the U.S. Fish and Wildlife Service's (Service) lack of action does need some further explanation. The Endangered Species Act (ESA) calls for designation of critical habitat "to the extent prudent and determinable." Previously, the Service adopted a policy that in most circumstances designation of critical habitat was "not prudent," as it did not provide sufficient additional benefits to the species over and above that provided by listing to warrant the commitment of agency resources that would be involved in the designation. The Service was not ignoring the requirement to designate, it was making "not prudent" findings based on a policy that the courts have determined to be in conflict with the applicable statutory requirements.

*Question 3.* Do you agree with the Department of Defense when they state that the Integrated Natural Resources Management Plans (INRMPs) are a more "holistic" approach to species conservation than merely designating critical habitat?

Response. Yes, in almost every case, active coordinated management of land provides far greater benefit to listed species than the protection which may accompany a critical habitat designation.

*Question 4.* Do you have some sympathy for the approach that former Clinton Administration Fish and Wildlife Service Director Jamie Clark, who will testify on the next panel, originally took when in the Final Determination of Critical Habitat for the Coastal California Gnatcatcher of October 24, 2000, she determined that because "a final INRMP that provides for sufficient conservation management and protection" and "meets the [appropriate] three criteria," lands on Marine Corps Base Miramar do not meet the definition of critical habitat?

Response. This Administration has continued that policy, and it is the basis for the proposed critical habitat provisions in the Administration's Readiness and Range Preservation Initiative.

*Question 5.* Moreover, do you think as a general rule that it would be a good idea to adopt the proposal of the Department of Defense to allow the more holistic approach of INRMPs in lieu of designating critical habitat?

Response. Yes, we fully support that proposal.

*Question 6.* Are you convinced that this proposal is important for our national security?

Response. It seems very clear that designation of critical habitat on military lands used for training or other readiness purposes can have the effect of delaying and restricting the military's ability to use those lands due to the need for additional consultations. In today's environment, we cannot afford unnecessary restrictions on the military's ability to train and deploy.

*Question 7.* Are you convinced that species can be protected using INRMPs just as well if not better using INRMPs instead of designating critical habitat?

Response. A properly prepared and implemented INRMP would be of far greater benefit to the conservation of all species, listed and unlisted, than the mere designation of the same area as critical habitat.

*Question 8.* Would the Department of Defense still have to have their INRMPs approved by the U.S. Fish and Wildlife Service?

Response. Yes, there is nothing in the Administration's Readiness and Range Preservation Initiative that alters the current process by which INRMPs are developed and approved.

*Question 9.* Will you please amplify your testimony with more of the background and specifics of the recent Arizona court decision involving designation of critical habitat?

Response. The Court made a number of findings in that case with which we do not agree. The one most directly applicable to the pending proposal relates to the definition of critical habitat.

The portion of the definition of critical habitat in question is: "specific areas . . . on which are found those physical or biological features—(1) essential to the conservation of the species and (II) which may require special management considerations or protection."

The overall issue in this case was a challenge to the Service's decision to exclude Forest Service lands from the designation of critical habitat on the grounds that the National Forest management plans provided adequate management protection for owls and that, therefore, "special management considerations or protections" were not needed. This is the same policy used to exclude military lands with approved INRMPs from critical habitat.

In the portion of the decision most directly addressing this issue, the court ruled:

The phrase 'which may require special management considerations or protection' can be rephrased as 'can require' or 'possibly requires' without altering its meaning. Hence, a plain reading of the definition of 'critical habitat' means lands essential to the conservation of a species for which special management or protection is *possible*.

Whether habitat does or does not *require* special management by Defendant or FWS is not determinative of whether or not the habitat is 'critical' to a threatened or endangered species. What is determinative is whether or not habitat is 'essential to the conservation of the species' and special management of that is possibly necessary. Thus, the fact that a particular habitat does, in fact, require special management is demonstrative evidence that the habitat is 'critical.' Defendant, on the other hand, takes the position that if a habitat is actually under 'adequate' management, then that habitat is per se not critical. This makes no sense. A habitat would not be subject to special management and protection if it were not essential to the conservation of the species. The fact that a habitat is already under some sort of management for its conservation is absolute proof that such habitat is 'critical.' [*Emphasis in original.*]

We believe that this decision ignores a great many valid and applicable factors which would normally, and reasonably, be taken into account in making such determinations. These include the fact that there are many reasons, including statutory or policy requirements apart from the ESA why any given area might have a conservation management plan; and that landowners not required to provide conservation management for their property might well not do so if that resulted in their land being definitionally classified as critical habitat,

*Question 10.* Does the lawsuit by an eco-radical special interest group have some bearing here?

Response. The portion of the court's ruling cited above is directly applicable to the issue of excluding military lands with approved INRMPs from critical habitat, as the court voided the policy upon which this is based. While this decision is only applicable to the Forest Service lands that were the subject of this specific case, it is available as precedent in other cases challenging the Service's exclusion of military lands from critical habitat.

*Question 11.* There was some confusion here on Capitol Hill yesterday regarding what the Arizona case actually states. Doesn't the lawsuit specifically say that "the ESA compels designation [of critical habitat] despite other methods of protecting the species the Secretary [through FWS] might consider more beneficial?"

Response. The ruling actually goes a step further than that. While prior litigation, such as NRDC v. U.S. Department of the Interior, 113 F.3d 1121 (9<sup>th</sup> Cir, 1997), resulted in ruling such as you describe, this decision says that critical habitat must be designated because of the existence of other, more beneficial, methods of protecting species.

While the military and many other Federal agencies have statutory obligations to conserve listed species and to complete and implement beneficial management plans, this is not at all true of State and private landowners. Were this decision to become applicable nationally, it would likely destroy one of the primary incentives for non-Federal landowners to take positive steps to conserve and assist in recovery of listed species, as few if any would do so if they knew the reward for their actions would be the designations of their lands as critical habitat.

*Question 12.* Doesn't the lawsuit specifically suggest that the Department of the Interior rethink critical habitat designation?

Response. The court did so suggest. The court noted that a large number of other courts had also ruled against the Service's decisions not to proposed critical habitat. It then 'mistakenly characterized those court rulings as involving the issue of "special management considerations or protection," when they were in fact based on the "not prudent" policy referenced above, and then it suggested that the Service should reverse its prior policy and, by implication, begin to designate critical habitat based on the criteria set forth by the court and quoted above.

*Question 13.* We have heard allegations that this legislation is overly broad. Isn't it true that the legislation is actually quite narrowly tailored?

Response. The provisions relating to critical habitat under the ESA and to the Marine Mammal Protection Act are quite narrow. The critical habitat provision codifies a policy first initiated in the previous Administration, and the proposals relating to the Marine Mammal Protection Act are also contained in the Administration's proposal for reauthorization of that Act, but are applicable to all regulated parties in that proposal. I defer to the other appropriate agencies' witnesses with respect to the other portions of the Initiative,

*Question 14.* Does this legislation appropriately respond to the restrictions the case now imposes?

Response. As indicated in my written statement, in response to this court ruling, we believe a slight modification to the original proposal is in order. We suggest striking the words "provides the 'special management considerations or protection' required under the Endangered Species Act (16 U.S.C. 1532(5)(A)) and" from the proposed new section 2017(a) of the Administration's Readiness and Range Preservation Initiative. While that phrase is consistent with our interpretation of the law, it could cause future litigation problems due to the court's ruling that the, necessity for, "special management considerations or protection" requires that land to be included, not excluded, from critical habitat.

This change would leave the section with an unambiguous statement that completion of an INRMP for the species in question precludes designation of critical habitat at that facility.

*Question 15.* Wasn't the subject of that case—the underlying rule—a matter that commenced in the Clinton Administration?

Response. The initial lawsuit seeking designation of critical habitat for the Mexican spotted owl was filed in 1994, during the Clinton Administration. There have been a number of legal actions and revisions to proposed and designated critical habitat for the species since that time. The critical habitat designation which was the subject of this particular suit was done based on a court order requiring a decision by January 15, 2001, also within the previous Administration.

*Question 16.* Didn't the judge rule that the actions of the previous Fish and Wildlife Service over which Ms. Jamie Clark presided were "nonsensical," "impermissible and contrary to law," and "knowingly unlawful?"

Response. The judge in this case did make those findings.

*Question 17.* As the court again noting in the recent Arizona case, didn't the Fish and Wildlife Service argue in the 1997 NRDC case regarding the gnatcatcher, in defense of its decision not to designate critical habitat for the endangered gnatcatcher, that a "far superior" state-run protection program adequately protected the habitat?

Isn't it a valid scientific conclusion that the holistic management plans can protect species in a way "far superior" to mere designation of critical habitat?

Response. Yes, the Service did make that argument, and we believe that argument is factually valid, even though it was found legally insufficient under the existing provisions of the ESA. Well-designed and implemented conservation management plans will, in virtually every case, provide far greater benefits to a species than a requirement, which is applicable only to Federal agencies, to avoid damage to the same habitat,

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RESPONSES OF H. CRAIG MANSON TO ADDITIONAL QUESTIONS FROM SENATOR GRAHAM

*Question 1.* In 1998, Congress amended the U.S. Armed Forces Code to give the military an opportunity to raise readiness issues to the political level of the executive branch and suspend administrative actions pending consultation between the Secretary of Defense and the head of the action agency involved. How many times as the Secretary of Defense used this provision for activities that fall under the scope of your agency?

Response. To the best of my knowledge, this has not been used for any activities under the jurisdiction of the Service.

*Question 2.* Does the need to manage former military lands with major contamination limit your ability to carry out other activities? Could you also please provide the committee with a list of contaminated military facilities transferred to Interior since 1990, including a brief description of the contamination?

Response. Yes, the need to manage these lands can limit our abilities to carry out other activities in at least two ways,

First, given that we do not routinely receive additional funding to clean up, oversee cleanup, or manage these lands either when or before they transfer to us we

routinely must use existing Service staff and base funds to perform these needed or required functions.

Second, it can actually physically limit how or what we can do to manage the land and associated biological resources. A few examples are the presence of unexploded munitions or significant contamination, which may prevent us from actively managing the land (e.g., mowing, plowing, controlled burning, sign posting or fencing) to maximize the benefit to the biological resources (e.g., animals, plants, or habitat) that we are trying to manage. In addition, for safety or liability reasons it can result in restricting access of both employees and the public.

Moreover, Attachment I lists the military facilities transferred to the Service since the beginning of fiscal year 1990 (starting October 1, 1989) and associated contaminants of concern at the time of transfer. Note that some of the reported contaminants of concern may since have been remediated. The list was provided from the Service's Division of Realty; the list of contaminants of concern was obtained from our data bases and files and from coordination with appropriate regional and field Environmental Contaminants staff.

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RESPONSES OF H. CRAIG MANSON TO ADDITIONAL QUESTIONS FROM SENATOR  
JEFFORDS

*Question 1.* The Sikes Act requires that INRMPs be prepared in cooperation with the Service and the State fish and wildlife agencies. In addition, the Service must comment on implementation and effectiveness of the INRMPs and be involved in the formal review process every 5 years.

In fiscal year 2002, the Service spent \$3.1 million and staff hours equal to 30 fulltime employees on INRMPs. What is the Service's budget request for this in 2004 and what would the impact be on the Service's budget if the DoD proposal was enacted?

Response. To clarify our expenditures in fiscal year 2002, it should be noted that the Service spent \$897,000 of its appropriated funds and \$2.2 million of Defense Department-provided funds. The Service has not requested additional appropriations pursuant to the Sikes Act authority in any year, including fiscal year 2004, due to many competing priorities for limited funds. The Service carries out its Sikes Act-related work using existing base funds. The Service's cooperation and coordination on INRMPs is a continuing process. All INRMPs are reviewed by military installations on a yearly basis and our feedback is requested concerning the implementation and effectiveness of the plans. Also, INRMPs will go through a formal review process at a minimum every 5 years. This formal review process is conducted by DOD and involves coordination with the Service and State fish and wildlife agencies to again obtain mutual agreement on the plan's conservation, protection, and management of fish and wildlife resources.

The importance of early involvement of the Service in the planning process will be even more crucial if the DOD proposal is enacted. Early coordination will ensure the adequacy of INRMPs in protecting threatened and endangered species and their habitats, and facilitate our final approval of the plans.

*Question 2.* In fiscal year 2002, the Service was involved in the development, review and implementation of INRMPs for 225 military installations. If enacted, what impact will the DoD proposal have on existing INRMPs?

How many species would be impacted?

Response. There would be no impact from this proposal on existing INRMPs or the species found on the installations covered by these plans. The Administration's proposal provides only that a facility with an approved INRMP for the species in question is precluded from having critical habitat designated for that species. This makes no change in the requirements for the preparation and approval of INRMPs, to the requirements for their contents, or in the requirement for the facility to consult under section 7 of the ESA due to the presence of the listed species.

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RESPONSES OF H. CRAIG MANSON TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

*Question 1.* Why does the DoD need these waivers when all of these laws have provisions that specifically exempt military activities in the case of national security?

Response. For the issue on which the Department of the Interior has the primary responsibility, critical habitat, the question of timeliness is more of an issue than the ultimate outcome, and it is generally the ultimate outcome of a consultation—certainly with respect to the ESA—that would trigger an exemption. We do ac-

knowledge that any new consultation could result in restrictions that might impact the military's ability to train its personnel, but the primary problem facing the military under the ESA is that the additional time needed for consultations and reinitiation of consultation if critical habitat were designated may preclude needed training activities.

There are additional concerns with the accumulation of various restrictions from multiple critical habitat designations, none of which in itself may be sufficient to warrant invoking the very cumbersome exemption process, but which cumulatively may degrade military readiness and training capabilities.

*Question 2.* We have long heard that this Administration is a defender of State and local rights. However, the DoD exemption proposals are opposed by a wide variety of State and local organizations.

Is it correct that the National Association of Attorneys General passed a resolution in March opposing DoD's exemption from environmental laws?

Is it correct that the State and local air pollution regulators opposed DoD's exemptions from environmental laws?

Is it correct that the State and local water quality regulators opposed DoD's exemptions from environmental laws?

Is it correct that Ingrid Lindemann, Council member from Aurora, Colorado, and representative of the National League of Cities finds that "the ramification of blanket exemption for military facilities and activities from such laws will be serious and untenable at the local level?"

Does it concern the Department of the Interior that there is widespread local and State opposition to DoD's proposed exemptions?

Response. From the nature of your question it appears that many of these statements of opposition are based on provisions of the Readiness and Range Preservation Initiative which are not within the jurisdiction of the Department of the Interior. The exemptions proposed for critical habitat and the Marine Mammal Protection Act would not impact on or relate to the responsibilities of any of these organizations or the governmental responsibilities of their members. Nevertheless, we take seriously all expressions of opinion and concern from State and local governments.

*Question 3.* The DoD exemption proposal before us would exempt DoD from many of the environmental laws and regulations that apply to the private sector. Is this administration abandoning the longstanding policy that the Federal Government, including DoD, should be held to the same environmental enforcement standard, enforcement and rules as the private sector?

Response. Again, responding to the issue for which the Department of the Interior is the lead, critical habitat, it has been the policy of this Administration, as initiated by the previous Administration, to apply this definitional exclusion from critical habitat designations on both public and private lands for which adequate management plans are in place. The only difference is that we are now seeking to codify the policy for Department of Defense lands so as to avoid adverse impacts to military readiness and national security should the policy be overturned by the courts.

ATTACHMENT 1

DoD Transfers to FWS: FYs 1990–2002

Base Name	Refuge Name	State/Region	Contaminant(s) of Concern
Kingman Reef (Navy).	Kingman Reef NWR	Pacific Islands/1	Munitions and munitions constituents
Midway Islands (Navy).	Midway Atoll NWR	Pacific Islands/1	Petroleum products, PCBs, lead-based paint, metals
Ritidian Point (Navy).	Guam NWR	Pacific Islands/1	Petroleum products, metals
Fort McClellan (Army).	Mountain Longleaf NWR	Alabama/4	Munitions and munitions constituents, lead
Naval Ammunition Support Detachment Viequez.	Viequez NWR	Puerto Rico/4	Munitions and munitions constituents, petroleum products, metals, solvents
Driver Naval Radio Transmission Facility (Navy).	Part of Nansemond NWR	Virginia/5	PCBs (partially remediated)
Eastern Shore/Fisherman's Island (Army).	Fisherman's Island NWR	Virginia/5	Petroleum products, DDT (remediated)

DoD Transfers to FWS: FYs 1990–2002—Continued

Base Name	Refuge Name	State/Region	Contaminant(s) of Concern
Fort Meade (Army) ..	Patuxent Research Refuge .....	Maryland/5 .....	Munitions and munitions constituents, lead, PCBs, pesticides, solvents
Galeville Airport (Army).	Shawangunk Grasslands NWR ..	New York/5 .....	Petroleum products (mostly remediated)
Loring Air Force Base (Air Force).	Aroostook NWR .....	Maine/5 .....	Petroleum products, PCBs, pesticides, solvents (mostly remediated)
Nomans Land Island (So. Weymouth Naval Air Station) (Navy).	Nomans Land Island NWR .....	Massachusetts/5 .....	Munitions and munitions constituents
Pease Air Force Base (Air Force).	Great Bay NWR .....	New Hampshire/5 .....	Petroleum products, solvents, arsenic (mostly remediated)
Sudbury Training Annex, Fort Devens (Army).	Assabet River NWR .....	Massachusetts/5 .....	Munitions and munitions constituents, arsenic
Woodbridge Research Facility/ Harry Diamond Lab (Army).	Occoquan Bay NWR .....	Virginia/5 .....	PCBs (mostly remediated)
Multiple DoD Facilities*.	Multiple Alaskan NWRs .....	Alaska/7 .....	Petroleum products, PCBs, munitions and munitions constituents, drilling muds, metals, pesticides—

\* A large number of military sites in Alaska are within refuges; when DoD revokes a withdrawal on one of these sites, the land reverts to the refuge in which it is located pursuant to the Alaska National Interest Lands Conservation Act and, consequently, the Service becomes a Responsible Party in the chain of liability for these contaminated sites.

STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT AND CEO, THE CENTER FOR SECURITY POLICY

SUPPORT THE TROOPS—BY ASSURING THEIR COMBAT READINESS

Chairman Inhofe, I would like to preface my remarks by expressing my personal appreciation—and, I am sure, that of all the men and women who wear our Nation’s uniform—for your extraordinary leadership on issues bearing on their readiness for combat.

I can think of no one who has devoted himself more tirelessly and more courageously than you have to tackling decisions that may, at some point, determine whether those who serve have been properly trained. You do so, of course, because you appreciate that the difference can seem inconsequential at the time the training takes place. But it can prove determinative—even literally a matter of life and death—in combat situations.

You deserve particular recognition for your efforts to ensure that Atlantic-based U.S. forces continue to be able to and experience as part of their training the closest thing to actual combat conditions: large-scale, live-fire combined arms exercises. It is nothing less than a travesty that shortsighted political considerations have been allowed to trump longstanding—and abiding—national security requirements, denying the American military future use of its only facility in the Atlantic dedicated to this purpose: the island of Vieques.

Today, as we witness American servicemen and women risking their lives for our safety and security, it is simply unfathomable that we would stint in any way on assuring theirs.

The harrowing experiences being televised hourly from the battlefields of Iraq; the sorts of threats our troops are encountering there, in Afghanistan and other theaters of the war on terror; the manifest need for adaptability in the face of unexpected forms of enemy action—all underscore the necessity of affording the maximum latitude to conduct realistic training to those charged with preparing our troops for war.

As you know, Mr. Chairman, I had the privilege of working early in my career for the late Senator Henry M. Jackson of Washington State. In his capacity as chairman of the Senate Energy and Natural Resources Committee, Scoop was the prin-

cial author of, and prime-mover behind, the Environmental Protection Act and numerous other legislative initiatives aimed at protecting our habitat.

Like you, Scoop was also committed to the national security of the United States. I believe he would be horrified at the situation that confronts our military today as a result of environmental legislation, regulations and judicial rulings run amok. In fact, I am confident that—were Senator Jackson still with us—he would be joining you in supporting at least the modest redress the Defense Department seeks in the form of the proposed “2003 Readiness and Range Preservation Initiative” now before the Congress.

If anything, I would respectfully suggest that far more relief is needed than that called for in these minimalist proposals.

Especially in time of war, we should return the training ranges and facilities our government and people have dedicated to the military’s use to their fullest necessary utilization. By failing to do so, we are clearly subordinating national security to what is—under present and foreseeable circumstances—an excessive, and currently insupportable, regard for the habitats of certain endangered species.

One of our military’s finest leaders, Lieutenant General Edward Hanlon, Jr. USMC, spoke for all those in uniform when he testified in May 2001 before the House Armed Services Committee in his capacity at the time as the Commanding General of Camp Pendleton:

. . . Our ability to train effectively is being slowly eroded by encroachment on many fronts. Urbanization, increasing environmental restrictions, and increasing civilian demands for airspace, land, sea space, and radio frequencies threaten the long-term, sustained use of Marine Corps bases and ranges. Encroachment is a serious and growing challenge.

Solutions are possible—we must achieve the necessary and right balance between military readiness, encroachment pressures, and stewardship responsibilities. . . .

Mr. Chairman, I believe the “2003 Readiness and Range Preservation Initiative” does strike a balance. I fear, frankly, that it favors too much the status quo concerning environmental protection—at the expense of military training and the consequent ability of our service personnel to survive and prevail in combat.

I hope that the Congress will, at an absolute minimum, provide the relief envisioned in this legislative initiative. I would urge the members of this committee, however, to give serious consideration as well to further steps that can materially contribute to the realism and utility of our military training exercises—and, therefore, to the likelihood that our loved ones in uniform will be able to conduct their missions safely and successfully.

I appreciate being afforded the opportunity to contribute to the committee’s deliberations on this important matter and look forward to responding to the members’ questions.

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RESPONSES OF FRANK GAFFNEY TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

*Question 1.* As you noted in your testimony, your former employer Washington Democrat Senator Scoop Jackson was a prime mover behind the National Environmental Policy Act.

This committee has oversight over NEPA and it has been a problem for the military. Let’s talk about this problem for a moment in this oversight hearing.

For example, the Navy spent 20 million dollars on an environmental impact statement and study and documentation just to test its LFA SONAR. For that it took 6 years. After it was all over, the Navy was sued by NRDC who said that this analysis was insufficient, and the Navy is in the process of losing that case by all indications of the judge.

A loss of that case would mean the United States cannot use this SONAR system.

Can you tell me about the need for the use of this sonar system?

Response. As I indicated in the course of the hearing, the LFA Sonar is one of the tools the Navy desperately needs to counter a real and growing danger: the proliferation worldwide of very quiet diesel-and battery-powered submarines capable of eluding many, if not all, of the United States’ currently deployed anti-submarine warfare sensor technologies.

I think this proliferation should be considered no less serious than that of other weapons of mass destruction insofar as such a submarine could, in the event it is able to penetrate Navy battle group defenses, be able to destroy aircraft carriers and other ships manned by hundreds or even thousands of U.S. personnel.

As a result, I am deeply troubled by the use of environmental regulations to impede or prevent the development of the LFA Sensor technology. I fear that if al-



lowed to continue, it will result in the tragic—and avoidable—loss of life among American servicemen and women.

*Question 2.* Can you tell me your thoughts about what your former boss Scoop Jackson would have thought about this use of NEPA?

Response. As I also indicated during the hearing, I am convinced that, were Senator Jackson alive today, he would have been appalled by what he could only perceive as an abuse of NEPA to the detriment of the national security, whose enhancement he considered to be his surpassing responsibility. By the way, I am joined in that assessment by Dr. Robert Kaufman, the author of an outstanding biography of Senator Jackson's long and distinguished career in public service.

*Question 3.* Can you tell me where our military could end up without being able to continue to operate at least under the conditions that the Clinton Administration applied?

Response. My assessment is that the United States military will, over time, become ever less capable of performing the tasks assigned to it unless relief is provided from the combined effects of civilian encroachment and creeping—if not actually galloping—environmental restrictions at least to the extent proposed by the Clinton Administration. There is, of course, no way to say in advance at exactly what point these effects will give rise to an intolerable situation (e.g., one in which elements of the armed forces are demonstrably unready for combat). But there can be little doubt that that day will inexorably arrive if corrective actions are not taken.

When that day does come, the repercussions will probably be measured in the avoidable death of both military personnel and of civilians they are sworn to defend. As Chairman Inhofe has observed, some of the former have already been lost in friendly fire accidents in Kuwait directly attributable to the lack of live-fire training now no longer available to Atlantic-based servicemen and women being sent into harm's way. Do we need to suffer still more such losses before addressing this danger?

*Question 4.* We see each other quite regularly, so I know the answer to this question, but for the record and the audience, would you mind going into your qualifications regarding defense policy?

Response. Over the past twenty-seven years, I have been privileged to work in a number of national security-related positions, both in government and out. From 1976 until 1983, I served in various capacities in the U.S. Senate including: working for the Permanent Subcommittee on Investigations on foreign and defense policy matters; for its then-chairman, Senator Jackson, as a legislative assistant supporting him in his capacity as a member of the Armed Services Committee; and as a professional staff member of that committee under Chairman John Tower.

From 1983–1987, I was the Deputy Assistant Secretary of Defense for Nuclear Forces and Arms Control Policy. During the last 7 months of that period

I acted as the Assistant Secretary of Defense for International Security Policy following my nomination to that post by President Reagan.

Since 1988, I have been the President and CEO of the Center for Security Policy, a non-profit institute focused on national security and foreign policy issues. Over the past 15 years, I have been a consultant to the Defense Department, a columnist for the Washington Times and numerous other publications and a frequent commentator on national and international television and radio programs concerning international affairs and related matters.

*Question 5.* In your expert opinion, then, are you convinced this legislation is advisable?

Response. In my opinion, the pending legislation, intended basically to preserve the status quo with respect to environmental restrictions on U.S. military and training activities, is the bare minimum required. I would personally like to see still-greater latitude afforded to the Defense Department to ensure that its military personnel are fully prepared to perform their vital missions. At the very least, I strongly urge that the Congress provide no less relief in this area than that sought by the President.

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STATEMENT OF BARRY W. HOLMAN, DIRECTOR DEFENSE INFRASTRUCTURE ISSUES,  
GENERAL ACCOUNTING OFFICEMILITARY TRAINING: DOD APPROACH TO MANAGING ENCROACHMENT ON TRAINING  
RANGES STILL EVOLVING

Mr. Chairman and members of the committee: I am pleased to have the opportunity to discuss the results of our work involving the constraints that encroachment places on military training. As you know, senior Department of Defense (DOD) and service officials have testified that they face growing difficulties in carrying out realistic training at installations and training ranges<sup>1</sup> because of so-called “encroachment”<sup>2</sup> issues, which limit their ability to train military forces at the desired levels and proficiencies. The eight encroachment issues identified by DOD are urban growth around military installations, competition for radio frequency spectrum; air pollution; noise pollution; competition for airspace; unexploded ordnance and munitions components;<sup>3</sup> endangered species habitat; and protected marine resources.

My testimony is largely built on work we reported on last year concerning the effects of encroachment in the continental United States on military training and readiness.<sup>4</sup> Last year we also reported on the constraints on training of U.S. forces overseas.<sup>5</sup> The findings of the two reviews have some similarities. Today, I would like to briefly highlight our findings regarding (1) the growing impact of encroachment on training range capabilities, (2) DOD’s efforts to document the effects of encroachment on readiness and costs, and (3) DOD’s process in addressing encroachment.

*Summary*

On the basis of our observations and discussions with officials at installations and major commands we visited last year here in the United States, we obtained numerous examples where encroachment had affected some training range capabilities, requiring workarounds—or adjustments to training events—and, in some cases, limited training. We identified similar effects overseas. The potential problem with workarounds is that they lack realism and can lead to the practice of tactics that are contrary to those used in combat. Officials, both stateside and abroad, reported that encroachment at times limits the time that training ranges are available and the types of training that can be conducted. Service officials believe that urbanization and population growth is primarily responsible for encroachment in the United States and is likely to cause more training range losses in the future.

Despite concerns voiced repeatedly by DOD officials about the effects of encroachment on training, DOD’s readiness reports did not indicate the extent to which encroachment was adversely affecting training readiness and costs. In fact, at the time we did our review, most readiness reports showed that units had a high state of readiness; and they were largely silent on the issue of encroachment. Recently, however, one DOD readiness report indicated that the Air Force has attributed environmental encroachment to a reduced capability to conduct flight training.<sup>6</sup> We have previously reported on limitations in DOD’s readiness reporting.<sup>7</sup> While improve-

<sup>1</sup>The term “training ranges” in this testimony refers to air, live-fire, ground maneuver, and sea ranges.

<sup>2</sup>DOD defines encroachment as the cumulative result of any and all outside influences that inhibit normal military training and testing.

<sup>3</sup>Unexploded ordnance are munitions that (1) have been primed, fused, armed, or otherwise prepared for action; (2) have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and (3) remain unexploded either by malfunction, design or any other cause. Munitions components—which DOD calls “constituents”—include things such as propellants, explosives, pyrotechnics, chemical agents, metal parts, and other inert components that can pollute the soil or groundwater.

<sup>4</sup>U.S. General Accounting Office, *Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges*, GAO-02-614 (Washington, DC.: June 11, 2002). The chairmen of the Committee on Government Reform and its Subcommittee on National Security, Emerging Threats and International Relations, House of Representatives, requested this review.

<sup>5</sup>U.S. General Accounting Office, *Military Training: Limitations Exist Overseas but Are Not Reflected in Readiness Reporting*, GAO-02-525 (Washington, DC.: Apr. 30, 2002). The chairman of the Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate, requested this review.

<sup>6</sup>U.S. Department of Defense, *Quarterly Readiness Report to the Congress, Institutional Training Readiness Report for Fiscal Year 2002, Unclassified Annex E* (Washington, DC.: Jan. 2003).

<sup>7</sup>U.S. General Accounting Office, *Military Readiness: New Reporting System Is Intended to Address Long-Standing Problems, but Better Planning Is Needed*, GAO-03-456 (Washington, DC.: Mar. 28, 2003).

ments in readiness reporting can and should be made to better show any shortfalls in training, DOD's ability to fully assess training limitations and their overall impact on training capabilities and readiness will be limited without (1) more complete baseline data, such as a comprehensive data base, on all training range capabilities and the services' training range requirements and (2) full consideration of how live training capabilities may be complemented by other forms of training, such as those available through training devices and simulations. These actions will not replace other steps needed to deal with encroachment, but they are key to better define the magnitude of the encroachment problem now and in the future. At the same time, it is important to note that while it is widely recognized that encroachment results in workarounds that can increase training costs, those costs are not easily aggregated to measure their full effect.

Although DOD has made some progress in addressing individual encroachment issues, that effort is still evolving; and more work will be required to put in place a comprehensive plan, as we recommended earlier, that clearly identifies steps to be taken, goals and milestones to track progress, and required funding. We reported last year that the department had prepared draft action plans that deal with each encroachment issue separately, but information was limited on specific actions planned, timeframes for completing them, and funding needed. In December 2001, DOD directed an Integrated Product Team 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. Last year and just recently, DOD submitted a package of legislative proposals, which it describes as clarifications, seeking to modify several statutory requirements. We are aware that consideration of these and other related legislative proposals affecting existing environmental legislation will need to include potential tradeoffs among multiple policy objectives and issues on which we have not taken a position. At the same time, we also understand that DOD recently asked the services to develop procedures for invoking the national security exceptions under a number of environmental laws. Historically, DOD and the services have been reluctant to seek such exceptions; and we are aware of only a couple of instances where this has been done. In our report last June on stateside encroachment issues, we made several recommendations aimed at helping DOD develop a comprehensive plan for dealing with encroachment and improve the information and data available for identifying and reporting on the effects of encroachment.<sup>8</sup> Our two reports last year recommended that DOD develop reports that accurately capture the causes of training shortfalls and objectively report units' ability to meet their training requirements. Following our reports, DOD issued a range sustainment directive<sup>9</sup> to establish policy and assign responsibilities for the sustainment of test and training ranges; and the Special Operations Command developed a data base identifying the training ranges it uses, type of training conducted, and restrictions on training. The department also plans to develop a set of internal policies and procedures based on the range sustainment directive, strengthen and empower its management structure to deal with range issues, and take a more proactive role in working with local governments and organizations.

We are not making any new recommendations in this testimony. As you may be aware, Mr. Chairman, section 366 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 requires a series of yearly reports to the Congress dealing with encroachment issues beginning this year, and a requirement for GAO to review those reports. The first of those reports was required to be submitted along with the President's budget for fiscal year 2004. That report was to describe DOD's progress in developing a comprehensive plan to use existing authorities to address training constraints on the use of military lands, marine areas, and airspace that are available in the United States and overseas for training. However, to our knowledge, DOD has not yet issued this report. The Act also requires the submission of a report not later than June 30, 2003, on plans of the department to improve its readiness reporting to reflect the readiness impact that training constraints have on specific units of the armed forces.

#### *Background*

Military ranges and training areas are used primarily to test weapon systems and train military forces. 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 re-

<sup>8</sup>GAO-02-614.

<sup>9</sup>U.S. Department of Defense, Directive: Sustainment of Ranges and Operating Areas (OPAREAs), 3200.15, Jan. 10, 2003.

alistic force-on-force and live-fire training at various unit levels; and sea ranges to conduct ship maneuvers for training.

According to DOD officials, there has been a slow but steady increase in encroachment issues that have limited the use of training facilities, and the gradual accumulation of these issues increasingly threatens training readiness. DOD has identified eight such encroachment issues:

- Designation of critical habitat under the Endangered Species Act of 1973. Under the Act, agencies are required to ensure that their actions do not destroy or adversely modify habitat that has been designated for endangered or threatened species. Currently, over 300 such species are found on military installations. In 1994, under the previous administration 14 agencies signed a Federal memorandum of understanding<sup>10</sup> for implementing the Endangered Species Act.<sup>11</sup> The agencies agreed to establish or use existing regional interagency working groups to identify geographic areas within which the groups would coordinate agency actions and overcome barriers to conserve endangered species and their ecosystems. Such cooperative management could help DOD share the burden of land use restrictions on military installations that are caused by encroachment issues, but implementation of this approach has been limited. We are currently reviewing this issue.<sup>12</sup>

- Application of environmental statutes to military munitions. DOD believes that the Environmental Protection Agency could apply environmental statutes to the use of military munitions, shutting down or disrupting military training. According to DOD officials, uncertainties about future application and enforcement of these statutes limit their ability to plan, program, and budget for compliance requirements.

- Competition for radio frequency spectrum. The telecommunications industry is pressuring for the reallocation of some of the radio frequency spectrum from DOD to commercial control. DOD reports that over the past decade, it has lost about 27 percent of the frequency spectrum allocated for aircraft telemetry. And we previously reported additional allocation of spectrum could affect space systems, tactical communications, and combat training.<sup>13</sup>

- Marine regulatory laws that require consultation with regulators when a proposed action may affect a protected resource. Defense officials say that the process empowers regulators to impose potentially stringent measures to protect the environment from the effects of proposed training in marine environments.

- Competition for airspace. Increased airspace congestion limits the ability of pilots to train as they would fly in combat.

- Clean Air Act requirements for air quality. DOD officials believe the Act requires controls over emissions generated on Defense installations. New or significant changes in range operations also require emissions analyses, and if emissions exceed specified thresholds, they must be offset with reductions elsewhere.

- Laws and regulations mandating noise abatement. DOD officials stated that weapon systems are exempt from the Noise Control Act of 1972, but DOD must assess noise impact under the National Environmental Policy Act. As community developments have expanded closer to military installations, concerns over noise from military operations have increased.

- Urban growth. DOD says that unplanned or “incompatible” commercial or residential development near training ranges compromises the effectiveness of training activities. Local residents have filed lawsuits charging that military operations lowered the value or limited the use of their property.

To the extent that encroachment adversely affects training readiness, opportunities exist for the problems to be reported in departmental and military service readi-

<sup>10</sup>Federal Interagency Memorandum of Understanding for Implementation of the Endangered Species Act, September 1994.

<sup>11</sup>The 14 Federal agencies included the Department of Agriculture’s Forest Service; the Department of Defense; the U.S Army Corps of Engineers; the Department of Commerce’s National Marine Fisheries Service; the Department of the Interior’s Bureau of Land Management, Bureau of Mines, Bureau of Reclamation, Fish and Wildlife Service, Minerals Management Service, and National Park Service; the Department of Transportation’s Federal Aviation Administration, Federal Highway Administration, and Coast Guard; and the Environmental Protection Agency.

<sup>12</sup>At the request of the Committee on Government Reform and its Subcommittee on National Security, Emerging Threats and International Relations, House of Representatives, we are reviewing (1) the extent to which management of endangered species and related land use restrictions are shared by DOD and other Federal landowners and (2) the efforts that DOD and/or other Federal landowners have undertaken to promote cooperative management and additional steps needed to enhance this approach. We expect to report on the results of this work later this year.

<sup>13</sup>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, DC.: Aug. 20, 2001).

ness reports. The Global Status of Resources and Training System is the primary means units use to compare readiness against designed operational goals.<sup>14</sup> The system's data base indicates, at selected points in time, the extent to which units possess the required resources and training to undertake their wartime missions. In addition, DOD is required under 10 U.S.C. 117 to prepare quarterly readiness reports to Congress. The reports are based on briefings to the Senior Readiness Oversight Council, a forum assisted by the Defense Test and Training Steering Group. In June 2000, the council directed the steering group to investigate encroachment issues and develop a comprehensive plan of action.

The secretaries of the military services 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 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; and the Director, Operational Test and Evaluation, provides advice on tests and evaluations.

*Encroachment Has Reduced Some Capabilities, and Its Effects Are Likely to Grow*

On the basis of what we have seen, the impact of encroachment on training ranges has gradually increased over time, reducing some training capabilities. Because most encroachment problems are caused by urban development and population growth, these problems are expected to increase in the future.

Although the effects vary by service and by individual installation, encroachment has generally 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 causes workarounds that may limit the amount or quality of training. Installations overseas all reported facing similar training constraints.

Some of the problems reported by installations we visited last year were those related to urban growth, radio frequency spectrum interference, air quality, noise, air space, and endangered species habitat. For example, in response to local complaints, Fort Lewis, Washington, voluntarily ceased some demolitions training. Eglin Air Force Base, Florida, officials reported the base's major target control system received radio frequency spectrum interference from nearby commercial operators. Nellis Air Force Base, Nevada, officials reported that urban growth near the base and related safety concerns had restricted flight patterns of armed aircraft, causing mission delays and cancellations. They also reported that they receive approximately 250 complaints about noise each year. About 10 percent of Marine Corps Base Camp Pendleton, California, had been designated as critical habitat for endangered species. Atlantic Fleet officials reported encroachment problems stemming from endangered marine mammals and noise. They said that the fleet's live-fire exercises at sea were restricted, and night live-fire training was not allowed.

More recently, in January 2003, DOD's Special Operations Command reported that its units encounter a number of obstacles when scheduling or using training ranges.<sup>15</sup> According to the report, the presence of endangered species and marine mammals on or near ranges result in restrictions on training for at least part of the year—closing the area to training, prohibiting live fire, or requiring modified operations. For example, a variety of endangered species live on the training areas of the Navy Special Warfare Command in California, particularly on Coronado and San Clemente islands. Due to environmental restrictions, Navy Special Warfare units report that they 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 addition, the Special Operations Command owns no training ranges of its own and largely depends on others for the use of their training ranges. As a result, command officials advised us that they must train under oper-

<sup>14</sup>The Global Status of Resources and Training System, which units use to report their readiness status monthly or whenever a change occurs. Units report readiness in four resource areas, including training. If a unit is not at the highest readiness level, it must identify the reasons from a list that includes training areas. Commanders may also include narrative statements with more detailed explanations.

<sup>15</sup>U.S. Special Operations Command, Tiger Team Report: Global Special Operations Forces Range Study, Jan. 27, 2003. The Special Operations Command recommended that all components needed to create master range plans that addressed their current and future range issues and solutions. The command also recommended that plans identify and validate training requirements and facilities available and define the acceptable limits of workarounds.

ational and scheduling restrictions imposed by its host commands. For example, the command normally trains at night; and because range management personnel are not often available at night, this prevents such training. Also, on many ranges, the command reported that priority is given to larger units than special operations units causing it to postpone or cancel training. According to the report, ranges are also inadequately funded for construction, maintenance, repairs, and upgrades. This results in some commanders using their own funds in order to prevent the ranges from becoming dangerous or unusable.

The Special Operations Command, while expressing concern for the future, reported that none of the eight encroachment issues identified by DOD had yet stopped military training, due mostly to the creativity and flexibility of its commanders and noncommissioned officers. In general, when obstacles threaten training, the unit will find a workaround to accomplish the training. In some instances, the unit may travel to another training facility, costing additional money for transportation and potentially requiring an extended stay at the training site. By sending units away to train, the command limits its ability to send people on future travel for training or missions due to efforts to control the number of days per year that servicemembers are deployed away from home. Other workarounds consist of commands using different equipment, such as plastic-tipped bullets; changing maneuvering, firing, and training methods to overcome training obstacles; and using facilities that need repair. According to the Special Operations Command, all of these workarounds expend more funds and manpower in order to accomplish its training mission.

DOD and military service officials said that many encroachment issues are related to urban growth around military installations. They noted that most, if not all, encroachment issues result from urban and population growth and that around DOD installations this is increasing at a rate higher than the national average. Figure 1 illustrates the increase in urban growth encroachment near Fort Benning, Georgia, while the fort has remained relatively unchanged. According to DOD officials, new residents near installations often view military activities as an infringement on their rights, and some groups have organized in efforts to reduce operations such as aircraft and munitions training. At the same time, according to Defense officials, the increased speed and range of weapon systems are expected to increase training range requirements.

Figure 1: Historical and Projected Urban Growth Near Fort Benning, Georgia:

[See PDF for image]

Note: (Top left to right) Urban growth near Fort Benning, Georgia, in 1955 and 1985. (Bottom left to right) Urban growth near Fort Benning, Georgia, in 1996 and projected for 2008.

[End of figure]

*Effects of Encroachment on Training Readiness and Costs Have Not Been Reflected in Most Service Readiness Reports*

Despite the loss of some training range capabilities, service readiness data did not show the impact of encroachment on training readiness. However, DOD's January 2003 quarterly report to Congress did tie an Air Force training issue directly to encroachment.

Even though DOD officials in testimonies and many other occasions have repeatedly cited encroachment as preventing the services from training to standards, DOD's primary readiness reporting system did not reflect the extent to which encroachment was a problem. In fact, it rarely cited training range limitations at all. Similarly, DOD's quarterly reports to Congress, which should identify specific readiness problems, hardly ever mentioned encroachment as a problem.

This is not surprising to us because we have long reported on limitations in DOD's readiness reporting system and the need for improvements; our most recent report was issued just last week.<sup>16</sup> Furthermore, on the basis of our prior reports on readiness issues and our examination of encroachment, we do not believe the absence of data in these reports concerning encroachment should be viewed simply as "no data, no problem!" Rather, as with other readiness issues we have examined over time, it suggests a lack of attention on the part of DOD in fully assessing and reporting on the magnitude of the encroachment problem.

However, DOD's most recent quarterly report did indicate a training issue that is tied directly to encroachment. The January 2003 Institutional Training Readiness Report showed that the Air Force has rated itself as C-2 for institutional flight

<sup>16</sup>GAO-03-456.

training.<sup>17</sup> This indicates that it is experiencing some deficiencies with limited impact on capabilities to perform required institutional training. The Air Force attributed this to training range availability and encroachment combined with environmental concerns that are placing increasing pressure on its ability to provide effective and realistic training. The Air Force also reported that sortie<sup>18</sup> cancellations are becoming a more common occurrence and may soon adversely impact the quality of training. For example, the spotting of a Sonoran Pronghorn on the Barry M. Goldwater Range forces immediate cancellation or relocation of scheduled missions.

Readiness reporting can and should be improved to address the extent of training degradation due to encroachment and other factors. However, it will be difficult for DOD to fully assess the impact of encroachment on its training capabilities and readiness without (1) obtaining more complete information on both training range requirements and the assets available to support those requirements and (2) considering to what extent other complementary forms of training may help mitigate some of the adverse impacts of encroachment. The information is needed to establish a baseline for measuring losses or shortfalls.

We previously reported that the services did not have complete inventories of their training ranges and that they do not routinely share available inventory data with each other (or with other organizations such as the Special Operations Command). DOD officials acknowledge the potential usefulness of such data and have some efforts underway to develop these data. However, since there is no complete directory of DOD-wide training areas, commanders sometimes learn about capabilities available on other military bases by chance. All this makes it extremely difficult for the services to leverage assets that may be available in nearby locations, increasing the risk of inefficiencies, lost time and opportunities, delays, added costs, and reduced training opportunities.

Although the services have shared 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. Last year, for example, our reported on encroachment<sup>19</sup> noted that the Navy Special Operations forces recently learned that some ranges at the Army's Aberdeen Proving Grounds in Maryland 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 would seem to be a logical step toward a more complete assessment of training range capabilities and shortfalls that may need to be addressed.

This issue was recently reinforced by the January 2003 range report by the Special Operations Command, which found that none of the services had joint data bases or management tools to combine all training ranges into a single tool accessible to all commands. The command concluded that such a centralized data base would contribute to improving unit readiness and mission success for all components. At the same time, we cannot be sure of the extent to which recent military operations in the Middle East could impact future training requirements. DOD will need to reassess lessons learned from these operations.

Each service has, to varying degrees, assessed its training range requirements and limitations due to encroachment. For example, the Marine Corps has completed one of the more detailed assessments of the degree to which encroachment has affected the training capability of Camp Pendleton, California. The assessment determined to what extent Camp Pendleton could support the training requirements of two unit types and two specialties by identifying the tasks that 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. Some of the tasks that could not be conducted to standards were the construction of mortar and artillery-firing positions outside of designated areas, cutting of foliage to camouflage positions, and terrain marches. Marine Corps officials said they might expand the effort to other installations. At the same time, the Air Force has funded a study at Shaw Air Force Base, South Carolina, which focuses on airspace requirements; and the Center for Navy Analysis is reviewing encroachment issues at Naval Air Station Fallon, Nevada. We have not had an opportunity to review the progress or the results of these efforts. In its 2003 range study report, the Special Operations Command compiled a data base identifying the training ranges

<sup>17</sup>By a way of comparison, C-1 rating is when a unit is at its highest readiness level and is able to fully meet its mission.

<sup>18</sup>A sortie is one mission by a single aircraft.

<sup>19</sup>GAO-02-614.

it uses, type of training conducted, and restrictions on training. In its study, the command recommended that a joint training range data base be produced and made available throughout DOD so that all training ranges, regardless of service ownership, may be efficiently scheduled and utilized.

While recent efforts show increased activity on the part of the services to assess their training requirements, they do not yet represent a comprehensive assessment of the impacts of encroachments. We have also previously reported that the services have not incorporated an assessment of the extent that other types of complementary training could help offset shortfalls. We believe these assessments, based solely on live training, may overstate an installation's problems and do not provide a complete basis for assessing training range needs. A more complete assessment of training resources should include assessing the potential for using virtual or constructive simulation technology to augment live training. However, based on our prior work I must emphasize, Mr. Chairman, that these types of complementary training cannot replace live training and cannot fully eliminate the impact of encroachment, though they may help mitigate some training range limitations.

In addition, while some service officials have reported increasing costs because of workarounds related to encroachment, the services' data systems do not capture these costs in any comprehensive manner. In its January 2003 report, the Special Operations Command noted that the services lacked a metric-base reporting system to document the impact of encroachment or track the cost of workarounds in either manpower or funds. We noted last year that DOD's overall environmental conservation funding, which also covers endangered species management, had fluctuated, with an overall drop (except for the Army) in obligations since 1999. If the services are indeed conducting more environmental assessments or impact analyses as a result of encroachment, the additional costs should be reflected in their environmental conservation program obligations.

#### *Progress in Addressing Encroachment Issues Still Evolving*

DOD has made some progress in addressing individual encroachment issues, including individual action plans and legislative proposals. But more will be required to put in place a comprehensive plan that clearly identifies steps to be taken, goals and milestones to track progress, and required funding. Senior DOD officials recognized the need to develop a comprehensive plan to address encroachment issues back in November 2000, but efforts to do so are still evolving. To their credit, DOD and the services are increasingly recognizing and initiating steps to examine range issues more comprehensively and in a less piecemeal fashion.

Recent efforts began in 2000 when a working group of subject matter experts was tasked with drafting action plans for addressing the eight encroachment issues. The draft plans include an overview and analysis of the issues; and current actions being taken, as well as short-, mid-, and long-term strategies and actions to address the issues. Some of the short-term actions implemented include the following.

- DOD has finalized, and the services are implementing, a Munitions Action Plan—an overall strategy for addressing the life-cycle management of munitions to provide a road map that will help DOD meet the challenges of sustaining its ranges.
- DOD formed a Policy Board on Federal Aviation Principles to review the scope and progress of DOD activities and to develop the guidance and process for special use air space.
- DOD formed a Clean Air Act Services' Steering Committee to review emerging regulations and to work with the Environmental Protection Agency and the Office of Management and Budget to protect DOD's ability to train.
- DOD implemented an Air Installation Compatible Use Zone Program to assist communities in considering aircraft noise and safety issues in their land use planning.

Some future strategies and actions identified in the draft plans addressing the eight encroachment issues 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 training ranges, its need to maintain readiness, and its need to build public support for sustaining training ranges.
- Developing assessment criteria to determine the cumulative effect of all encroachment restrictions on training capabilities and readiness. 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 training readiness has never been done.
- 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 base officials and city planners and other local officials in managing urban growth.

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. After internal coordination deliberations, the proposals were submitted in late April 2002 to Congress for consideration. According to DOD, the legislative proposals sought to “clarify” the relationship between military training and a number of provisions in various conservation and compliance statutes, including the Endangered Species Act, the Migratory Bird Treaty Act, the Marine Mammal Protection Act, and Clean Air Act. DOD’s proposals would, among other things, do the following:

- 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 remain.

- Permit DOD to “take” migratory birds under the Migratory Bird Treaty Act without action by the Secretary of the Interior, where the taking would be in connection with readiness activities, and 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.<sup>20</sup>

- Modify the conformity provisions of the Clean Air Act. The proposal would maintain the Department’s obligation to conform military readiness activities to applicable State Implementation Plans but would give DOD 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.

Of the above proposals, Congress passed, as part of the fiscal year 2003 defense authorization legislation, a provision related to the Migratory Bird Treaty Act.<sup>21</sup> Under that provision, until the Secretary of the Interior prescribes regulations to exempt the armed forces from incidental takings of migratory birds during military readiness activities, the protections provided for migratory birds under the Act do not apply to such incidental takings. In addition, Congress authorized DOD to enter agreements to purchase property or property interests for natural resource conservation purposes, such as creating a buffer zone near installations to prevent encroachment issues, such as urban growth.<sup>22</sup>

In February 2003, DOD submitted to Congress the Readiness and Range Preparedness Initiative for fiscal year 2004. In it, the department restates a number of legislative proposals from 2002 and includes a proposal concerning the Marine Mammal Protection Act. In the 2004 initiative, the department seeks to reconcile military readiness activities with the Marine Mammal Protection Act by adding language to sections of title 16 of the U.S. Code.

We are aware that consideration of these legislative proposals affecting existing environmental legislation will need to include potential tradeoffs among multiple policy objectives and issues on which we have not taken a position. At the same time, we also understand that DOD recently asked the services to develop procedures for invoking the national security exceptions under a number of environmental laws. Historically, DOD and the services have been reluctant to seek such exceptions; and we are aware of only a couple of instances where this has been done.

<sup>20</sup>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, feeding, breeding, and sheltering.

<sup>21</sup>Section 315, P.L. 107–314, Dec. 2, 2002.

<sup>22</sup>Section 2811, P.L. 107–314, Dec. 2, 2002 (codified at 10 U.S.C. 2684).

Our two reports last year both recommended that DOD develop reports that accurately capture the causes of training shortfalls and objectively report units' ability to meet their training requirements. At the time we completed our reviews in 2002, DOD's draft action plans for addressing the eight encroachment issues had not been finalized. DOD officials told us that they consider the plans to be working documents and stressed that many 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 assignments of responsibilities, measurable goals and timeframes for accomplishing planned actions, or funding requirements—information that would be needed in a comprehensive plan. Our report on stateside encroachment problems also recommended that DOD develop and maintain a full and complete inventory of service and department-wide training infrastructure; consider more alternatives to live training; and ensure that the plan for addressing encroachment includes goals, timelines, responsibilities, and projected costs.<sup>23</sup> Our recently issued report on overseas training also recommended that DOD develop reports that accurately capture the causes of training shortfalls and objectively report units' ability to meet their training requirements.<sup>24</sup>

Following our reports, DOD issued a range sustainment directive to establish policy and assign responsibilities for the sustainment of test and training ranges,<sup>25</sup> and the Special Operations Command developed a data base identifying the training ranges it uses, type of training conducted, and restrictions on training. In addition, DOD is working with the other regulatory agencies in the Federal Government to manage the way in which laws are enforced and plans to issue four more directives that cover outreach, range clearance, community noise, and Air Installation Compatibility Use Zone.

In the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Congress required the Secretary of Defense to develop a comprehensive plan for using existing authorities available to the Secretary of Defense and the secretaries of the military departments to address training constraints on the use of military lands, marine areas, and airspace that are available in the United States and overseas for training.<sup>26</sup> As part of the preparation of the plan, the Secretary of Defense was expected to conduct an assessment of current and future training range requirements of the armed forces and an evaluation of the adequacy of current DOD resources (including virtual and constructive training assets as well as military lands, marine areas, and airspace available in the United States and overseas) to meet those current and future training range requirements. Also, as you may be aware, Mr. Chairman, that Act requires annual reports to Congress dealing with encroachment issues beginning this year and requires GAO to review those reports. The first of those reports was required to be submitted along with the President's budget for fiscal year 2004. That report was to describe the progress in developing a comprehensive plan to address training constraints. To our knowledge, Mr. Chairman, DOD has not completed a comprehensive plan or provided Congress with the progress report. Officials of the Office of the Secretary of Defense said that they plan to report to Congress later this calendar year. The Act also requires the submission of a report not later than June 30, 2003, on the department's plans to improve its readiness reporting to reflect the readiness impact that training constraints have on specific units of the armed forces.

This concludes my statement. I would be pleased to answer any questions you or other members of the committee may have at his time.

Contact and Acknowledgment:

For further contacts regarding this statement, please contact Barry W. Holman on (202) 512-8412. Individuals making key contributions to this statement include Tommy Baril, Byron Galloway, Jane Hunt, John Lee, Mark A. Little, Patti Nichol, Michelle K. Treistman, and John Van Schaik.

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RESPONSES OF BARRY HOLMAN TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

*Question 1.* For the record and the audience, would you mind going into your qualifications regarding defense policy and environmental policy?

Response. GAO products involving work such as our assessment of training range and encroachment issues are not the product of one person but represent a team

<sup>23</sup>GAO-02-614.

<sup>24</sup>GAO-02-525.

<sup>25</sup>U.S. Department of Defense, Directive: Sustainment of Ranges and Operating Areas (OPAREAs), 3200.15, Jan. 10, 2003.

<sup>26</sup>Section 366, P.L. 107-314, Dec. 2, 2002.

effort of multi-disciplined and multi-experienced individuals producing an institutional product. In this recent effort, GAO brought to bear the work of persons experienced in Defense readiness, training, infrastructure, natural resource and encroachment issues, and legal counsel. As a senior manager, it is my responsibility to ensure that we have the right team in place with the requisite knowledge, skills, and abilities. I believe we did that with regard to this body of work.

*Question 2.* Is there indeed a problem here with regard to encroachment?

Response. Encroachment is a problem but the magnitude of that problem is not clear. GAO's June 2002 report on encroachment (U.S. General Accounting Office, Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges, GAO-02-614 [Washington, DC.: June 11, 2002]) 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." It also concluded that "[t]he 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 [in readiness reports], suggests that additional steps are needed to improve the reporting process."

My April 2, 2003, testimony before the Senate Committee on Environment and Public Works noted that "Although the effects vary by service and by individual installation, encroachment has generally 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 causes workarounds that may limit the amount or quality of training."

*Question 3.* You testified last year on this topic before the House of Representatives and have been an observer of what's happening. In the past year, do you believe that litigation and workarounds have trended better or worse for the military?

Response. GAO has not done a comprehensive analysis of relevant litigation that would enable us to state whether there have been specific trends and what the impact may be for the military, although recent lawsuits could potentially influence how the current critical habitat provisions impact all Federal agencies, including the military. For example, the U.S. Fish and Wildlife Service (FWS) had been following a general practice of not designating critical habitat, based on its determination that such designation conveys little additional protection to species. However, some lawsuits have successfully challenged FWS' failure to designate critical habitat for certain species. As a result, FWS is designating more critical habitat than it has in the past, and these designations may include military land that would have otherwise not been affected by existing critical habitat provisions.

In addition, a recent Federal district court decision has the potential to result in another change in how FWS is implementing critical habitat provisions, specifically regarding its exclusion of lands from a designation if special management provisions are already in effect. (Center For Biological Diversity v. Norton, No. CV 01-409 TUC DCB [D. Ariz. January 13, 2003].) In this case, the court ruled that the U.S. Forest Service's land and resource management plans, prepared under a law governing forest management, did not eliminate the need to designate land as critical habitat under the Endangered Species Act. If, under current law, FWS excludes military lands from a critical habitat designation on the basis that the lands are covered by an Integrated Natural Resources Management Plan, courts might apply the same rationale and preclude this approach.

*Question 4.* The GAO report you authored has been characterized in the press and elsewhere as being quite adverse to the military's perspective on military encroachment. Would you please set the record straight about these characterizations of your work?

Response. We are aware of numerous instances where others have referenced GAO's June 2002 report to suggest GAO was saying that DOD's training and readiness had not been adversely affected by encroachment issues. However, GAO's reports and testimonies on this subject have clearly noted the services' loss of some training range capabilities due to encroachment while also noting that the services' readiness data largely did not show the extent to which encroachment has adversely affected training or readiness. As noted in our April 2 testimony, "This is not surprising to us because we have long reported on limitations in DOD's readiness reporting system and the need for improvements. . . . Furthermore, on the basis of our prior reports on readiness issues and our examination of encroachment, we do not believe the absence of data in these reports concerning encroachment should be viewed simply as 'no data, no problem!' Rather, as with other readiness issues we have examined over time, it suggests a lack of attention on the part of DOD in fully assessing and reporting on the magnitude of the encroachment problem."

*Question 5.* Where do you see the future of the military's training without some stabilization of the laws in this area?

Response. As noted in our response to question 2 above, our June 2002 report 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." That report noted the need for a comprehensive plan to manage encroachment on training ranges. Our April 2 testimony noted that while DOD has made some progress in addressing individual encroachment issues, that effort is still evolving and more work will be required to put in place a comprehensive plan that clearly identifies steps to be taken, goals and milestones to track progress, and required funding. We noted that in the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Congress required the Secretary of Defense to develop a comprehensive plan for using existing authorities available to the Secretary of Defense and the secretaries of the military departments to address training constraints on the use of military lands, marine areas, and airspace that are available in the United States and overseas for training. As part of the preparation of the plan, the Secretary of Defense was expected to conduct an assessment of current and future training range requirements of the armed forces and an evaluation of the adequacy of current DOD resources to meet those current and future training range requirements. That act requires annual reports to Congress dealing with encroachment issues beginning this year and requires GAO to review those reports. The first of those reports was required to be submitted along with the President's budget for fiscal year 2004. That report was to describe the progress in developing a comprehensive plan to address training constraints. DOD has not yet submitted its initial report.

In DOD's August 2001 Endangered Species Act Sustainable Ranges Action Plan, DOD identified a combination of legislative and administrative actions to deal with encroachment issues. However, our work to date, and limitations in DOD's own assessments, provides us with insufficient basis to comment on the extent to which legislation may be required to deal with the issue.

*Question 6.* If we can achieve better results for the species by means other than critical habitat designation, doesn't it just make common sense to achieve these common goals by less restrictive means?

Response. If we can achieve better results for threatened and endangered species by means that are less restrictive than critical habitat designation, it makes sense to use the alternative means. The proposed legislation would preclude the FWS from designating critical habitat on a military installation if the installation has a completed Integrated Natural Resources Management Plan, pursuant to the Sikes Act Improvement Act, that addresses threatened or endangered species and their habitat. While this proposed change may be less restrictive than designation of critical habitat, the proposal will not necessarily achieve better results for species. In fact, depending on how it is implemented and enforced, the proposed legislation could result in reduced flexibility for FWS and the National Marine Fisheries Service in carrying out their responsibilities under the Endangered Species Act to protect the habitat of threatened and endangered species. The proposal could also represent a fundamental shift in emphasis from the strong role that all Federal agencies, including DOD, are expected to play in protecting threatened and endangered species under the Endangered Species Act. Currently, the Endangered Species Act requires that all Federal agencies protect threatened and endangered species and their habitats, while the Sikes Act, as amended, provides that there be no net loss in the capability of the installation to support its military mission when preparing resource management plans for military lands.

*Question 7.* Can some legislation in these areas make a difference for the military and aid in training?

Response. It is likely that some of these changes would make a difference for the military and aid in training. As we concluded in our June 2002 report, DOD can be expected to experience increased losses of training range capabilities in the future, absent efforts to mitigate encroachment. However, we cannot determine the extent of the proposed legislation's affect because the military services do not have data to show the extent to which critical habitat for threatened and endangered species and other encroachment issues have adversely affected training.

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STATEMENT OF DANIEL S. MILLER, FIRST ASSISTANT ATTORNEY GENERAL, COLORADO DEPARTMENT OF LAW, ON BEHALF OF THE ATTORNEYS GENERAL OF ARIZONA, CALIFORNIA, COLORADO, DELAWARE, HAWAII, IDAHO, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, NORTHERN MARIANA ISLANDS, NEW YORK, OREGON, SOUTH DAKOTA, UTAH, AND WASHINGTON

### *Introduction*

This statement is submitted on behalf of the Attorneys General of Arizona, California Colorado, Delaware, Hawaii, Idaho, Massachusetts, New Hampshire, New Mexico, New York, Northern Mariana Islands, Oregon, South Dakota, Utah and Washington. Our statement addresses the Department of Defense's recent proposed legislation to amend the Clean Air Act, the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental, Response, Compensation and Liability Act (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. Historically, however, military training activities have caused adverse impacts on human health and the environment, and resulted in expensive cleanups. For example, there are 129 DOD facilities on the Superfund National Priorities List. 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 instance 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. And we note that Christine Whitman, the Administrator of the Environmental Protection Agency, recently testified before the Senate Environment and Public Works Committee that she was not aware of any training mission anywhere in the country that was being held up or not taking place because of these laws.<sup>1</sup> 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, not weakened. Certainly, any amendments that would weaken the protections these laws provide must be justified by important countervailing considerations that are supported by facts. While we certainly agree that maintaining readiness is necessary, the lack of any demonstrated conflict with RCRA, CERCLA and Clean Air Act requirements and the inherent flexibility of these laws cause 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. 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. We disagree with DOD's statements that the amendments to RCRA and CERCLA only apply to "operational" ranges. As described more specifically later in this statement, DOD's proposed amendments to RCRA and CERCLA would likely have the following results:

- Section 2019 will likely be interpreted to preempt or impair state authority over munitions, explosives and the like not only at operational ranges, but—contrary to DOD's assertions—also at former military ranges now in private ownership, DOD sites other than ranges, Department of Energy facilities, and even at private defense contractor sites.
- Section 2019 may preempt or impair EPA and state authority under RCRA and analogous state laws to require cleanup not only of unexploded ordnance, but also the chemical constituents of the ordnance such as perchlorate, TNT, or RDX—

<sup>1</sup>As reflected in the record of the Senate Environment and Public Works Hearing of February 26, 2003 on the President's 2004 Budget for the Environmental Protection Agency.

that may have leached out and contaminated the soil and groundwater. Again, this is not limited to operational ranges, but would likely extend to other Federal facilities, former military ranges now in private ownership, and defense contractor sites.

- Subsection 2019(a) would likely preempt states and EPA from using RCRA authorities to regulate the cleanup of unexploded ordnance and other munitions-related contamination at 16 million acres of land on closed, transferred, and transferring ranges that DOD estimates are potentially contaminated with unexploded ordnance. Much of this land is in private ownership.

- Proposed paragraph 2019(a)(2) appears to provide a wholesale exemption for munitions and explosives-related contamination that also likely extends beyond ranges to other Federal facilities and even to defense contractor sites. This exemption may encompass waste streams from the manufacture of explosives and munitions constituents, such as perchlorate contamination.

- Paragraph 2019(b)(2) arguably precludes state superfund authority over munitions-related contamination on operational ranges.

- Paragraph 2019(b)(2) also likely precludes prevents states from requiring cleanup of munitions-related contamination on 16 million acres of closed, transferred, and transferring ranges under state superfund-type laws.

Finally, we are concerned with the legislative process by which these proposed amendments have been considered. As we understand it, DOD has requested that the proposed amendments be included as part of the Defense Authorization Bill. 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 should be subjected to regular order with hearings before the congressional committees with jurisdiction over the environmental laws, not proposed as amendments to authorization or appropriations bills. Last summer, the National Association of Attorneys General approved a resolution urging the Congress to only consider laws that might impair state authority over Federal facilities through regular order.<sup>2</sup>

*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" for 2002 downplay the need for amending RCRA and CERCLA, characterizing the impact on readiness as merely "potentially significant".<sup>3</sup> DOD's justification for its proposed amendments to RCRA and CERCLA is a citizen suit filed in Alaska. According to DOD, this suit alleges that the discharge of ordnance onto an operational military range constitutes "disposal" under RCRA and a "release" under CERCLA.<sup>4</sup> DOD concludes that 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, and live-fire training during the remediation would be impossible.

We disagree with DOD's conclusion. First, there are no RCRA imminent and substantial endangerment or illegal disposal allegations in the Ft. Richardson citizen suit. Plaintiffs in that suit did allege violation of an Alaska statutory provision that prohibits pollution.<sup>5</sup> The cited provision is not part of Alaska's hazardous waste reg-

<sup>2</sup>See Exhibit 1.

<sup>3</sup>"Readiness and Range Preservation Initiative Summary," dated April 18, 2002, p. 7 (attached as Exhibit 2).

<sup>4</sup>Id.

<sup>5</sup>Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief, para. 29, Alaska Community Action on Toxics, et al. v. United States, A02-0083 CV, filed June 26, 2002 (attached as Exhibit 3). 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. See para. 3 of Exhibit 3. In paragraph 29, plaintiffs allege that the Army's violation of Alaska Statutes §46.03.710 constitutes a violation of RCRA's waiver 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."

ulatory 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. Thus, if this case were decided adversely to the Army, it would not set any precedent regarding RCRA.

Even if DOD's characterization of the plaintiff's complaint were correct, the likelihood that cleanup requirements would preclude training is remote. First, remediation would only be required if the munitions or munitions constituents posed a risk to human health or the environment. Generally speaking, this would only occur in situations where munitions constituents were contaminating environmental media, such as ground or surface water. Assuming that some remediation were required, there is no evidence to suggest that remediation of environmental contamination would impact military readiness. 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.

The underlying premise of DOD's position 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 will impose remedial requirements that will conflict with military readiness. DOD has cited no evidence to support this premise. States have regulated cleanup of contaminated Department of Energy nuclear weapons facilities and Department of Defense sites for decades in a responsible manner. 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.

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.<sup>6</sup> 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*

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, 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 requirements. 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. Conversely, DOD's approach weakens environmental protections unnecessarily in the vast majority of cases where there is 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.<sup>7</sup> These are not burdensome requirements. All that is required is

<sup>6</sup>Exhibit 2, p. 6.

<sup>7</sup>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

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.”<sup>8</sup> The entire finding consists of three paragraphs. President Clinton made similar findings annually from 1996 through 2000 regarding this same matter. 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.”<sup>9</sup> 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. The Clean Air Act’s “general conformity” regulations that DOD’s amendments would override contain still more flexibility. These regulations allow DOD to set aside clean air requirements for up to 6 months in response to “emergencies,” which, by definition, include responses to terrorist activities and military mobilizations. This exemption is renewable every 6 months through a written determination by DOD.<sup>10</sup>

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.<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> If they are unable to reach agreement, the Secretary of Defense must notify the President, who shall resolve the matter.<sup>14</sup>

*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*<sup>15</sup> 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.<sup>16</sup>

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.”

<sup>8</sup>67 Fed. Reg. 78425 (Dec. 24, 2002), attached as Exhibit 4.

<sup>9</sup>42 U.S.C. §7418(b).

<sup>10</sup>40 C.F.R. 93.153(d)(2), 93.153(e); 40 C.F.R. 152.

<sup>11</sup>42 U.S.C. §6961(b)(2).

<sup>12</sup>10 U.S.C. §2014(a) and (d).

<sup>13</sup>10 U.S.C. §2014(c).

<sup>14</sup>10 U.S.C. §2014(e).

<sup>15</sup>503 U.S. 607 (1992).

<sup>16</sup>“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.



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 from a high of 94.2 percent in fiscal year 1993 to a low of 61.5 percent in fiscal year 1998.<sup>17</sup> DOD's Clean Water Act compliance rates are slightly worse than the Federal agency totals.<sup>18</sup>

Compliance statistics alone, telling as they are, do not paint the entire picture of Federal agencies' failure to comply 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*,<sup>19</sup> 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.<sup>20</sup> 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. Interpreting a similar waiver of immunity, the Supreme Court again sided with the Federal agencies.<sup>21</sup> Again, Congress acted swiftly to amend the Clean Water Act to require Federal agencies to obtain discharge permits.<sup>22</sup> More recently, DOD spent years challenging state authority over cleanup of contamination at Federal facilities, ultimately losing in the Tenth Circuit.<sup>23</sup>

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.<sup>24</sup>

<sup>17</sup>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.

<sup>18</sup>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.

<sup>19</sup>426 U.S. 167 (1976).

<sup>20</sup>Pub.L. 95-95, §116(a).

<sup>21</sup>*Environmental Protection Agency v. California*, 426 U.S. 200 (1976).

<sup>22</sup>Pub.L. 95-217, §§60, 61(a).

<sup>23</sup>*U.S. v. Colorado*, 990 F.2d 1565 (10th Cir. 1993).

<sup>24</sup>See exchange of letters between State of Hawaii Department of Health and U.S. Army Garrison Hawaii, attached hereto as Exhibit 5.

- 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.<sup>25</sup>
- DOD is also challenging state and EPA authority to require compliance with "institutional controls." "Institutional controls" are legal mechanisms to restrict land or water use, and are often employed to reduce the cost of cleaning up contaminated sites. 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.

*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.<sup>26</sup> All together, DOD is responsible for addressing over 28,500 potentially contaminated sites across the country.<sup>27</sup> Through fiscal year 2001, DOD had spent almost \$25 billion cleaning up sites for which it is responsible.<sup>28</sup> DOD recently estimated that it would take another \$14 billion to complete the remediation of environmental contamination at active, re-aligning and closing sites.<sup>29</sup>

But the need for cleanup of active and closing bases is only part of the picture. DOD is also responsible for assessing and cleaning up thousands of potentially contaminated "Formerly Used Defense Sites" ("FUDS") in the United States and its territories and possessions.<sup>30</sup> Many FUDS are former bombing or gunnery ranges that contain unexploded ordnance. The GAO estimated recently that unexploded ordnance contamination may exist at over 1,600 FUDS.<sup>31</sup> DOD estimates that approximately 16 million acres of land on transferred ranges are potentially contaminated with unexploded ordnance.<sup>32</sup> There are no reliable data on the cost of addressing the contamination at these former ranges and other FUDS. DOD's recent estimates for unexploded ordnance cleanup vary from \$14 billion to over \$100 billion.<sup>33</sup> 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.<sup>34</sup> 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 mil-

<sup>25</sup>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." 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."

<sup>26</sup>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.

<sup>27</sup>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>

<sup>28</sup>Id., p. 21.

<sup>29</sup>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.

<sup>30</sup>"Environmental Contamination: Cleanup Actions at Formerly Used Defense Sites," GAO-01-557 (July 2001), p. 1. FUDS are properties that were formerly owned, leased, possessed, or operated by DOD or its components.

<sup>31</sup>Id., at 2.

<sup>32</sup>"DOD Training Range Cleanup Cost Estimates Are Likely Understated," GAO-01-479 (April 2001), p. 11.

<sup>33</sup>Id., pp. 5 and 13.

<sup>34</sup>"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 at p. C-1-22.

lion.<sup>35</sup> 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.<sup>36</sup>

The bottom line is that unexploded ordnance contamination at FUDS represents an environmental problem of huge dimensions. As shown below, DOD's proposed amendments would likely be read to preempt state authority over cleanup of these sites. Independent state oversight is needed to ensure these sites are cleaned up in a manner that protects human health and the environment.<sup>37</sup>

In addition to the obvious explosive hazards of unexploded ordnance, some constituents of explosives and munitions contamination have toxic or potential carcinogenic effects,<sup>38</sup> and can cause groundwater contamination. For example, perchlorate is a chemical widely used in solid rocket fuel and munitions. It interferes with iodide uptake into the thyroid gland, and disrupts the thyroid function. The Wall Street Journal has reported that EPA is concerned that fetuses and newborn babies may be particularly sensitive to exposure to perchlorate.<sup>39</sup> 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 that migrated from MMR. Subsequently, DOD spent approximately \$2 million to hook the town up to an alternate water supply.<sup>40</sup> Reportedly, explosives contaminants have been detected in about 100 groundwater monitoring wells on MMR, and have exceed EPA health advisory limits at 53 of those wells.<sup>41</sup> Similarly, military training activities at the Aberdeen Proving Ground have contaminated groundwater there with perchlorate, again prompting closure of a municipal water supply well that had been contaminated.<sup>42</sup>

Indeed, perchlorate contamination from military training, research, and production activities has caused widespread groundwater contamination in at least 22 states, according to the Wall Street Journal.<sup>43</sup> DOD's proposed legislation would likely be read to preempt or impair state authority to address many of these sites, including some privately owned defense contractor sites, under RCRA, CERCLA, and analogous state laws.

*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.<sup>44</sup> 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 readi-

<sup>35</sup>Id. at p. C-1-25.

<sup>36</sup>Id., pp. C-1-8 to C-1-21.

<sup>37</sup>For example, 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 making some "no further action" determinations. 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. Contamination at the 32 sites included high levels of PCBs, unexploded ordnance, leaking underground storage tanks, asbestos, and groundwater contamination. "No Further Action Survey," Association of State and Territorial Solid Waste Management Officials, December 1998. 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."

<sup>38</sup>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 7. Also included in Exhibit 7 are two EPA documents regarding perchlorate, another common munitions constituent.

<sup>39</sup>"A Fuel of cold war Defenses Now Ignites Health Controversy," 12/16/2002 article by Peter Waldman, reported on page 1 of the Wall Street Journal, attached as Exhibit 8.

<sup>40</sup>"Military Cash Flows for New Water Supply," story by Kevin Dennehy, Cape Cod Times, April 24, 2002, attached as Exhibit 9.

<sup>41</sup>"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.

<sup>42</sup>"Group calling for cleanup of perchlorate in Aberdeen," 10/3/2002 article by Lane Harvey Brown in the Baltimore Sun, attached as Exhibit 11.

<sup>43</sup>See Exhibit 8.

<sup>44</sup>See, e.g., Exhibit 2.

ness concerns. Considering the magnitude of the munitions contamination problem at FUDS and other DOD sites, and the groundwater contamination at sites such as the Massachusetts Military Reservation and the Aberdeen Proving Grounds, any change in DOD's obligation to comply with cleanup requirements has the potential for large impacts. But the bottom line is that DOD's proposed amendments likely create broad exemptions that jeopardize the states' ability to protect their citizens' health and environment, without any corresponding benefit to readiness.

DOD's amendment to RCRA would likely be read to preempt or impair 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.<sup>45</sup> By narrowing this definition, DOD's amendments 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."<sup>46</sup> Thus, the scope of the RCRA sovereign immunity 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.<sup>47</sup> By re-defining "solid waste" in a very limited fashion, DOD's proposed amendment will likely preempt or impair state authority over munitions, explosives and the like not only at operational ranges, but—contrary to DOD's assertions—also at FUDS, DOD sites other than ranges, DOE facilities, and even at private defense contractor sites.

*DOD's proposed amendment to the definition of solid waste provides:*

*"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 subparagraph (a)(1)(A) shall be subject 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 subparagraph (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;

<sup>45</sup>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.

<sup>46</sup>42 U.S.C. §6961(a).

<sup>47</sup>Department of Energy v. Ohio, 503 U.S. 607 (1992). See also the discussion of *Hancock v. Train*, *supra*.

“(C) are or have been deposited, incident to their normal and expected use, and remain on an operational range, except as provided in subparagraph (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.

*“Nothing in subparagraphs (2)(A), (B), (C), (D), or (E) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that have been deposited on an operational range once the range ceases to be an operational range.”* (Italics indicate substantive changes from the 2002 version of DOD’s proposal.)

As an initial matter, paragraph 2019(a)(1) applies to an extremely broad range of items. It does not just cover munitions, munitions fragments, explosives, ordnance, and unexploded ordnance, but also constituents of any of those items. That means it applies not just to unexploded ordnance that may contaminate an area, but also to the chemical constituents of the ordnance such as perchlorate, TNT, or RDX—that may have leached out and contaminated the soil and groundwater. For convenience, we will generally refer only to munitions when describing the scope of section 2019, but it is well to remember that it actually covers many more items.

Paragraph 2019(a)(1) sets forth the circumstances under which munitions are solid wastes. Again, because the term “solid waste” is used in RCRA’s waiver of immunity, it will be construed narrowly. Thus, under paragraph 2019(a)(1), the only circumstances under which munitions will be considered solid wastes are if: (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 rendered safe or retrieved.

Subparagraph 2019(a)(2)(C) compels the same conclusion, because it expressly limits the instances in which munitions-related materials that “are or have been deposited, incident to their normal and intended use, on operational ranges,” to the circumstances set forth in 2019(a)(1). This year, DOD has added a sentence to the end of section 2019 that it says limits the scope of this section to only “operational” ranges.

We disagree that the new language limits the reach of section 2019. First, it only limits the impact of paragraph 2019(a)(2), not paragraph 2019(a)(1). As noted above, because of the narrow construction courts place on waivers of immunity, even absent the language of 2019(a)(2)(C), paragraph 2019(a)(1) likely will be read as defining the exclusive universe of circumstances under which states may regulate munitions pursuant to the RCRA waiver. Paragraph 2019(a)(1) excludes from the definition of solid waste munitions that were deposited on an operational range while it was operational and remain there after it closed.

Second, the new language is ambiguous. It can be read to mean that nothing in paragraph 2019(a)(2) affects the legal requirements applicable to munitions that were deposited on a range after the range ceased to be operational. This would result in a narrower waiver of immunity than the interpretation DOD has proffered, and consequently would likely be the interpretation a Federal court would adopt.

Third, in 1997, EPA deferred promulgation of a rule that would have codified EPA’s interpretation that munitions left in place at the time a range closed or was transferred out of military control are solid wastes as defined in RCRA.<sup>48</sup> In light of EPA’s regulatory inaction, DOD may argue that there currently are no legal re-

<sup>48</sup>“Military Munitions Rule,” 62 Fed. Reg. 6622, 6632 (2/12/97). Under this interpretation, such munitions would have been statutory solid wastes, but not “regulatory” solid wastes. (EPA’s regulatory definition of solid waste is narrower than the statutory definition. See 40 CFR 261.2.) Both regulatory and statutory solid wastes may be subject to RCRA’s imminent and substantial endangerment provisions (42 U.S.C. §§6972 and 6973) and, if located at a facility subject to RCRA permitting requirements, its corrective action authorities (see 42 U.S.C. §§6924(u) and (v) and 6928(h)). However, only regulatory solid wastes are subject to the full panoply of RCRA permit and management requirements. See 42 U.S.C. §6903(27); *Military Toxics Project v. EPA*, 146 F.3d 948, 950–51 (D.C. Cir. 1998). EPA also proposed that its interpretation of munitions on closed ranges as solid wastes would “sunset” if and when DOD promulgated a rule allowing for public involvement in the cleanup of closed and transferred ranges. EPA decided to postpone action on this rule in part because many commenters argued that DOD had no authority to promulgate such a rule, and that such deferral would be contrary to the Federal Facility Compliance Act. When Congress passed the Federal Facility Compliance Act, it rejected a Senate proposal that would have allowed DOD to regulate waste munitions, in favor of state and EPA regulation under RCRA. See House Conf. Rep. No. 102–886 (Sept. 22, 1992), pp. 28–29.

quirements applicable to munitions that were deposited on a range while it was operational, and remain there after it has closed.<sup>49</sup> It could then argue that subparagraph 2019(a)(2)(C) precludes EPA from promulgating any such regulation in the future, because the munitions are not a solid waste as defined in RCRA.

Even with DOD's revision to proposed section 2019, munitions that were deposited on an operational range and simply remain there after the range closed or was transferred are not solid wastes under RCRA, 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 be read to 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.

In addition, paragraph 2019(a)(1) is not limited to ranges on military bases. Under EPA's "Military Munitions Rule" (see below),<sup>50</sup> a range may include land owned by an entity under contract with DOD or DOE that is set aside for researching, developing, testing and evaluating military munitions and explosives. In other words, a military range may include defense contractor facilities.<sup>51</sup> Paragraph 2019(a)(1) may thus preempt state and EPA authority under RCRA and analogous state laws to address groundwater contaminated with perchlorate or other munitions constituents at defense contractor sites that may be considered ranges, potentially including some of those described in the Wall Street Journal article.<sup>52</sup>

Proposed subsection 2019(a) may well override 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),<sup>53</sup> 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 subparagraph 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 paragraph 2019(a)(2) provides a broad exemption that may also encompass munitions-related contamination at defense contractor sites. This paragraph 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 is not limited to ranges at all, but instead applies to any facility with such wastes, such as facilities owned and operated by defense contractors who produce munitions constituents, including perchlorate, TNT, or RDX, or who produce munitions, weapons, or weapons systems. Because this exemption includes munitions and explosives constituents, it may extend to waste streams from the production of munitions or explosives. Thus, under para-

<sup>49</sup>EPA's final munitions rule—including its decision to postpone promulgation of the provision defining certain munitions as statutory solid wastes—does not mean that discharged munitions on ranges cannot be statutory solid wastes. Under the Federal Facility Compliance Act, if such munitions meet the statutory definition of "discarded," they are statutory solid wastes. The Department of Justice took this position in recent litigation concerning the Navy's facilities in Vieques, Puerto Rico. See *Water Keeper Alliance v. U.S. Department of Defense*, 152 F. Supp.2d 163, 176, n. 3 ("Defendants [the United States] point out that they 'do not seek dismissal of any claim that ordnance debris and unexploded ordnance left to accumulate on the [Live Impact Area] constitute solid waste.' [citation omitted] Consequently, the Court will not dismiss this claim.")

<sup>50</sup>40 CFR §266.201.

<sup>51</sup>We understand that DOD may be offering a similar definition for codification in Title 10 of the U.S. Code. This proposed definition would then apply to proposed section 2019.

<sup>52</sup>See Exhibit 8.

<sup>53</sup>See Exhibit 7.

graph 2019(a)(2), the perchlorate contamination from the Aerojet-General corporation's plant near Rancho Cordova, California, or from the Kerr-McGee ammonium perchlorate production facility in Henderson, Nevada, that are described in the Wall Street Journal article<sup>54</sup> likely would not be subject to regulation as a solid or hazardous waste under RCRA.

Proposed subsection 2019(a)(2) may even extend to the chemical munitions scheduled for destruction at various military installations around the country. If DOD conducts or has conducted research or evaluation of chemical munitions constituents (such as mustard agent)—even for defensive purposes—under subparagraph 2019(a)(2)(A), these materials could be considered exempt from the definition of solid waste. Currently, states have the authority to regulate the scheduled destruction of chemical agent stockpiles around the United States under RCRA. For example, Colorado is planning to issue a permit for the destruction of 780,000 rounds of mustard agent at the Pueblo Chemical Depot. DOD's proposed amendments may call into question Colorado's and other states' authority over the destruction of these chemical weapons.

*DOD's amendments do not simply codify EPA's "Military Munitions Rule"*

DOD states that its proposed amendments would "clarify and confirm" EPA's "Military Munitions Rule." We disagree. DOD's proposal differs from the munitions rule in at least four significant ways. First, DOD's proposal narrows RCRA's statutory definition of solid waste, while the munitions rule does not affect RCRA's statutory definition of solid waste. Thus, unlike the munitions rule, this statutory change precludes states and EPA from using RCRA's imminent and substantial endangerment authorities to address most munitions-related contamination. In addition, changing the statute's definition of solid waste likely narrows RCRA's waiver of immunity and likely limits EPA's authority to regulate munitions under RCRA, as described below.

Second, by narrowing the statutory definition of solid waste, a term used in RCRA's waiver of sovereign immunity, DOD's amendments likely narrow the waiver of immunity. The amendments may thus preempt state authority to require the cleanup of most munitions-related contamination, including unexploded ordnance and perchlorate contamination, under RCRA. In contrast, the munitions rule does not preempt state authority at all. When it first proposed the munitions rule, EPA solicited comment on a regulatory approach that would preempt states from enforcing broader or more stringent requirements respecting military munitions.<sup>55</sup> In the final rule, EPA determined not to adopt such an approach, and expressly acknowledged that under RCRA sections 3006 and 3009, "States may adopt requirements with respect to military munitions that are more stringent or broader in scope than the Federal requirements."<sup>56</sup>

Third, as described above, DOD's proposal likely prevents EPA from promulgating additional regulations under RCRA governing the cleanup of munitions on non-operational ranges, because they are excluded from the statute's definition of solid waste. Under the munitions rule, EPA expressly reserved promulgation of such regulations for future decision.<sup>57</sup>

Fourth, by including the phrase "or constituents thereof," in paragraphs 2019(a)(1) and (a)(2), DOD's proposal may well preempt state and EPA authority over munitions-related and explosives-related constituents that have leached from the munitions and are contaminating the environment. These include chemicals such as perchlorate, RDX, TNT, DNT and white phosphorous. The munitions rule does not address munitions constituents at all, and does not prevent EPA or the states from requiring cleanup of these chemicals when they leach from munitions into the soil or groundwater.<sup>58</sup>

*DOD's proposed amendments to CERCLA go far beyond DOD's stated concerns with readiness*

Proposed subsection 2019(b) has similarly broad consequences for CERCLA. This provision states:

"(b) 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

<sup>54</sup>See Exhibit 8.

<sup>55</sup>60 Fed. Reg. 56488 (Nov. 8, 1995).

<sup>56</sup>62 Fed. Reg. 6625 (Feb. 12, 1997).

<sup>57</sup>"Military Munitions Rule," 62 Fed. Reg. 6622, 6632. See note 48, supra.

<sup>58</sup>62 Fed. Reg. 6631.

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 and remain thereon.

“(3) Notwithstanding the provisions of paragraph (2), 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 take action because there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance includes the authority to take action because of 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 and remain thereon.

“(4) Nothing in this section affects the authority of the Department to protect the environment, safety, and health on operational ranges.”

DOD’s proposed change to the definition of “release” 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.”<sup>59</sup> CERCLA’s definitions of “removal” and “remedial action” are limited by the definition of “release.”<sup>60</sup> 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,” paragraph 2019(b)(2) arguably precludes state superfund authority over munitions-related contamination on operational ranges.

Read in conjunction with proposed paragraph 2019(b)(1), paragraph 2019(b)(2) also may be read to preclude prevents states from requiring cleanup of munitions-related contamination on closed, transferred, and transferring ranges (i.e., FUDS) under state superfund-type laws. This statutory construction follows from the fact that paragraph 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 the range was operational could only be considered a “release” if paragraph 2019(b)(1) specifically included the presence of munitions-related contamination on a non-operational range in its definition of release.

However, paragraph 2019(b)(1) only says that the deposit or migration of munitions-related contaminants off an operational range constitutes a release under CERCLA. Thus, under subsection 2019(b), munitions-related contamination on a former military range that arises from the deposit of such materials on the range while it was still operational may not be considered a “release” under CERCLA, and would not fall within the scope of CERCLA’s waiver of immunity. States may thus be precluded from using their state superfund-type laws to require DOD to address munitions-related contamination, including residual unexploded ordnance or soil or groundwater contaminated with munitions constituents such as perchlorate, RDX, or TNT at former military ranges. Additionally, there are several states whose superfund-type laws are tied to definitions in CERCLA. Amending CERCLA’s definition of “release” may limit these states’ ability to require parties other than DOD to clean up such contamination at former ranges.

Subsection 2019(b)’s overall impact on EPA’s CERCLA authority to clean up munitions-related contamination on operational ranges is far from clear. While preserving the President’s authority under CERCLA section 106, this provision appears to eliminate section 104 removal and remedial authority for munitions-related and explosives-related contamination. It also appears to remove the cleanup of such contamination from the scope of CERCLA section 120 interagency agreements 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) may undermine

<sup>59</sup>42 U.S.C. §9620(a)(4).

<sup>60</sup>42 U.S.C. §9601(23) and (24).



the goal of achieving cleanups that adequately protect human health and the environment.

Finally, section 2019 may limit state and Federal authority to pursue natural resource damage actions for contamination caused by munitions and explosives constituents. Natural resource damages are only available for releases of hazardous substances that cause injury to, loss of, or destruction of natural resources.<sup>61</sup> By restricting the definition of solid waste to exclude munitions and explosives constituents, subsection 2019(a) may exclude some such constituents from being “hazardous substances” under CERCLA.<sup>62</sup> And by restricting the definition of “release” under CERCLA, subsection 2019(b) restricts the number of sites where natural resource damage claims may be pursued.

#### *Conclusion*

DOD’s far-reaching amendments to RCRA, CERCLA, or the Clean Air Act are not 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.

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#### NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Co-Sponsors: Attorney General Salazar, Attorney General Shurtleff, Attorney General Gregoire, Attorney General Wasden

SPRING MEETING

March 17–20, 2003

Washington, DC

PROPOSED RESOLUTION

SUPPORTING THE PRINCIPLE THAT FEDERAL FACILITIES BE SUBJECT TO THE SAME ENVIRONMENTAL STANDARDS AS PRIVATE INDUSTRY AND OPPOSING AMENDMENTS TO WEAKEN STATE AND EPA AUTHORITY OVER THE DEPARTMENT OF DEFENSE

WHEREAS, our nation has long made the protection of human health and the environment a priority through enactment of several environmental laws, including the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund); and

WHEREAS, Congress recognized in each of these laws that the States have a fundamental right to protect their citizens and the environment within their borders and therefore included in each law a waiver of the Federal Government’s sovereign immunity; and

WHEREAS, the Attorneys General play a primary role in protecting human health and the environment through their enforcement of State laws authorized under the Resource Conservation and Recovery Act, the Clean Air Act, the Clean

<sup>61</sup>42 U.S.C. §9607(a)(4)(C).

<sup>62</sup>See 42 U.S.C. §9601(14).

Water Act, and the Safe Drinking Water Act, and through representation of their States in cases brought under Superfund, and

WHEREAS, despite Congress' long-standing adherence to the principle that Federal agencies should be subject to the same environmental standards and enforcement as private industry, the States have experienced significant difficulty in bringing Federal agencies into compliance with Federal and State environmental laws because Federal agencies continue to dispute the extent of waivers of immunity in the environmental laws; and

WHEREAS, Federal agencies have long been recognized as the nation's largest polluters with thousands of contaminated sites across the Nation, which will cost hundreds of billions of dollars to remediate; and

WHEREAS, consideration and adoption of proposed legislation through regular order, with full and open hearings before the congressional committees of jurisdiction, is one of the fundamental procedural safeguards of the legislative process, because it allows an opportunity for interested parties to present their views, allows for construction of a record upon which the need for legislation can be judged, and allows for debate on the merits of any proposed legislative language; and

WHEREAS, the Department of Defense has proposed legislation amending RCRA, CERCLA and the Clean Air Act that would provide broad exemptions from these laws, notwithstanding the lack of any demonstration that any of these laws has adversely impacted military readiness, and notwithstanding the existence of waiver mechanisms in each of these laws; and

WHEREAS, these proposed amendments to RCRA and CERCLA would preempt State and EPA authority over munitions-related and explosives-related wastes at a broad range of sites, including Department of Energy facilities, defense contractor sites, current military bases, and up to 16 million acres of former ranges that may be contaminated with unexploded ordnance; and

*NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:*

1. Urges the Congress to consider legislation affecting Federal agency compliance with environmental requirements only through regular order, and to solicit and consider the views of affected States in considering any such legislation;

2. Urges Congress to strengthen and clarify existing waivers of immunity in Superfund and the Clean Water Act, and in the other environmental laws, as appropriate, and to reject any proposed amendments that would impair States' authority to protect the health of their citizens, such as DOD's proposed amendments to RCRA, CERCLA and the Clean Air Act;

3. Re-establishes the Federal Facilities Working Group, composed of representatives of the offices of interested Attorneys General, under the auspices of the NAAG Environment Committee to serve as a resource to the Attorneys General/ NAAG regarding Federal agency compliance with State and Federal environmental laws; to monitor proposed legislation and regulatory actions in this area; and to assist the Attorneys General in formulating such responses to such proposed legislation and regulatory actions as may be timely and appropriate; and

4. Authorizes the Executive Director to transmit this resolution to Congress, the Administration, and other interested organizations and individuals; and to monitor and report back on proposed legislation that might impair State authority over Federal facilities.



National Association  
of Attorneys General

**Adopted**

**Summer Meeting  
June 18-22, 2002  
Farmington, Pennsylvania**

**RESOLUTION**

**SUPPORTING THE PRINCIPLE THAT FEDERAL FACILITIES BE SUBJECT TO  
THE SAME ENVIRONMENTAL STANDARDS AS PRIVATE INDUSTRY**

WHEREAS, our nation has enacted a series of environmental laws designed to protect human health and the environment by regulating the emission of pollutants and by requiring remediation of environmental contamination; and

WHEREAS, such environmental laws include the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund); and

WHEREAS, the Congress, in enacting each of these laws, intended that federal agencies be subject to each of these laws, and therefore included in each law a waiver of the federal government's sovereign immunity; and

WHEREAS, the States are the primary implementers of the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, and are key partners with the Environmental Protection Agency in implementing Superfund; and

WHEREAS, despite Congress' long-standing adherence to the principle that federal agencies should be subject to the same environmental standards and enforcement as private industry, the states have experienced significant difficulty in bringing federal agencies into compliance with federal and state environmental laws because federal agencies continue to dispute the extent of waiver of immunity in the environmental laws; and

WHEREAS, federal agencies have long been recognized as the nation's largest polluters with thousands of contaminated sites across the nation, which will cost hundreds of billions of dollars to remediate; and



WHEREAS, data from the Environmental Protection Agency demonstrate that clear waivers of federal sovereign immunity are necessary to ensure federal agencies comply with state and federal environmental laws; and

WHEREAS, on several occasions, legislation has been proposed that could alter or impair state authority over federal facility environmental compliance, such proposed legislation 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; and

WHEREAS, consideration and adoption of proposed legislation through regular order, with full and open hearings before the Congressional committees of jurisdiction, is one of the fundamental procedural safeguards of the legislative process, because it allows an opportunity for interested parties to present their views, allows for construction of a record upon which the need for legislation can be judged, and allows for debate on the merits of any proposed legislative language; and

WHEREAS, the importance of regular order in considering legislation that could alter or impair state authority over federal facility environmental compliance is particularly important because of the close scrutiny federal courts give waivers of federal sovereign immunity;

**NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:**

1. Urges the Congress to consider legislation affecting federal agency compliance with environmental requirements only through regular order;
2. Urges Congress to solicit and consider the views of affected states in considering any such legislation;
3. Urges Congress to strengthen and clarify existing waivers of immunity in Superfund and the Clean Water Act, and in the other environmental laws, as appropriate;
4. Establishes a Federal Facilities Working Group, composed of representatives of the offices of interested Attorneys General, to serve as a resource to the Attorneys General, NAAG, and the NAAG Environment Committee regarding federal agency compliance with state and federal environmental laws; to monitor proposed legislative and regulatory actions in this area; and to assist the Attorneys General in formulating such responses to such proposed legislative and regulatory actions as may be timely and appropriate; and
5. Authorizes the Executive Director to transmit this resolution to Congress, the Administration, and other interested organizations and individuals; and to monitor and report back on proposed legislation that might impair state authority over federal facilities.

**Readiness and Range Preservation Initiative Summary**

(April 30, 2002)

**Introduction.** The Department of Defense has embarked on a multifaceted effort to improve readiness today and in the future. As part of that effort, the Department is recommending that Congress clarify the way that several provisions of environmental laws apply to military training and testing activities. For the most part, these changes simply confirm the way existing laws and regulations are currently administered, thereby safeguarding these existing practices against litigation seeking to overturn them. From an environmental perspective, such elements of the package range from neutral to strongly positive in its effects. From a readiness perspective, however, these amendments are of great significance.

The changes are designed to save the lives of America's young men and women by preparing them and their equipment for combat on the first day of battle. A battlefield is not the place for soldiers, sailors, airmen, or Marines to learn how a military tactic or weapon really works. We often say that we need to train as we fight. The reality is we fight as we train. With the many restrictions placed on military training and weapons testing in recent years, training is losing its realism. Having to "unlearn" artificial training restrictions can have serious implications. To employ weapons systems and handle and use munitions properly on the battlefield, our troops must experience that use in a realistic training environment. The battlefield is not the place to learn these skills.

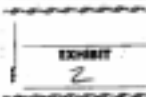
The sustainable readiness initiative is narrow in scope, addressing only military readiness activities—the training, testing, and operations that relate to combat. It does not affect the wide range of Defense Department activities that do not directly relate to combat, such as our wastewater treatment plants, dry cleaners, or routine transportation. And it does not affect our closed bases, or those bases that close in the future. For those bases, DoD's cleanup responsibilities remain unchanged.

The initiative also contains several proposals that will enhance environmental protection by protecting additional habitat around existing bases—a win-win for the environment and readiness. By encouraging creation of such buffer zones for our bases, the initiative will create new protection for wildlife and natural resources while simultaneously protecting our bases from encroachment by inconsistent development.

**Specific Provisions.**

**Endangered Species Act.** The legislation would confirm the prior Clinton Administration's decision that there is no need to designate critical habitat on military installations for which an Integrated Natural Resources Management Plan has been completed. These plans for conserving natural resources on military property, required by the Sikes Act, are developed in cooperation with state wildlife agencies, the U.S. Fish and Wildlife Service, and the public. They offer superior protection for species because they consider the base's environment holistically, rather than using an obsolete and unscientific species-by-species analysis.

**Need for Legislation:** The Clinton Administration's decision that INRMPs provide for



appropriate endangered species habitat management is being challenged in court by environmental groups, who cite Ninth Circuit caselaw suggesting that a California habitat management program was an insufficient basis for the Fish and Wildlife Service to avoid designating Critical Habitat. This legislation would insulate the Fish and Wildlife Service's policy from such challenges.

**Effect on the Environment: Neutral to Positive**

- This legislation confirms existing policy of the last two Administrations.
- DNRMPs are a superior form of habitat and species protection, as the both the Clinton and Bush Administrations have affirmed. Such plans are required to provide for fish and wildlife management, land management, forest management, and fish and wildlife-oriented recreation; fish and wildlife habitat enhancement; wetland protection, enhancement, and restoration; establishment of specific natural resource management goals, objectives, and timeframes; and enforcement of natural resource laws and regulations.
- In 1999, the Fish and Wildlife Service stated in a Notice of Proposed Rulemaking that "we have long believed that, in most circumstances, the designation of 'official' critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources.... [W]e have long believed that separate protection of critical habitat is duplicative for most species."
- The legislation explicitly requires that the Defense Department continue to consult with the Fish and Wildlife Service and the National Marine Fisheries Service under Section 7 of the Endangered Species Act (ESA); the other provisions of the ESA, as well as other environmental statutes such as the National Environmental Policy Act, would continue to apply, as well.

**Effect on Readiness: Critical**

- Absent this policy, environmental litigants would have forced the Fish and Wildlife Service to designate over 50% of the 13,000-acre Marine Corps Air Station (MCAS) Miramar and over 65% of the 125,000-acre Marine Corps Base (MCB) Camp Pendleton. Prior to adoption of this policy, 72% of Fort Lewis and 40% of the Chocolate Mountains Aerial Gunnery Range were designated as critical habitat for various species, and analogous habitat restrictions were imposed on 33% of Fort Hood. These are vital installations.
- Unlike Sikes Act DNRMPs, critical habitat designation imposes rigid limitations on military use of bases, denying commanders the flexibility to manage their lands for the benefit of both readiness and endangered species.

**Marine Mammal Protection Act.** The legislation would codify the National Research Council's recommendation that the current overly broad definition of "harassment" of marine mammals, which includes "annoyance" or "potential to disturb," be focused on biologically significant effects. As recently as 1999, the National Marine Fisheries Service asserted that under the sweeping language of the existing statutory definition harassment "is presumed to occur when marine mammals...react to the generated sounds or visual cues"—in other words, whenever a marine mammal notices and reacts to an activity, no matter how transient or benign the reaction. Both the Clinton and Bush Administrations have sought to refine this

overboard definition. This legislation would apply to military readiness activities a definition of harassment consistent with the recommendation of the National Research Council and developed by the Departments of Commerce, Interior, and Defense under the last two Administrations.

**Need for Legislation:** Environmental groups challenge the National Marine Fisheries Service's policy of using a more scientific, effects-based standard of harassment as inconsistent with the sweeping statutory standard and have announced that they will challenge NMFS' permitting of vital national security technology under that standard. Although reauthorization of the MMPA with a similar provision would obviate such a suit, global MMPA reauthorization is likely to be protracted and could be delayed by other issues. A narrow amendment for military readiness activities is fully consistent with a subsequent general reauthorization.

**Effect on the Environment: Neutral**

- The legislation confirms existing policy of the last two Administrations, endorsed by the National Research Council.
- Although excluding transient, biologically insignificant effects from regulation, the MMPA would remain in full effect for biologically significant effects—not only death or injury but also disruption of significant activities.
- The Defense Department already exercises extraordinary care in its maritime programs: all DoD activities worldwide result in fewer than 10 deaths or injuries annually (as opposed to 4800 deaths annually from commercial fishing activities).
- DoD currently funds much of the most significant research on marine mammals, and will continue this research in future.

**Effect on Readiness: Critical**

Application of the current hair-trigger definition of "harassment" has profoundly affected both vital R&D efforts and training. 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 two years has often had to find alternate training sites for Vieques. To date, the Navy has been able to avoid the delay and burden of applying for a take permit only by curtailing and/or dumbing down training and research/testing.

- For 6 years, the Navy has been working on research to develop a suite of new sensors and tactics (the Littoral Advanced Warfare Development Program, or LWAD) to reduce the threat to the fleet posed by ultraquiet carrier-killer diesel submarines operating in the littorals and shallow seas like the Persian Gulf, the Straits of Hormuz, the South China Sea, and the Taiwan Strait. These submarines are widely distributed in the world's navies, including "Axis of Evil" countries like Iran and North Korea and other potentially hostile great powers.
  - In the 6 years that the program has operated, over 75% of the tests have been impacted by environmental considerations.
  - In the last 3 years, 9 of 10 tests have been affected. One was cancelled entirely, and 17 different projects have been scaled back.
- Deployment of the Surveillance Towed – Array Sensor System (SURTASS) Low Frequency Active (LFA) sonar system, a key defense against ultraquiet diesel

subsidies, has been delayed for over six years, in large measure by the MMPA's definition of "harassment."

- o The Navy sponsored a \$10 million scientific research project conducted by the Woods Hole Oceanographic Institute and Cornell University.
- o In 1998 these scientists concluded that although some marine mammals could be "harassed" (though not injured) by LFA, LFA would not adversely affect marine mammal populations.
- o The Navy still awaits the Letter of Authorization (LOA) to allow incidental taking of marine mammals in connection with the LFA program. Once the LOA is issued, DoD anticipates a lawsuit challenging, among other things, interpretation of harassment by the Navy and NMFS and the NMFS decision to issue a permit based on that interpretation.

**Migratory Bird Treaty Act.** The legislation would reverse a March 2002 judicial decision applying the MBTA to training activities at the Fardon de Medina (FDM) range in the Western Pacific that are vital to Operation Enduring Freedom. The provision would require that the military services take practical steps to prevent injuries to birds in the course of training.

**Need for Legislation:** Without clarifying the scope of the MBTA, DoD now faces the potential for an injunction that would halt military training if it could result in the death or injury of any migratory birds. In the FDM litigation, the judge himself stated that Congress should take up the current inflexible MBTA requirements.

- Although DoI may attempt to address this problem by regulation, a formal rulemaking process would entail at least 18-24 months, and subsequent litigation is likely since the FDM plaintiffs have already stated that they do not believe Interior has authority to issue either regulations or permits for military readiness activities. (An emergency interim regulation, by contrast, would be subject to further procedural challenge.)
- DoI's ability to address the problem by issuance of "special purpose" permits is also qualified by the fact that it would be very difficult administratively to issue site-specific special-purpose permits for the hundreds of DoD bases and activities implicating the MBTA. Programmatic special-purpose permits for categories as broad as "low-level military aviation" would likely entail at least 24-36 months to complete the requisite environmental documentation, and a subsequent lengthy legal challenge would be likely since the FDM plaintiffs have argued to the court that DoI may not lawfully issue MBTA incidental take permits that do not conduce to the net benefit of migratory birds.

**Effect on the Environment: Neutral to Positive**

The legislation merely restores the legal and regulatory status quo as it existed for over 80 years, until the FDM decision last month. The military already undertakes extensive mitigation efforts, not just at FDM but throughout all our aviation activities, because bird strikes represent a critical threat to pilot safety. Our legislation would expand that by committing to reduce injuries to migratory birds to the extent possible.

**Effect on Readiness: Critical**

- Senior commanders have testified that loss of FDM will have important detrimental effects on Operation Enduring Freedom.
  - o VADM Metzger: "FDM [has] become a necessity for training and readiness in the



war against terrorism...Closing FDM will mean that units transiting to the 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.”

- o Maj. Gen. Cartwright: “FDM’s critical role in Marine aviation military readiness, and therefore national security, has dramatically increased since the September 11, 2001 terrorist attacks.”
- Almost all species of birds everywhere are migratory, and the FDM case was brought in the D.C. Circuit, which has jurisdiction over all DoD activities.
- As a result, the holding in the FDM case puts at risk all military aviation, military telecommunications, and live-fire training nationwide and as far afield as FDM.

**Clean Air Act.** The legislation would provide more flexibility for the Defense Department in ensuring that emissions from its military training and testing are consistent with State Implementation Plans under the Clean Air Act by allowing DoD and the state a slightly longer period to accommodate or offset emissions from military readiness activities.

**Need for Legislation:** The Clean Air Act’s “general conformity” requirement, applicable only to federal agencies, has repeatedly threatened deployment of new weapons systems and base closures/realignment despite the fact that relatively minor levels of emissions were involved.

- The planned realignment of F-14s from NAS Miramar to NAS Lemoore in California would only have been possible because of the fortuity that neighboring Castle Air Force Base in the same airshed had closed, thereby creating offsets.
- The same fortuity enabled the homebased of new F/A-18 E/Fs at NAS Lemoore.
- The realignment of F/A-18 C/Ds from Cecil Field, Florida to NAS Oceana in Virginia was made possible only by the fortuity that Virginia was in the midst of revising its Implementation Plan and was able to accommodate the new emissions. The Hampton Roads area in which Oceana is located will likely impose more stringent limits on ozone in the future, thus reducing the state’s flexibility.

As these near-misses demonstrate, under the existing requirement there is limited flexibility to accommodate readiness needs, and DoD is barred from even beginning to take readiness actions until the requirement is satisfied.

- The Clean Air Act permits the President to issue renewable one-year waivers for individual federal sources upon a paramount national interest finding, or to issue renewable three-year regulations waiving the Act’s requirements for weaponry, aircraft, vehicles, or other uniquely military equipment upon a paramount national interest finding.
  - o Use of such time-limited authorities in the context of activities that are (a) ongoing indefinitely, and (b) largely cumulative in effect would be difficult under a paramount interest standard, and would require needless revisiting of the issue annually or triennially.

**Effect on the Environment: Strongly positive**

The new legislation would greatly facilitate the 2005 base closure round authorized by Congress by facilitating realignment of military units from closing bases. This round will substantially reduce aggregate DoD emissions nationwide, both by reducing the number of

DoD facilities and by enabling upgrade of aging infrastructure at the remaining facilities. By contrast, the new emissions the legislation would responsibly authorize are typically less than .5% of the total emissions in air regions—several hundred tons in airsheds with emissions budgets of tens of thousands of tons.

**Effect on Readiness: Major**

- The provision is necessary to facilitate a new base closure round critical to military transformation.
- The more efficient and powerful engines that are being designed and built for virtually all new weapons systems will burn hotter and therefore emit more NOx than the legacy systems they are replacing, even though they will also typically emit lower levels of VOCs and CO. Without greater flexibility, the conformity requirement could be a significant obstacle to basing military aircraft in any Southern California location, as well as a potentially serious factor for the siting of the Joint Strike Fighter and the Marine Corps' Advanced Amphibious Assault Vehicle.

**RCRA and CERCLA.** The legislation would confirm that military munitions are subject to EPA's Military Munitions Rule while on range, and that cleanup of operating ranges is not required so long as material stays on the range. If such material moves off range, it still must be addressed promptly under existing environmental laws. Moreover, if munitions cause an imminent and substantial endangerment on range, EPA will retain authority to address it on range under CERCLA section 106.

**Need for Legislation.**

- Because of the broad statutory definition of "solid waste" in RCRA, and because states possess broad authority to adopt more stringent RCRA regulations than EPA (enforceable both by the states and by environmental plaintiffs), EPA has limited ability to afford DoD regulatory relief under RCRA.
- The broad statutory definition of "release" under CERCLA, combined with EPA's past assertions that munitions are a hazardous substance subject to CERCLA response authorities, may also limit EPA's ability to afford DoD regulatory relief.
- The President's site-specific, annually renewable waiver (under a paramount national interest standard in RCRA and a national security standard in CERCLA) are inapt for the reasons discussed above.

**Effect on the Environment: Neutral**

- The legislation codifies virtually uniform existing regulatory policy.
- The legislation does not modify the overlapping protections of the Safe Drinking Water Act, NEPA, and the ESA against environmentally harmful activities at operational military bases.
- The legislation does nothing to modify EPA's CERCLA section 106 authority to address imminent and substantial endangerment on operational military bases.
- The legislation clarifies and confirms the applicability of both RCRA and CERCLA to migration of munitions constituents off-range.
- The legislation does not modify DoD's existing cleanup responsibilities at Formerly Used Defense Sites, closed, closing, or transferring ranges, or currently operational bases that may close in the future.

**Effect on Readiness: Potentially Significant**

- Environmental plaintiffs have filed suit alleging RCRA and CERCLA violations at Fort Richardson, Alaska. If successful, plaintiffs could force remediation of the Eagle River Flats impact area, precluding live-fire training at the only mortar and artillery impact area at Fort Richardson and dramatically degrading readiness of the 172<sup>nd</sup> Infantry Brigade, the largest infantry brigade in the Army.
- If successful, the Fort Richardson litigation could set a precedent fundamentally affecting military training and testing at virtually every test and training range.

**Additional Provisions.**

- The legislation provides DoD with additional authority to work with conservation groups to address urban encroachment of its installations that threatens military testing, training, and operations, including purchase of land around existing installations that would be managed to protect habitat for sensitive species and to prevent development incompatible with the installation.
- In addition, it would provide legislative authority to transfer surplus property without charge to state and local government or private organizations for conservation purposes.

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U.S. DISTRICT COURT  
DISTRICT OF ALASKA

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA AT ANCHORAGE

ALASKA COMMUNITY ACTION ON TOXICS,  
COOK INLET KEEPER, THE CHICKALOGIN  
VILLAGE TRADITIONAL COUNCIL, JANET  
DANIELS, RICHARD MARTIN, and THE  
MILITARY TOXICS PROJECT

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE  
ARMY, UNITED STATES DEPARTMENT OF  
DEFENSE, and DONALD RUMSFELD IN HIS  
OFFICIAL CAPACITY AS UNITED STATES  
SECRETARY OF DEFENSE,

Defendants.

Civil Action No. A03-0083 CV (Dane)

AMENDED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

EXHIBIT  
3

**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs allege as follows:

**NATURE OF THE CASE**

1. This is a citizens' suit brought pursuant to the provisions of Clean Water Act 33 U.S.C. §1251, *et seq.*, the Solid Waste Disposal Act, 42 U.S.C. §6901, *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*

**JURISDICTION**

2. This Court has jurisdiction over the subject matter of the First Count herein pursuant to 33 U.S.C. §1365(a)(1). Defendants have waived sovereign immunity to the First Count pursuant to 33 U.S.C. §§1323(a) and 1365(a)(1).

3. This Court has jurisdiction over the subject matter of the Second Count pursuant to 42 U.S.C. §6972(a)(1)(A). The Defendants have waived sovereign immunity to the Second Count pursuant to 42 U.S.C. §§6961(a) and 6972(a)(1)(A).

4. This Court has jurisdiction over the subject matter of the Third Count pursuant to 42 U.S.C. §9659(a)(1). The Defendants have waived sovereign immunity to the Third Count pursuant to 42 U.S.C. § 9659(a)(1).

5. By letter dated June 15, 2001, the Plaintiffs gave notice of their intent to commence this action as required by 33 U.S.C. § 1365(b)(1) and 42 U.S.C. §§ 6972(b)(1) and 9659(d)(1). Shortly following the Defendants' receipt of said letter, the Plaintiffs and Defendants commenced negotiations aimed at reaching a settlement of the claims asserted herein. At the request of the Defendants, Plaintiffs agreed that they would not commence this action.

until such time as the Plaintiffs and Defendants ceased their negotiations. By letter dated about April 10, 2002, the Defendants terminated said negotiations. Plaintiffs commenced this action as soon as possible thereafter.

#### THE PLAINTIFFS

6. Plaintiff, Alaska Community Action on Toxics ("ACAT") is a non-profit corporation incorporated under the laws of the State of Alaska. The purposes for which ACAT exists include ensuring that the environment of the State of Alaska is safe and healthful for its members and that the environment is suitable for recreation and enjoyment by its members. Members of ACAT have consumed and/or continue to consume fish and game taken from the waters and the lands in the area of the upper Cook Inlet in the vicinity of the Eagle River, the Eagle River Flats and the Krik Arm. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, said members have reduced their consumption of fish and/or game taken from these areas. If the relief requested herein were granted, said members would consume somewhat greater amounts of fish and/or game taken from these areas. The members of ACAT also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Krik Arm. As a result of the water pollution resulting from the Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members' opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members' opportunity to watch, and their enjoyment in watching, animals in these areas would

be increased.

7. Plaintiff, Cook Inlet Keeper, is a non-profit corporation. The purposes of Cook Inlet Keeper include protection of the lands and waters in the vicinity of Cook Inlet against pollution and/or other degradation. Members of Cook Inlet Keeper have consumed and/or continue to consume fish and game taken from the waters and the lands in the area of the upper Cook Inlet in the vicinity of the Eagle River, the Eagle River Flats and the Kwik Arm. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, said members have reduced their consumption of fish and/or game taken from these areas. If the relief requested herein were granted, said members would consume somewhat greater amounts of fish and/or game taken from these areas. The members of Cook Inlet Keeper also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Kwik Arm. As a result of the water pollution resulting from the Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members' opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members' opportunity to watch, and their enjoyment in watching, animals in these areas would be increased.

8. Plaintiff, the Chickaloon Village Traditional Council ("Chickaloon"), is a federally recognized native American tribe. As a traditional part of the Chickaloon cultural heritage, the Chickaloon members engaged in hunting of water fowl and the gathering of water fowl eggs in and on lands and waters in the near vicinity of Fort Richardson, the Eagle River,

be increased.

7. Plaintiff, Cook Inlet Keeper, is a non-profit corporation. The purposes of Cook Inlet Keeper include protection of the lands and waters in the vicinity of Cook Inlet against pollution and/or other degradation. Members of Cook Inlet Keeper have consumed and/or consent to consume fish and game taken from the waters and the lands in the area of the upper Cook Inlet in the vicinity of the Eagle River, the Eagle River Flats and the Krik Arm. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, said members have reduced their consumption of fish and/or game taken from these areas. If the relief requested herein were granted, said members would consume somewhat greater amounts of fish and/or game taken from these areas. The members of Cook Inlet Keeper also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Krik Arm. As a result of the water pollution resulting from the Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members' opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members' opportunity to watch, and their enjoyment in watching, animals in these areas would be increased.

8. Plaintiff, the Chickaloon Village Traditional Council ("Chickaloon"), is a federally recognized native American tribe. As a traditional part of the Chickaloon cultural heritage, the Chickaloon members engaged in hunting of water fowl and the gathering of water fowl eggs in and on lands and waters in the near vicinity of Fort Richardson, the Eagle River,

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San Francisco, CA 94103



Eagle River Flats and the Kwik Arm. As a result of the water and land pollution described below, the members of the Chickaloon have substantially reduced and/or altogether eliminated their traditional hunting and egg gathering in these areas. Members of the Chickaloon have also traditionally eaten fish taken from waters in the vicinity of the upper Cook Inlet, including without limitation the waters in the vicinity of the Kwik Arm and the streams and rivers adjacent thereto. As a result of the pollution of lands and waters described below, the members of the Chickaloon have reduced their consumption of fish caught in such areas. If the relief requested herein were granted, the members of the Chickaloon would increase their hunting of water fowl and egg gathering in these areas, and would consume greater amounts of fish taken from these areas.

9. Plaintiff, Janet Daniels is an individual who is a member of Plaintiffs ACAT, Cook Inlet Keeper, Chickaloon and MTP. Ms. Daniels has consumed and/or does consume fish taken from waters in the vicinity of the Eagle River, Eagle River Flats and/or the Kwik Arm, including without limitation fish taken from Moose Creek and fish caught at a native fish camp in Eklutna. As a result of the land and water pollution resulting from the Army's discharge of materials and/or the constituents and/or byproducts and/or residues of materials as described below, Ms. Daniels has reduced and/or eliminated her consumption of fish taken from these areas. For example, Ms. Daniels has completely eliminated her consumption of fish taken at the native fish camp near Eklutna. Even when Ms. Daniels consumes fish taken from areas such as Moose Creek, her enjoyment of said fish is greatly reduced due to her fear that the fish contain harmful levels of toxic or otherwise hazardous substances resulting from the Army's activities. If the relief requested herein were granted, Ms. Daniels would consume greater amounts of fish

taken from these areas.

10. Plaintiff, Richard Martin, is an individual and a member of Plaintiffs ACAT and Chickaloon. Mr. Martin has consumed and/or does consume fish taken from waters in the vicinity of the Eagle River, Eagle River Flats and/or the Knik Arm, including without limitation fish taken from Peters Creek and areas nearby. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, Mr. Martin has reduced and/or eliminated his consumption of fish taken from these areas. If the relief requested herein were granted, Mr. Martin would consume greater amounts of fish taken from these areas.

11. Plaintiff, Military Toxics Project ("MTP"), is a non-profit organization formed for the purpose of, among other things, protecting the health and welfare of its members from environmental pollution caused by the activities of the United States military. While MTP has members nationwide, MTP has members that live in the vicinity of Fort Richardson and who consume fish and/or game taken from the lands and/or waters in the vicinity and who have reduced or eliminated their consumption of such fish and/or game as a result of the pollution of the lands and/or waters on or near Fort Richardson described below. If the relief requested herein were granted, said members would, once again, consume greater amounts of fish and/or game taken from these areas. The members of MTP also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Knik Arm. As a result of the water pollution resulting from the Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members'

opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members' opportunity to watch, and their enjoyment in watching, animals in these areas would be increased.

**FIRST COUNT**

**VIOLATIONS OF CLEAN WATER ACT**

12. Plaintiffs hereby incorporate each of the foregoing allegations by reference as though fully set forth in this cause of action.

13. This First Count is brought against Defendants, United States Department of the Army and the United States Department of Defense only.

14. Each of the Plaintiffs is a "citizen" as said term is defined in 33 U.S.C. § 1365(g), in that they are persons having an interest which is or may be adversely affected by the actions of the Defendants described in this First Count. Each of the Plaintiffs likewise has one or more interests that are or may be adversely affected by the actions or inactions of the Defendants described in the Second and Third Counts below.

15. Defendants, United States Department of the Army and United States Department of Defense (collectively the "Army"), maintain jurisdiction and/or control over a military installation consisting of approximately 60,000 acres known as Fort Richardson, located north of Anchorage, Alaska. Fort Richardson lies within this district.

16. As part of its operations at Fort Richardson, beginning at a time currently unknown to the Plaintiffs and continuing to the present, the Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, in to and on various lands and waters on and/or in the vicinity of Fort Richardson.

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AMENDED COMPLAINT

17. The Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, into waters and/or on to lands on or in the vicinity of Fort Richardson, using cannons, rifles, artillery and/or other point sources.

18. The waters into which the Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, include the waters of the Eagle River, Eagle River Flats and/or Kuk Arm.

19. The Army has not applied for, nor has it been issued, a permit from the United States Environmental Protection Agency ("EPA") authorizing the discharge of munitions into waters as described in this First Count.

20. The Army therefore has violated, continues to violate and/or threatens to violate 33 U.S.C. §§1311(a) and 1323(s), as well as 40 C.F.R. §122.21.

21. The waters of the Eagle River on and in the vicinity of Fort Richardson violate the water quality standards established by 18 Alaska Administrative Code 070.20(b) in that among other things such waters contain toxic or otherwise hazardous substances at levels exceeding the water quality standards, and said toxic or otherwise hazardous substances pose a danger to the health or well being of fish, birds, mammals, other animals, and plants, and many of said substances are capable of accumulating, and do accumulate, in fish, birds, mammals, other animals and plants, thereby posing a health risk to persons who consume the fish and/or birds and/or mammals or other animals. Said toxic or otherwise hazardous substances are and/or threaten to be transported by natural processes such as currents, tides, and ice movement, in to the waters of the Cook Inlet and the streams and/or rivers in the vicinity thereof. The waters of the Eagle River also violate the water quality standards in other ways that will be proven at trial.

22. The Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions into and on lands and waters as described herein, has caused and/or contributed, and continue to cause and/or contribute, to violations of Alaska water quality standards in the Eagle River. The Army therefore has violated and continues to violate 18 Alaska Administrative Code 070.10 and 33 U.S.C. §1323(a). The State of Alaska has identified the Army's military activities as the cause for the Eagle River's violation of the quality standards.

23. The Army's discharge of munitions and the constituents, by-products and/or residues of munitions as described herein, has polluted and/or added to the pollution of the land and/or waters on and/or in the vicinity of Fort Richardson. Said lands and/or waters include lands and/or waters in, on and/or under the Eagle River, Eagle River Flats, and/or the Kuk Arm. The Army's actions therefore have violated and continue to violate Alaska Statutes 46.03.710 and 33 U.S.C. § 1323(a).

24. As a result of the Army's actions, large amounts of munitions and the constituents and/or by-products and/or residues of munitions now exist in and on the lands and waters in and near the Eagle River. These munitions and the constituents and/or by-products and/or residues of munitions have been, are being, and threaten to be released to the Eagle River and such release has caused and continues to cause the waters of the Eagle River to violate the Alaska water quality standards.

25. The Army has never adopted or carried out any plan to clean up the munitions and constituents and/or by-products and/or residues of munitions from these lands and waters. By failing to adopt and carry out such a clean-up plan, the Army has caused and contributed, and continues to cause and contribute, to violations of the water quality standards in the Eagle River;

and therefore has violated and continues to violate 18 A.A.C. 070.10 and 33 U.S.C. § 1323(a).

**SECOND COUNT**

**VIOLATIONS OF SOLID WASTE DISPOSAL ACT**

26. Plaintiffs hereby incorporate each of the foregoing allegations by reference as though fully set forth in this cause of action.

27. This Second Count is brought against Defendants, United States Department of the Army and the United States Department of Defense only.

28. As described in the First Count above, the Army has violated and continues to violate Alaska Statutes §§46.03.710.

29. The Army's violations of Alaska Statutes §§46.03.710 constitute a violation of 42 U.S.C. §6961(a).

**THIRD COUNT**

**VIOLATIONS OF CERCLA**

30. Plaintiffs hereby incorporate each of the foregoing allegations by reference as though fully set forth in this cause of action.

31. This Third Count is brought against all of the Defendants named above.

32. In 1994, due to a high level of pollution, the Environmental Protection Agency placed Fort Richardson on the National Priorities List, a list of the nation's most polluted facilities that are to be given priority for cleanup.

33. Shortly thereafter, the EPA, the State of Alaska, and the Army entered into an "interagency agreement" (as that term is used in 42 U.S.C. §6030(a)) entitled "Federal Facility Agreement Under CERCLA Section 120 Administrative Docket Number 1093-05-02-120"



(hereinafter the "FFA") regarding Fort Richardson.

34. Unexploded ordnance, also referred to as ordnance and explosives ("OE") exists in, on, and/or under the lands and/or water on Fort Richardson, including without limitation the lands and/or waters of the Eagle River, Eagle River Flats and/or the Kwik Arm, as well as the lands and/or waters in an area of Fort Richardson referred to by the Army as the OB/OD pad. OE may also exist in, on, and/or under other lands and/or waters on or in the vicinity of Fort Richardson. The Army caused this OE to be released to the lands and/or waters as described above. The Army intends to allow this OE to remain in and/or on the lands and/or waters permanently, and the Army does not intend to clean up or remove this OE.

35. As a result of the release of OE in and/or on the lands and/or waters described above, toxic or otherwise hazardous substances (including without limitation explosive compounds and heavy metals) have been, are being, and/or threaten to be released to the waters and lands on Fort Richardson. These toxic or otherwise hazardous substances pose a danger to the health or well being of fish, birds, mammals, other animals, and plants, and many of said substances are capable of accumulating, and do accumulate, in fish, birds, mammals, other animals and plants, thereby posing a health risk to persons who consume the fish and/or birds and/or mammals or other animals. Said toxic or otherwise hazardous substances are being and/or threaten to be transported by natural processes such as currents, tides, and ice movement, in to the waters of the Cook Inlet and the streams and/or rivers in the vicinity thereof. Natural processes also have transported and/or threaten to transport unexploded ordnance off of Fort Richardson and in to and/or on lands or waters in the vicinity of Fort Richardson, thereby posing an explosive danger to persons and wildlife off of Fort Richardson.

35. This OE is, on and/or under the lands and/or waters of Fort Richardson constitutes and contains "hazardous substances" and/or "pollutants or contaminants" as those terms are defined in 42 U.S.C. §§9601(17) and 9601(33). The Army, however, has taken, and continues to take, the position that this OE neither constitutes nor contains "hazardous substances" and/or "pollutants or contaminants" as those terms are defined in 42 U.S.C. §§9601(17) and 9601(33).

37. The Army has never commenced, nor has it performed, a remedial investigation or feasibility study (RI/FS) regarding OE on Fort Richardson.

38. The Army's failure to commence or perform such an RI/FS has violated and continues to violate 42 U.S.C. §9620(a)(1) as well as paragraphs 8.8 and 8.9 and Attachment 1 of the FFA (including without limitation section 3.1 of Attachment 1).

39. The Army has never adopted a plan for remediation of the OE described above; nor has the Army commenced or performed remediation of such OE. The Army therefore has violated and continues to violate 42 U.S.C. §§9620(a)(7)-(a)(9) as well as ¶8.10 and Attachment 1 to the FFA.

#### REQUEST FOR RELIEF

Plaintiff respectfully request the following relief:

40. Declare that the Army's discharge of munitions into waters as described in the First Count herein has violated and continues to violate 33 U.S.C. §§1311(a) and/or 1323(a).

41. Order the Army to stop discharging munitions into any waters, including the waters of the Eagle River, Eagle River Flats and/or the Kwik Arm until such time as the Army obtains a permit authorizing the discharge from the EPA.

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42. Declare that the Army's discharge of munitions and the constituents and/or by-products and/or residues of munitions to lands and waters as described in the First and Second Counts herein has violated and/or continues to violate 18 A.A.C. §070.10, Alaska Statutes §§46.03.710 and/or 33 U.S.C. §1323(a) and/or 42 U.S.C. §6961(a).

43. Issue appropriate injunctive relief prohibiting the Army from continuing to discharge munitions and the constituents and/or by-products and/or residues of munitions to lands and waters as described in the First and Second Counts in violation of 18 A.A.C. §070.10, AS §§46.03.710 and/or 33 U.S.C. §1323(a) and/or 42 U.S.C. §6961(a).

44. Declare that the Army's failure to adopt or implement a plan to clean-up munitions in and on lands and waters as described in the First Count herein has violated and continues to violate 18 A.A.C. §070.10 and 33 U.S.C. § 1323(a).

45. Issue appropriate injunctive relief requiring the Army to adopt and implement a plan to clean up munitions so as to reduce and/or eliminate violations of Alaska's water quality standards.

46. Declare that the OE in, on, and/or under the lands and waters on Fort Richardson constitutes and contains "hazardous substances" and/or "pollutants or contaminants" as those terms are defined in CERCLA, 42 U.S.C. §§9601(17) and 9601(33).

47. Order the Army to commence and fully perform an RIFS regarding OE on Fort Richardson.

48. Order the Army to pay the Plaintiffs' costs and attorneys fees as provided by statute, including 33 U.S.C. §1365(f) and 42 U.S. §§ 6972(a) and 9659(f).

49. Order the Army to pay appropriate civil penalties as provided by 33 U.S.C. §

1319(f), 42 U.S.C. § 6928(g), 42 U.S.C. §§ 9609(a)(1)(E), 9609(b)(5), 9622(i), and/or 9639(i).

SO. Issue other and further relief as the court deems just and proper.

Dated: June 26, 2002

COX & MOYER

By:

  
SCOTT J. ALLEN  
Attorneys for Plaintiffs

Re: Alaska Wildlife Conservation

Certificate of Service

I CERTIFY THAT I SERVED A COPY OF:

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF,

ON JUNE 26, 2002 TO:

VIA HAND DELIVERY:

US DEPT. OF JUSTICE ATTORNEYS OFFICE  
DISTRICT OF ALASKA  
222 W. 7<sup>TH</sup> AVE. #9 ROOM 253  
ANCHORAGE, AK 99513-7567

VIA FAX AND FEDERAL EXPRESS:

SCOTT WILLIAMS  
TRIAL ATTORNEY  
U.S. DEPT. OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
ENVIRONMENTAL DEFENSE SECTION  
501 D STREET, N.W.  
WASHINGTON, DC 20004

  
JOANNA PARKER  
Legal Assistant  
Trustee For Alaska

Cox & Moyer  
705 Market Street, Suite 1800  
San Francisco, CA 94109

walkers to maintain records for three years containing information about testing, inspections, sales and distributions of these products.

The records of testing and other information required by the regulations allow the Commission to determine if baby-bouncers, walker-jumpers, and baby-walkers comply with the requirements of the regulations codified at 16 CFR 1500.96(a)(2). If the Commission determines that products fail to comply with the regulations, the records required by 16 CFR 1500.96(a)(4) enable the firm and the Commission to: (1) identify specific models of products which fail to comply with applicable requirements, and (2) notify distributors and retailers to the extent those products are subject to recall.

**Additional Information About the Request for Extension of Approval of a Collection of Information.**

Agency address: Consumer Product Safety Commission, Washington, DC 20207.

Title of information collection: Requirements for Baby-Bouncers, Walker-Jumpers, and Baby-Walkers, 16 CFR 1500.11(a)(1) and 1500.96(a)(2).

Type of request: Extension of approval without change.

General description of respondents: Manufacturers and importers of baby-bouncers, walker-jumpers, and baby-walkers.

Estimated number of respondents: 28.  
Estimated average number of hours per respondent: 2 per year.

Estimated number of hours for all respondents: 56 per year.

Estimated cost of collection for all respondents: \$1,890.40 per year.

Comments: Comments on this request for extension of approval of information collection requirements should be submitted by January 23, 2003 to (1) the Office of Information and Regulatory Affairs, Attn: OIG Desk Office for CPSC, Office of Management and Budget, Washington DC 20503; telephone (202) 395-7343; and (2) the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207. Written comments may also be sent to the Office of the Secretary by facsimile at (302) 304-0127 or by e-mail at [os@cpsc.gov](mailto:os@cpsc.gov).

Copies of this request for extension of the information collection requirements and supporting documentation are available from Lyle's Office, management and program analyst, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC

20287; telephone: (301) 504-8400, ext. 3318.

Dated: December 24, 2002.

David A. Hernandez,  
Secretary, Consumer Product Safety  
Commission.

395 Dec. 02-2047 Filed 12-24-02, 8:41 and  
8:42 am 2002 028 414

#### DEPARTMENT OF DEFENSE

Department of the Air Force LA Civil  
Signal Interface Control Document  
(ICD) Revision 2

AGENCY: Department of the Air Force,  
DoD.  
ACTION: Request for public comment of  
LA Civil Signal Interface Control  
Document (ICD) Revision 2.

SUMMARY: This notice informs the public that the Global Positioning System (GPS) Joint Program Office (JPO) has released the current ICD-GPS-700 dated 1 December 2002, Navstar GPS Space Segment/Nav Segment LA Interface, for public review and comment. This ICD describes the interface characteristics of LA, a signal to be incorporated into the GPS system for the benefit of the civilian community. The ICD can be reviewed at the following Web site: <http://jpo.jcs.mil>. Click on "Public Interface Control Working Group (PICWG)" Hyperlinks to the ICD and review instructions are provided. The review should save the ICD to a local directory location prior to opening and performing the review. All comments and their resolutions will be posted to the web site.

ADDRESS: Submit comments to DM7/CDSC/ 2420 Vela Way, Suite 1407, El Segundo, CA 90245-4815. A comment matrix is provided for your convenience at the web site and is the preferred method of comment submission. Comments may be submitted to the following Internet address: [com.mil@icd.dau.mil](mailto:com.mil@icd.dau.mil). Comments may also be sent by fax to 1-310-383-3357.

DATE: The response date for comment submitted is January 17, 2003.  
FOR FURTHER INFORMATION CONTACT: CDSC/CDSC at 1-310-383-6318, GPS JPO System Engineering Division, or write to the address above.

SUPPLEMENTARY INFORMATION: The civilian and military communities use the Global Positioning System which employs a constellation of 24 satellites to provide continuously transmitted signals to enable appropriately configured GPS user equipment to

produce accurate position, navigation, and time information.

Paula D. Blagovold,  
Air Force Policy Register Liaison Officer  
395 Dec. 02-2047 Filed 12-24-02, 8:40 am  
8:42 am 2002 028 414

#### DEPARTMENT OF DEFENSE

Presidential Determination on  
Classified Information Concerning the  
Air Force's Operating Location Near  
Gross Lake, NV

AGENCY: Department of the Air Force,  
DoD.

ACTION: Notice.

SUMMARY: Notice is hereby given that the President has accepted the United States Air Force's operating location near Gross Lake, Nevada from any Federal, State, Interstate, or local provision respecting control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information to any unauthorized person.

FOR FURTHER INFORMATION CONTACT: Mr. W. Kipling Al Lee, Jr., Deputy General Counsel, Military Affairs, Office of the Secretary of the Air Force, Washington DC 20330; telephone (703) 695-8985.

SUPPLEMENTARY INFORMATION: At U.S.C. 6951 makes each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste subject to all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provision for injunctive relief and such sections as may be imposed by a court to enforce such relief, reporting control and abatement of solid waste or hazardous waste disposal, and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. 42 U.S.C. 6951 also states that 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 and that any exemption shall be for a period not in excess of one year.



On September 13, 2002, the President exempted the Air Force's opening location near Green Lake, Nevada from any Federal, State, interstate, or local provisions respecting control and abatement of acid waste or hazardous waste disposal that would require the disclosure of classified information concerning that opening location to any unauthorized person. Therefore, the text of the Memorandum from the President to the Secretary of the Air Force is set forth below.

**Patricia D. Fitzgerald,**  
Air Force Patent Register Liaison Officer,  
Patent Determination No. 4883-04  
September 13, 2002  
Memorandum for Administration of the  
Environmental Protection Agency (and the  
Secretary of the Air Force)  
Subject: Classified Information Concerning  
the Air Force's Opening Location Near  
Green Lake, Nevada

I find that it is in the paramount interest of the United States to exempt the United States Air Force's opening location near Green Lake, Nevada, the subject of litigation in *Rosen v. Microsoft*, D. Nev., CV-01-790-790-790 and *Post v. Army*, D. Nev., CV-01-790-790-790, from any applicable law relating to the disclosure of unauthorized persons of classified information concerning that opening location. Therefore, pursuant to 41 U.S.C. 4852(a), I hereby exempt the Air Force's opening location near Green Lake, Nevada, from any Federal, State, interstate or local provisions respecting control and abatement of acid waste or hazardous waste disposal that would require the disclosure of classified information concerning the opening location to any unauthorized person. This exemption shall be effective for the full one-year statutory period.

Nothing herein is intended to: (a) imply that in the absence of such a Presidential exemption, the Resource Conservation and Recovery Act (RCRA) or any other provision of law permits or requires disclosure of classified information to unauthorized persons; or (b) limit the applicability or enforcement of any requirement of law applicable to the Air Force's opening location near Green Lake, Nevada, except those provisions, if any, that would require the disclosure of classified information.

The Secretary of the Air Force is authorized and directed to publish this Memorandum in the Federal Register.

George W. Bush

(79) Exec. 60-32236 Filed 12-23-02; 9:43 am  
65,196 0202 900-01-0

#### DEPARTMENT OF EDUCATION

##### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.  
**SUMMARY:** The Leader, Regulatory Management Group, Office of the Chief Information Officer, is in the process of reviewing and updating the Department of Education's Information Collection System (ICS). The ICS is a system of surveys designed to collect basic data from approximately 4,500 postsecondary institutions in the United States. The ICS provides information on numbers of students enrolled, degrees completed, other awards earned, dollars expended, staff employed at postsecondary institutions, and cost and pricing information. The amendments to the Higher Education Act of 1969, Part C, Sec. 151, specify the need for the "redesign of relevant data systems to improve the usefulness and timeliness of the data collected by such systems." As a consequence, in 2000 IPEDS began to collect data through a web-based data collection system and to concentrate on those institutions that participate in Title IV Federal student aid programs where institutions may participate on a voluntary basis.

Information Office, in this connection on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before February 24, 2003.

**SUPPLEMENTARY INFORMATION:** Section 3006 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may exempt or waive the requirement for public consultation to the extent that public participation in the approved process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) Will this information be processed and used in a timely manner; (3) Is the estimate of burden accurate; (4) How might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) How might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

**Dated:** December 23, 2002.  
**John B. Truesdell,**  
Leader, Regulatory Management Group,  
Office of the Chief Information Officer.

##### Office of Educational Research and Improvement

**Type of Review:** Revision.  
**Title:** Integrated Postsecondary Education Data System (IPEDS) Web-Based Collection System.  
**Frequency:** Annually.

**Affected Public:** Not-for-profit institutions, businesses or other for-profit, State, Local, or Tribal Gov't, CEOs or CEOs.

**Reporting and Recordkeeping Burden:**

**Responses:** 43,224.  
**Duration:** 180,000.

**Abstract:** IPEDS is a system of surveys designed to collect basic data from approximately 4,500 postsecondary institutions in the United States. The IPEDS provides information on numbers of students enrolled, degrees completed, other awards earned, dollars expended, staff employed at postsecondary institutions, and cost and pricing information. The amendments to the Higher Education Act of 1969, Part C, Sec. 151, specify the need for the "redesign of relevant data systems to improve the usefulness and timeliness of the data collected by such systems." As a consequence, in 2000 IPEDS began to collect data through a web-based data collection system and to concentrate on those institutions that participate in Title IV Federal student aid programs where institutions may participate on a voluntary basis.

Written requests for information should be addressed to Vivian Rosen, Department of Education, 400 Maryland Avenue, SW, Room 4030, Regional Office Building 3, Washington, DC 20202-4610 or to the e-mail address [rosen\\_vivian@ed.gov](mailto:rosen_vivian@ed.gov). Requests may also be faxed to 202-769-0046. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address [Kathy.Axt@ed.gov](mailto:Kathy.Axt@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

(79) Exec. 60-32236 Filed 12-23-02; 9:43 am  
65,196 0202 900-01-0

#### DEPARTMENT OF EDUCATION

##### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.  
**SUMMARY:** The Leader, Regulatory Management Group, Office of the Chief Information Officer, is in the process of reviewing and updating the Department of Education's Information Collection System (ICS). The ICS is a system of surveys designed to collect basic data from approximately 4,500 postsecondary institutions in the United States. The ICS provides information on numbers of students enrolled, degrees completed, other awards earned, dollars expended, staff employed at postsecondary institutions, and cost and pricing information. The amendments to the Higher Education Act of 1969, Part C, Sec. 151, specify the need for the "redesign of relevant data systems to improve the usefulness and timeliness of the data collected by such systems." As a consequence, in 2000 IPEDS began to collect data through a web-based data collection system and to concentrate on those institutions that participate in Title IV Federal student aid programs where institutions may participate on a voluntary basis.

**DATES:** Interested persons are invited to submit comments on or before January 24, 2003.

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STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P.O. BOX 3076  
HONOLULU, HAWAII 96813

IT IS THE POLICY OF THE STATE OF HAWAII TO PROVIDE ACCESS TO INFORMATION

November 20, 2001

U11035RC

Colonel William E. Ryan III  
Director of Public Works  
Headquarters, U.S. Army Garrison Hawaii  
Schofield Barracks, Hawaii 96857-5000

Dear Colonel Ryan:

SUBJECT: Pohakuloa Training Area  
Building 343  
Facility ID No. B-601658  
Withdrawal of Field Citation No. 2038

This letter is in response to your letter dated May 22, 2001, notifying the Hawaii Department of Health (DOH) that the United States Department of the Army (Army) had corrected the violation cited in DOH's Field Citation No. 2038. The Field Citation was issued during DOH's May 8, 2001, inspection of the Pohakuloa Training Area, Building 343. DOH's inspector determined that the Army had violated Hawaii Administrative Rules (HAR) Section 11-281-51(a) by failing to provide a release detection method for UST Nos. 343-7 and 343-8. Your letter and the Army's comments in the "Description of Corrections" section of the Field Citation (attached to your letter) indicate that the Army has taken appropriate steps to correct the violation. DOH appreciates the Army's efforts to correct the violation.

Your letter also advised DOH that the Army could not agree to pay the proposed \$500 penalty because the Army is not authorized to waive the sovereign immunity of the United States for penalties imposed by states for violations of state UST rules.

Under HAR Section 11-281-126, if an owner or operator of a facility that has received a Field Citation does not correct the violations, pay the penalty, and sign and return the Field Citation/Settlement Agreement to DOH within thirty (30) days after the issuance of the Field Citation, the Field Citation is automatically withdrawn, and DOH may proceed with a more formal enforcement action.



Enclosure 1

COPY

Colonel William E. Ryan III  
November 20, 2001  
Page 2

Even though the Army corrected the violation, it has failed to sign and return the Field Citation/Settlement Agreement, and has refused to pay the penalty. Therefore, the Field Citation has been automatically withdrawn, and DOH is authorized to pursue more formal enforcement action. DOH has referred this matter to the Hawaii Department of the Attorney General.

Should you have any questions regarding this matter, please contact Gregory Cimelosi of the Solid and Hazardous Waste Branch at (808) 585-4226.

Sincerely,



GARY GILL  
Deputy Director  
Environmental Health Administration

- cc: Dana Viola, Deputy Attorney General, Honolulu
- Norman Scott, U.S. EPA, Region 9, San Francisco

FEB 25 2002



DEPARTMENT OF THE ARMY  
HEADQUARTERS, UNITED STATES ARMY GARRISON, HAWAII  
SCHOFIELD BARRACKS, HONOLULU 96874-6000



February 20, 2002

*ef/ma*

Directorate of Public Works

Mr. Gregory Olstread  
Solid and Hazardous Waste Branch  
Hawaii State Department of Health (DOH)  
919 Ala Moana Boulevard, Room 212  
Honolulu, Hawaii 96814

*ASB*  
*G-601058*

COPY

RE: Field Citation No. 1038

Dear Mr. Olstread:

The Army acknowledges receipt of your letter dated November 28, 2001, at enclosure 1, concerning the above referenced field citation. The Army wishes to reaffirm its position that the Federal government has sovereign immunity and is not required to pay such state penalties.

The Army remains committed to its mission of environmental stewardship. If there are any questions, contact Ian Beltran, Environmental Division, Directorate of Public Works, 656-2878 extension 1026 or Jesse Prosser, Staff Judge Advocate, 438-6724.

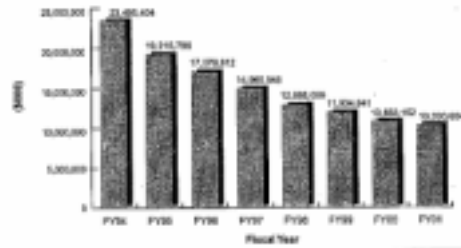
Sincerely,

*William E. Ryan III*

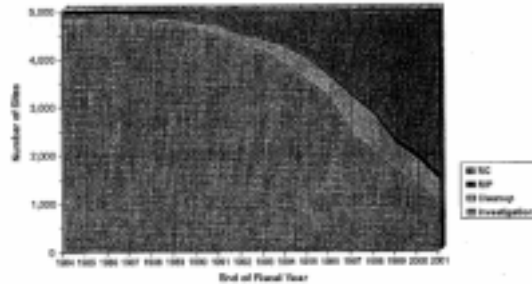
William E. Ryan III  
Colonel, U.S. Army  
Director of Public Works

Enclosure

**Figure 8**  
Active Installation Cost-to-Complete Trends  
(Excluding FUDS in \$000)



**Figure 9**  
BRAC Installation Site Progress Over Time

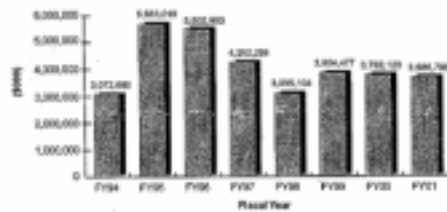


Based on OIG's BRAC Site Inventory of AEF's sites  
Initiation of site work

EXHIBIT  
6



**Figure 99**  
**BRAC Installation Cost-to-Complete**  
**Estimate Trends\***  
 (in 1000)



\*FY94 and FY98 funding includes compliance in addition to estimator funding.  
 \*Based on the Department's agency wide FY01 financial statements. For additional BRAC contract installability (cost-to-complete) see approximately 14 billion in FY01, 20, 2001.

into restoration in FY98, additional funding was required, as shown by the increase in cost-to-complete estimates from FY95 to FY99.

BRAC cost-to-complete estimates are not declining at the same rate as the estimates for active installations. This is attributed, among other reasons, to a greater proportion of sites in study or cleanup phases, and a greater range of assessments considered in the environmental restoration process. Requirements to address these issues to a greater extent at BRAC installations than active installations has impacted BRAC funding requirements and cost-to-complete estimates.

□□□

In this chapter, DoD presented a comprehensive overview of the resources that have allowed the Department to achieve its current success protecting human health and the environment and the resources it will need to guide the program to completion.

The next two chapters provide an in-depth look at the status and progress and differing requirements of the DERP's Installation Restoration and Military Maritime Response sub-programs.



## 2,4- and 2,6-DINITROTOLUENE CAS # 121-14-2 and 606-20-2

Agency for Toxic Substances and Disease Registry ToxFAQs

June 1999

This fact sheet answers the most frequently asked health questions (FAQs) about 2,4- and 2,6-dinitrotoluene. For more information, call the ATSDR Information Center at 1-888-422-8737. This fact sheet is one in a series of summaries about hazardous substances and their health effects. It's important you understand this information because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

**HIGHLIGHTS:** 2,4- and 2,6-dinitrotoluenes are used in a number of industries. Exposure to high levels may affect the nervous system and the blood. Both are known to cause cancer in laboratory animals. These substances have been found in at least 19 (2,4-DNT) and 55 (2,6-DNT) of the 146 National Priorities List sites identified by the Environmental Protection Agency (EPA).

### What are 2,4-dinitrotoluene (2,4-DNT) and 2,6-dinitrotoluene (2,6-DNT)?

(Pronounced 2,4- and 2,6-di' ni' tro' tol' u' en)

Both 2,4-DNT and 2,6-DNT are pale yellow solids with a slight odor. They are two of the six forms of the chemical called dinitrotoluenes (DNT).

DNT is not a natural substance. It is made by mixing toluene with nitric acid. DNT is usually used to make flexible polyurethane foams used in the bedding and furniture industries. DNT is also used to produce explosives, ammunition, and dyes. It is also used in the air bags of automobiles.

### What happens to 2,4- and 2,6-DNT when they enter the environment?

- DNT has been found in the soil, surface and ground water, and air.
- It has been found at hazardous waste sites that contain buried ammunition wastes.
- DNT does not usually evaporate; it is found mostly in the air of manufacturing plants.
- DNT does not stay in the environment because it is broken down by sunlight and by bacteria.

- In water, DNT tends to be more stable and less likely to break down.
- DNT can be transferred to plants by root uptake from contaminated water or soil.

### How might I be exposed to 2,4- and 2,6-DNT?

- Most people will not be exposed to 2,4- and 2,6-DNT.
- Breathing contaminated air near manufacturing plants.
- Drinking contaminated water or eating contaminated food.
- Breathing air near a hazardous waste site that contains buried ammunition wastes.

### How can 2,4- and 2,6-DNT affect my health?

Workers who have been exposed to 2,4-DNT showed a higher than normal death rate from heart disease. However, these workers were exposed to other chemicals as well. 2,4- and 2,6-DNT may also affect the nervous system and the blood of exposed workers.

One study showed that male workers exposed to DNT had reduced sperm counts, but other studies did not confirm this finding.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Public Health Service  
Agency for Toxic Substances and Disease Registry



ToxFAQs Internet address via WWW is <http://www.atfdh.cdc.gov/toxfaq.html>

Animals exposed to high levels of DNT had lowered number of sperm and reduced fertility. Animals also showed a reduction in red blood cells, nervous system diseases, and liver and kidney damage.

#### How likely are 2,4- and 2,6-DNT to cause cancer?

In animal studies, both 2,4- and 2,6-DNT caused liver cancer in rats. There are no studies on the effects of 2,4- and 2,6-DNT on people. The International Agency for Research on Cancer (IARC) has determined that 2,4- and 2,6-DNT are possible human carcinogens.

#### How can 2,4- and 2,6-DNT affect children?

It is unlikely that children would be exposed to 2,4- and 2,6-DNT unless they live near a manufacturing plant or a waste site that contains these compounds. Children are at risk of exposure if DNT has leached into a community's drinking water supply from a nearby hazardous waste site, since they drink more fluids in proportion to their body weight than adults. Children playing in DNT-contaminated surface water might be more exposed than adults, because of their larger skin area in proportion to their body weight.

The health effects of DNT on children have not been studied. It is not known if DNT affects children differently than adults, or what long-term effects might appear in adults exposed as children.

#### How can families reduce the risk of exposure to 2,4- and 2,6-DNT?

If your doctor finds that you have been exposed to significant amounts of 2,4- or 2,6-DNT, ask if children may also be exposed. When necessary your doctor may need to ask your state Department of Public Health to investigate.

#### Is there a medical test to show whether I've been exposed to 2,4- and 2,6-DNT?

Both 2,4- and 2,6-DNT and the chemicals they change into in the body can be measured in the blood and urine. The urine must be collected within 24 hours of exposure. These tests cannot show how much 2,4- or 2,6-DNT a person has been exposed to. They are not usually available in a doctor's office, but they can be performed in special laboratories.

#### Has the federal government made recommendations to protect human health?

EPA requires that spills or accidental releases of more than 1,000 pounds of DNT be reported to the EPA.

The Occupational Safety and Health Administration (OSHA) requires that total DNT (all forms) in workplace air should not exceed 1.5 mg per cubic meter (1.5 mg/m<sup>3</sup>) for an 8-hour workday, 40-hour workweek.

The National Institute of Occupational Safety and Health (NIOSH) recommends a workplace limit of 1.5 mg/m<sup>3</sup>. This is the average concentration for a 10-hour day over a 40-hour workweek.

#### Source of Information

Agency for Toxic Substances and Disease Registry (ATSDR). 1998. Toxicological profile for 2,4- and 2,6-dinitrotoluene. Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

Animal testing is sometimes necessary to find out how toxic substances might harm people and how to treat people who have been exposed. Laws today protect the welfare of research animals and scientists must follow strict guidelines.

**Where can I get more information?** For more information, contact the Agency for Toxic Substances and Disease Registry, Division of Toxicology, 1550 Clifton Road NE, Mailstop E-25, Atlanta, GA 30333. Phone: 1-888-422-8777, FAX: 404-535-6338. ToxFAQs Internet address via WWW is <http://www.atfdh.cdc.gov/toxfaq.html>. ATSDR can tell you where to find occupational and environmental health clinics. These specialists can recognize, evaluate, and treat illnesses resulting from exposure to hazardous substances. You can also contact your community or state health or environmental quality department if you have any more questions or concerns.





**RDX**  
CAS # 121-82-4

Agency for Toxic Substances and Disease Registry ToxFAQs

September 1996

This fact sheet answers the most frequently asked health questions (FAQs) about RDX. For more information, call the ATSDR Information Center at 1-888-422-8737. This fact sheet is one in a series of summaries about hazardous substances and their health effects. It's important you understand this information because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

**SUMMARY:** RDX is an explosive. If you are exposed to RDX, exposure to large amounts can cause seizures. RDX has been found in at least 16 of the 1,340 National Priorities List sites identified by the Environmental Protection Agency (EPA).

#### What is RDX?

(Pronounced RIX)

RDX stands for Royal Decolition explosive. It is also known as cyclotrim or hexogen. The chemical name for RDX is 1,3,5-trinitro-1,3,5-triazine. It is a white powder and is very explosive.

RDX is used as an explosive and is also used in combination with other ingredients in explosives. Its odor and taste are unknown. It is a synthetic product that does not occur naturally in the environment. It creates flames when it is burned with other substances.

#### What happens to RDX when it enters the environment?

- Particles of RDX can enter the air when it is disposed of by burning.
- RDX can enter the water from disposal of waste water from Army ammunition plants, and it can enter water or soil from spills or leaks from improper disposal at these plants or at hazardous waste sites.
- RDX dissolves very slowly in water, and it also evaporates very slowly from water.

- It does not cling to soil very strongly and can move into the groundwater from soil.
- RDX can be broken down in air and water in a few hours, but it breaks down more slowly in soil.
- RDX does not build up in fish or in people.

#### How might I be exposed to RDX?

Few people will be exposed to RDX. Fewer than 500 people are known to work with RDX. These people can be exposed by:

- Breathing dust with RDX in it.
- Getting RDX on their skin.
- Drinking contaminated water or touching contaminated soil and factories that produce RDX.

#### How can RDX affect my health?

RDX can cause seizures (a problem of the nervous system) in humans and animals when large amounts are inhaled or eaten. The effects of long-term (365 days or longer), low-level exposure on the nervous system are not known. Nausea and

ToxFAQs Internet address via WWW is <http://www.atsdc.cdc.gov/toxfaq.html>

vomiting have also been seen. No other significant health effects have been seen in humans.

Rats and mice that ate RDX for 3 months or more had decreased body weights and slight liver and kidney damage.

It is not known whether RDX causes birth defects in humans; it did not cause birth defects in rabbits, but it did result in smaller offspring in rats. It is not known whether RDX affects reproduction in people.

#### How likely is RDX to cause cancer?

The EPA has determined that RDX is a possible human carcinogen.

In one study, RDX caused liver tumors in mice that were exposed to it in the food. However, carcinogenic effects were not noted in rat studies and no human data are available.

#### Is there a medical test to show whether I've been exposed to RDX?

Medical tests are available that can measure RDX levels in your blood or urine. However, these tests can only be used if you have come in contact with RDX in the last few days. These tests can determine if you have been exposed to RDX, but they cannot be used to determine how much RDX entered your body.

These tests aren't available at most doctors' offices, but can be done at special laboratories that have the right equipment. However, they cannot be used to determine long-term health effects from RDX.

The usual immediate health effects (nausea, muscle twitching, or vomiting) from very high exposures would probably occur before you had the blood or urine test.

#### Has the federal government made recommendations to protect human health?

The Department of Transportation (DOT) has many regulations on the transportation of explosives.

The EPA recommends a drinking water guideline of 2 micrograms ( $\mu\text{g}$ ) RDX per liter for lifetime exposure for adults.

The National Institute for Occupational Safety and Health (NIOSH) has recommended an exposure limit of 1.5 milligrams RDX per cubic meter of air ( $1.5 \text{ mg/m}^3$ ) for a 10-hour working, 40-hour workweek.

The NIOSH short-term exposure limit, which is the highest level of RDX that they recommend workers be exposed to for 15 minutes, is  $5 \text{ mg/m}^3$ .

The American Conference of Governmental Industrial Hygienists (ACGIH) also recommends an exposure limit of  $1.5 \text{ mg/m}^3$  in workplace air for an 8-hour working, 40-hour workweek.

#### Glossary

**Carcinogen:** A substance that can cause cancer.

**CAS:** Chemical Abstracts Service.

**Dissolve:** To disappear gradually.

**Evaporate:** To change into a vapor or a gas.

**Microgram ( $\mu\text{g}$ ):** One millionth of a gram.

**Milligram ( $\text{mg}$ ):** One thousandth of a gram.

**Tumor:** An abnormal mass of tissue.

#### Reference

Agency for Toxic Substances and Disease Registry (ATSDR). 1995. Toxicological profile for RDX. Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

**Where can I get more information?** For more information, contact the Agency for Toxic Substances and Disease Registry, Division of Toxicology, 1680 Clifton Road NE, Mailstop E-29, Atlanta, GA 30333. Phone: 1-888-423-8737, FAX: 404-616-6399. ToxFAQs Internet address via WWW is <http://www.atsdc.cdc.gov/toxfaq.html>. ATSDR can tell you where to find occupational and environmental health clinics. Their specialists can recognize, evaluate, and treat illnesses resulting from exposure to hazardous substances. You can also contact your community or state health or environmental quality department if you have any more questions or concerns.





## 2,4,6-TRINITROTOLUENE (TNT) CAS # 118-96-7

Agency for Toxic Substances and Disease Registry ToxFAQs

September 1996

This fact sheet answers the most frequently asked health questions (FAQs) about 2,4,6-trinitrotoluene. For more information, call the ATSDR Information Center at 1-888-422-8737. This fact sheet is one in a series of summaries about hazardous substances and their health effects. It's important you understand this information because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

**SUMMARY:** Exposure to 2,4,6-trinitrotoluene occurs through eating, drinking, or using, or inhaling contaminated soil, water, food, or air. Health effects reported in people exposed to 2,4,6-trinitrotoluene include anemia, abnormal liver function, skin irritation, and cataracts. This substance has been found in at least 20 of the 1,470 National Priorities List sites identified by the Environmental Protection Agency.

### What is 2,4,6-trinitrotoluene?

(Pronounced 2,4,6-tri-NUH-tri-TOH-NUH-yoh-TOH)

2,4,6-Trinitrotoluene is a yellow, odorless solid that does not occur naturally in the environment. It is commonly known as TNT and is an explosive used in military shells, bombs, and grenades, in industrial uses, and in underwater blasting.

2,4,6-Trinitrotoluene production in the United States occurs solely at military arsenals.

### What happens to 2,4,6-trinitrotoluene when it enters the environment?

- 2,4,6-Trinitrotoluene enters the environment in waste waters and solid wastes resulting from the manufacture of the compound, the processing and destruction of bombs and grenades, and the recycling of explosives.
- It moves in surface water and through soils to groundwater.
- In surface water, it is rapidly broken down into other chemical compounds by sunlight.
- It is broken down more slowly by microorganisms in water and sediment.
- Small amounts of it can accumulate in fish and plants.

### How might I be exposed to 2,4,6-trinitrotoluene?

- Drinking contaminated water that has migrated from chemical waste disposal sites.
- Breathing contaminated air.
- Eating contaminated foods such as fruits and vegetables.
- Eating contaminated soil.

### How can 2,4,6-trinitrotoluene affect my health?

Workers involved in the production of explosives who were exposed to high concentrations of 2,4,6-trinitrotoluene in workplaces are experienced several harmful health effects, including anemia and abnormal liver function.

Similar blood and liver effects, as well as spleen enlargement and other harmful effects on the immune system, have been observed in animals that ate or breathed 2,4,6-trinitrotoluene.

Other effects in humans include skin irritation after prolonged skin contact, and cataract development after long-term (365 days or longer) exposure.

ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html>

It is not known whether 2,4,6-trinitrotoluene can cause birth defects in humans. However, male animals treated with high doses of 2,4,6-trinitrotoluene have developed serious reproductive system effects.

#### How likely is 2,4,6-trinitrotoluene to cause cancer?

The EPA has determined that 2,4,6-trinitrotoluene is a possible human carcinogen. This assessment was based on a study in which rats that ate 2,4,6-trinitrotoluene for long periods developed tumors of the urinary bladder.

#### Is there a medical test to show whether I've been exposed to 2,4,6-trinitrotoluene?

Laboratory tests can detect 2,4,6-trinitrotoluene or its breakdown products in blood or urine. Detection of its breakdown products in urine is a clear indication of exposure. This test isn't available at most doctors' offices, but can be done at special laboratories that have the right equipment.

A simple, but less specific test of 2,4,6-trinitrotoluene exposure is a change in the color of urine to amber or deep red due to the presence of its breakdown products. However, none of these tests can predict whether a person will experience any health effects.

#### Has the federal government made recommendations to protect human health?

Since 2,4,6-trinitrotoluene is explosive, flammable, and toxic, EPA has designated it as a hazardous waste.

The Department of Transportation (DOT) specifies that when 2,4,6-trinitrotoluene is shipped, it must be wet with at least 15% water (by weight) and it must be clearly labeled as a flammable solid.

The Occupational Safety and Health Administration (OSHA) set a maximum level of 1.5 milligrams of 2,4,6-trinitrotoluene per cubic meter of workplace air (1.5 mg/m<sup>3</sup>) for an 8-hour workday for a 40-hour workweek.

The National Institute for Occupational Safety and Health (NIOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH) recommend an exposure limit of 0.5 mg/m<sup>3</sup> in workplace air for a 40-hour workweek.

#### Glossary

**Anemia:** A decreased ability of the blood to transport oxygen.

**Breakdown product:** A substance that is formed when a chemical breaks down in the body.

**Carcinogen:** A substance that can cause cancer.

**CAS:** Chemical Abstracts Service.

**Conjunct:** Clouding of the lens or capsule of the eye, causing partial or total blindness.

**Milligram (mg):** One thousandth of a gram.

#### Reference

Agency for Toxic Substances and Disease Registry (ATSDR). 1991. Toxicological profile for 2,4,6-trinitrotoluene (update). Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

**Where can I get more information?** For more information, contact the Agency for Toxic Substances and Disease Registry, Division of Toxicology, 1609 Clifton Road NE, Mailstop E-29, Atlanta, GA 30333. Phone: 1-888-421-8717, FAX: 404-639-6319. ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html>. ATSDR can tell you where to find occupational and environmental health clinics. These specialists can recognize, evaluate, and treat illnesses resulting from exposure to hazardous substances. You can also contact your community or state health or environmental quality department if you have any more questions or concerns.



WHITE PHOSPHORUS

1

### 1. PUBLIC HEALTH STATEMENT

This statement was prepared to give you information about white phosphorus and white phosphorus smoke and to emphasize the human health effects that may result from exposure to it. The Environmental Protection Agency (EPA) identifies the most serious hazardous waste sites as in the nation. These sites make up the National Priorities List (NPL) and are the sites targeted for long-term federal clean-up activities. White phosphorus has been found in at least 77 of 1,400 current or former NPL sites. However, the total number of NPL sites evaluated is not known. As more sites are evaluated, the number of sites at which white phosphorus is found may increase. This is important because exposure to white phosphorus may harm you and because these sites are sources of human exposure to white phosphorus.

When a substance is released from a large area, such as an industrial plant, or from a container, such as a drum or bottle, it enters the environment. This release does not always lead to exposure. You can be exposed to a substance only when you come in contact with it. You may be exposed by breathing, eating, or drinking substances containing the substance or by skin contact with it.

If you are exposed to a substance such as white phosphorus, many factors will determine whether harmful health effects will occur and what the type and severity of these health effects will be. These factors include the dose (how much), the duration (how long), the route or pathway by which you are exposed (breathing, eating, drinking, or skin contact), the other chemicals to which you are exposed, and your individual characteristics such as age, sex, nutritional status, family traits, lifestyle, and state of health.

#### 1.1 WHAT ARE WHITE PHOSPHORUS AND WHITE PHOSPHORUS SMOKE?

Pure white phosphorus is a colorless-to-white waxy solid, but commercial white phosphorus is usually yellow. Therefore, it is also known as yellow phosphorus. White phosphorus is also called phosphorus tetramer and has a garlic-like smell. In air, it catches fire at temperatures



## WHITE PHOSPHORUS

2

## 1. PUBLIC HEALTH STATEMENT

30-35 degrees above room temperature. Because of its high reactivity with oxygen in air, white phosphorus is generally stored under water. White phosphorus does not occur naturally. Industries produce it from naturally occurring phosphate rocks.

White phosphorus is used mainly for producing phosphoric acid and other chemicals. These chemicals are used to make fertilizers, additives in foods and drinks, cleaning compounds, and other products. Small amounts of white phosphorus have been used as rat and roach poisons and in fireworks. In the past, white phosphorus was used to make matches, but another chemical with fewer harmful health effects has since replaced it.

In the military, white phosphorus is used in munitions such as mortar and artillery shells, and grenades. When munitions containing white phosphorus are fired in the field, they burn and produce smoke. The smoke contains some unburnt phosphorus, but it mainly has various burned phosphorus products. In military operations, such smoke is used to conceal troop movements and to identify targets or the locations of friendly forces. White phosphorus munitions are intended to burn or flambomb the opponents, in other words, to effectively produce widespread damage but not kill the enemy.

You will find more information on the physical properties and uses of white phosphorus and white phosphorus smoke in Chapters 3 and 4 of this profile.

**1.2 WHAT HAPPENS TO WHITE PHOSPHORUS AND WHITE PHOSPHORUS SMOKE WHEN IT ENTERS THE ENVIRONMENT?**

White phosphorus enters the environment when industries make it or use it to make other chemicals and when the military uses it as ammunition. It also enters the environment from spills during storage and transport. Because of the discharge of waste water, white phosphorus is likely to be found in the water and bottom deposits of rivers and lakes near facilities that make or use it. It may also be found at sites where the military uses phosphorus-containing ammunition during training exercises. Rainwater washout of these sites may contaminate nearby waterways and their bottom deposits. Hazardous waste sites that contain white phosphorus are also

### 1. PUBLIC HEALTH STATEMENT

potential source of exposure to people. However, because white phosphorus reacts very quickly with oxygen in the air, it may not be found far away from sources of contamination.

The fate of white phosphorus smoke is similar to the fate of reaction products of white phosphorus vapor in air. White phosphorus vapor in air reacts with oxygen and is changed to relatively harmless chemicals within minutes. However, particles in the air may have a protective coating that makes them unreactive for a longer time. White phosphorus reacts mainly with oxygen in water and may stay in water for hours to days. However, chunks of white phosphorus coated with protective layers may stay in water and soil for years if oxygen levels in the water and soil are very low.

In water with low oxygen, white phosphorus may react with water to form a compound called phosphine. Phosphine is a highly toxic gas and quickly moves from water to air. Phosphine in air is changed to less harmful chemicals in less than a day. In water, white phosphorus builds up slightly in the bodies of fish. The other chemicals in white phosphorus smoke are mainly changed to relatively harmless chemicals in water and soil. White phosphorus may stay in soil for a few days before it is changed to less harmful chemicals. However, in deeper soil and the bottom deposits of rivers and lakes where there is no oxygen, white phosphorus may remain for several thousand years. White phosphorus binds moderately to soil and typically doesn't move deep in soil with oxygen-depleted rainwater.

Chapter 5 provides more information about the fate and movement of white phosphorus in the environment.

#### 1.3 HOW MIGHT I BE EXPOSED TO WHITE PHOSPHORUS AND WHITE PHOSPHORUS SMOKE?

You may be exposed to white phosphorus by breathing in air that contains white phosphorus or by swallowing water or food contaminated with it. White phosphorus has rarely been found in air. Therefore, unless you are near military facilities during training exercises that use white phosphorus ammunition, exposure to it by breathing air will be insignificant. White phosphorus

## WHITE PHOSPHORUS

## 1. PUBLIC HEALTH STATEMENT

has not been found in drinking water or any food other than fish caught in contaminated water and game birds from contaminated areas. The maximum level found was 207 milligrams of white phosphorus per kilogram (207 mg/kg) in the muscle of channel catfish caught from the Yellow Lake in Pine Bluff, Arkansas. Some people are exposed to low levels of white phosphorus by eating contaminated food. People who work in industries that produce or use white phosphorus, people who eat contaminated fish or game birds, and people who live near phosphorus-containing waste sites may be exposed to white phosphorus at higher levels than the rest of the population. Other than exposure of certain workers at the Pine Bluff Arsenal in Arkansas, very few studies exist that have information on exposure to high levels of white phosphorus.

Most known cases of fatal or severe exposure to white phosphorus resulted from adults or children accidentally or deliberately swallowing rat poisons or fireworks or handling munitions containing white phosphorus. Other known instances of severe exposure of workers were a result of accidents in white phosphorus loading plants. People, particularly those in the military who use phosphorus-containing munitions, may be exposed to white phosphorus smoke during warfare, training exercises, and accidents.

#### 1.4 HOW CAN WHITE PHOSPHORUS AND WHITE PHOSPHORUS SMOKE ENTER AND LEAVE MY BODY?

White phosphorus can enter your body when you breathe air containing white phosphorus. We do not know if white phosphorus in your lungs will enter the blood. White phosphorus can also enter your body when you eat food or drink water containing white phosphorus or when you are burned by it. We do not know if white phosphorus can enter your body through skin that has not been cut or burned. If it enters your body when you eat, drink, or are burned, white phosphorus enters the blood rapidly. We do not know if it changes into other compounds in the blood. Most of the white phosphorus that enters your body leaves in urine and feces after several days. White phosphorus smoke can enter your lungs when you breathe air containing it. When that happens, we do not know if it will enter your blood or how it will leave your body. For more information, please read Chapter 2.

## 1. PUBLIC HEALTH STATEMENT

## 1.5 HOW CAN WHITE PHOSPHORUS AND WHITE PHOSPHORUS SMOKE AFFECT MY HEALTH?

Breathing in white phosphorus can cause you to cough or develop a condition known as phosby jaw that involves poor wound healing in the mouth and a breakdown of the jaw bone. Damage to the blood vessels of the mouth has been observed in rats breathing air containing white phosphorus. Most of what is known about the health effects of breathing this compound is from studies of workers. Current levels of white phosphorus in workplace air are much lower than in the past. If you eat or drink a small amount of white phosphorus (less than one teaspoon), you may vomit, have stomach cramps, have liver, heart, or kidney damage, become extremely drowsy, or die. Most of what is known about the health effects of eating or drinking white phosphorus is from reports of people eating rat poison or fireworks that contained it. White phosphorus is no longer found in rat poison or fireworks. The levels of it that you might be exposed to in food or water are much lower than the levels that were in rat poison or fireworks. We do not know if more serious health effects will occur in people who eat or drink white phosphorus-containing substances for a long time. If burning white phosphorus touches your skin, it will burn you. If you are burned with white phosphorus, you may also develop heart, liver, and kidney damage. We do not know if it can cause cancer or birth defects, or if it affects the ability of people to have children. Because of the lack of cancer studies on animals or people, the EPA has determined that white phosphorus is not classifiable as to human carcinogenicity (that is, whether or not it causes cancer). If you breathe white phosphorus smoke, you may damage your lungs and throat. We do not know how white phosphorus smoke can affect your health if it gets on your skin. For more information, please read Chapter 2.

## 1.6 IS THERE A MEDICAL TEST TO DETERMINE WHETHER I HAVE BEEN EXPOSED TO WHITE PHOSPHORUS AND WHITE PHOSPHORUS SMOKE?

There are no medical tests to tell if you have been exposed to white phosphorus or its smoke. However, the health effects that can follow exposure may lead your physician to suspect exposure. For more information, please read Chapters 2 and 6.

## WHITE PHOSPHORUS

## 1. PUBLIC HEALTH STATEMENT

## 1.7 WHAT RECOMMENDATIONS HAS THE FEDERAL GOVERNMENT MADE TO PROTECT HUMAN HEALTH?

EPA requires industry to report spills of white phosphorus of more than 1 pound. White phosphorus levels in workplace air are regulated by the Occupational Safety and Health Administration (OSHA), and recommendations for safe levels have been made by the National Institute for Occupational Safety and Health (NIOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH). All these organizations set the inhalation exposure limit for white phosphorus in the workplace during an 8-hour workday at 0.1 milligram per cubic meter of air (mg/m<sup>3</sup>). There are no federal government recommendations for white phosphorus smoke. More information can be obtained from Chapter 7.

## 1.8 WHERE CAN I GET MORE INFORMATION?

If you have any more questions or concerns, please contact your community or state health or environmental quality department or:

Agency for Toxic Substances and Disease Registry  
Division of Toxicology  
1600 Clifton Road NE, Mailstop E-29  
Atlanta, Georgia 30333  
(404) 639-6000

This agency can also provide you with information on the location of occupational and environmental health clinics. These clinics specialize in the recognition, evaluation, and treatment of illness resulting from exposure to hazardous substances.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 18 1999

OFFICE OF  
RESEARCH AND DEVELOPMENT

SUBJECT: Interim Assessment Guidance for Perchlorate

FROM: Neive E. Neuberger *Neive E. Neuberger*  
Assistant Administrator (E1012)

TO: Regional Administrators  
Regional Waste Management Division Directors  
Regional Water Management Division Directors

The purpose of this memorandum is to transmit the attached interim assessment guidance from the Office of Research and Development (ORD) relevant to Agency activities related to perchlorate. The development of this guidance is in response to requests to ORD from some of the Regional offices, as well as from individual States.

As you know, the Office of Solid Waste and Emergency Response (OSWER) has recently forwarded to you the final report of the February 1999, External Peer Review of the document entitled "Perchlorate Environmental Contamination: Toxicology Review and Risk Characterization." The external review document (ERD), subject of the peer review, was developed by ORD's National Center for Environmental Assessment (NCEA).

The human health and ecological assessment issues related to environmental contamination by perchlorate are complex. The ERD addressed an immediate need to bring more science into the assessment process, but at the time of the February 1999 peer review meeting, several key studies on perchlorate were underway or planned. These studies will provide some critical assessment information. These new data will be incorporated into the revised assessment document that will undergo a second external peer review in January 2000. Because ORD is committed to bringing the latest available science to bear on the human and ecotoxicology estimates, ORD is recommending that until the completion of the second review, EPA risk assessors and risk managers follow the attached interim guidance. This guidance has been reviewed by the Office of Water (OW), Office of Solid Waste and Emergency Response (OSWER), and the Office of General Counsel and is supported by both OW and OSWER.

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NO. 574 PMS-005

We look forward to working with you as we come to closure on this aspect of the permissive contactation issues over the next nine months. If there are any questions or if you require additional information, do not hesitate to contact Annie Jarboe, at 919-541-4843 (voice), 919-541-1818 (FAX), or [jarboe.annie@ncga.gov](mailto:jarboe.annie@ncga.gov) (E-mail).

**Attachments**

cc: Tim Fields, OSWER  
Jonathan C. Fox, DW  
William Tietzel, NCEA  
Lt. Col. Dan Rogers, DeD  
Annie Jarboe, NCEA

### ORD Interim Guidance for Perchlorate

**Because of remaining significant concerns and uncertainties that must be addressed in order to finalize a human health oral risk benchmark for perchlorate, the Office of Research and Development (ORD) recommends that Agency's risk assessors and risk managers continue to use the standing provisional RFD range of 0.0001 to 0.0005 mg/kg-day for perchlorate-related assessment activities. This recommendation is based on the determination that important new emerging data may have an impact on the proposed revised oral human health risk benchmark contained in the February 1999 External Review Document (ERD). Some background information and the reasons for this recommendation are detailed below.**

In February 1999, an external peer review meeting was held in San Bernardino, California to review the document entitled "Perchlorate Environmental Contamination: Toxicology Review and Risk Characterization." This ERD was developed by ORD's National Center for Environmental Assessment (NCEA). The ERD, available on the Internet at <http://www.epa.gov/ceaa/perchl.htm>, was developed as part of a wide interagency effort to address environmental contamination issues related to perchlorate. More information on this effort is available at <http://www.epa.gov/epo/ceaa/perchl/perchl.htm>. The external peer review was sponsored by the Office of Solid Waste and Emergency Response (OSWER) and the Office of Water. The final peer review report of the February 1999 meeting has recently been transmitted to you by OSWER.

As explained in the ERD, the current range of a provisional RFD value for perchlorate spans from 0.0001 mg/kg-day to 0.0005 mg/kg-day; this range was issued by the NCEA Superfund Technical Support Center based on assessments in 1992 and revised in 1995. If state or local environmental authorities decide to pursue site-specific clean-up or other water management decisions based on this provisional RFD range by applying the standard default body weight (70 kg) and water consumption level (2 L/day), the resulting provisional clean-up levels or action levels would range from 4-18 parts per billion (ppb). It should be noted that no cancer assessment was performed at this time.

The ERD presented an updated human health risk assessment as well as a screening-level ecological assessment of newly performed studies on the toxicity of perchlorate. The updated health assessment harmonizes noncancer and cancer approaches to derive a single oral risk benchmark based on precursor effects for both neurodevelopmental effects and thyroid neoplasia. Both of these are historically established effects often observed after disturbances in the hypothalamic-pituitary-thyroid feedback system. By their nature, each of these effects is likely to have a biological threshold. The proposed revised oral human health risk benchmark is protective of potential carcinogenic effects based on new perchlorate data on the lack of its genotoxicity and the reversibility of induced thyroid hyperplasia/hyperplasia. The proposed revised oral human health risk benchmark is 0.0009 mg/kg-day. No traditional RFD or cancer slope factor was proposed in the ERD. If state or other local environmental authorities choose to apply the same default values as above to the revised oral benchmark, a site-specific clean-up or action level of 32 ppb would result.



The Agency has committed to another external peer review as part of the process to more completely and accurately characterize the human and ecotoxicological risks associated with perchlorate contamination and to make this information available through the Integrated Risk Information System (IRIS). In the next assessment, NCEA will address comments made in the February 1999 report, as well as review and incorporate data from additional studies that were either nearing completion or recommended at that time. In addition to recommended studies on pharmacokinetics, developmental effects testing in another species and repeat acute activity evaluations are underway. Another important recommended activity underway is a National Toxicology Program-sponsored pathology working group (PWC) review of the thyroid and brain tissue from all previous and pending studies. This PWC review will provide for a common nomenclature of lesions and for a consistent pathology review across studies, with the goal to reduce variability in the data. Further, an in-laboratory validation study of the hormone analytes (T4, T3, and TSH) across participating laboratories will be performed. Additional ecotoxicology studies, including some site-specific and farm gate analyses of food crops, are also either being reviewed or already underway.

The purpose of the next external peer review will be to evaluate these additional data and to review the draft final NCEA assessment. All of the perchlorate testing and study activities, whether underway, in review, or planned, are being used to support the goal of the next external peer review in January 2000. As mentioned above, this next peer review is intended as part of the IRIS process. After revision to reflect any additional comments or recommendations, the final NCEA assessment will then go to IRIS assessment review.

Because new analyses and data are to be considered, we can predict that the human and ecotoxicology benchmarks are likely to change. The new estimates will reflect greater accuracy and may be either higher or lower than the harmonized benchmark proposed in the February 1999 document (0.0009 mg/kg-day). Therefore, ORD recommends that Agency risk assessors and risk managers continue to use the standing provisional RfD range of 0.0001 to 0.0005 mg/kg-day because of continued uncertainty with respect to the impact of the pending data and analyses on the final estimate. This recommendation helps to ensure that the Agency bases its risk management decisions on the best available peer reviewed science and is in keeping with the full and open participatory process embodied by the proposed series of peer review workshops. It should be noted, that due to the uncertainty of whether the final oral human health risk benchmark will increase or decrease based on the new data and analyses, the standing provisional RfD range is the more conservative of the estimates available at this time and, therefore, more likely to be public health protective in the face of this uncertainty. This is also consistent with Agency practice that existing toxicity estimates remain in effect until the review process to revise them is completed.

This document provides guidance to EPA Regions concerning Agency activities related to perchlorate. It also provides guidance to the public and the regulated community on how EPA intends to exercise its discretion in carrying out these activities. The guidance is designed to implement national policy on these issues. The document does not, however, substitute for EPA statutes or regulations; nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA decisionmakers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate. EPA may change this guidance in the future.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I  
ONE CONGRESS STREET SUITE 1100  
BOSTON, MASSACHUSETTS 02114-2003**

**memorandum**

**date:** 26 July 2001

**re:** Sarah Levinson, Human Health Risk Assessment Support  
Technical Support Branch

**cc:** Todd Wenzl, Project Manager  
MMR Project Team

**subject:** Recommendations Regarding Human Health Risk Evaluation of Perchlorate: Application to MMR  
Project Activities

In response to detections of perchlorate in ground water samples at MMR, perchlorate has become a chemical of interest at the MMR. Neither EPA nor MA DEP has formally adopted a safe drinking water standard or health advisory for perchlorate in public water supplies. However, the Agencies are aware and are concerned about the potential for perchlorate to cause adverse human health effects (especially on the thyroid) were exposure to occur. As such, the purpose of this letter is to communicate current EPA policy regarding human health risk evaluation of perchlorate in groundwaters. This policy is based upon my communications with the perchlorate chemical manager Andre Jacobek (ORD), Peter Grevatt (OSWER St. Salsaria HQ), and other EPA Regional toxicologists.

While the issues surrounding risk evaluation of perchlorate are complex and are the subject of review at present, it has been and continues to be the position of EPA that human health risk evaluation of perchlorate should proceed using the provisional oral reference dose (IRD) issued by EPA's NCEA Superfund Technical Support Center of 0.0001 to 0.0005 mg/kg-day. This position was articulated in a guidance of June 18, 1999 from Norine Nissman (CGD) to all Regional Administrators and all Waste and Water Management Division Directors (copy attached). While issued as interim guidance, it was to remain in effect until such time that a final assessment of the hazard to human health posed by exposure to perchlorate was formally adopted and placed on EPA's IRIS database. The range of oral reference doses issued by EPA in 1992 and later revised in 1995 of 0.0001 to 0.0005 mg/kg/day is based on adverse effects of the thyroid gland and has not been superseded by an IRIS value at present.

Since 1995, EPA has attempted to bring the latest available scientific information to bear on a health protective benchmark value for perchlorate and in 1998, EPA released an External Peer Review

Draft document ("Perchlorate Environmental Contamination: Toxicology Review and Risk Characterization"). However, because EPA believes important new studies that were not available in 1999 are either underway or planned and are anticipated to have an impact on the proposed human health risk benchmarks, EPA does not recommend use at this time of the 0.0009 mg/kg/day health risk benchmark contained in the 1999 Risk and Review Document. This policy helps to ensure that EPA bases its risk management decisions on the best available peer reviewed science and is consistent with EPA practice that existing toxicity estimates remain in effect until the review process to revise them is completed.

Thus, using the range of provisional oral reference doses (0.0001 to 0.0005 mg/kg-day) suggested to be used in this interim period and in keeping with prudent public health measures assuming that a young child (15 kg body weight, 1 liter water ingestion rate) represents a possible receptor, the concentration of perchlorate in water that would not exceed the provisional reference dose for a child equates to approximately 2 ppb - 8 ppb (1.5 ppb - 7.5 ppb). Were one only concerned about effects on adults (2 liter ingestion rate, 70 kg body weight), then the concentration of perchlorate in water that would not exceed the provisional reference dose for an adult approximates 4-18 ppb (3.5 ppb - 17.5 ppb). As the child receptor is consistent with the beneficial use of the aquifer as a public drinking water supply, I strongly advise consideration be given to protecting the young child receptor population for essential decisions involving perchlorate in groundwater at BMR.

Attachment (EPA Memo from N. Norman to Regional Administrator 6/18/99)

# THE WALL STREET JOURNAL

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MONDAY, DECEMBER 16, 1982 - VOL. CXXI, NO. 118 - \*\*\*\*\* \$1.40



**EL PASO CHEMICALS, CASE—**For years, El Paso and DuPont Vortech had been trying a silicosis disease here in the heart of the American River. And in the last few years, there's been a lot of trouble. The El Paso plant, they called it, had been producing chlorine, perchloroethylene, and other things, along with chlorine and vinyl chloride. It was a big plant, and it was producing a lot of chlorine and vinyl chloride. It was a big plant, and it was producing a lot of chlorine and vinyl chloride. It was a big plant, and it was producing a lot of chlorine and vinyl chloride.

The case of El Paso was "almost perfect," Mr. Vortech says. "Almost perfect" because it was a case of a disease that was caused by a chemical. It was a case of a disease that was caused by a chemical. It was a case of a disease that was caused by a chemical. It was a case of a disease that was caused by a chemical.



**Greg Vortech**  
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## Sleeping Threat A Fuel of Cold War Defenses Now Ignites Health Controversy

**Pentagon's Ban on Asbestos  
To Water Supply of Millions;  
Pentagon Closes With EPA  
Greg Vortech's Two Tumors**  
By Peter Weisman

The El Paso plant, which was producing a lot of chlorine and vinyl chloride, was a big plant. It was a big plant, and it was producing a lot of chlorine and vinyl chloride. It was a big plant, and it was producing a lot of chlorine and vinyl chloride. It was a big plant, and it was producing a lot of chlorine and vinyl chloride.

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## Perchlorate Reaches Water Supply of Millions

The EPA wants suspected water supplies tested nationwide for perchlorate, but the Pentagon, which uses perchlorate-flame retardants in Page A5, Column 1

Continued from Page 1  
 are isn't dangerous in small doses, it is raising in many cases. Instead, the Pentagon has asked Congress for an exemption from environmental laws covering the dumping of explosive residues at specified sites.

It's impossible to determine definitively whether perchlorate caused the "hot spots" 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 diseases associated with the chemical. Eight states have passed safety limits on perchlorate, ranging from one part per billion in Maryland, Massachusetts and New Mexico, to two ppb in California and 11 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 bit more concerned about even subtle deficiencies of thyroid hormone on brain development than I was before," says biologist Thomas Boston, 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.

### Billion in Cleanup Costs

The Pentagon and several of its major contractors, all facing billions of dollars in possible cleanup and liability costs, argue perchlorate is perfectly safe in trace amounts. They argue the chemical, an ordinary salt as similar to sodium, 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 Marlene Kertz, 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 to make 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 dumped onto the ground, left to flow unimpeded into streams and underground aquifers.

The polluting continued for years af-

ter evidence began to mount of the dangers of perchlorate. A three-month investigation by The Wall Street Journal has found that even after California regulations filed to control disposal of the chemical in the 1980s, 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.

At late as 1978, in fact, Aerojet-General Corp., operator of the Florida plant near the Yuccafield basin, built a special, 1,500-foot pipeline to dump toxic waste into confined 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 ground leaking problem.

"A 1,500-foot pipeline may not quite be temporary," acknowledges William Phillips, longtime general counsel of Aerojet's parent, DynCorp of Sacramento. But Mr. Phillips and other defense industry officials say that the contractor 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 policies issued by the Pentagon, which owned and

managed most of the perchlorate supply and paid 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 not different from any other set of individuals who operate in states and localities and follow the laws," says Mr. Boston. He attacked undersecretary of defense. "We do not consider it our job to get out in front of the local and environmental regulatory agencies in terms of elevating" pollution risks.

"Should someone have connected the dots in 1961, 1973 or 1987? Absolutely," says Kevin Meyer, 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 Yuccafield neighborhood water as far back as 1963—seven years before they moved to state water regulators declared local violations. The Yuccafield residents' class-action lawsuit in 1981, filed in Sacramento state court, accusing Aerojet, Boeing Co. and two local water utilities of negligence and fraud. The defendants denied the allegations, and the case is pending.

"I think they knew it was dangerous and just kept doing it," says Mr. Yuccafield, now 61 years old. "There was nobody there to stop them, and nobody was the wiser."

Perchlorate fueled the aircraft of American royalty. During World War II,

the hairy-tipped Theodore von Kármán, a Hungarian-born aerospace 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 rocketologists from Caltech founded Aerojet in Azusa, 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 sugar," is vacuumed inside a rocket engine with aluminum powder and a rubber-like polymer to make an intense burn. To propel a rocket, the solid fuel must be ground and scooped into a particular shape. Over time, the fuel breaks down, requiring occasional replacements. That's why, for more than a year, tons of perchlorate were routinely dumped from rockets and missiles into the ground and into water supplies.

Aerojet began manufacturing at a plant in the San Gabriel Valley town of Azusa, Calif., about 20 miles east of down-

town Los Angeles. Nearly from the start, it had discharge problems. In 1945, 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 the Azusa plant was connected to an industrial sewer line in 1952.

### Move Out of the City

Stunned to by the burgeoning Los Angeles suburbs, Aerojet moved most of its rocket operations north to some abandoned gold-mining fields in Rancho Cordova, about 15 miles east of Sacramento. In 1981, shortly after leaving the site, an Aerojet employee calculated that about 1,000 gallons of liquid waste, plus 200 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 confined 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 hazardous waste departments in Sacramento, the regulators unanimously rejected the proposed "perchlorate 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 ground." For treatment, he recommended excavation in "lined 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 a scrubbing how thing," says Mr. Major of the EPA.

On May 21, 1983, California's Central Valley Regional Water Pollution Control Board, over Aerojet's objections, issued Resolution No. 37, banning "injection" of perchlorate and eight other chemicals into local groundwater and the nearby American River. That same year, scientists published their findings that perchlorate blocks the uptake of essential iodine into the thyroid gland, thus inhibiting thyroid-hormone production.

Neither the medical findings nor the water board's order had much effect. By 1985, 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 140 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 neighboring well on Aerojet's property was contaminated with 1,800 ppb of perchlorate, indicating "waste water from the camp is contaminating with underlying groundwater."

Mr. Phillips, the San Diego 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 1977, a national task group on unimproved waste reported perchlorate contamination had crept over "several square miles" east of Sacramento. The group's report, published in the American Water Works Association Journal, described perchlorate as a "weekender" toxic to plants at 1,000 to 2,000 ppb. It said the perchlorate plume near Sacramento ranged from 1.5 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 1981, 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 1980, board members described Aerojet's operations as a mess, with "four or five major discharges" into a creek feeding the American River and many smaller releases into 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, as areas of extremely permeable soil, much, the board should not give industry a blank check in discharging anything [it] desired to the groundwater basin," a state engineer wrote after the briefing.

The updated was Resolution 38-11, the board's 1983 order to Aerojet not to discharge anything "contaminating to humans, animals, plants, or aquatic life" into local waters. The resolution set maximum discharge limits for 11 chemicals—5,000 ppb for perchlorate—and ordered Aerojet, for the first time, to "disclose" all waste before it left Aerojet's property.

But 1983 was the year of the Ocala waste crisis, and Aerojet had other concerns. A unit of General Tire of the firm, Aerojet was playing a big part in helping the U.S. close the chemical gap with the Soviet Union. At the height of the rocket race in the early 1980s, Aerojet's Sacramento County facility employed 11,000 workers in three shifts, seven days a week. It said, then, that disposal of its solid-fuel environmental byproducts was a "Minesweeper 1. Because I didn't require

them to look, as legal fact requires, the Minesweeper is believed to have helped steel President Kennedy's nerve during the Ocala missile crisis.

Aerojet's operations were overseen by 800 to 400 full-time Postage inspectors who approved every load 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. "Knowingly approved thought they were doing the right thing."

#### Burning the Stuff

In 1981, Aerojet had begun burning its excess perchlorate, along with dimes of the chlorinated solvent trichloroethylene, or TCE, which is now considered carcinogenic. But, large quantities of the chemicals continued to go into the ground, according to documents by former Aerojet employees given to California investigators in a 1979 criminal probe. That same 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 director of Aerojet's chemical waste disposal unit from 1981 to

1988, said they dumped hazardous chemicals into a septic system 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 metallic parts (laden with solid rocket fuel).

Meanwhile, tests of the underground aquifer at the Aerojet site showed steadily rising concentrations of perchlorate—from 15,000 ppb in the mid-1980s to 11,000 ppb in 1991. In the decade after 1985 alone, Aerojet processed roughly 10 million pounds of ammonium perchlorate at "grind stations." Line 10, company documents say, the "daily washdown" of the area, flowed into shallow ponds.

The water board issued more discharge orders, with little effect. In February 1987, for example, the board granted perchlorate to Aerojet's Corona Chemical unit to dig an injection well for inserting waste deep underground. The board ordered explicitly banned "pollution" and discharging waste in any "surface drainage courses." But just three months after that order came out, Corona built the 1,500-foot pipeline to channel waste straight into an old-fashioned 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 90 times the board's allowable limit. No one worried about it then. Mr. Phillips says, because, among other reasons, Aero-

jet's wells weren't for drinking.

Perchlorate became a drinking-water concern in 1980, 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 2,000 ppb. But five of the six so-called field blanks—samples of purified water that were also tested to assure data quality—unexpectedly tested positive for perchlorate. Phrased, 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 Feb. 24, 1986, underscored the state toxicity concerns. The Postage and EPA are still arguing about 17 years later. The agency "strongly recommended" testing the San Gabriel wells.

"Although the limited data available does not suggest that several thousand ppb of perchlorate would represent an acute threat to public health," the toxicology agency's letter concluded, "the effects of sustained low-level perchlorate ingestion need to be described in more detail."

**Superfund Sites**

These efforts remained unidentified for more than a decade afterward. In 1980, the EPA, citing the 1982 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 Northera 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 injecting it into the aquifer with 4,000 ppb of perchlorate still at 2-4 ppb regulatory TCE levels.

"We did not have any data which indicated that perchlorate had been identified as a constituent of concern," testified Thomas Pickett, who oversees Aerojet's cleanup for the regional water board from 1983 through 1988, in a recent deposition. After the EPA's 1982 health screening, 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 600 ppb. The defense industry, meanwhile, was fighting the EPA's health assessment, arguing in a 1986 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. "Pickett tended to stop at their houses," one says.

The biggest break in early 1987, 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 200 ppb.

The Voeteches learned in the media about the thyroid-disrupting contaminant staining nearby wells. Mr. Voetech 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 Voeteches then joined the class-action lawsuit, led by the law firm that employs Erin Brockovich, the lead-actress part played by Julia Roberts in the film of the same name. The suit, among several filed over perchlorate contamination, is settled in the courts, and Mr. Voetech 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. Voetech says.

The firm's chief attorney, Edward Maury, says the perchlorate claims haven't been contacted in several years because a judge put a stay on their case, pending legal motions, but should be leaving from the firm shortly.

With more sensitive tests, perchlorate quickly turned up in several water supplies in Southern California. In 1987, the San Gabriel Valley plume—11 years after its initial discovery—had spread to a 750-square-mile area beneath about 200,000 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 De-

partment officials got wind of a plume in Redlands, Calif., they circulated an internal "background" report telling colleagues to keep the information secret. The June 1987 report noted 200,000 residents could be "adversely affected," with "pregnant women and children" among the most at risk. Yet, citing the best estimate of perchlorate's discovery in wells near Sacramento several months earlier, the report warned of "far-reaching ramifications when the public learns of the situation." In conclusion: "Federal government programs could be adversely affected due to increased environmental costs."

**Plumes Spread**

In 1987, the Pentagon and several defense contractors, under EPA pressure, funded 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 1988, 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 out along the Colorado River to Lake Mead, above Hoover Dam. From there, they tracked the plume 30 miles westward, up a desert rhyolite called the Las Vegas Wash, to Kerr-McGee Corp.'s giant ammonium perchlorate plant in Borden, Nev. The Navy built the plant in the 1950s to make perchlorate compounds for the war. Inherited by Kerr-McGee in a 1967 merger, the facility effused 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 drinkable water source for southwestern Nevada. Perchlorate was detected in Kerr-Mc-

Gee's groundwater back in the mid-1960s, and it was ignored. The company wouldn't treat the aquifer for the metal chromium-6, and rejecting high levels of perchlorate-tainted water back underground, say officials of Nevada's Division of Environmental Protection. "The pollution in 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 600 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, as much perchlorate has already entered Lake Mead that the levels below Hoover Dam—all the way out to Las Vegas—have badly lagged in five years, ranging from five to 13 ppb.

**'Breaker of Illness'**

"It will probably take decades for the cleanup effort to finish it all out," says Douglas Zimmerman, an environmental regulator in Nevada.

In addition to making their way across the Southwest, the Colorado River water irrigates 90% 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 85, according to calculations by Ramon Sorens 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," Mr. Sorens says.

For now, that standard is only a recommendation. Treatment 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 Voetech family, and fell sick with Crohn's disease at age 13. Now 36, she wants to become a large-animal veterinarian, but is still debilitated by pain problems, muscle pain 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.



Kevin Soper

"I don't seem like the government cares very much about this problem," she says. "It's not like perchlorate is killing people. It's slow."

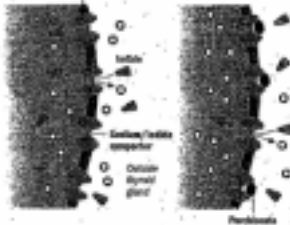
**Blocking Agent**

In the human body, perchlorate inhibits production of thyroid hormones, essential to normal organ development in babies, especially brain development.



1 Iodine from foods, such as salt, enters the body.  
(Source: Environmental Protection Agency; Environmental Working Group)

**Blockade of the thyroid gland**



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.



**Greg and Devin Westlund** (left) believe perchlorate made their family sick. Devin Linder (bottom left) got thyroid disease at 15. Larry Ladd (bottom), with daughter Katelyn, passed California and sought to sue for perchlorate in local drinking water.





## The Debate Over Safety Levels

Perchlorate is one of a newly recognized group of toxins called endocrine disruptors—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 Armenia 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 100 ppb. Millions of dollars in cleanup and liability costs may hinge on the results, since most perchlorate mines in the U.S., including the Colorado Silver, range between four and 100 ppb.

In 1984, 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 1985 by General's David S. Seltzer, was "to provide EPA with a science-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 toxics 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 water. 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 science 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 unable to detect or 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 makes a different epidemiological study that it claims shows "strong evidence" of perchlorate's danger to infants. The 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 homespaced women. 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 H. Ravn



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April 24, 2002

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## Military cash flows for new water supply

By KEVIN DENNEHY  
STAFF WRITER

BOURNE - The military this week delivered \$2.7 million to help the beleaguered Bourne Water District solve a potential water shortage, weeks after pollution from Camp Edwards forced the closure of half the district's supply wells.

The money will come from the military's \$300 million Environmental Restoration account, made up of Army, Air Force and Army National Guard funds.

When added to money provided three years ago to replace wells threatened by another plume of groundwater pollution, the Bourne district has more than \$4 million with which to explore new water supply sources and link to a clean source.

Groundwater tests continue to show that trace levels of the chemical perchlorate, a component of rocket propellant and munitions, have moved off base toward the district's water supply.

All threatened wells have been shut off, and no contaminated water is reaching any homes, according to the military.

But to make up for lost water, about \$1.85 million of the military money will be spent linking Bourne with a clean-water source before the summer and its increased water demand arrive.

A 3-mile pipeline will link the Bourne district water main, located near the Otis Rotary on Route 28, to a military-funded water supply located on the other side of the base in Sandwich.

"We are on a fast track to get that water main across (Route 28), probably in the next two weeks," said Ralph Marks, the Bourne Water District superintendent who has pushed the military for help since the first traces of contamination were found in February.

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State officials want to complete the work near the rotary before the busy Memorial Day weekend, Marks said.

According to an agreement signed yesterday, the Army Corps of Engineers will begin digging by mid-May.

Crews will begin digging the pipeline from both ends, and are expected to link up by June 28.

#### **Future supplies**

The Bourne district includes about half of the Upper Cape town, including neighborhoods of Catramet, Pocasset and Monument Beach. About 19,000 people are served by the district during the summer.

The district does not include customers in Sagamore, South Sagamore or Buzzards Bay.

District officials say they are still evaluating the problem and aren't sure what costs they'll run into. For now, the military funding will pay for the supply line to the base and other costs.

While all tainted supply wells are now shut off, there remains concern in the community about future water supplies.

During a meeting last night of the panel that monitors the Camp Edwards cleanup, more than 100 Bourne residents crowded into a Best Western Hotel reception room to learn more about the problem.

#### **Health concerns**

Both residents and Impact Area Review Team members pressed the state's Department of Public Health to assess whether past exposure to the contamination has affected public health.

While perchlorate is not considered a cancer-causing substance, it can affect the thyroid gland, potentially slowing metabolism, growth and development, according to the federal Environmental Protection Agency.

The state has suggested that no "sensitive" people - including children and pregnant women - consume water contaminated with even small traces of the chemical.

David Williams of the DPH said last night that there is no evidence that the chemical has caused health problems to date.

But Richard Hugus of Falmouth, a member of the Impact Area Review Team, said it would be "a miracle" if the military caught the perchlorate plume before it reached the water supply.

He and others pushed the DPH to look at past records to determine whether there are any higher levels of thyroid disease in the region.

In the meantime, the military has scrambled funds for the problem in near-record time, said Mike Misior of the Air Force Center for Environmental Excellence, which is running the cleanup of the southern portion of the Massachusetts Military Reservation.

"The folks above us recognized the seriousness of the situation," he said. "And they did everything they could to expedite moving the money to the Bourne Water District."

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THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

## Work to clean Cape Cod pollution continues as Pentagon seeks environmental exemptions

By Melissa S. Robinson, Associated Press, 6/21/2002 12:34

WASHINGTON (AP) Five years of investigation at the Massachusetts Military Reservation on Cape Cod has yielded evidence that groundwater pollution is more extensive than even the U.S. Environmental Protection Agency thought when it ordered the military to look into the problem.

Now, environmental experts are wondering if there's enough clean water left on the upper Cape to correct a shortfall in drinking water for local residents, due to base pollution, that could reach 11 million gallons per day by 2020.

"This was an area that was the hope for the future of the Cape's water supply," said Betty Higgins, director of environmental review for EPA's New England office. "They're finding a lot more contamination than anyone ever thought we would find."

The reservation is a 22,000-acre military base that's been used for training by the Army, Air Force and National Guard since 1911.

Underneath is Cape Cod's sole source aquifer, the only drinking water source for the Cape's 200,000 year-round and 500,000 seasonal residents. Sandy soil makes the aquifer vulnerable to contamination, which can travel quickly.

The EPA's precedent-setting cleanup order in 2000 marking the first time the military was required to clean an active training ground is focused on Camp Edwards, an Army National Guard training range and impact area occupying the northern 15,000 acres. Old Air National Guard Base occupies the southern third of the area.

Progress has been made since 1997, when the EPA first ordered the investigation that led to the cleanup. The Guard took a series of immediate actions to contain pollution, and feasibility studies are ongoing in five major cleanup areas.

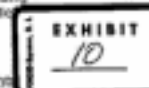
But as work has gone on, more and more pollution has turned up, sometimes at very high levels.

Most recently, perchlorate, a pollutant associated with rocket fuel that's suspected of causing thyroid disease, showed up in water supply wells in Bourne, forcing the community to connect to an alternate water supply provided by the military. The supply is permanent but now provides about 3 million gallons a day, a fraction of what will ultimately be needed.

On the camp itself, explosive contaminants have turned up in about 100 monitoring wells, and in 53 of them at levels exceeding EPA's health advisory, EPA data showed. More than 200 monitoring wells have been installed throughout the camp.

In the part of the camp known as demolition area 1, the explosive-related, possibly cancer-causing contaminant RDX has been found in groundwater at concentrations as high as 370 parts per billion, well above the EPA's standard of two parts per billion, data showed.

[http://www.boston.com/dailynews/147/economy/Work\\_to\\_clean\\_Cape\\_Cod\\_pollutP.shtml](http://www.boston.com/dailynews/147/economy/Work_to_clean_Cape_Cod_pollutP.shtml)



In the range's southwest corner near the most productive part of the aquifer perchlorate concentrations as high as 311 parts per billion have been found near the base boundary, upgrade from Snake Pond, a swimming pond for a children's camp, data showed. EPA doesn't have a standard established for the contaminant but suggests a range of 4-16 parts per billion for adults.

If people are exposed to contaminants at levels above EPA standards, which generally are based on the risk of long-term health effects after a lifetime of exposure, it doesn't necessarily mean they will get sick, only that they are at increased risk for health problems.

Even so, many who live near the base, which is surrounded by Bourne, Falmouth, Mashpee and Sandwich, have long worried about the potential negative impact on health as well as on water supplies, which are already stressed by dry weather and population growth.

"Everybody drinks bottled water," said Joel Felgenbaum of Sandwich, who has compiled state public health data to track cancer rates on the upper Cape. "Even in areas where it's safe, nobody believes it's safe because there's been so much happening."

Overall, the military has committed \$250 million over 15 years to the cleanup, and EPA believes it will take all of that to get the project done. It is expected to be several years before EPA knows the full extent of damage to the aquifer, after which the military will have to figure out how to provide enough clean water for the neighboring communities.

"We will be looking at long-term solutions," said Ray Fitz, the Army's deputy assistant secretary for the environment.

Meanwhile, national military leaders who have complained about the reservation cleanup order are worried that they will be forced to take similar actions elsewhere.

"The potential for cessation of live-fire training at other ranges is of great concern to us," Mario P. Fiori, assistant Army secretary for installations and environment, complained in testimony to a House subcommittee on military readiness earlier this year.

Defense officials have aggressively sought environmental exemptions from Congress, arguing that soldiers can't properly train if they can't use live fire or are otherwise restricted due to laws protecting air, land, water, wildlife and plants.

In Massachusetts, because soldiers have been limited to plastic, frangible and green ammunition, Army Reserve and Guard troops have had to do some training at Fort Drum in New York, adding 12 hours of travel time to already tight training schedules, Fiori said.

The outlook for the exemptions is unclear.

The House voted to exempt military installations from having to designate habitat areas for endangered species if a separate natural resources management plan is in place, and to excuse forces for accidental kills of migratory birds during operations fewer exemptions than the Pentagon originally sought.

In the Senate, a key committee failed to endorse the changes. However, individual senators could propose such exemptions as amendments to larger bills up for debate in the coming months.

On The Net:

New England EPA: <http://www.epa.gov/region1/>

National Guard: <http://www.ngb.dtic.mil/>

[http://www.boston.com/dailynews/147/economy/Work\\_to\\_clean\\_Cape\\_Cod\\_pollutP.shtml](http://www.boston.com/dailynews/147/economy/Work_to_clean_Cape_Cod_pollutP.shtml)

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<http://www.sunreport.net/news/health/water04.04162004/story?col=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 petitioned 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 Woodruff 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 E. Hirth, 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."

Woodruff 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 migrated 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.



<http://www.sunreport.net/templates/misc/printstory.jsp?slug=ba%2Dwater04> 9/14/02

Thomas Zedler, 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. Roberman, 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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STATEMENT OF DOUGLAS BENEVENTO, EXECUTIVE DIRECTOR, COLORADO  
DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Good morning, my name is Doug Benevento and I am the executive director of the Colorado Department of Public Health and Environment. In that position I am responsible for the oversight of the State of Colorado's air, water, solid waste and hazardous waste programs as well as the bulk of the state's health programs. The majority of the programs that I am responsible for on the environmental side are programs that are delegated to the state through the Clean Air Act, the Clean Water Act, or the Resource Conservation and Recovery Act. Also, I am a member of the Environmental Council of States and serve on that body's executive committee. Also, I am also a co-chair of ECOS' DoD forum, which is designed to open communications with DoD for the purpose of working through issues like this one.



I do want to make clear though that today I am speaking for the state of Colorado and not ECOS or the DoD forum.

It is a great honor for me to be testifying before the U.S. Senate. Prior to moving back to Colorado in June 1999 I had worked for almost 10 years for Senator Allard in a variety of staff positions and it is truly a great honor to be testifying before a committee he serves on.

Since returning to Colorado to first run the environmental programs and subsequently to run the entire agency my involvement in Federal facilities has increased dramatically both from the standpoint of day to day cleanup and oversight of these facilities to such non-routine matters such as how to handle sarin nerve gas bomblets manufactured decades ago at the Rocky Mountain Arsenal and found in a junk pile at the site.

My experience on both Capitol Hill and in state government has given me a unique perspective on environmental issues as they impact the military. Those who have a background developing environmental laws or those who are environmental regulators tend to automatically react negatively to any change in the laws that could provide more flexibility to the military. This conclusion is reinforced for me by reviewing testimony from a hearing on this issue last year where colleagues of mine in environmental regulation did a superb job of pointing out every potential and actual shortfall in a similar proposal without offering any suggestions for making the proposal viable.

On the other hand the proponents of more flexibility tend to develop their proposals in isolation and then spring them out at the last moment, professing surprise that there would be any questions that would arise. A good example of this was also last year when final language was proposed and states learned about it at about the time it was being considered in Congress. Last year we did not feel like our advice was being seriously sought or considered.

This year is different and I am very grateful that states are being asked by this committee for their opinions early on. I believe that based upon the early outreach and the willingness that DoD and congressional staff have expressed to me with respect to working on this issue we can craft language that meets the needs of all parties.

Much of the credit for this is due to the outreach that this committee and other committees are engaging in on this topic. I also want to thank DoD for spending a lot of time with me over the past week and walking through the issues they face. My experience is that these kinds of issues are resolvable so long as the lines of communication are open. I commend the committee for helping open those lines of communication.

I am here today to try and offer some suggestions that would be helpful in resolving some of the issues surrounding the proposed amendments to certain environmental laws. These amendments are called the Readiness and Range Preservation Initiative and seek to provide greater flexibility for the military so that they ensure that their training is done in a fashion that is timely and not hindered by unnecessary environmental requirements. I offer my suggestions today in the spirit of allowing DoD to reach that goal while at the same time ensuring that offsite impacts are prevented or mitigated.

The suggestions that I offer today are based upon the principle that no harm to the public would be acceptable to the state of Colorado, DoD, or this committee. I believe that the suggestions that I will offer are consistent with this criterion.

Specifically, I would today like to address the proposal of DoD with respect to the changes they are seeking to CERCLA, RCRA, and the Clean Air Act. These are the environmental laws that my agency is either responsible for implementing through a delegation or, in the case of CERCLA, a law which we partner with EPA on implementing.

With some changes in general I think Colorado would be comfortable with the goals stated by Armed Services Committee staff and DoD of ensuring essential training activities can be accomplished and that public health is protected.

I would like to spend the rest of my time defining what I see as the issues and then offer suggestions on how those issues can be resolved in a fashion that ensures military training can be done without unnecessary delay while also ensuring that public health and the environment is protected. I don't have statutory language to offer at this time but would be happy to draft something for the committee if it would be helpful.

After reading the statutory language and prior testimony on this issue it appears as if DoD is seeking exemptions from certain portions of environmental laws including: the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and seeking time extensions from compliance with portions of the Clean Air Act. My under-

standing of the intent of the DoD in seeking these exemptions under RCRA and CERCLA is to allow for training at specifically identifiable sites. As I understand, DOD is not seeking to be excused from any cleanup obligations under RCRA or CERCLA for contamination it causes, nor from any offsite impacts, nor from obligations under the Safe Drinking Water Act. Finally, DOD is not seeking a permanent exemption from hazardous waste management requirements under RCRA at the defined sites. Under the CAA my understanding of the intent of the DoD is to allow for movement of planes and other mechanized material between bases without triggering immediate applicability of portions of the CAA. In short:

1. They are seeking time extensions from portions of the Clean Air Act.
2. Also, they are seeking exemptions from RCRA on operational ranges where the military is actively undertaking military training where, “explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof,” could be found.
3. Finally, they are seeking a clarification of the definition of what is a release under CERCLA.

I would like to comment on the proposed changes to RCRA, CERCLA, and the CAA and to offer some suggestions that from my perspective would make all three proposals more workable.

First, I would like to address RCRA. I want to state at the outset that I don't know of any state that issues RCRA permits or attempts to regulate normal training activities of the military. Colorado has worked well with DoD on training activities on their sites in our state. I think the proposed legislation attempts to codify a generally good relationship with Colorado and other states on these issues.

I have had several conversations with DoD and Armed Services Committee staff on this topic and I think that I understand what they are attempting to accomplish and I think their goals in RCRA should be supportable by states. What DoD is seeking are protections for their training activities on a range. They are not, according to my conversations with them, seeking to exempt themselves from any impact caused by training off of a range.

For example, in conversations with DoD they were clear that under RCRA they are not seeking a change to permitting of open burning or open detonation (OB/OD) when used as a disposal activity. Colorado currently permits such activities and will continue to permit such activities even under their proposed concept. However, under this law an OB/OD activity that is a necessary part of training would be exempt. That is legitimate and currently the practice in Colorado and other states.

At the outset I want to state that like most environmental laws RCRA is relatively old and almost every word in the statute has a meaning applied to it either through adjudication, regulation, or common understanding. The current proposal before you seeks to change definitions in RCRA to exempt out certain training activities on certain DoD sites.

The first issue that I would raise is that the language as drafted allows for exemptions at operational ranges. I can't find a definition of an operational range in current law or regulation and therefore don't know to what ranges this section would apply. There is no limitation on what is an operational range and that obviously causes some concern.

Second, it is also unclear from the drafting whether the activities exempted must be on an operational range or whether certain activities can occur anywhere and still be exempted. My understanding from talking with DoD is that they are seeking exemptions from RCRA at operational ranges for legitimate DoD training activities. If that is correct this language is too broad and should be narrowed to accomplish the end they are seeking—assurances that sites they operate on would not be subject to RCRA permitting that could interfere with their training.

Third, groundwater and surface water protection are also of concern in this regard. Depending upon the soil type and how near the groundwater is to the surface there is the possibility that groundwater could be contaminated by constituents of spent or live ordnance. Offsite impacts could be created from these activities and these should be addressed. It is my understanding that DOD's proposal would not affect their obligations under the Safe Drinking Water Act. It would be helpful if the legislation stated this explicitly.

Therefore, I would like to suggest the following changes to the language that has been provided to the committee. First, don't change current definitions or any current law; instead create an exemption under a new section of RCRA. Second, limit the exemption to active ranges and inactive ranges and the munitions on those ranges. My understanding after talking with DoD is that they are seeking protection on active ranges and that they are seeking to preserve their ability to use inactive ranges in the future. I would avoid creating new terms, such as “operational range” because it isn't clear what that means. Instead, what I would recommend is that you create an exemption based off current definitions. Third, the exemption for inac-

tive ranges may be controversial. However, the way it was explained to me by DoD was that these are ranges that are potentially useful in the future. The military does not want to give up their potential use because training sites are becoming difficult to find. Therefore, an exemption in both these areas makes sense. However, from a state perspective it would be helpful if every few years the military was forced to go through a review process of these inactive ranges and, after seeking public input, determine whether they should remain inactive, go to active status, or move to clean up status. Fourth, limit the exemption with tight language so that we all understand what we are exempting and what we are not exempting. Fifth, I would recommend that some kind of additional ground and or surface water monitoring be required if conditions dictate that to be appropriate. If the monitors did catch contamination then appropriate actions to prevent an environmental or public health concern could be required by states. Sixth, state clearly that in no way does this section impact cleanup responsibilities of DoD once the site no longer meets the definition of an active range. Seventh, mandate that DoD maintain good records of activities that take place on the range so that we know what was used on the site and what will be necessary for cleanup, without an expensive remedial investigation. Finally, it should be made clear that the exemptions are available only to DoD and not to contractors or other private parties.

What this gets you is a solution to the expressed concern that RCRA could impact military training. What it does not do is expose the public to contaminants from ordnance. In this regard, I would also suggest the committee strike the part of proposed §2019(a)(1)(A)(i)(III) that allows material that goes offsite to be addressed under CERCLA before States can take action under their authorities to protect public health and the environment. There is no military readiness rationale for DoD to be given this priority for off-range material, and States need to be able exercise their authority to protect the public. We have examples in Colorado from sites like the Rocky Mountain Arsenal where we have found it important to have the ability to exercise State authority over potential offsite impacts.

A better approach may be one that several states have already worked out with DOD in a collaborative effort called the "Munitions Response Committee." In this committee we have agreed with DoD to identify key decision points in the cleanup process for which we will seek consensus on decisions. If that can't be achieved, there would be an expeditious dispute resolution process. If agreement still can't be achieved, each party would rely on their existing CERCLA and RCRA authorities for action. This approach preserves both DOD's and States' existing authorities while making every effort to reach agreement. Further, since there is some agreement on this issue currently, it should not require a statutory change to RCRA or CERCLA.

Finally, there has been considerable work and thinking over the last several years on the role of enforceable land use controls onsites where contamination remains. One example is Colorado's environmental covenants law. Mechanisms like Colorado's law give communities and regulatory agencies comfort that contamination is being monitored and that controls to protect public health and the environmental are established and enforced. This kind of approach should be considered for munitions that remain on DOD ranges.

With the above caveats and changes I don't think that this type of narrow exemption under RCRA should cause a concern for human health or the environment. This exemption would meet DOD's need to conduct readiness activities without regulatory hindrance.

The next exemption in the language that I have seen surrounds an exemption from the term "release" as used in CERCLA for the purposes of triggering action under that law. The exemption from release would apply to explosives, ordnance, etc on operational ranges but would not apply to releases offsite of an operational range.

As with RCRA conceptually I would agree that there should be some middle ground that could be reached on a narrow exemption under the same criteria I outlined above for RCRA.

Again I would encourage the committee to abandon any rewrite of the body of CERCLA and instead encourage adding on an exemption to CERCLA.

The change being sought by DoD is really a limitation on Federal power. Since Superfund is not a delegated law this limitation would apply to an action by the Federal Government. The only recommendation we would have is that the exemption should apply, as with RCRA above, to active and inactive ranges and not operational ranges because as I noted above there is not yet an established definition of operational range and therefore what that term would apply to is uncertain. There is a definition of active and inactive range that should have some common

understanding amongst both the military and environmental regulators that should provide some certainty as to what is being exempted.

Finally, I would like to address the proposed changes to the Clean Air Act.

This portion of the proposal is the most difficult to work with because it involves offsite releases. As I mentioned earlier in my testimony the principle that I ran these proposal through was whether any exemption would allow for an offsite release. Within the borders of a training area I think that statutory flexibility is appropriate. However, as Colorado's top public health official I must be concerned about offsite releases from any activity and then I must try and ensure that those impacts are minimized.

There are two applicable air quality sections of the proposed legislation;

The first is conformity. There are two parts to conformity the first is the concept of general conformity and the second is transportation conformity.

This legislation would exempt the military from meeting the general conformity test that no Federal action will cause or contribute to the violation of the National Ambient Air Quality Standards (NAAQS). Under the proposal within 3 years after starting a military readiness activity, DoD would have to come into compliance with the requirements of the applicable law. The general conformity requirements would apply to any non-attainment or maintenance area of a state. In Colorado for example, this would most likely apply to the Colorado Springs area and the Denver area.

The general conformity provisions would most likely apply in Colorado to fog oil or fire that that could lead to particulate non-attainment situations. An area would have to develop a full SIP showing that all other measures are being taken to meet attainment including adoption of any mandatory Federal programs prescribed for that type of non-attainment area.

My concern with this language is first and foremost the offsite impacts of the activities and the 3-year exemption from addressing those offsite impacts. However, I am also slightly confused by how this section would be implemented. The language says that there is a 3-year exemption but the administrator must approve the plan. I assume that the administrator and the states would have to show at some point that within years some control of the emissions from the military readiness activity had occurred. Second, I would like further information as to when the 3-year clock would start running. Section 2018(a)(3) states that, "within 3 years of the date new activities begin" the activity must conform to the requirements of the CAA. I think it would be important to have a common understanding on when these activities begin to avoid confusion. For example, if planes are being brought into an area is that a military readiness activity that trigger this section or does the activity begin when the new planes start arriving or when they are all onsite.

Also, I think there may be an important practical problem with this approach. My responsibility is to protect public health and environment in Colorado. Therefore, if for example the Denver Metro Area were to fall into non-compliance with the NAAQS my goal would be to put controls in place as quickly as possible to protect air quality in the area. Therefore, if there were a 3-year restriction on controls at any military readiness activity we deemed was contributing to the problem my response would be to make my restrictions on other sources more stringent to make up for what the military was not contributing. As a practical matter what I would want to do in this situation is put control in place to ensure an area's air quality was safe. Because I would have to wait 3-years for certain exempted activities it would make sense for me to merely shift whatever burden turned out to be to other sources. This you can imagine would not be welcomed by those sources that felt they were being disproportionately controlled.

I don't want to appear to be hypercritical of this proposal but I think it is important that it be fully understood prior to implementation so that states and EPA know fully what to expect. Also, it is important that DoD understand the potential impact from this change.

My initial suggestion to fix this problem would be to exempt military readiness activities altogether instead of for merely 3 years. However, you should still require that the emissions budgets be developed as envisioned by this proposal and then require offsets on other non-military readiness activities in the impacted area from DoD sources. For example, requiring stricter controls at any power plants on military bases or require stricter controls for non-exempt vehicle fleets. If this would not offset the emissions increase then they would be required to purchase emissions credits from other sources in the area.

This would meet the intent of DoD. However, this approach also has its own shortcomings that I want to be certain to point out. First, it could require the expenditure of significant amounts of money depending upon the offsets. Second, the offsets may not be available in a given area or may not be sufficient. Third, purchasing credits is a good market based approach but in many areas there is not a

well-developed credit-trading program or credits may not be available in a given area.

Another alternative would be to direct EPA to expand their natural events policy to include military activities. As you may know EPA has a policy that allows states to avoid non-attainment due to natural events. This policy has been used by Colorado to avoid PM<sub>10</sub> non-attainment in certain areas of the state that experience significant windborne dust and that result in attainment problems. The purpose of the policy is to first recognize that there are certain uncontrollable events that can cause non-attainment that should not lead to non-attainment designation. However, this policy does have certain mitigation and notification requirements that could be burdensome. Further, the policy would likely have to be adjusted so that it would meet the needs of the military better.

The downside to this proposal of course would be that offsite impacts from training would still occur and may raise the concern of the community.

I would be willing to continue to explore solutions to the issues brought up by DoD but at this point I would encourage the committee to proceed cautiously with this portion of the proposal.

I understand that one of the motivations behind DOD's present proposal is concern about citizen suits potentially impacting its military readiness activities. Consistent with my overall comments, if this is a concern that Congress wishes to address, I suggest an exemption from citizen suits for readiness activities on active ranges rather than the definitional changes to the environmental laws proposed.

Finally, as you are well aware, the question of sovereign immunity for DOD's waste management and cleanup obligations has been dealt with several times over the years by Congress. This has been necessary due to the narrow interpretation given such waivers by the Courts. In the interest of preserving the current state of the law and just narrowly addressing DOD's concern, the committee may wish to affirm that any exemption granted not enlarge the universe of current sovereign immunity.

Thank you for your time and for asking me to testify. I would like to finish by re-emphasizing my belief that most of the issues brought up by DoD are resolvable with appropriate statutory changes. However, the one difficult area I would encourage some caution is with changes to the CAA.

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

Good morning, Chairman Inhofe, Senator Jeffords and Members of the committee. My name is Jamie Rappaport Clark, Senior Vice President for Conservation Programs at the National Wildlife Federation, the nation's largest conservation education and advocacy organization. I am here to testify on behalf of National Wildlife Federation, as well as Defenders of Wildlife, the Endangered Species Coalition, Fund for Animals, Humane Society of the United States, Military Toxics Project, Public Employees for Environmental Responsibility, Public Interest Research Group, Natural Resources Defense Council, and World Wildlife Fund. I thank the committee for this opportunity to testify on the Administration's Readiness and Range Preservation Initiative.

Prior to arriving at the 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 a 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 many occasions during my tenures at FWS and the Defense Department, DOD 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.

The Administration now proposes in its Readiness and Range Preservation Initiative that Congress scale back DOD's responsibilities to conserve wildlife and to protect people from the hazardous pollution that DOD generates. This proposal is both unjustified and dangerous. It is unjustified because DOD's longstanding approach of working through compliance issues on an installation-by-installation basis works. As DOD itself has acknowledged, our armed forces are as prepared today as they ever have been in their history, and this has been achieved without broad exemptions from environmental laws.

The DOD proposal is dangerous because, if Congress were to broadly exempt DOD from its environmental protection responsibilities, both people and wildlife would be threatened with serious, irreversible and unnecessary harm. Moreover, other Federal agencies and industry sectors with important missions, using the same logic as used here by DOD, would line up for their own exemptions from environmental laws.

My expertise is in the Endangered Species Act (ESA), so I would like to focus my testimony on why exempting the Defense Department from key provisions of the ESA would be a serious mistake. I will rely on my fellow witnesses to explain why the proposed exemptions from other environmental and public health and safety laws is similarly unwise.

*Concerns with the ESA Exemption*

The Defense Department's proposed ESA exemption suffers from three basic flaws: it would severely weaken this nation's efforts to conserve imperiled species and the ecosystems on which all of us depend; it is unnecessary for maintaining military readiness; and it ignores the Defense Department's own record of success in balancing readiness and conservation objectives under existing law.

*1. Section 2017 Removes a Key Species Conservation Tool*

Section 2017 of the Administration's Readiness and Range Preservation Initiative would preclude designations of critical habitat on any lands owned or controlled by DOD if DOD has prepared an Integrated Natural Resources Management Plan (INRMP) pursuant to the Sikes Act and has provided "special management consideration or protection" of listed species pursuant to Section 3(5)(A) of the ESA.

This proposal would effectively eliminate critical habitat designations on DOD lands, thereby removing an essential tool for protecting and recovering species listed under the ESA. Of the various ESA protections, the critical habitat provision 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.

Section 2017 would replace this crucial habitat protection with management plans developed pursuant to the Sikes Act. The Sikes Act does not require the protection of listed species or their habitats; it simply directs DOD to prepare INRMPs that protect wildlife "to the extent appropriate." Moreover, the Sikes Act provides no guaranteed funding for INRMPs and the annual appropriations process is highly uncertain. Even the best-laid management plans can go awry when the anticipated funding fails to come through. Yet, under Section 2017, even poorly designed INRMPs that allow destruction of essential habitat and put fish, wildlife or plant species at serious risk of extinction would be substituted for critical habitat protections.

Section 2017 contains one minor limitation on the substitution of INRMPs for critical habitat designations: such a substitution is allowed only where the INRMP provides "special management consideration or protection" within the meaning of Section 3(5)(A) of the ESA. Unfortunately, this limitation does nothing to ensure that INRMPs truly conserve listed species.

The term "special management consideration or protection" was never intended to provide a biological threshold that land managers must achieve in order to satisfy the ESA. The term is found in Section 3(5) of the ESA, which sets forth a two-part definition of critical habitat. Section 3(5)(A) states that critical habitat includes areas occupied by a listed species that are "essential for the conservation of the species" and "which may require special management consideration or protection." Section 3(5)(B) states that critical habitat also includes areas not currently occupied by a listed species that are simply "essential for the conservation of the species."

As this language makes clear, an ESA §3(5) finding by the U.S. Fish and Wildlife Service or National Marine Fisheries Service (Services) that a parcel of land "may require special management consideration or protection" is not the same as finding that it is already receiving adequate protection. Such a finding simply highlights the importance of a parcel of land to a species, and it should lead to designation of that land as critical habitat. See *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) (rejecting, as contrary to plain meaning of ESA, defendant's interpretation of "special management consideration or protection" as providing a basis for substituting a U.S. Forest Service management plan for critical habitat protection). By allowing DOD to substitute INRMPs for critical habitat designations whenever it unilaterally makes a finding of "special management consideration or protection," Section 2017 significantly weakens the ESA.

Section 2017 is also problematic because it would eliminate many of the ESA Section 7 consultations that have stimulated DOD to "look before it leaps" into a poten-

tially harmful training exercise. As a result of Section 7 consultations, DOD and the Services have routinely developed what is known as “work-arounds,” strategies for avoiding or minimizing harm to listed species and their habitats while still providing a rigorous training regimen.

Section 2017 purports to retain Section 7 consultations. However, the duty to consult only arises when a proposed Federal action would potentially jeopardize a listed species or adversely modify or destroy its critical habitat. By removing critical habitat designations on lands owned or controlled by DOD, Section 2017 would eliminate one of the two possible justifications for initiating a consultation, reducing the likelihood that consultations will take place. This would mean that DOD and the Services would pay less attention to species concerns and would be less effective in conserving imperiled species and maintaining the sustainability of the land.

The reductions in species protection proposed by DOD 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. These installations have played a crucial role in species conservation and must continue to do so.

## *2. The ESA Exemption is Not Necessary to Maintain Military Readiness*

The ESA already has the flexibility needed for the Defense Department to balance military readiness and species conservation objectives. Three key provisions provide this flexibility. First, under the consultation provision of Section 7(a)(2) of the Act, DOD is provided with the opportunity to develop solutions in tandem with the Services to avoid unnecessary harm to listed species from military activities. Typically, the Services conclude, after informal consultation, that the proposed action will not adversely affect a listed species or its designated critical habitat or, after formal consultation, that it will not likely jeopardize a listed species or destroy or adversely modify its critical habitat. See, e.g., U.S. Army Environmental Center, *Installation Summaries from the fiscal year 2001 Survey of Threatened and Endangered Species on Army Lands* (August 2002) at 9 (noting successful conclusion of 282 informal consultations and 36 formal consultations, with no “jeopardy” biological opinions). In both informal and formal consultations, the Services either will recommend that the action go forward without changes, or it will work with DOD to design “work-arounds” for avoiding and minimizing harm to the species and its habitat. In either case, DOD accomplishes its readiness objectives while achieving ESA compliance.

Second, under Section 4(b)(2) of the ESA, the Services are authorized to exclude any area from critical habitat designation if they determine that the benefits of exclusion outweigh the benefits of specifying the area. (An exception is made for when the Services find that failure to designate an area as critical habitat will result in the extinction of a species a finding that the Services have never made.) In making this decision, the Services 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 virtually all of the habitat at Camp Pendleton habitat deemed critical to five listed species in proposed rulemakings—from final critical habitat designations. Thus, for situations where the Section 7(a)(2) consultation procedures place undue burdens on readiness activities, DOD already has a tool for working with the Services on excluding land from critical habitat designation. Attached to my testimony is a factsheet that shows how the Services have worked cooperatively with DOD on these exclusions, and another factsheet showing the importance of maintaining the Services’ role in evaluating proposed exclusions.

Third, 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 the fact that other provisions of the ESA have provided DOD with all the flexibility it needs to reconcile training needs with species conservation objectives.

Where there are site-specific conflicts between training needs and species conservation needs, the ESA provides these three mechanisms 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.

*a. DOD Has Misstated the Law Regarding Its Ability to Continue with a Cooperative, Case-by-Case Approach to Critical Habitat Designations*

DOD has stated that the ESA exemption is necessary because a recent court ruling in Arizona would prevent DOD from taking the cooperative, case-by-case approach to critical habitat designations that was developed when I served as Director of the Fish and Wildlife Service. This description of the court ruling is inaccurate the ruling clearly allows DOD to continue the cooperative, case-by-case approach if it wishes.

The court ruling at issue is entitled *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003). In this case, FWS excluded San Carlos Apache tribal lands from a critical habitat designation pursuant to ESA §4(b)(2) because the tribal land management plan was adequate and the benefits of exclusion outweighed the benefits of inclusion. The Federal district court upheld the exclusion as within FWS's broad authority under ESA §4(b)(2). At the same time, the court held that lands could not legitimately be excluded from a critical habitat designation on the basis of the "special management" language in ESA §3(5).

Under the court's reasoning, FWS continues to have the broad flexibility to exclude DOD lands from a critical habitat designation on the basis of a satisfactory INRMP and the benefits to military training that the exclusion would provide. The ruling simply clarifies that such exclusions must be carried out pursuant to ESA §4(b)(2) rather than ESA §3(5). Thus, DOD's assertion that the Center for Biological Diversity ruling prevents it from working with FWS to secure exclusions of DOD lands from critical habitat designations is inaccurate.

*b. DOD's Anecdotes Do Not Demonstrate That the ESA Has Reduced Readiness*

The DOD has offered a series of misleading anecdotes describing difficulties it has encountered in balancing military readiness and conservation objectives. Before Congress moves forward with any exemption legislation, the appropriate congressional committees should get a more complete picture of what is really happening at DOD installations.

Some of DOD's anecdotes are simply unpersuasive on their face, such as DOD's repeated assertion that environmental laws have prevented the armed services from learning how to dig foxholes and that troops abroad have been put at greater risk as a result. There is simply no evidence that environmental laws have ever prevented foxhole digging. Moreover, given its vast and varied landholdings and the many management options available, the Defense Department certainly can find places on which troops can learn to dig foxholes without encountering endangered species or other environmental issues.

Other anecdotes have simply disregarded the truth. For example, DOD and its allies have repeatedly argued that more than 50 percent of Camp Pendleton may not be available for training due to critical habitat designations. In fact, only five species have been proposed for critical habitat designations at Camp Pendleton. In each of these five instances, DOD raised concerns about impacts to military readiness, and in each instance, FWS worked closely with DOD to craft a solution. FWS ultimately excluded virtually all of the habitats for the five listed species on Camp Pendleton from critical habitat designations even though FWS had earlier found that these habitats were essential to the conservation of the species. As a result of FWS's exclusion decisions, less than 1 percent of the training land at Camp Pendleton, and less than 4 percent of all of Camp Pendleton, is designated critical habitat. (Most of the critical habitat designated at Camp Pendleton is non-training land leased to San Onofre State Park, agricultural operations, and others. DOD's repeated suggestion that more than 50 percent of Camp Pendleton is at risk of being rendered off-limits to training due to critical habitat is simply inaccurate.

DOD also has argued that training opportunities and expansion plans at Fort Irwin have been thwarted by the desert tortoise. Yet just 2 weeks ago this official line was contradicted by the reality on the ground. In an article dated March 21, 2003, Fort Irwin spokesman Army Maj. Michael Lawhorn told the Barstow Desert Dispatch that he is unaware of any environmental regulations that interfere with troops' ability to train there. He also said there isn't any environmental law that hinders the expansion.

Attached to my testimony is a factsheet outlining a series of additional misleading anecdotes used by DOD and the additional facts that must be considered before drawing any conclusions about the impact of the ESA on military readiness.

These examples of misleading anecdotes highlight the need for Congress to look behind the reasons that are being put forward by DOD as the basis for weakening environmental laws. DOD uses the anecdotes in an attempt to demonstrate that conflicts between military readiness and species conservation objectives are irreconcilable. However, solutions to these conflicts are within reach if DOD is willing to



invest sufficient time and energy into finding them. DOD has vast acres of land on which to train and vast stores of creativity and expertise among its land managers. With careful inventorying and planning, DOD can find a proper balance.

Has DOD made the necessary effort to inventory and plan for its training needs? In June 2002, the General Accounting Office issued a report entitled "Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges," suggesting that the answer is no. The GAO found:

- DOD has not fully defined its training range requirements and lacks information on training resources available to the Services to meet those requirements, and that problems at individual installations may therefore be overstated.
- The Armed Services have never assessed the overall impacts of encroachment on training.
- 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 officials themselves admit that population growth around military installations is responsible for past and present encroachment problems.
- The Armed Services' own readiness data do not show that environmental laws have significantly affected training readiness.

Ten months after the issuance of the GAO report, DOD still has not produced evidence that environmental laws are at fault for any of the minor gaps in readiness that may exist. EPA Administrator Whitman confirmed this much at a recent hearing. At a February 26, 2003, Senate Environment and Public Works Committee hearing on EPA's budget, EPA Administrator Whitman stated that she was "not aware of any particular area where environmental protection regulations are preventing the desired training."

To this date, DOD has not provided Congress with the most basic facts about the impacts of ESA critical habitat requirements on its readiness activities. Out of DOD's 25 million acres of training land, how many acres are designated critical habitat? At which installations? Which species? In what ways have the critical habitat designations limited readiness activities? What efforts did DOD make to alert FWS to these problems and to negotiate resolutions? Without answers to these most basic questions, Congress cannot fairly conclude that the ESA is at fault for any readiness gaps or that a sweeping ESA exemption is warranted.

### *3. DOD has Worked Successfully with the Services to Balance Readiness and Species Conservation Objectives*

The third reason why enacting DOD's proposed ESA changes would be a mistake is because the current approach developing solutions at the local level, rather than relying on broad, national exemptions—has worked. My experience at both FWS and DOD has shown me that solutions developed at the local level are sometimes difficult to arrive at, but they are almost always more intelligent and long-lasting than one-size-fits-all solutions developed at the national level.

Allow me to provide a few brief examples. At the Marine Corps Base 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. Here is the lesson that Major General David M. Mize, the Commanding General at Camp Lejeune, has drawn from this experience:

"Returning to the old myth that military training and conservation are mutually exclusive; this notion has been repeatedly and demonstrably debunked. In the overwhelming majority of cases, with a good plan along with common sense and flexibility, military training and the conservation and recovery of endangered species can very successfully coexist."

"Military installations in the southeast are contributing to red-cockaded woodpecker recovery while sustaining our primary mission of national military readiness."

"I can say with confidence that the efforts of our natural resource managers and the training community have produced an environment in which endangered species management and military training are no longer considered mutually exclusive, but are compatible."

These sentiments, which I share, were relayed by Major General Mize just 8 weeks ago at a National Defense University symposium sponsored by the U.S. Army Forces Command (FORSCOM) and others. At that symposium, representatives of Camp Lejeune Marine Corps Base, Eglin Air Force Base, Fort Bragg Army Base, Fort Stewart Army Base, Camp Blanding Training Center in Florida, the U.S. Army Environmental Center, and other Defense facilities—some of the most heavily utilized training bases in the country—heralded the success that Defense Department

installations have had in furthering endangered species conservation while maintaining military readiness.

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.

Attached to my testimony is a factsheet with additional examples of successful efforts by DOD installations across the country to balance military readiness and species conservation.

These success stories highlight a major trend that I believe has been missed by those promoting the DOD exemptions. In recent years, DOD has increasingly recognized the importance of sustainability because it meets several importance objectives at once. Sustainable use of the land helps DOD achieve not only compliance with environmental laws, but also long-term military readiness and cost-effectiveness goals. For example, by operating tanks so that they avoid the threatened desert tortoise, DOD prevents erosion, a problem that is extremely difficult and costly to remedy. If DOD abandons its commitment to environmental compliance, it will incur greater long-term costs for environmental remediation and will sacrifice land health and military readiness.

A November 2002 policy guidance issued by the then-Secretary of the Navy to the Chief of Naval Operations and the Commandant of the Marine Corps suggests that certain members of DOD’s leadership are indeed willing to abandon the sustainability goal. The policy guidance on its face seems fairly innocuous it purports to centralize at the Pentagon all decisionmaking on proposed critical habitat designations and other ESA actions. However, the Navy Secretary’s cover memo makes clear that its purpose is also to discourage any negotiation of solutions to species conservation challenges by Marines or Navy personnel in the field, lest these locally developed “win-win” solutions undercut DOD’s arguments on Capitol Hill that the ESA is broken. According to paragraph 2 of the cover memo, “concessions . . . could run counter to the legislative relief that we are continuing to pursue with Congress.”

Similar sentiments were voiced by Deputy Defense Secretary Paul Wolfowitz in his March 7, 2003, memo to the chiefs of the Army, Navy and Air Force. Deputy Secretary Wolfowitz argued that “it is time for us to give greater consideration to requesting exemptions” from environmental laws and pleaded for specific examples of instances in which environmental regulations hamper training. The implicit message is that efforts at the installation level to resolve conflicts between conservation and training objectives should be suspended, and that such conflicts instead should be reported to the Pentagon, where environmental protections will simply be overridden.

These messages to military personnel in the field mark a very unfortunate abdication of DOD’s leadership in wildlife conservation. To maintain its leadership role as steward of this nation’s endangered wildlife, DOD must encourage its personnel to continue developing innovative solutions and not thwart those efforts.

### *Conclusion*

With the Iraq war ongoing and terrorism threats always present, no one can dismiss the importance of military readiness. However, there is no justification for the Defense Department to retreat from its environmental stewardship commitments at home. As base commanders have been telling us, protecting endangered species and other important natural resources is compatible with maintaining military readiness.

Surveys show that the American people today want environmental protection from the Federal Government, including the Defense Department, as much as ever. According to an April 2002 Zogby Poll, 85 percent of registered voters believe that the Defense Department should be required to follow America’s environmental and public health laws and not be exempt. Americans believe that no one, including the Defense Department, should be above the law.

Congress should reject the proposed environmental exemptions in the Administration’s defense authorization package. This proposal, along with the parallel proposal in the Administration’s fiscal year 2004 budget request that Congress cut spending on DOD’s environmental programs by \$400 million, are a step in the wrong direction.

DOD has a long and impressive record of balancing readiness activities with wildlife conservation. The high quality of wildlife habitats at many DOD installations provides tangible evidence of DOD’s positive contribution to the nation’s conserva-

tion goals. At a time when environmental challenges are growing, DOD should be challenged to move forward with this successful model and not to sacrifice any of the progress that has been made.

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ATTACHMENT

*DOD Has a Long History of Working Successfully with the ESA*

The Department of Defense (DOD) is again pursuing exemptions from key environmental laws. A legislative package with these exemptions has been sent to Congress, which will soon be casting crucial votes. If this legislation is approved it will greatly reduce DOD's obligations under the Endangered Species Act (ESA), Marine Mammal Protection Act, Clean Air Act, Superfund, and Resource Conservation and Recovery Act.

Last year, the Administration requested exemptions from six environmental statutes, and Congress settled on an exemption from the Migratory Bird Treaty Act.

*DOD and ESA Success Stories*

DOD has argued, and intends to do so again, 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 sought 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 lawmakers to oppose any proposals that exempt DOD from the ESA and other environmental laws!

For more information, contact Corry Westbrook, Legislative Representative, National Wildlife Federation, at 202-797-6840, westbrooknwf.org.

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FWS HAS REPEATEDLY GRANTED DOD’S REQUESTS THAT ITS LANDS BE EXCLUDED FROM ESA CRITICAL HABITAT DESIGNATIONS

In pushing for exemptions from Endangered Species Act (ESA) critical habitat protections, the Department of Defense (DOD) has argued that the ESA lacks sufficient flexibility to exclude DOD lands from critical habitat designations where appropriate. However, as shown below, where the U.S. Fish and Wildlife Service (FWS) has found that DOD’s lands are needed for training and listed species are being adequately conserved, it has repeatedly acceded to DOD’s requests that those be excluded from critical habitat designations. See also NWF Factsheet: FWS’s Case-by-Case Review of INRMPs is Essential for Conserving Imperiled Wildlife. DOD’s effort to replace this flexible, case-by-case review with a sweeping ESA exemption is completely unwarranted.

The following FWS statements from the Federal Register show that, time and again, FWS has used the flexibility of the existing ESA to exclude large swaths of valuable habitat on DOD lands from critical habitat designations:

1. *Lompoc yerba santa and Gaviota tarplant (plants) at Vandenberg Air Force Base, 67 FR 67968-01 (November 7, 2002):*

“Although measures to provide for the conservation of *Eriodictyon apitatum* or *Deinandra increscens* ssp. *villosa* are not currently included in the draft INRMP, the Air Force has committed to incorporate into their INRMP, and implement, specific measures that will address the conservation of these species and their habitat where they occur on Vandenberg. Based on this commitment, we have, therefore, determined that lands on Vandenberg Air Force Base should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits inclusion and will not cause the extinction of the species. For this reason, we are excluding from the designated critical habitat those proposed units and portions of proposed units that were located on Vandenberg.”

2. *I Chlorogalum purpureum (a plant) at Camp Roberts and Ft. Hunter Liggett, 67 FR 65414-01 (October 24, 2002):*

“We have revised the proposal to eliminate lands at Camp Roberts under section 3(5)(A), and lands at Ft. Hunter Liggett under section 4(b)(2). It is our policy that if any areas containing the primary constituent elements are currently being managed to address the conservation needs of *Chlorogalum purpureum* management or protection, these areas would not meet the definition of critical habitat in section 3(5)(A)(i) of the Act and would not be included in this final rule. We have determined that this is the case at Camp Roberts due to their having an approved Integrated Natural Resources Management Plan which addresses the conservation needs of *Chlorogalum purpureum*.

We have also determined that the direct and indirect costs to the Army, including reduction in military readiness, from designation of critical habitat at Ft. Hunter Liggett are such that the benefits of excluding those lands exceed the benefits of their inclusion.

3. *Monterey Spineflower at Naval Postgraduate School, 67 FR 37498-01 (May 29, 2002)*

“In their comments on the proposed rule, the DON requested that the lands of the School be excluded from the Marina unit of critical habitat because of the protections and management actions provided for *Chorizanthe pungens* var. *pungens* as part of the INRMP. We evaluated the INRMP and found that it meets the three criteria described above. We excluded these lands from critical habitat under the section 3(5)(A) definition.”

4. *Riverside Fairy Shrimp at Miramar AFB and Camp Pendleton 67 FR 59884-01 (September 24, 2002)*

[NOTE: This designation was vacated by a Federal court on October 30, 2002, after an industry group claimed that FWS's economic impact analysis was not sufficiently broad. See *Building Ind. Legal Defense Found. V. Norton*, 231 F. Supp. 100 (D.D.C. 2002). The court required FWS to complete a new designation by July 2004.]

"To date, Miramar is the only DOD installation that has completed a final INRMP that provides, for sufficient conservation management, and protection for vernal pools and the., Riverside fairy shrimp. We reviewed this plan and determined that it addresses and meets the three criteria. Therefore, lands on Miramar (proposed Critical Habitat Unit 5) do not meet the definition of critical habitat, and they have not been included in this final designation of critical habitat for the Riverside fairy shrimp."

"To date, as the INRMP for Camp Pendleton has not yet been completed and approved, these lands meet the definition of critical habitat. Nevertheless, we have determined that it is appropriate to exclude training areas on Camp Pendleton from this critical habitat designation under section 4(b)(2). The main benefit of this exclusion is ensuring that the mission-critical military training activities can continue without interruption at Camp Pendleton while the INRMP is being completed."

"The proposed critical habitat designation included about 2,295 ha (5,670 ac), or about 10 percent of the base. This exclusion does not apply to the vernal pool complexes in the Wire Mountain Housing Area, within the Cockleburr Sensitive Area, and lands leased to the State of California and included within San Onofre State Park. Because these lands are used minimally, if at all, by the Marines for training, the 312 ha (770 ac) of lands proposed on Camp Pendleton and within the San Onofre State Park are retained in the final designation."

*California Red-legged Frog 66 FR 14626-01 (March 13, 2001)*

"During the comment period for the proposed determination of critical habitat for the California red-legged frog, we received and subsequently evaluated a final INRMP for Vandenberg Air Force Base found in Units 23, 24, and 26. This plan addresses the California red-legged frog as a covered species and provides conservation measures for the species. Based on this plan and Vandenberg's section 7 consultation history, we have determined that the conservation measures afforded the subspecies are sufficient to assure its conservation on the base. Therefore, we have excluded Vandenberg Air Force Base from the final determination of critical habitat for the red-legged frog resulting in a reduction of approximately 38,445 ha (95,000 ac) from these units."

"We also received and evaluated a request from Camp Parks Reserve Forces Training Area found in Unit 15 and Camp San Luis Obispo found in Unit 21, for exclusion from final designation because of the impact a final designation would have on their training critical mission. The proposed designation included about 90 percent of both installations. After evaluation of the benefits of inclusion and the benefits of exclusion, we have excluded Camp Parks resulting in a reduction of approximately 857 ha (2,118 ac) in Unit 15 and CSLO resulting in a reduction of approximately 2,272 ha (5,613 ac) in Unit 21 from this final designation."

*Arroyo Toad 66 FR 9414-01 (February 7, 2001)*

[NOTE: This designation was vacated by a Federal court on October 30, 2002, after an industry group claimed that the economic impact analysis was not sufficiently broad. See *Building Ind. Legal Defense Found. V. Norton*, 231 F. Supp. 100 (D.D.C. 2002). The court required FWS to complete a new designation by July 2004.]

"Arroyo toad numbers on Camp Pendleton are significant and are inclusive of the few remaining populations along the coastal plain."

"[W]e have determined that it is appropriate to exclude Camp Pendleton from this critical habitat designation under section 4(b)(2). The main benefit of this exclusion is ensuring that the mission-critical military training activities can continue without interruption at Camp Pendleton while the INRMP and programmatic uplands consultation are being completed. This exclusion does not include that part of Camp Pendleton leased to the State of California and included within San Onofre State Park (including San Mateo Park) and those agricultural leased lands adjacent to San Mateo Creek. Because these lands are used minimally, if at all, by the Marines for training, the lands proposed within the state park and agricultural leases are retained in the final designation."

"Fort Hunter Liggett seemed most concerned in their comments about the inclusion of what they termed "marginal and unsuitable" habitat and the resulting consultation requirements, and the perceived need to reinitiate consultation on certain

actions. We believe we have adequately addressed much of their concern by eliminating the northernmost reach of the river that was proposed, and by the reduction in grid cell size to eliminate such marginal habitat (see Changes from the Proposal section).”

“A primary concern expressed by Fallbrook Naval Weapons Station is that the designation of critical habitat within certain developed areas will impose additional restrictions on their operations. However, existing structures, ordnance storage magazines and bunkers, and other developed areas do not provide the primary constituent elements necessary for the arroyo toad and thus by definition are not critical habitat.”

*Mexican Spotted Owl 66 FR 8530-01 (February 1, 2001)*

[NOTE: In *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003), the court overturned the critical habitat designation for the Mexican spotted owl on the ground that that U.S. Forest Service lands could not legitimately be excluded from a critical habitat designation on the basis of the “special management” language in ESA §3(5). However, the court upheld FWS’s exclusion of tribal lands as within FWS’s broad authority under ESA §4(b)(2). Thus, the ruling does not remove FWS’s flexibility to exclude DOD lands from a critical habitat designation on the basis of a satisfactory INRMP and the benefits to military training that the exclusion would provide. See NWF Factsheet: DOD’s Argument for an ESA Exemption is Based Upon a Misstatement of the Law.]

“Fort Carson, Colorado, provided information during the comment period that indicated the Mexican spotted owl is not known to nest on the military installation and the species is a rare winter visitor. Protected and restricted habitat is also not known to exist on Fort Carson. Further, Fort Carson is updating the Integrated Natural Resources Management Plan (INRMP) to include specific guidelines and protection measures that have been recently identified through informal consultation with us. The INRMP will include measures to provide year-round containment and suppression of wildland fire and the establishment of a protective buffer zone around each roost tree. The target date of completion for this revision is early 2001. Fort Carson, through consultation with us, indicated they will ensure that the INRMP will meet the criteria for exclusion. They also provided additional information and support to indicate that no protected or restricted habitat exists on the base, and asked to be excluded from the final designation. We agree that Fort Carson should be excluded from the final designation.”

*Coastal California Gnatcatcher 65 FR 63680-01 (October 24, 2000)*

“To date, Marine Corps Air Base Miramar is the only DOD installation that has completed a final INRMP that provides for sufficient conservation management and protection for the gnatcatcher. We have reviewed this plan and have determined that it addresses and meets the three criteria. Therefore, lands on Marine Corps Air Base Miramar do not meet the definition of critical habitat and have been excluded from the final designation of critical habitat for the gnatcatcher.”

*California Red-legged Frog 66 FR 14626-01 (March 13, 2001)*

“During the comment period for the proposed determination of critical habitat for the California red-legged frog, we received and subsequently evaluated a final INRMP for Vandenberg Air Force Base found in Units 23, 24, and 26. This plan addresses the California red-legged frog as a covered species and provides conservation measures for the species. Based on this plan and Vandenberg’s section 7 consultation history, we have determined that the conservation measures afforded the subspecies are sufficient to assure its conservation on the base. Therefore, we have excluded Vandenberg Air Force Base from the final determination of critical habitat for the red-legged frog resulting in a reduction of approximately 38,445 ha (95,000 ac) from these units.”

“We also received and evaluated a request from Camp Parks Reserve Forces Training Area found in Unit 15 and Camp San Luis Obispo found in Unit 21, for exclusion from final designation because of the impact a final designation would have on their training critical mission. The proposed designation included about 90 percent of both installations. After evaluation of the benefits of inclusion and the benefits of exclusion, we have excluded Camp Parks resulting in a reduction of approximately 857 ha (2,118 ac) in Unit 15 and CSLO resulting in a reduction of approximately 2,272 ha (5,613 ac) in Unit 21 from this final designation.”

*Arroyo Toad 66 FR 9414-01 (February 7, 2001)*

[NOTE: This designation was vacated by a Federal court on October 30, 2002, after an industry group claimed that the economic impact analysis was not suffi-

ciently broad. See *Building Ind. Legal Defense Found. V. Norton*, 231 F. Supp. 100 (D.D.C. 2002). The court required FWS to complete a new designation by July 2004.)

“Arroyo toad numbers on Camp Pendleton are significant and are inclusive of the few remaining populations along the coastal plain.”

“[W]e have determined that it is appropriate to exclude Camp Pendleton from this critical habitat designation under section 4(b)(2). The main benefit of this exclusion is ensuring that the mission-critical military training activities can continue without interruption at Camp Pendleton while the INRMP and programmatic uplands consultation are being completed. This exclusion does not include that part of Camp Pendleton leased to the State of California and included within San Onofre State Park (including San Mateo Park) and those agricultural leased lands adjacent to San Mateo Creek. Because these lands are used minimally, if at all, by the Marines for training, the lands proposed within the state park and agricultural leases are retained in the final designation.”

“Fort Hunter Liggett seemed most concerned in their comments about the inclusion of what they termed “marginal and unsuitable” habitat and the resulting consultation requirements, and the perceived need to reinitiate consultation on certain actions. We

In contrast to Marine Corps Air Base Miramar, other military installations within the area proposed as critical habitat for the gnatcatcher have not yet completed their INRMPs. Most notably, Marine Corps Base Camp Pendleton (Camp Pendleton) represents one of the largest contiguous blocks of coastal sage scrub in southern California. The base provides habitat for numerous core populations of gnatcatchers and essential habitat linkages between core populations in northern San Diego County to those in southern Orange and southwestern Riverside Counties. In light of these factors, we proposed 20,613 ha (50,935 ac) of the approximately 50,000 ha (125,000 acre) base as critical habitat for the gnatcatcher.”

“During both public comment periods for the proposal, the Marines concluded that the designation, if it were to become final, would cripple their ability to conduct their critical training activities. They asserted that “this overwhelming proposal [if made final] will have a long term, cumulative and detrimental impact on [their] mission.” The proposed critical habitat encompassed more than 40 percent of the Base. Out of the 46 training or joint use areas on Camp Pendleton, the proposal included all of 22 and portions of 9 such areas, which were concentrated on the coastal portion of the Base. In addition, the proposal included three of four principal landing beaches and the key inland training areas adjacent to these beaches where Marines train in amphibious warfare, large and small tactics, and warfighting skills. Camp Pendleton is the Marine Corps’ only amphibious training base on the Pacific coast.”

“Today, as the INRMP has not yet been completed and approved, these lands on the base meet the definition of critical habitat. Nevertheless, we have determined that it is appropriate to exclude Camp Pendleton from this critical habitat designation under section 4(b)(2). The main benefit of this exclusion is ensuring that the mission-critical military training activities can continue without interruption at Camp Pendleton while the INRMP is being completed.”

“In particular, the Marines implement a set of “programmatic instructions” that create 500-foot buffers around each 1998 gnatcatcher observation. These avoided areas, after eliminating overlapping buffers and off-Base areas, total about 3,343 ha (8,260 ac), or a little less than 7 percent of the entire area of Camp Pendleton. Although avoiding these areas constrains Marine training activities to some degree, the effectiveness of their overall mission is not compromised. The proposed critical habitat designation, however, included about 20,613 ha (50,935 ac), or, to reiterate, about 40 percent of the Base. If this area is included in the final designation of critical habitat for the gnatcatcher, the Marines would be compelled by their interpretation of the Endangered Species Act to significantly curtail necessary training within the area designated as critical habitat, to the detriment of mission-critical training capability, until the consultation is concluded, up to a year from now. As a result, this increase in the extent of avoided areas would greatly restrict use of the Base, severely limiting the Base’s utility as a Marine training site.”

“This exclusion does not include that part of Camp Pendleton leased to the State of California and included within San Onofre State Park (including San Mateo Park).

Because these lands are used minimally, if at all, by the Marines for training, the 1,195 ha (2,960 ac) of lands proposed within the state park are retained in the final designation. These lands do not include lands leased for agricultural purposes.”

*San Diego Fairy Shrimp 65 FR 63438-01 (October 23, 2000)*

“We evaluated Department of Defense (DOD) Integrated Natural Resource Management Plans (INRMPs) for DOD land that was within the proposed critical habitat to determine whether any INRMPs met the special management criteria. To date, Marine Corps Air Base, Miramar is the only DOD installation that has completed a final INRMP that provides for sufficient conservation management and protection for the San Diego fairy shrimp. We reviewed this plan and determined that it addresses and meets the three criteria. Therefore, lands on Marine Corps Air Base, Miramar no longer meet the definition of critical habitat, and they have been excluded from the final designation of critical habitat for the San Diego fairy shrimp.”

“In contrast to Marine Corps Air Base Miramar, Marine Corps Base Camp Pendleton (Camp Pendleton) has not yet completed their INRMP. Camp Pendleton has several substantial vernal pool complexes that support the San Diego fairy shrimp. In light of these factors, we proposed 4,902 ha (12,114 ac) of the approximately 50,000 ha (125,000 acre), base as critical habitat for the San Diego fairy shrimp. Out of the 46 training or joint use areas on Camp Pendleton, the proposal included all of five such areas, which were concentrated on the coastal portion of the Base. In addition, the proposal included habitat found elsewhere on the base.”

“Today, as the INRMP has not yet been completed and approved, these lands on the base meet the definition of critical habitat. Nevertheless, we have determined that it is appropriate to exclude Camp Pendleton from this critical habitat designation under section 4(b)(2). The main benefit of this exclusion is ensuring that the mission-critical military training activities can continue without interruption at Camp Pendleton while the INRMP is being completed.”

For more information, contact Corry Westbrook, NWF Legislative Representative, at 202-797-6840, westbrooknwf.org, or John Kostyack NWF Senior Counsel, at 202 797-6879, kostyacknwf.org <mailto:kostyacknwf.org>.

FWS'S CASE-BY-CASE REVIEW OF INRMPs IS ESSENTIAL FOR CONSERVING IMPERILED WILDLIFE

REJECT DEFENSE DEPARTMENT'S PROPOSED EXEMPTION FROM THIS ACCOUNTABILITY

The Defense Department has requested an exemption from the Endangered Species Act (ESA) on the ground that the Integrated Natural Resources Management Plans (INRMPs) it prepares under the Sikes Act are an adequate substitute for ESA critical habitat protection.

However, the U.S Fish and Wildlife Service (FWS) has reviewed a number of INRMPs in the past few years for the very purpose of determining their adequacy as substitutes for critical habitat protection. As shown in the table below, on repeated occasions, FWS has determined that INRMPs were inadequate to conserve listed species.

U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPs

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Pacific Missile Range, Navy's Barking Sands Facility, Kauai.	Plants: <i>Panicum niuhauense</i> (no common name) .....	“Management at the PRMF Barking Sands Facility lands currently consists of restricting human access and off-road vehicles from the dune ecosystems and mowing landscaped areas. These actions alone are not sufficient to address the factors inhibiting the long-term conservation of <i>Panicum niuhauense</i> . Therefore, we cannot at this time find that management, on these lands under Federal jurisdiction as sufficient to find that they no longer meet the definition of critical habitat.” 68 FR 9116 (February 27, 2003).



U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPs—Continued

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Santa Cruz Armory, California.	Plants: Santa Cruz tarplant ( <i>Holocarpha macradenia</i> ).	“We conclude that [the California Army National Guard] does not yet have an INRMP for the Santa Cruz Armory that sufficiently addresses the criteria above. These lands do not warrant exclusion from critical habitat designation because the proposed management plan has not been approved and does not contain assurances that the management actions it describes will be implemented or effective.” 67 FR 63968 (October 16, 2002).
Navy's Barking Sands and Makaha Ridge Facility, Kaua'i.	Plants: <i>Panicum niihauense</i> (no common name) ..... <i>Sesbania tomentosa</i> ('ohai) ..... <i>Wilkesia hobbayi</i> (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] <i>Panicum niihauense</i> and <i>Wilkesia hobbayi</i> . Therefore, we cannot 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. 8, 2002).
Army's Dillingham Military Reservation, Oahu.	Plants: <i>Cyperus trachysanthos</i> (pu'uka'a) ..... <i>Hibiscus brackenridgei ssp. mokuleianus</i> (ma'o hau hele). <i>Nototrichium humile</i> (kulu'i) ..... <i>Schiedea kealiae</i> (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 Data base 2001; Army 2001b). In addition, proposed management actions identified for [the plant] <i>Schiedea kealiae</i> 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).

U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPS—Continued

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Army's Kahuku Training Area, Oahu.	Plants: <i>Adenophorus periens</i> (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 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).
	<i>Chamaesyce rockii</i> ('akoko) .....	
	<i>Cyanea grimesiana ssp. grimesianna</i> (haha) .....	
	<i>Cyanea koolauensis</i> (haha) .....	
	<i>Cyanea longiflora</i> (haha) .....	
	<i>Eugenia koolauensis</i> (nioi) .....	
	<i>Gardenia mannii</i> (nanu) .....	
	<i>Hesperomannia arborescens</i> (no common name) ...	
	<i>Phyllostegia hirsuta</i> (no common name) .....	
	<i>Tetraplasandra gymnocarpa</i> ('ohe 'ohe) .....	
Army's Kawadoa Training Area, Oahu.	Plants: <i>Adenophorus periens</i> (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).
	<i>Chamaesyce rockii</i> ('akoko) .....	
	<i>Cyanea acuminata</i> (haha) .....	
	<i>Cyanea crispy</i> (haha) .....	
	<i>Cyanea grimesiana ssp. grimesiana</i> (haha) .....	
	<i>Cyanea humboldtiana</i> (haha) .....	
	<i>Cyanea koolauensis</i> (haha) .....	
	<i>Cyanea long jora</i> (haha) .....	
	<i>Cyanea st. johnii</i> (haha) .....	
	<i>Cyrtandra dentata</i> (ha iwale) .....	
	<i>Cyrtandra virid flora</i> (ha iwale) .....	
	<i>Delissea subcordata</i> (no common name) .....	
	<i>Eugenia koolauensis</i> (nioi) .....	
	<i>Gardenia mannii</i> (nanu) .....	
	<i>Hesperomannia arborescens</i> (no common name) ...	
	<i>Labordia cyrtandrae</i> (kamakahala) .....	
	<i>Lobelia oahuensis</i> (no common name) .....	
	<i>Melicope lydgatei</i> (alani) .....	
	<i>Myrsine juddii</i> (kolea) .....	
	<i>Phlegmariurus nutans</i> (wawae'iole) .....	
	<i>Phyllostegia hirsuta</i> (no common name) .....	
	<i>Phyllostegia parv fora</i> (no common name) .....	
	<i>Plantago princeps</i> (ale) .....	
	<i>Platanthera holochila</i> (no common name) .....	
	<i>Pteris, lidgatei</i> (no common, name) .....	
	<i>Sanicula purpurea</i> (no common name) .....	
	<i>Tetraplasandra gymnocarpa</i> ('ohe'ohe) .....	
	<i>Viola oahuensis</i> (no common name) .....	

## U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPs—Continued

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Army's Makua Military Reservation, O'ahu.	Plants: <i>Alectryon macrococcus</i> (mahoe) ..... <i>Alsinidendron obovatum</i> (no common name) ..... <i>Bonamia menziesii</i> (no common name) ..... <i>Cenchrus agrimonioides</i> (kamanomano) ..... <i>Chamaesyce celastroides</i> var. <i>keanana</i> ('akoko) <i>Ctenitis squamigera</i> (pauoa) ..... <i>Cyanea superba</i> (haha) ..... <i>Cyrtandra dentata</i> (ha'iwale) ..... <i>Delissea subcordata</i> (no common name) ..... <i>Diellia falcata</i> (no common name) ..... <i>Dubautia herbstobatae</i> (na'ena'e) ..... <i>Euphorbia haeleleana</i> ('akoko) ..... <i>Flueggea neowawraea</i> (mehamehame) ..... <i>Hedyotis degeneri</i> (no common name) ..... <i>Hedyotis parvula</i> (no common name) ..... <i>Hibiscus brackenridgei</i> (ma'o hau hele) ..... <i>Lepidium arbuscula</i> ('anaunau) ..... <i>Lipochaeta tenuifolia</i> (nehe) ..... <i>Lobelia niihauensis</i> (no common name) ..... <i>Lobelia oahuensis</i> (no common name) ..... <i>Neraudia angulata</i> (no common name) ..... <i>Nototrichium humile</i> (kulu'i) ..... <i>Plantago princeps</i> (ale) ..... <i>Sanicula mariversa</i> (no common name) ..... <i>Schiedea hookeri</i> (no common name) ..... <i>Schiedea nuttallii</i> (no common name) ..... <i>Silene lanceolata</i> (no common name) ..... <i>Spermolepis hawaiiensis</i> (no common name) ..... <i>Tetramolopium filiforme</i> (no common name) ..... <i>Tetramolopium lepidotum</i> ssp. <i>lepidotum</i> (no common name). <i>Viola chamissoniana</i> ssp. <i>chamissoniana</i> ('olopu; amakani).	"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, Oahu (continued).	Bird: <i>Chasiempis sandwichensis ibidis</i> (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: <i>Chamaesyce rockii</i> ('akoko) ..... <i>Cyanea acuminata</i> (haha) ..... <i>Cyanea koolauensis</i> (haha) ..... <i>Cyanea longiflora</i> (haha) ..... <i>Cyanea st johnii</i> (haha) ..... <i>Cyrtandra subumbellata</i> (ha'iwale) ..... <i>Gardenia mannii</i> (nanu) ..... <i>Hesperomannia arborescens</i> (no common name) ... <i>Isodendron laurifolium</i> (aupaka) ..... <i>Lobelia gaudichaudii</i> ssp. <i>koolauensis</i> (no common name). <i>Lobelia oahuensis</i> (no common name) ..... <i>Phlegmariurus nutans</i> (wawae'iole) ..... <i>Phyllostegia hirsuta</i> (no common name) ..... <i>Pteris lidgatei</i> (no common name) ..... <i>Sanicula pupurea</i> (no common name) ..... <i>Tetraplasandra gymnocarpa</i> ('ohe'ohe) ..... <i>Viola oahuensis</i> (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).

U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPS—Continued

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Army's Schofield Barracks East Range, O'ahu (continued).	Bird: <i>Chasiempis sandwichensis ibidis</i> (O'ahu 'elepaio).	<p>"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).</p> <p>"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.</p>
Army's Schofield Barracks Military Reservation, O'ahu.	<p>Plants: <i>Abutilon sandwicense</i> (no common name) ....</p> <p><i>Alectryon macrococcus</i> (mahoe) .....</p> <p><i>Alsinidendron trinerve</i> (no common name) .....</p> <p><i>Cenchrus agriminooides</i> (kamanomano) .....</p> <p><i>Ctenitis squamigera</i> (pauoa) .....</p> <p><i>Cyanea acuminata</i> (haha) .....</p> <p><i>Cyanea grimesiana ssp. grimesiana</i> (haha) .....</p> <p><i>Cyanea grimesiana ssp. obatae</i> (haha) .....</p> <p><i>Cyanea superba</i> (haha) .....</p> <p><i>Delissea subcordata</i> (no common name) .....</p> <p><i>Diellia falcata</i> (no common name) .....</p> <p><i>Diplazium molokaiense</i> (no common name) .....</p> <p><i>Eragrostis fosbergii</i> (no common name) .....</p> <p><i>Flueggea neowawraea</i> (mehamehame) .....</p> <p><i>Gardenia mannii</i> (nanu) .....</p> <p><i>Isodendrion longifolium</i> (aupaka) .....</p> <p><i>Labordia cyrtandrae</i> (kamakahala) .....</p> <p><i>Lepidium arbuscula</i> ('anaunau) .....</p> <p><i>Lipochaeta lobata var. leptophylla</i> (nehe) .....</p> <p><i>Lipochaeta tenuifolid</i> (nehe) .....</p> <p><i>Lobelia niihauensis</i> (no common name) .....</p> <p><i>Lobelia oahuensis</i> (no common name) .....</p> <p><i>Neraudia angulata</i> (no common name) .....</p> <p><i>Nototrichium huinile</i> (kulu'i) .....</p> <p><i>Phyllostegia hirsuta</i> (no common name) .....</p> <p><i>Phyllostegia mollis</i> (no common name) .....</p> <p><i>Plantago princeps</i> (ale) .....</p> <p><i>Schiedea hookeri</i> (no common name) .....</p> <p><i>Schiedea nuttallii</i> (no common name) .....</p> <p><i>Solanum sandwicense</i> (popolo 'aiakeakua) .....</p> <p><i>Stenogyne kanehoana</i> (no common name) .....</p> <p><i>Tetramolopium lepidotum ssp. lepidotum</i> (no common name).</p> <p><i>Urera kaalae</i> (opuhe) .....</p> <p><i>Viola chamissoniana ssp. chamissoniana</i> ('olopu; pamakani).</p>	<p>"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).</p>

U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPs—Continued

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Army's Schofield Barracks Military Reservation, Oahu (continued).	Bird: <i>Chasiempis sandwichensis ibidis</i> (O'ahu'elepaio).	<p>"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).</p> <p>"[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.</p>
Naval Computer and Telecommunications Area Master Station Pacific Radio Transmitting Facility at Lualualei, Oahu.	Plant: <i>Marsilea villosa</i> ('ihi'ihii) .....	<p>"One [plant] species, <i>Marsilea villosa</i>, 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 Data base 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).</p>
Naval Magazine Pearl Harbor Lualualei Branch, O'ahu.	<p>Plants: <i>Abutilon sandwicense</i> (no common name) ....</p> <p><i>Alectryon macrococcus</i> (mahoe) .....</p> <p><i>Bonamia menziesii</i> (no common name) .....</p> <p><i>Chamaesyce kuwaleana</i> ('akoko) .....</p> <p><i>Diellia falcata</i> (no common name) .....</p> <p><i>Flueggea neowawraea</i> (mehamehame) .....</p> <p><i>Hedyotis parvula</i> (no common name) .....</p> <p><i>Lepidium arbuscula</i> ('anaunau) .....</p> <p><i>Lipochaeta lobata</i> (nehe) .....</p> <p><i>Lipochaeta tenuifolia</i> (nehe) .....</p> <p><i>Lobelia niihauensis</i> (no common name) .....</p> <p><i>Marsilea villosa</i> ('ihi'ihii) .....</p> <p><i>Melicope sanit. johnii</i> (alani) .....</p> <p><i>Neraudia angulata</i> (no common name) .....</p> <p><i>Nototrichium humile</i> (kulu'i) .....</p> <p><i>Phyllostegia hirsuta</i> (no common name) .....</p> <p><i>Plantago princeps</i> (ale) .....</p> <p><i>Sanicula mariversa</i> (no common name) .....</p> <p><i>Schiedea hookeri</i> (no common name) .....</p> <p><i>Tetramolopium filiforme</i> (no common name) .....</p> <p><i>Tetramolopium lepidotum</i> (no common name) .....</p> <p><i>Urera kaalae</i> (opuhe) .....</p> <p><i>Viola chamissoniana ssp. chamissoniana</i> ('olopu; pamakani).</p>	<p>"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).</p>

U.S. Fish and Wildlife Service's Findings Regarding Inadequacy of INRMPs—Continued

DOD Installation	Endangered and Threatened Species Habitat at Installation	FWS Findings
Naval Magazine Pearl Harbor Luailualei Branch, O'ahu.	Bird: <i>Chasiempis sandwichensis ibidis</i> (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 Luailualei 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, H'ahu.	Bird: <i>Chasiempis sandwichensis ibidis</i> (O'ahu 'elepaio).	"To date, no military installation on Oahu has completed a final INRMP that provides sufficient management and protection for the etepaio." 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001).
Army's Pohakuloa Training Area, Island of Hawaii.	Plants: <i>Asplenium fragile var. insulare</i> (no common name). <i>Hedyotis coriacea</i> (kio'ele) ..... <i>Neraudia ovata</i> (no common name) ..... <i>Fortutaca sclerocarpa</i> (po'e) ..... <i>Silene hawaiiensis</i> (no common name) ..... <i>Silene lanceolata</i> (no common name) ..... <i>Solanum incompletum</i> (popolo ku mai) ..... <i>Spermolepis hawaiiensis</i> (no common name) ..... <i>Tetramolopium arenarium</i> (no common name) ..... <i>Zanthoxylum hawaiiense</i> (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 cannot 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).

DOD HAS USED MISLEADING ANECDOTES TO JUSTIFY ITS PROPOSAL TO EXEMPT ITSELF FROM THE ESA'S CRITICAL HABITAT PROTECTIONS

The Department of Defense (DOD) is again pursuing exemptions from key environmental laws. A legislative package with these exemptions has been sent to Congress, which will soon be casting crucial votes. If this legislation is approved it will greatly reduce DOD's obligations under the Endangered Species Act (ESA), Marine Mammal Protection Act, Clean Air Act, Superfund, and Resource Conservation and Recovery Act.

The DOD is requesting these exemptions even though the General Accounting Office 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 adhering to environmental laws has significantly impeded training.

What justification has DOD offered sweeping exemptions from the ESA? It turns out that the only evidence by DOD has consisted of highly misleading anecdotes.

THE ESA'S CRITICAL HABITAT PROTECTIONS HAVE NOT SIGNIFICANTLY IMPEDED TRAINING

An analysis of DOD's ESA 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 successful negotiations, DOD frequently persuaded the U.S. Fish and Wildlife Service (FWS) to exclude DOD lands from critical habitat

designations. In the rare cases where critical habitat has been designated, DOD has never identified an obstacle to achieving readiness. DOD has never found it necessary to utilize the “national security” exemption procedure provided by the ESA.

*Camp Pendleton, California*

DOD ASSERTION: “At Camp Pendleton, proposed critical habitat under the Endangered Species Act would cover 57 percent of the base . . . .” (congressional Testimony of Raymond F. DuBois, Jr., Deputy Undersecretary of Defense, March 13, 2003.)

THE REST OF THE STORY: Such proposals were rejected 2 years ago by the FWS in its final rules, which excluded all but 875 acres of Camp Pendleton’s approximately 120,000 acres of training land from its final critical habitat designations. Camp Pendleton encompasses 125,118 acres, roughly 5,000 acres of which are leased for various non-military purposes, such as California’s San Onofre State Park and agricultural operations. FWS’s critical habitat designations have been focused almost entirely on these non-training lands.

The following list provides the number of acres originally proposed and actually designated for each of the five species with proposed critical habitat designations at Camp Pendleton. Some of these species share the same habitats, so acreage totals should not be combined to derive total acres designated as critical habitat.

*San Diego Fairy Shrimp Critical Habitat:*

12,829 acres were proposed but only 40 acres were designated. The entire 40 acres designated are within San Onofre State Park and are not used for training.

*Coastal California Gnatcatcher Critical Habitat:*

50,992 acres were proposed but only 3,773 acres were designated. None of the 3,773 acres designated are used for training; 2,960 acres are within San Onofre State Park and the remainder are leased for agricultural purposes.

*Tidewater Goby Critical Habitat:*

731 acres were proposed but 959 acres were designated. Less than 875 acres of designated lands are potential training lands; the remaining 84 acres are within San Onofre State Park. Camp Pendleton has the only remaining population of this endangered fish in the region.

*Riverside Fairy Shrimp Critical Habitat:*

5,567 acres were proposed but only 770, acres were designated. All of the 770 acres designated are in San Onofre State Park or otherwise in leased areas that, according to FWS, are “used minimally, if at all, by the Marines for training.” As a result of a building industry lawsuit, this designation has now been vacated and a more extensive, economic impact analysis is now being prepared.

*Arroyo Toad Critical Habitat:*

38,210 acres were proposed but only 2,680 acres were designated. According to FWS, all of these designated acres are either in San Onofre State Park or on agricultural leased lands that are “used minimally, if at all, by the Marines for training.” As a result of a building industry lawsuit, this designation has now been vacated and a more extensive economic impact analysis is being prepared. In summary, despite the presence of 18 threatened and endangered species on Camp Pendleton, less than 1 percent of the training lands on the base—not the reported 57 percent—is designated as critical habitat for any species.

DOD ASSERTION: “At Camp Pendleton, proposed critical habitat under the Endangered Species Act would cover 57 percent of the base, including all 17 miles of the beach that is critical to training operations. . . .” (congressional Testimony of Raymond F. DuBois, Jr., Deputy Undersecretary of Defense, March 13, 2003. Emphasis added.)

THE REST OF THE STORY: The biggest limitation on training is not critical habitat designation but the presence of Interstate 5, a railroad, 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 five-to 6-month nesting seasons of the endangered Western snowy plover and California least tern.

DOD essentially concedes that the training restrictions to protect the Western snowy plover and California least tern are not a significance to training. Camp Pendleton’s successful efforts to protect the 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.” The exemption from the ESA’s critical habi-

tat provisions proposed by DOD. would not even affect the restrictions related to the snowy plover and the least tern those restrictions are in place pursuant to the ESA's jeopardy and take. prohibitions. Neither species has designated critical habitat on Camp Pendleton.

DOD ASSERTION: The proposed amendment is narrowly tailored and will only apply to portions of Camp Pendleton and other military bases needed for training.

THE REST OF THE STORY: The amendment would apply to land owned by the military even if used for non-military purposes. In the case of Camp Pendleton, the amendment would apply to San Onofre State Park, which is leased to the State of California by the Marine Corps. San Onofre is the 10th most popular park in California and currently is home to several endangered and threatened species and their designated critical habitat. However, because the Park is "owned" by the Department, the amendment would preclude any designation of critical habitat on park property.

*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' five-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 as 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 atherback 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 lawmakers to oppose any proposals providing exemptions from the Endangered Species Act and other environmental laws!

For more information, contact Corry Westbrook, NWF Legislative Representative, at 202-797-6840, westbrooknwf.org <mailto:westbrooknwf.org>, or John Kostyack, NWF Senior Counsel, at 202 , 797-6879, kostyacknwf.org

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DOD HAS A LONG HISTORY OF WORKING SUCCESSFULLY WITH THE ESA

The Department of Defense (DOD) is again pursuing exemptions from key environmental laws. A legislative package with these exemptions has been sent to Congress, which will soon be casting crucial votes. If this legislation is approved it will greatly reduce DOD’s obligations under the Endangered Species Act (ESA), Marine Mammal Protection Act, Clean Air Act, Superfund, and Resource Conservation and Recovery Act.

Last year, the Administration requested exemptions from six environmental statutes, and Congress settled on an exemption from the Migratory Bird Treaty Act.

*DOD and ESA Success Stories*

DOD has argued, and intends to do so again, 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 sought 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 endan-

gered 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 lawmakers to oppose any proposals that exempt DOD from the ESA and other environmental laws!

For more information, contact Corry Westbrook, Legislative Representative, National Wildlife Federation, at 202-797-6840, westbrooknwf.org.

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RESPONSES OF JAMIE RAPPAPORT CLARK TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

*Question 1.* The DOD proposal substitutes the completion of an Integrated Natural Resources Management Plan under the Sikes Act for the designation of critical habitat under the Endangered Species Act. In addition, the DOD is stating that due to a recent U.S. District Court decision in Arizona, the change to current law is even more necessary. However, in your testimony, you disagree with the DOD interpretation of the Court’s decision. Could you elaborate on this for the committee?

Response. DOD testified before the Senate Armed Services Committee that the current FWS approach—reviewing INRMPs on a case-by-case basis for their adequacy as substitutes for critical habitat—is satisfactory, but that it needs an ESA exemption because continuation of this approach is jeopardized by the ruling in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003). This is inaccurate. The court ruling does not justify any concern about FWS’s ability to continue its case-by-case approach.

In *Center for Biological Diversity v. Norton*, FWS excluded San Carlos Apache tribal lands from a critical habitat designation pursuant to ESA §4(b)(2) on the basis that the tribal land management plan was adequate and that the benefits of exclusion outweighed the benefits of inclusion. The Federal district court upheld the exclusion as within FWS’s broad authority under ESA §4(b)(2). At the same time, the court held that lands could not legitimately be excluded from a critical habitat designation on the basis of the “special management” language in ESA §3(5).

Under the court’s reasoning, FWS continues to have the flexibility to exclude DOD lands from a critical habitat designation on the basis of a satisfactory INRMP and the benefits to military training that the exclusion would provide. The ruling simply clarifies that such exclusions must be carried out pursuant to ESA §4(b)(2) rather than ESA §3(5). Thus, DOD’s assertion that the *Center for Biological Diversity* ruling prevents it from working with FWS to secure exclusions of DOD lands from critical habitat designations is inaccurate.

*Question 2.* Do you believe that we should be substituting INRMPs for critical habitat designation? What does a critical habitat designation provide that an INRMP does not?

Response. Whether an INRMP should be substituted for critical habitat designation on a DOD installation very much depends on the specific facts at the installation in question. At some installations, INRMPs do not adequately conserve imperiled species; at other installations, INRMPs do a good job. ESA §4(b)(2) provides the mechanism for determining when a substitution may be appropriate. It states that FWS “may exclude any area from critical habitat if [it] determines that the *benefits*

*of such exclusion outweigh the benefits of specifying such area as part of critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*" (Emphasis added.)

In implementing ESA §4(b)(2) on DOD lands, FWS must evaluate the conservation benefits of relying on the INRMP as an alternative to critical habitat at the time a species is considered for critical habitat designation. In recent years, FWS has evaluated INRMPs by applying the 3-part test discussed in the next answer. This case-by-case approach provides an essential measure of protection for threatened and endangered species.

DOD's proposed approach—in which INRMPs are automatically substituted for critical habitat designations across-the-board—is unwise because it fails to acknowledge the wide disparity of conditions among DOD installations. Both FWS and DOD itself have recognized that some INRMPs have not been fully implemented as needed to conserve imperiled species. FWS statistics as of April 8, 2003, show that 87 (23 percent) of the 376 military installations that are required to prepare INRMPs have not yet obtained FWS review and approval of INRMPs. Roughly 30 percent of those installations do not even have an INRMP. DOD's Inspector General report on INRMPs dated October 1, 2002, states (at page 8) that DOD and FWS do not have a process for tracking implementation of INRMPs. In its annual report to Congress on INRMP implementation, DOD has cited "total dollars spent" as its sole measure of success. However, the DOD Inspector General finds (at page 9) that this report is inadequate because it does not reveal whether INRMP projects have been funded or implemented.

A critical habitat designation provides a number of benefits that an INRMP will not necessarily provide. For example, there is no guaranteed funding or enforcement mechanism to ensure that implementation of INRMPs takes place. In contrast, the ESA provides an enforcement mechanism to ensure that adverse modification of critical habitat is avoided. Moreover, INRMPs do not address off-base activities that degrade habitat values on the DOD installation. In contrast, the ESA requires that Federal agencies undertake a consultation with FWS and carry out conservation measures to address off-base activities if they degrade designated critical habitat on the installation.

*Question 3.* The DOD witness has stated that INRMPs are a superior form of habitat and species protection and that the Clinton Administration affirmed that, as well. Because you were part of the Clinton Administration during the development of INRMPs, could you please tell us if the DOD proposal encompasses what the previous Administration envisioned.

Response. The DOD proposal is radically different from what the previous Administration sought to accomplish with INRMPs. In the previous Administration, we recognized that certain INRMPs could be substituted for critical habitat designations only when measures were taken to conserve threatened and endangered species. We rejected substitutions of INRMPs for critical habitat designations in certain instances where the INRMP would not adequately conserve listed species. We employed a three-part test for evaluating the adequacy of these conservation measures: (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 strategies will be effective (i.e., provide for periodic monitoring, adaptive management, and revisions as necessary).

In contrast, the DOD proposal does not allow for FWS to reject substitution of INRMPs for critical habitat designations. It essentially mandates an across-the-board substitution of INRMPs for critical habitat designation regardless of the adequacy of the INRMPs' measures to conserve listed species. Thus, DOD's proposal would prevent designation of critical habitat even in cases where the INRMP completely fails to address the needs of listed species on a DOD installation.

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RESPONSES OF JAMIE RAPPAPORT CLARK TO ADDITIONAL QUESTIONS FROM SENATOR GRAHAM

*Question 1.* Why is it important to protect habitat on Department of Defense lands?

Response. DOD manages approximately 25 million acres of land on more than 425 major military installations. These lands, many of which are islands of green space amidst a sea of urbanization, are home to at least 300 federally listed species. Many species have already lost large portions of their original ranges due to habitat de-

struction and degradation. Without the refuge provided by these DOD installations, many species would slide rapidly toward extinction.

*Question 2.* How do the proposed exemptions impact private property landowners?

Response. The primary reason why species are listed under the ESA is habitat loss. For most species, the ESA's protection and recovery goals can be achieved only by taking regulatory and other measures to secure most of the remaining habitat. FWS has some flexibility to authorize habitat loss, but this flexibility is reduced every time that a species habitat base is further eroded. If Congress were to remove DOD's obligation to protect critical habitat as proposed by DOD, FWS would have less flexibility to authorize habitat-disturbing activities by private landowners. In other words, DOD's proposal would shift the burden of species protection from the public to the private sector.

*Question 3.* Based on your experience at the Fish and Wildlife Service, what is your impression of the impact of the fiscal year 2004 Budget Request reduction for environmental programs on the ability of the Department of Defense to reconcile encroachment and training problems.

Response. Adequate funding of environmental programs is essential to DOD's success in reconciling environmental compliance with encroachment and training. The Administration's proposed funding cuts, if accepted by Congress, would jeopardize DOD's ability to carry out a wide array of conservation activities, including acquiring buffer lands between training areas and civilian populations, cleaning up contaminated areas, developing and implementing INRMPs, and devising and implementing "work-arounds" to protect endangered species from the impacts of specific training exercises.

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STATEMENT OF INGRID LINDEMANN, COUNCILMEMBER, AURORA, COLORADO, ON  
BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mr. Chairman, members of the committee. I am Ingrid Lindemann, Councilmember from Aurora, Colorado and Advisory Council representative to the National League of Cities' Energy, Environment and Natural Resources Committee. I have also spent most of my adult life as a military spouse. I am here today to testify on behalf of NLC and the 18,000 cities and towns across America we represent on the Defense Department's proposed changes to environmental laws. The concerns of the nation's cities and towns are most especially relevant to the proposed exemptions from the Resource Conservation and Recovery Act (RCRA), Superfund (CERCLA) and the Clean Air Act.

I want to make clear at the outset, that the municipal elected officials who comprise the National League of Cities support effective testing and training of the men and women who serve in our Armed Forces to ensure they are the best-equipped and best-prepared in the world. But we do not believe it is necessary or appropriate to accomplish—this goal at the expense of our non-military citizens.

NLC's National Municipal Policy calls on Federal facilities to comply with Federal and state environment, health and safety laws and to be subject to the enforcement provisions of such statutes. The ramifications of a blanket exemption for military facilities and activities from such laws will be serious and untenable at the local government level. First, we believe there is significant potential for adverse public health effects in cities with respect to air, drinking water, and management of hazardous waste. Second, there is substantial potential for serious negative economic effects on local communities,

*Potential for Significant Negative Health Effects*

The Clean Air Act imposes health-based air quality standards. Creating a fiction—as we believe the DoD proposal does—that an area is in compliance with the National Ambient Air Quality Standards when it is not—is unacceptable. While there may be no legal requirement on either the state or local government to seek offsets to the air pollution caused by military activities, the community will have an air quality problem which, in reality, has health consequences for the people who live there. We are also concerned that a fictitious attainment designation, may even exacerbate the air quality problem by allowing non-military facilities and/or activities to use the military's pollution as cover for relaxing or ignoring what might otherwise be required of them.

Exemptions from the Resource Conservation and Recovery Act are equally problematic, in part because of their impact on the appropriate disposal and/or clean-up of hazardous waste, but equally importantly, because of the impact, or potential impact, on sources of drinking water which in many parts of the country are already diminishing and/or scarce. It is estimated that there are 16 million acres of trans-

ferred ranges around the country, which are potentially contaminated by unexploded ordnance. Contamination, and subsequent closure, of sources of drinking water by military ordnance constituents such as perchlorate, RDX and TNT have already occurred in Maryland and Massachusetts—under current law. What will happen in these municipalities if the Department of Defense is exempted from the relevant environmental statutes? While finding alternative sources of drinking water in the water-rich eastern

United States may be eminently feasible, those of us in the water-limited west have major legitimate concerns about our ability to identify alternative safe and affordable sources of drinking water. We can ill-afford the kind of contamination we have seen at the Aberdeen (Maryland) Proving Ground or Massachusetts Military Reservation. We believe the citizens in municipalities affected by such contamination should not have their health compromised because of an exempted defense installation, nor should they be required to bear the burden of cleanup costs or the costs of finding alternative sources of drinking water.

#### *Negative Economic Impacts on Local Communities*

Exemption of military facilities from hazardous waste clean-up standards would be a major impediment to redevelopment of closed facilities. Of the 165 Federal facilities currently on the National Priorities List, it is our understanding that 129 are or were military facilities. Many of these facilities are on prime real estate, in or near cities or towns. Among these are sites that are decommissioned or in the process of being decommissioned. Until they are restored, they are unusable and an economic drain on the communities in which they are located. If Congress opts to exempt these facilities from CERCLA remediation requirements, they will never be viable opportunities for reuse and economic growth in the communities that hosted them since Federal law prohibits deeding the property before the site is environmentally clean or before effective environmental remediation is in place. Hazardous materials remaining on the properties will continue to pose a threat to the health and safety of near-by citizens and preclude any effective opportunity for redevelopment and economic sustainability in the surrounding community.

The closure of a military facility has a huge economic impact in the area and without the ability to redevelop and reuse the site, it can leave the host community in a permanent economic morass.

Exclusion of military facilities and contractors from the requirements of RCRA and CERCLA will negate the positive economic impact of hosting a military installation. No community would welcome even the short-term economic benefit of having a military facility knowing that the military has carte blanche to contaminate and pollute and no responsibility—now, or in the future for mitigating, remediating or even controlling such activities.

We also believe the amendments proposed by the Department of Defense to the Federal environmental statutes in question are unnecessary. As Assistant Secretary of Defense Paul Wolfowitz indicated in a March 7, 2003 memorandum to the Secretaries of the Army, Navy and Air Force, “In the vast majority of cases, we have demonstrated that we are able both to comply with environmental requirements and to conduct necessary military training and testing.” Exemptions are broadly available—and have been granted—when the president determines such exemptions to be in the “paramount interest of the United States.”

Furthermore, in recent testimony before this committee, EPA Administrator Christine Todd Whitman said she was unaware of any military training program that was held up because of environmental statutes.

To the best of our knowledge, the Defense Department has provided no examples where environmental requirements have impeded its activities. There appears to be no demonstrable problem with environmental laws adversely affecting military training and testing activities and if there is, the statutes provide adequate and prompt relief. If the issue is that the process for obtaining exemptions is cumbersome—and there appears to be no evidence that this is the case either—then the appropriate response would be to amend or adjust the process. We concur with the March 19 statement of the Attorneys General before the House Armed Service Committee that 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.

For municipalities the critical issues are protection of public health and the economic impact of contaminated properties in our communities. While supportive of our military, the need for adequate and appropriate training and testing, and the legitimate concerns about national security, we do not believe unfettered authority

to pollute our nation's cities and adversely affect the health of our citizens is the appropriate way to accomplish these objectives.

Thank you for the opportunity to present the views of the National League of Cities.

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RESPONSES OF INGRID LINDEMANN TO ADDITIONAL QUESTIONS FROM SENATOR  
INHOFE

*Question 1.* For the record and the audience, though I know Senator Allard knows some of this answer, would you mind going into your experience regarding environmental policy?

Response. I have served on the National League of Cities' (NLC) Energy, Environment and Natural Resources Steering Committee (EENR) since 1990. I was vice-chair of the committee in 1995 and chaired the committee in 1996. I am now the NLC Advisory Council representative to the EENR committee. The mission of this committee is to develop NLC's National Municipal Policy regarding issues of energy, the national environment, and the use of our natural resources. NLC's National Municipal Policy forms the basis of NLC's efforts to influence congressional legislation. Through the years members of this committee (myself included) have been instrumental in the passage and/or reauthorization of the Clean Air Act, Endangered Species Act, Marine Mammal Protection Act, Solid Waste Disposal Act, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), Clean Water Act, Safe Drinking Water Act, etc. In order to accomplish this, several times each year our committee met with, and was briefed by, representatives of the affected Federal agency(ies) to ensure our thorough understanding of the issues and ramifications of proposed actions.

On the home front, I served on the Regional Air Quality Council (RAQC), which shepherded the Denver metropolitan area through the elimination of our "brown cloud" and redesignation of the area from non-attainment of the National Ambient Air Quality Standards (NAAQS) to attainment. Many other environmental issues have required my attention and therefore necessitated my delving into existing environmental legislation. I regularly deal with issues surrounding two closed military installations (Lowry AFB and Fitzsimmons Army Hospital), a landfill with Superfund designation, and a former Air Force bombing range with remaining munitions (some even affecting our drinking water supply). In addition, the siting of new drinking water reservoirs, cleaning streets—whether through sweeping and creating PM<sub>10</sub> particles or the runoff of melting snow—and many other municipal tasks require a thorough knowledge and understanding of environmental policy. In addition, I actively participated in the Aspen Institute Series on the Environment where senior government officials and corporate CEOs attempted to find methods of preserving the environment without bankrupting the Nation.

In short, Senator, I believe I am well qualified to testify before this committee on this issue and its potential impact on the citizens of the United States.

*Question 2.* I want to assure you, Ms. Lindemann, that as a former mayor of Tulsa, I certainly have the interests of the cities in mind. Sometimes, it can be out of the regular routine for those involved in city government to interact with Federal agencies.

How much time have you personally spent analyzing the actual legislative language and its relationship to other environmental laws?

Response. As you can see in my answer to the previous question, I have spent considerable time over the last 13 years dealing with Federal legislation, some of it assisted by my staff, but most of it on my own or in discussion with other municipal officials. Moreover, in recent weeks I have spent many hours analyzing the proposed exemptions and assessing their impact on the environmental quality of life in communities adjacent to military installations. It is on that cumulative effort that my remarks are based.

*Question 3.* How much time have you personally spent talking to the Department of Interior, the Environmental Protection Agency, or the Department of Defense on these issues?

Response. My personal interaction with the Department of the Interior has been minimal but many hours have been spent interacting with representatives of the Environmental Protection Agency (EPA) and the Department of Defense (DOD). Through my participation in the Aspen Institute Series on the Environment I was at the table with EPA representatives from the national and regional levels. My community and I have expended considerable time and money to interact with DOD on various issues including environmental remediation of formerly used defense sites (FUDS). Moreover, as the spouse of a military member for more than a quarter

of a century, I recognize the importance of training on the efficiency of our military and the safety of our military personnel. With that in mind, consider that I bring a perspective and belief that with little additional effort, military training can be accomplished without sacrificing the environment in which we all live.

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RESPONSES OF INGRID LINDEMANN TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

*Question.* The military has made a point to say that relief from our toxic waste laws would apply only to waste on military sites. Yet we know that this waste has a history of migrating to civilian areas, or of getting buried and appearing later in children's playgrounds as recently happened in the D.C. area. Do you believe that so-called onsite waste would prove a health threat offsite? And are you concerned about the health of military personnel who live on those military sites? Please explain.

*Response.* Senator, my husband served our nation for more than 27 years. We raised three children on and near Air Force installations. The last base we lived on was Lowry Air Force Base in Colorado (now closed) which is currently attempting to clean a Tri-Chloroethylene plume which originates on the base and has migrated under the homes in neighborhoods north of the base. Of course I am concerned about the health of those persons living and working on the installations and in the surrounding areas. Recently asbestos containing materials (ACM) was found buried in an area of Lowry which had been a trailer park for military personnel—how many of their children may have been exposed to that asbestos because, at that time, the military was not concerned about such things? I fully recognize that the Federal Government will clean these sites, but I also recognize that these sites are part of our communities and that pollution—whether it be in the air, the water, or the land—does not respect political boundaries.

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STATEMENT OF BONNER COHEN, PH.D., SENIOR FELLOW, LEXINGTON INSTITUTE

Good morning. 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, Virginia. I want to thank Chairman Inhofe and the other members of this committee for the opportunity to address a subject bearing directly on our nation's security. As a senior member of the Senate Armed Services Committee, and as chairman of this committee, Chairman Inhofe is uniquely qualified to pass judgment on the issue before us today.

And that issue is a deadly serious one. In recent years, a host of environmental statutes designed to do such things as protect endangered species and safeguard marine mammals has 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 Department of Defense has come to Capitol Hill with a package of requests, because it has 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 two areas where, through the application of common sense, we can safeguard national security and provide for environmental stewardship.

*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. In 2001, 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 quiet diesel submarines launched by rogue states, 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.

*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.

As General John M. Keane, Vice Chief of Staff, United States Army, has testified before Congress, the armed forces of this country are facing a “train wreck” in military readiness unless the Department of Defense is granted the relief it has requested. As written, the Endangered Species Act and other environmental statutes are an open invitation to never-ending waves of lawsuits by activists groups more interested in promoting their agenda than in saving lives.

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.

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STATEMENT OF EDWIN F. LOWRY, DIRECTOR, CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL

I am Edwin F. Lowry, Director of the California Department of Toxic Substances Control. My Department’s charge is to protect public health and the environment in California from the adverse effects associated with exposure to hazardous wastes. In accomplishing this mission, we regulate hazardous waste management and oversee hazardous site cleanups throughout the State of California.

I appreciate the opportunity to offer my views concerning amendments proposed by the Department of Defense (DoD) to the Resource Conservation and Recovery Act (RCRA) and to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) with regard to the Readiness and Range Preservation Initiative. This statement represents the views of the Department of Toxic Substances Control related to our statutory responsibility to oversee the generation, transportation, treatment, storage, disposal, and cleanup of toxic substances in California.

Before I begin to outline our concerns with the proposed amending language for RCRA and CERCLA, I wish to make three contextual points:



1. I want to assure you of our strong and continuing support for ensuring the readiness of the United States armed forces. Further, we fully appreciate that combat training and equipment testing is essential to making our armed forces the strongest military force on the globe.

2. California has more experience with environmental issues at military facilities than does any other State. My Department has been and continues to be involved with environmental cleanup at 29 closed or closing installations, more than twice the number as the next most affected State. We work with 107 other open military installations both on matters having to do with hazardous waste management and with site cleanup. Further, California is home to 1,090 formerly used defense sites, at least one quarter of which will require cleanup to restore the land to productive use. It is clear, then, that we bring to the discussion a great deal of practical experience with respect to environmental issues at military properties.

3. I am proud to report to you that my Department has established what I consider to be an exemplary record of collaboration with the DoD and with each of the military services. This productive and cooperative relationship manifests itself most obviously in the many situations in which we have exercised considerable flexibility in our regulatory oversight to accommodate the operational needs of specific installations. I have provided you with a handful of examples.

Having reviewed the proposed Readiness and Range Preservation Initiative language, my concerns focus on five areas, each of which I will expand upon briefly in a moment:

1. As a practical matter, this proposal could allow the military to designate any location as an operational range.

2. The proposal, as worded, could exempt non-military entities, such as defense contractors, from having to comply with current environmental regulations.

3. The proposal could limit our ability to adequately regulate or cleanup closed training ranges.

4. The proposal could limit our ability to restore formerly used defense sites to productive use.

5. The proposal could allow significant unnecessary contamination of California's valuable groundwater resources.

To repeat a previous comment, while I strongly believe that providing adequate training and testing opportunities is imperative, I believe with equal conviction that doing so does not have to be at the expense of public health and natural resources in California.

National security involves many elements, including protecting our environment for generations to come and restoring the land and water that has been adversely affected by the release of hazardous substances. In my estimation, this proposal sacrifices the security of California's and the nation's environment.

Let me now further describe the five concerns I noted.

First, the proposed amendments could jeopardize public health and safety by allowing DoD to avoid important environmental safeguards even when there is no immediate effect on military readiness. This is because the military could designate an location as an operational range, whether or not it had any plans to use it for testing or training. While Section 2019(a)(1) of the proposal would modify the RCRA definition of "solid waste" to include "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that are deposited on an "operational range" and are removed for treatment or disposal, it would exempt all wastes that are left on an "operational range," whether or not the range is still actually used for munitions testing or training.

The proposal also would severely curtail California's ability to regulate the practice of using open burning or open detonations to "treat," i.e., destroy explosives and unexploded ordnance. Given the known environmental impacts of this practice, which includes the release of metal fragments and toxic propellant residues, and the yet unknown environmental impacts, we find the proposal to be very troubling.

Second, the proposal is written broadly enough that it could apply anywhere that explosives or other covered materials are handled, even non-military facilities. Section 2019(a)(2) would exclude from the definition of "solid waste" any "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that are used in military training, research and development or testing, or deposited on an operational range." In other words, not only would it apply to military ranges, but it could also exempt defense contractors from the requirements of RCRA. Defense contractors handle a number of hazardous substances that are constituents of munitions or their delivery systems, such as perchlorate.

Perchlorate contamination from defense contractor facilities is a pervasive problem in groundwater in California and also in the Colorado River. As we see more

and more water purveyors forced to shut down their municipal wells, I can say with confidence that perchlorate contamination threatens the drinking water supplies of millions of Californians. Obviously, we can ill-afford to exempt from regulatory oversight defense contractors which might exacerbate this troubling situation.

Third, contrary to representations by DoD, the proposal has not been drafted to limit its effect to operational ranges. The language at the end of Section 2019(a)(2) states: "Nothing in subparagraphs (2)(A), (B), (C), (D), or (E) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that have been deposited on an operational range once the range ceases to be an operational range." As written, this language would only apply to Section 2019(a)(2) and not to Section 2019(a)(1). Thus, this language would not affect materials left on an operational range, and these materials would still be excluded from the definition of "solid waste" by Section 2019(a)(1), even after the range ceased to be operational. The proposal would also narrow our authority to use CERCLA to ensure cleanups at military bases. Section 2019(b) would exclude from the CERCLA definition of "release" any "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof" that are deposited and expected to remain on an "operational range." As stated above, the military could designate any location as an "operational range," including an inactive range that had not been used for that purpose for decades and might not ever again be used as a range. Moreover, the proposal would also limit our cleanup authority at closed ranges, because materials deposited on a range when it was open could still be excluded from the definition of "release" even after it was closed. For obvious reasons associated with potential future land uses, this element of the proposal is completely at odds with the protection of public health and the environment.

Fourth, the circuitous exclusion described above could limit California's authority to ensure cleanups at formerly used defense sites. Currently, there are 1,090 such sites in California, of which at least 200 are likely to be contaminated with explosives and ordnance. These sites will pose obvious risks to public safety if they are not restored to safe conditions.

Fifth, the proposal would exclude from the definition of "solid waste" and the definition of "release" constituents of munitions (including perchlorate) in groundwater below a range as long as they had not migrated off range. Once contaminated groundwater migrates off range it can be far more difficult to contain, posing much higher risks and costs. As I noted previously, California's pervasive perchlorate contamination is causing the shutdown of public drinking water wells and other serious impacts at present. We object to any proposal that would allow a known problem to be uncontrolled until such time as an artificial boundary is crossed.

I have two additional, non-technical concerns. First, the section-by-section analysis prepared by DoD for this proposal claims, as the basis for this initiative, that:

In recent years . . . novel interpretations and extensions of environmental laws and regulations, along with such factors as population growth and economic development, have significantly restricted the military's access to and use of military lands and test and training ranges, and limited its ability to engage in live-fire testing and training.

As the Director of California's Department of Toxic Substances Control, do not agree with this conclusion. Far from significantly restricting the use of test and training ranges, I am not aware of any instances in California in which any hazardous waste management or cleanup requirement has impeded, limited or infringed on the military's ability to conduct missioncritical operations, including training or testing activities. In fact, nationally, the Washington Post recently quoted EPA Administrator Christine Todd Whitman as saying, "I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."

Contrary to the DoD statement, my Department has consistently worked with DoD and the military services to resolve peripheral issues resulting from range use. For example, open burning of excess propellants and open detonation of munitions left over from live fire exercises may be managed under federally delegated State hazardous waste management authorization in order to ensure that releases are properly controlled. These kinds of activities have no effect on the conduct of the range firing itself. Nevertheless, we have provided base managers with the necessary flexibility to carry out these activities. We routinely approve variances to allow military facilities to accumulate wastes beyond the normal time limits, and we issue emergency permits to allow the open burning of munitions that cannot safely be removed to the permitted treatment area.

For site cleanups on operating military bases, we have worked with base managers to position monitoring devices and schedule the collection of environmental samples in a manner that will avoid any conflict with ongoing military base oper-

ations. These are just a few of the many ways that we have worked cooperatively with the military to resolve issues arising from the implementation of environmental laws. The attached document provides other examples. If the very premise of DoD's proposal is that California or any State has adversely affected the military's ability to maintain the highest state of readiness, I assert that the premise is flawed and, therefore, the proposal as a whole is unnecessary. In fact, our substantial record of cooperation with the military demonstrates that there is no need for the proposed RCRA and CERCLA amendments.

Finally, assuming the worst about other States' hazardous waste management and cleanup practices, to which I am hard-pressed to give an example, even if there were a situation in which RCRA or CERCLA interfered with essential live-fire testing or training, these statutes still provide extraordinary Presidential authority to suspend their application so that essential training activity could be continued. I am not suggesting use of this authority should become routine, nor that it be used lightly. Like all extraordinary powers, they must be used with respect and circumspection. But the fact remains that the authority is available. Congress has already provided remedies for extraordinary circumstances, and if they are insufficient, a much stronger justification needs to be put forth.

To conclude, I am concerned that DoD's proposal could lead to an open-ended inclusion of environmentally damaging activities under the umbrella of "readiness." As a result, not only might legitimate training and testing activities lead to avoidable releases of contamination, but other marginally related activities might also cause avoidable releases of hazardous substances. The military, as responsible party, and State and Federal regulators would then have to revisit these releases in the future as much larger and more expensive problems requiring cleanup.

I want to close by reiterating my strong desire to assist DoD and the military services in more practical ways. The Department of Toxic Substances Control will continue to work with the military to make effective use of their active range resources, and to improve the likelihood that those ranges will continue to be sustainable into the indefinite future. We believe 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 all Californians, and we will work actively with their representatives to find ways to make range operations safe and workable. At the same time, we are obligated to protect California from environmental injury from all sources. I firmly believe that national security includes environmental protection and that there are better approaches to ensure that military security and environmental security complement, rather than counteract one another.

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STATEMENT OF COLONEL ADDISON D. DAVIS, IV, GARRISON COMMANDER, FORT BRAGG, NORTH CAROLINA

Mr. Chairman and distinguished members of the committee, thank you for the opportunity to present this testimony regarding environmental encroachment issues at Fort Bragg, North Carolina.

Fort Bragg is situated in the Sandhills of North Carolina, 10 miles northwest of downtown Fayetteville in the south central portion of the State. Fort Bragg occupies 161,000 acres (or 251 square miles), stretching into six counties. Included within this area are Camp Mackall (an auxiliary training complex), 7 major drop zones, 4 impact areas, 84 ranges, 16 live fire maneuver areas, and 2 Army airfields. Approximately 75 percent of our acreage includes ranges, deployment and training areas, with the remaining 25 percent dedicated to those areas where people live, work and play. Fort Bragg is a major city, providing approximately 28 million square feet of office buildings, 11 shopping centers, 28 restaurants, 19 miles of railroad lines, a major medical center, 9 schools, 11 churches, 183 recreational facilities, and approximately 5,000 homes housing over 12,000 family members. We are a significant economic presence in North Carolina, contributing an estimated \$4.8 billion annually to local communities. In the next 30 years, the North Carolina Office of State Planning projects the population in the six counties surrounding Fort Bragg will grow by an additional 269,000 people, much of it within one mile of the Fort Bragg boundary.

By population, Fort Bragg is the largest Army installation in the world, providing a home to almost 10 percent of the Army's active component forces. Like many thriving organizations and communities, the success of Fort Bragg is directly linked to the quality, dedication, and professionalism of its people. Approximately 45,000 military and 10,000 civilian personnel work at Fort Bragg.

“Home of the Airborne and Special Operations Forces,” Fort Bragg’s strategic response forces serve every Unified Command Combatant Commander and are postured for no-notice worldwide deployment by air, sea, and land; to fight on arrival and win. We maintain the Army’s premier power projection platform, capable of launching the Army’s first strike capability in 18 hours or less. In addition to the rapid deployment force capability, Fort Bragg maintains the capability to assemble and deploy a Joint Task Force Headquarters, deploy special operations forces, and receive, train, and deploy crucial mobilizing Reserve Component forces. Units located on Fort Bragg include the XVIII Airborne Corps, Joint Special Operations Command, and the U.S. Army Special Operations Command.

Neighboring Pope Air Force Base’s operational capabilities provide the necessary airfield facilities to simultaneously airlift divisional and non-divisional forces, Special Operations forces, and Joint Task Force assets during deployments. Simmons Army Airfield gives Fort Bragg the additional capability to prepare, upload, and deploy crucial Army aviation elements in support of our mission.

#### ENCROACHMENTS ON TRAINING

I would like to emphasize that we are trained, equipped, and ready to execute our wartime contingency missions. We demonstrate our readiness on a daily basis in worldwide deployments. The key to this is tough realistic training. Troops perform in combat to the standard they have been trained in peacetime. In order to ensure this, training must replicate as close as possible the conditions (rigors, stress, and demands) of combat. This means training conducted at night, under live fire conditions, as part of a combined arms team.

Within our 161,000 acres, approximately 112,000 acres are used as maneuver training land; 35,000 acres are devoted to live fire and impact areas; and 14,000 acres are allocated to garrison cantonment or restricted areas (buildings, roads, motor pools, etc.). In addition to providing training to units assigned to Fort Bragg, we also provide training to the Marine Corps, Air Force, Army Reserve, National Guard, and Reserve Officer Training Corps units. During fiscal year 2002, Fort Bragg conducted 1,075,776 man-days of training, which included 8853 Live Fire exercises (the keystone of our training philosophy), in addition to 1505 Airborne operations and 157,676 aviation training missions.

Fort Bragg recognizes its responsibility to protect the environment and its natural resources. This is not a duty based solely on legal compulsion; this duty is very practical. Environmental stewardship is a necessity to preserve our land, which is, in turn, essential to our ability to train soldiers. This is the only training land we have, and we must protect it; however, there has to be balance in the way we go about environmental management. Fort Bragg’s goal is to strike a reasonable balance between mission accomplishment and conservation. This has been, and continues to be, a very difficult challenge. Nevertheless, Fort Bragg has taken a leadership role in the North Carolina Sandhills Region in conserving endangered species and other natural resources. This is evidenced through our Sustainable Fort Bragg and Sustainable Sandhills initiatives, as well as our partnership with the Nature Conservancy and other non-governmental organizations under the umbrella of the Private Lands Initiative to abate encroachment.

#### LESSONS LEARNED

In the 1990’s there were several instances where major training areas had to be closed because of directives from environmental regulators. With the assistance of the US Fish and Wildlife Service, Fort Bragg has turned that situation around and can now train on the vast majority of its training lands, albeit with some limitations.

In 1990, in response to a U.S. Fish and Wildlife Service jeopardy biological opinion, Fort Bragg limited training activities in Red-cockaded woodpecker cluster sites to transient foot traffic, restricted all vehicular traffic to pre-existing trails and roads, and prohibited troops from constructing obstacles, cutting pine trees, employing smoke, or digging in cluster sites or endangered species habitat. Additionally, the opinion restricted all training activities within endangered plant sites as well as within one hundred feet of wetlands.

These training restrictions degraded realistic training. Maneuver was restricted, and units were artificially channeled to existing trails and roads. Engineer units’ earth-moving, barrier and denial and smoke operations training were constrained.

In October 1991, to ensure continued compliance with a 1985 biological opinion, Fort Bragg’s Directorate of Plans and Training closed Ranges 63 (a \$20-million multi-purpose firing range; upgraded in 1984–85) and 67 (a \$1-million .50 caliber machinegun qualification range; upgraded in 1987). Based on similar concerns, the

Directorate of Plans and Training also closed Range 78 (a \$2 million aviation gunnery range) and 50 percent of Range 79 (a \$1.2-million anti-armor range). Ten months later, the U.S. Fish and Wildlife Service issued the Coleman biological opinion, authorizing resumption of restricted operations on Ranges 63 and 67, and unrestricted operations on Ranges 78 and 79. The restrictions imposed on Ranges 63 and 67, resulting in the loss of use of two moving targets, remain in effect today. During the 10-month training hiatus, units had to travel to other installations to conduct their normal training at a cost of approximately \$632,000.

In May 1992, as a result of further consultations with the U.S. Fish and Wildlife Service, the Directorate of Plans and Training closed nine of 16 lanes on Range 56 (a \$1.1-million M-16 rifle qualification range) for 24 months, and postponed the \$2.3-million modernization of Ranges 33 and 43 (both M-16 rifle qualification ranges) for 24 months.

In January 1995, in response to the MacRidge jeopardy opinion, the Directorate of Plans and Training closed four of 10 lanes on Range 30 (a \$1.1-million complex and Fort Bragg's only automated machinegun range). The range remained closed until the construction of backstops to protect three cluster sites at an estimated cost of \$25,000.

At this point, we had about 13,000 acres of training area severely restricted by limitations caused by protecting critical habitat of the Red-cockaded woodpecker. It was clear that we needed to work to reverse this trend, and, with the assistance of the U.S. Fish and Wildlife Service, we made progress. In 1996, the U.S. Fish and Wildlife Service published revised management guidelines for Red-cockaded woodpecker management. Under these guidelines, Fort Bragg was allowed to reduce many of the training restrictions. By 2002, we had 5,364 acres where training was significantly limited, and this was area for all five of our endangered species. Although current training restrictions are at a lower level, they continue to impact realism.

There is a significant cost for ecosystem management, including rare and endangered species monitoring. Costs for these programs include salaries, contracts, research, and partnering; however, habitat restoration activities such as prescribed burning and pine thinning also benefit training needs as well as the ecosystem. Salaries for endangered species personnel ranged from \$529,561 in 1995 to \$601,655 in 2002. Contracts ranged from \$495,004 in 1995 to \$440,228 in 2002. An additional \$170,508 was spent between 1995 and 2002 for supplies and equipment.

While reducing the size of the area where training is constrained by environmental limitations, we have succeeded in growing our Red-cockaded woodpecker population from 270 clusters in 1996 to 376 clusters in 2002. Our ultimate goal is to manage 401 active clusters that would provide the necessary habitat for 350 potential breeding pairs.

However, it must be remembered that reductions in training restrictions are contingent upon the success of the species moving toward recovery. Should the species start to fail, on or off Federal lands, the previous training restrictions or more strenuous restrictions could be imposed.

In addition to managing our five currently listed federally endangered species, Fort Bragg remains the host for an additional 23 species that are candidates for possible future listing under the Endangered Species Act. The listing of one or a number of these candidate species could have a significant impact on our ability to train to standard.

We currently meet our training goals without any significant closures of training areas because of endangered species concerns. We have thousands of dollars and hundreds, if not thousands, of man-hours working with the U.S. Fish and Wildlife Service to reach our current balance between training realism and endangered species protection. Any additional limitations, such as those that would result from application of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA) to our impact areas, or a limitation caused by the need to protect the habitat of one or more new endangered species, would impact our ability to achieve balance.

Our concern over the impact of any increase in environmental constraints on training caused us to seek new approaches to maintain the balance between being the Army's leader for training as well as its leader for environmental stewardship. We seized the concept of regional land use planning and the Private Lands Initiative. We recognized that success would only come from active participation from the State and local governments, as well as that of the private land owners. To that end, Fort Bragg works closely with the surrounding communities, leaders and State government toward compatible land use and conservation; however, these are often resource intensive activities that the installation is neither funded nor staffed to provide.

## THE WAY AHEAD

The Department of Defense is seeking to develop regional partnerships that encourage shared responsibilities for protected species management and recovery to reduce future restrictions on military training. Fort Bragg is a major participant in the recently developed regional North Carolina Sandhills Conservation Partnership, as is the Army Environmental Center, U.S. Fish and Wildlife Service, the Nature Conservancy, State Sandhills Gamelands, and the Sandhills Ecological Institute research organization. The challenge is to conserve the longleaf pine ecosystem and individual species within and meet Red-cockaded woodpecker recovery goals while ensuring Fort Bragg can continue to effectively train troops.

To deal with the issue of urban encroachment, Fort Bragg initiated a Joint Land Use Study (JLUS) in 1988. Bragg was the first Army installation to do a JLUS. It was also the first time that an Army and Air Force installation conducted a joint study. The purpose of the study was to accommodate the growth and development of the region without compromising the military missions of Bragg and Pope. Over time, the JLUS perspective on encroachment has broadened to include the impact of endangered species management on training, as well as other environmental-related regulatory constraints.

The Joint Land Use Study mobilized Fort Bragg to aggressively purchase key parcels contiguous to the installation to deal with urban encroachment. Using the JLUS as our support, we began a program to buy lands that created training constraints or might cause us to limit training if they were used in a manner inconsistent with our nearby training. Thanks to strong congressional support, Fort Bragg was able to purchase the following key land parcels:

1991 .....	Longleaf Partners Tract .....	366 acres	\$ 285,000
1994 .....	Williams Tract .....	884 acres	850,000
1995 .....	Green Tract .....	124 acres	130,000
1995 .....	McLean/Thompson .....	100 acres	1,046,530
1997 .....	Overhills .....	10,580 acres	29,400,000
	TOTAL .....	12,054 acres	\$31,711,530

With the purchase of the Longleaf Partners tract in 1991, Fort Bragg now owns all of the Clear Zone on the southwest end of Mackall Army Airfield. About 75 percent of the Accident Potential Zone 1 is protected due to the Longleaf purchase, existing Camp Mackall acreage, or the State-owned Sandhills Game Lands. (Camp Mackall is a sub-installation of Fort Bragg.)

In 1994, Fort Bragg purchased the Williams tract. This purchase provided 884 acres of buffer land on the rapidly developing northeast part of Camp Mackall. This part of Moore County is starting to develop into upscale golf communities and horse farms.

In 1995, Fort Bragg acquired a small tract of land through condemnation known as the Green tract at the end of Rhine-Luzon Drop Zone. The USAF would not certify the drop zone for jumps from the C-141 (a jet aircraft) because the first jumper had to exit the door over this tract of privately owned land. The purchase assured us of the full use of this drop zone by the more modern aircraft then being used by our paratroopers. Fortunately, the land was undeveloped and Congress was supportive of our request to acquire.

In October 1995, Fort Bragg purchased the McLean-Thompson tract. With this purchase, we bought all of Accident Potential Zone 2 and most of the noise contours that extended off post. An effort by the owner to change the zoning to allow up to six homes per acre to be built in the approach zone to the runway triggered the effort to purchase. Multiple attempts to modify the residential density at the zoning commission and before the City Council were unsuccessful. Consequently, the necessary actions were taken to purchase the land and ensure the viability of the airfield.

In January 1997, with the purchase of the Rockefeller or Overhills tract, Fort Bragg obtained some of the land that falls in Accident Potential Zone 2 for Pope Air Force Base, as well as land that falls under Pope noise contours. This 10,580-acre tract will help serve as a major buffer against urban encroachment. It already serves as a noise abatement flight track corridor for Pope Air Force Base. A noise abatement flight track corridor involves routing arrival and departure patterns over

the least sensitive land use areas, such as open space corridors, instead of over housing.

In the fall of 2001, Bragg and Pope began a major update of the earlier Joint Land Use Study. The update is being performed under the auspices of the Fort Bragg/Pope Air Force Base Regional Land Use Advisory Commission (RLUAC). The RLUAC is a State-chartered regional body whose voting members are local elected officials, land planning professionals, State planning officials, and local and State officials with an interest in economic development. Army, Air Force and DoD personnel participate in the activities of the RLUAC, but as non-voting ex officio members.

The RLUAC is currently in the process of reviewing the draft report containing recommendations for the region. One of the remarkable benefits of the study is the excellent quality Geographic Information System (GIS) mapping that has already been delivered. With the sophisticated GIS mapping of the region, it is possible to see exactly where the encroachment problem areas are, see exactly which parcels are affected by noise and aircraft safety/accident issues, and enable the development of concrete strategies for dealing with the encroachment. Through intelligent use of the data that will be captured by the JLUS Report, Fort Bragg hopes to avoid future encroachment on training activities by adjacent inconsistent land uses, such as those that increase the environmental compliance burden or limit full military use of training areas because of development along the installation's boundaries.

Fort Bragg did not always take a regional perspective to training limitations and, as a result, have lost the use of some training areas. For example, as the direct result of urban development which has been permitted to expand in Hoke County near Fort Bragg's Sainte Mere Eglise Drop Zone, the Army has been forced to drastically curtail its training activities in the area. This was an example where Fort Bragg did not foresee the effects and did not purchase key land as a buffer. Prior to the creation of the residential neighborhoods, Ste Mere Eglise was used for heavy equipment drops from C-130 cargo planes. A very large subdivision of modular homes was built so close to the boundary and adjacent drop zone that the "Home of the Airborne" has essentially had to give up a large part of the airborne training that used to be conducted on this drop zone. Heavy equipment drops must now take place at more remote locations on the installation.

For well over a decade, efforts have been made to raise the public's awareness of endangered plant and animal species located within the Sandhills region of North Carolina which are being threatened by urban development pressures. The initial protection efforts focused on a single animal species—the Red-cockaded woodpecker; however, a more holistic approach has emerged over time which seeks to identify and protect North Carolina's endangered "Longleaf Pine" ecosystem as well.

Fort Bragg, as a Federal agency, bears a responsibility for recovering the listed endangered species and in preserving the ecosystem they require to survive. However, in 1994 Fort Bragg began a major effort which seeks to share the responsibility for management and protection with other regional stakeholders through the Private Lands Initiative. This effort, which led to the formation of the North Carolina Sandhills Conservation Partnership, has been successful in developing a coordinated approach to the issue.

As previously mentioned, the Sandhill's Partnership mission is to coordinate the development and implementation of conservation strategies for the Red-cockaded woodpecker, other native biota, longleaf pine and other ecosystems in the Sandhills of North Carolina compatible with the land use objectives of the partners. Working with its partners, the Sandhills Partnership has been successful in acquiring, through acquisition or conservation easement, approximately 5,800 acres of key land for conservation purposes in the areas surrounding Fort Bragg in a program called the Private Lands Initiative. However, unlike Fort Bragg's land acquisitions of the 1990's, acquisitions by the Sandhills Partnership do not remove the land from the tax base. Again with the support of Congress, the following tracts have been acquired:

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Horse Creek .....	549 acres	\$ 1,875,000
Quewhiffle Creek .....	243 acres	436,608
Parsons .....	333 acres	750,000
Carvers Creek .....	1,172 acres	5,276,430
Calloway .....	2,400 acres	5,300,000
Breeden .....	100 acres	297,500

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Upchurch .....	980 acres	100,000
TOTAL .....	5,777 acres	\$14,035,538

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## CONCLUSION

Fort Bragg remains committed to its responsibility as an environmental steward. However, we are also committed to providing the most realistic training possible to our soldiers since only through tough realistic training can we assure their success and their safety. Although Fort Bragg continues to make progress and provide leadership, we believe that the listing of additional species or the implementation of new regulations or guidelines will significantly impact our ability to train.

Right now, Fort Bragg is at the wall. We can continue to provide realistic training; however, each day we are becoming more limited by the constraints imposed through incompatible adjacent land use practices that encroach on training and by other constraints caused by environmental compliance requirements.

We must act now to marshal the necessary resources to obtain requisite buffer zones designed to mitigate further incompatible development along the installation's boundaries. Further, we must continue to pursue the Private Lands initiative and work toward the preservation of the Sandhills ecosystem, which in turn supports military training, readiness, and ultimately preserves our national security.

Thank you, Mr. Chairman and distinguished members of the committee for allowing me to present this testimony.

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STATEMENT OF REAR ADMIRAL JONATHAN W. GREENERT, UNITED STATES NAVY,  
DEPUTY COMMANDER, UNITED STATES PACIFIC FLEET

*Introduction*

Chairman Inhofe, Senator Jeffords, and members of the committee, thank you for this opportunity to share my views regarding the growing negative effects of encroachment on military readiness and training of our American Sailors as they prepare for combat. I appreciate your attention to this vital and timely topic, which is of great importance to national security and the environment.

## THE U.S. PACIFIC FLEET

The mission of Commander, U.S. Pacific Fleet, is to support the U.S. Pacific Command's (USPACOM's) theater strategy, and to provide interoperable, trained and combat-ready naval forces to USPACOM and other U.S. unified commanders. The U.S. Pacific Fleet area of responsibility (AOR) covers more than 50 percent of the earth's surface, encompassing just over 100 million square miles. Each day, Pacific Fleet ships are at sea in the Arabian Gulf, and the Pacific, Indian, and Arctic Oceans. Our AOR extends from the west coast of the U.S. to India. The Pacific Fleet is made up of approximately 200 ships, 1,500 aircraft and 250,000 Sailors, Marines and Civilians. Together they keep the sea-lanes open, deter aggression, provide regional stability, and support humanitarian relief activities.

The high quality of training we provide to these Sailors is perhaps unseen, yet it is an essential element of their impressive level of combat readiness. Clearly, before this nation sends its most precious asset-its young men and women-into harms way, we must be uncompromising in our obligation to prepare them to fight, survive, and win. This demands the most realistic and comprehensive training we can provide.

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 our combat effectiveness. The ratio of enemy aircraft shot down by U.S. aircraft in Vietnam improved to 13-to-1 from less than 1-to-1 after the Navy established its Fighter Weapons School, popularly known as TOPGUN. More recent data shows aircrews that 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.

As we prepare for possible conflict today and look to the future, we should be concerned about the growing challenges in our ability to ensure our forces receive the necessary training with the weapon and sensor systems they will employ in combat. 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, 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 facilities and urban sprawl and constrained by State and Federal environmental laws and regulations and cumbersome permitting processes which negatively impact our ability to train.

#### NAVY'S ENVIRONMENTAL STEWARDSHIP

The Navy continues its commitment to good stewardship of the environment. Indeed, our culture reflects this, as the men and women manning our fleet were raised in a generation with a keen awareness of environmental issues. The Navy environmental budget request for fiscal year 2004 totals \$1.0 billion. This funding supports environmental compliance and conservation, pollution prevention, environmental research, the development of new technologies, and environmental cleanup at Active and Reserve bases. It is precisely as a result of this stewardship that military lands present favorable habitats for plants and wildlife, including many protected species. Ironically, our successful stewardship programs have helped increase the number of protected species on our ranges, which has resulted in less training capacity.

#### BALANCING MILITARY READINESS AND THE ENVIRONMENT

Sustaining military readiness today has become increasingly difficult because, over time, a number of factors, including urban sprawl, regulations, litigation, and our own accommodations to demands from courts, regulatory agencies and special interest groups have cumulatively diminished the Navy's ability to effectively train and test systems. Among the greatest threats to proper military training are laws that include ambiguous provisions and cumbersome process requirements that result in unintended negative consequences, which inhibit realistic, timely and comprehensive training. These laws, and the court decisions which have interpreted and expanded them, have resulted in Federal courts and regulatory agencies curtailing essential training despite the "best available science" supportive of the Navy's ability to train without harm to the environment. As a result, military readiness requirements and environmental protection are out of balance.

The Department of Defense's Readiness and Range Preservation Initiative (RRPI) proposes modest amendments to several environmental laws which will help restore the balance, meeting our national security needs and maintaining good stewardship of the environment. I ask for your help to address the challenges of most concern to the Navy in the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA).

#### MARINE MAMMAL PROTECTION ACT

Last year before the Senate Environment and Public Works Committee, the VCNO testified that the definition of the term "harassment" of marine mammals in the MMPA was a source of confusion because the definition is tied to vague and ambiguous terms such as "annoyance" and "potential to disturb." These terms arguably apply to even the slightest changes in marine mammal behavior and subject Navy training and testing at sea to the scrutiny and control of courts, regulatory agencies and special interests groups, even in the absence of evidence of adverse impacts on the marine mammals. The severity of the impact on Navy training and testing is strikingly more apparent now.

In November 2002, a Federal district judge in San Francisco presiding over a case brought by environmental groups alleging violation of the MMPA, National Environmental Policy Act (NEPA), and the Endangered Species Act issued a preliminary injunction that limits employment of the Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar system. This advanced system is designed to detect and track the growing number of quiet diesel submarines possessed by nations, which could threaten our vital national security. After highlighting flaws in regulatory agency implementation of the MMPA and ESA, the court issued a preliminary injunction restricting Navy's deployment of SURTASS LFA to a limited

area in the western Pacific. Navy now finds the deployment and operation of one of our most important national security assets constrained by a Federal court as a result of litigation brought by environmental groups specifically designed to deny Navy use of the system. Future testing and employment of SURTASS LFA could be adversely affected. The MMPA was originally enacted to protect whales from commercial exploitation and to prevent dolphins and other marine mammals from accidental death or injury during commercial fishing operations. Military readiness concerns were not raised at the time of its enactment.

As a result of the preliminary injunction issued by the Federal district court, our ability to test and train with LFA in the waters in which it will need to be employed could be compromised. SURTASS LFA is a critical part of anti-submarine warfare (ASW). The Chief of Naval Operations has stated that ASW is an essential and core capability of the Navy. Testing and training with LFA is essential to our future success. By way of comparison, during the cold war we made every effort to search, detect, and track Soviet nuclear submarines. In so doing, we learned their habits, went to school on their operational procedures, and worked hard to stay ahead of them. Today the nature of the submarine threat has changed. The challenge is different. Nevertheless, the preliminary injunction on testing and training with LFA issued by the Federal district court has limited our ability to do prepare for this challenge.

#### *The Current Quiet Diesel Submarine Threat*

As we enter the 21st century, the global submarine threat is becoming increasingly more diverse, regional, and challenging. The Russian Federation and the People's Republic of China have demonstrated that the submarine is a centerpiece of their respective navies. Published naval strategies and current operations of potential adversaries, including Iran and North Korea, have demonstrated the same strategic doctrine. Diesel submarines are deemed a cost-effective platform for the delivery of several types of weapons, including torpedoes, anti-ship cruise missiles, anti-ship mines and nuclear weapons. Potential adversary nations are investing heavily in submarine technology. In addition to the United States, Australia, Canada, and the United Kingdom, 41 other countries, including China, North Korea, and Iran, have modern quiet diesel submarines. Of the 380 submarines owned by these 41 countries, more than 300 are quiet diesel submarines.

Submarine quieting technology continues to proliferate, making submarines, operating in their quietest mode, difficult to detect even with the most capable passive sonar. The inability to detect a hostile submarine at long-range—in other words, at a sufficient “stand-off” distance before it can launch a missile or a torpedo—is a critical vulnerability that puts ships and our Sailors at risk. The threat of a quiet diesel submarine, in certain circumstances, could deny access to vital operational areas to U.S. or coalition naval forces. These threats to our Navy are a reality that the U.S. Pacific Fleet must consider as it carries out its responsibility to be able to conduct theater warfare in the Pacific Fleet.

Because of these threats, Navy identified the requirement to detect hostile submarines before they are close enough to use weapons. The most promising and best available technology to reliably meet this requirement is SURTASS LFA. This capability is particularly critical where there exists a concentration of forces at sea, as recently occurred in the Sea of Japan for exercise Foa Eagle, or as is planned in support of Operational and Contingency Plans in the vicinity of Northeast Asia. When it becomes necessary to place carrier battle groups or amphibious task forces in harms way, these valuable national assets, their supporting ships and their crews have to transit constricted bodies of water or straits. These limited areas provide the perfect opportunity for quiet diesel submarines to stalk our ships. A pre-positioned diesel submarine, conducting a quiet patrol on battery power, is extremely difficult to detect with passive sonar. The most promising system to counter this threat to Navy and national security is SURTASS LFA. To be effective, SURTASS LFA must be tested and evaluated for integration into the Fleet. It is not effective to be kept “on the shelf” in the event our forces need to use it in a real contingency.

#### *Comprehensive Environmental Analysis*

In meeting its obligations under current environmental laws for deploying SURTASS LFA, the Navy undertook a comprehensive and exhaustive environmental planning and associated scientific research effort. Working cooperatively with the National Marine Fisheries Service (NMFS)—the Federal regulatory agency tasked with protection and preservation of marine mammals—the Navy completed an Environmental Impact Statement (EIS), developed mitigation measures for protecting the environment, and obtained all required permits pursuant to the MMPA and ESA. The scientific research and EIS involved extensive participation by inde-

pendent scientists from a large number of laboratories and academic organizations. The Navy also undertook a wide-ranging effort to involve the public in the EIS process through an unprecedented program of public meetings and outreach for the Navy. Based on this effort, NMFS concluded that the planned SURTASS LFA operations would have negligible impacts on marine mammals.

*EIS Outreach*

- Notice of Intent published in 1996
- 3 public scoping meetings
- 8 public outreach meetings
- 3 public hearings on the Draft EIS (DEIS)
- DEIS distributed to Federal, State and local government agencies, citizen groups and organizations, and 17 public libraries
- Over 1,000 public comments received on DEIS
- Record of Decision signed in June 2002

Despite plaintiffs' failure to produce scientific evidence contradicting the independent scientific research that the LFA system could be operated with negligible harm to marine mammals, the court opined that Navy testing and training must be restricted. In reaching this conclusion, the court noted that under the definition of harassment, the phrase "potential to disturb" hinged on the word "potential" and extended to individual animals. The court stated, "In fact, by focusing on potential harassment, the statute appears to consider all the animals in a population to be harassed if there is the potential for the act to disturb the behavior patterns of the most sensitive individual in the group." (Emphasis added.) Interpreting the law this broadly could require authorization (permits) for harassment of potentially hundreds, if not thousands, of marine mammals based on the benign behavioral responses of one or two of the most sensitive animals.

Highlighting how difficult it would be to apply the MMPA to worldwide military readiness activities under such a broad interpretation of harassment, the court pointed out that a separate structural flaw in the MMPA limits permits for harassment to no more than a "small number" of marine mammals. Overturning the regulatory agency's decades-old interpretation of the MMPA, the court also said that the "small number" of animals affected cannot be defined in terms of whether there would be negligible impact on the species, but rather the court's opinion suggests that the term must be interpreted as an absolute number that must be determined to be "small." The court's opinion underscores shortcomings in the MMPA that apply to any worldwide military readiness activity, or any grouping of military training activities that might be submitted for an overall review of impact on the environment.

In addition to the decision to restrict deployment of the SURTASS LFA system, two other recent decisions by different Federal district courts have stopped scientific research due to concerns about acoustic impacts to marine mammals. In one case, the court enjoined seismic air gun research on geological fault lines conducted by the National Science Foundation off the coast of Mexico based on the court's concern that the research might be harming marine mammals in violation of the MMPA and NEPA. In another case, a court enjoined a Navy funded research project proposed by the Woods Hole Oceanographic Institute designed to study the effectiveness of a high frequency detection sonar in detecting migratory Grey Whales off the coast of California.

To address these issues, I ask for your consideration of the narrowly focused amendments to the MMPA proposed in the fiscal year 2004 National Defense Authorization Act, which has now been transmitted by the President to Congress.

ENDANGERED SPECIES ACT (ESA)

Negative impacts on military readiness activities have also resulted from the ESA. For example, the designation of land used for military training as critical habitat under the ESA can undermine the primary purpose for which these lands were set aside. Federal courts have held that critical habitat is intended not only as a safe haven for species survival, but also as a cradle for species recovery-even if the species is not currently present on the land. Under the ESA, Federal agencies are required to ensure that their activities do not adversely modify designated habitats. Hence designation as critical habitat can drastically limit land uses by placing inflexible restrictions on land that has been dedicated by our nation to maintain military readiness.

*Guam*

In some cases, the challenge of critical habitat designation has become an issue even when the relevant endangered species are not currently present. Under litiga-

tion pressure brought by environmental groups in Federal court, the Government is considering whether it is necessary under the law to designate part of Guam as critical habitat for the Mariana Crow, Mariana Kingfisher, and Mariana Fruit Bat. Guam is the headquarters of Commander, Naval Forces Marianas (COMNAVMAR). Guam is a critical, forward deployed facility providing essential logistical and training support to our Fleet. This critical habitat designation proposal covers roughly 7,500 of the 8,840 acres that comprise the Naval Ordnance Annex. This Navy land is currently used as magazines for forward deployed ordnance storage, jungle training areas (special operations forces), and low-level aviation training areas by all military services. Neither the crow nor kingfisher currently lives on the land. Designation would have substantial adverse consequences on the Navy, and should be avoidable, given that the Navy and the U.S. Fish and Wildlife Service in 1994 entered into a Cooperative Agreement to establish the Guam National Wildlife Refuge. This 22,426-acre Refuge was created in lieu of a previously proposed critical habitat designation involving the same three species and covers 12,237 acres of Navy lands.

The proposal under consideration calls into question what is meant by “special management consideration” under the ESA. Under the Act’s present wording, if no special management considerations are needed because of other conservation plans or measures then the designation of critical habitat should be unnecessary. Both the Guam National Wildlife Refuge and the COMNAVMAR Installation and Natural Resource Management Plan for the Ordnance Annex could provide such special management considerations for the species’ habitats. Accordingly, designation of critical habitat should not be necessary.

*Pacific Missile Range Facility (PMRF)*

In February 2003, USFWS designated 177 acres of PMRF, Hawaii as critical habitat for a species of grass. PMRF is a long, relatively narrow strip of land on Kauai, critical to the testing and evaluation of weapons, and capable of supporting a broad range of training and testing, including amphibious landings and Missile Defense Agency efforts to rapidly achieve an operational ballistic missile defense capability. This designation, like several of those proposed on Guam, was made because the habitat provides a suitable base for the recovery of the species. Thus, we not only facing the requirements of critical habitat per se, but the added responsibilities and restrictions associated with the reintroduction of the species on the facility

The Administration has proposed a legislative solution to this challenge that would rely on Integrated Natural Resource Management Plans (INRMPs) in lieu of designating critical habitat. DoD is already obligated to develop INRMPs 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 USFWS and State agencies, and these agencies recommend ways for DoD installations to better provide for species conservation and recovery. In addition, the legislative proposal does not remove the requirement for agency consultations under the Endangered Species Act.

There are examples that indicate that INRMPs are an effective tool for protecting the environment. For example, at Naval Amphibious Base Coronado, the Navy is spending about \$720,000 per year 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 from 187 to 825 (over 4 times as many in 9 years) and the number of Western Snowy Plover nests from 7 to 99 (nearly 14 times as many in 9 years). Similar good environmental stewardship by the Navy has been demonstrated at Vieques Island, Puerto Rico, where over 17,000 sea turtle eggs have been incubated and returned to the environment during a 10-year program. Vieques is only one part of a Navy-wide sea-turtle conservation effort in which we invest about \$1 million a year.

Adopting this recommended change would better balance training needs with the protection of threatened or endangered species. Changing the law to establish clearly that an approved INRMP provides sufficient species protection—rather than designating more and more military land as critical habitats—would help retain balance of Services’ training needs and endangered species protection.

SUMMARY

We face numerous challenges and adversaries that threaten our way of life. The President has directed us to “be ready” to face this challenge. To fulfill this directive, we must conduct comprehensive and realistic combat training—providing our Sailors with the experience and proficiency to carry out their missions. This requires appropriate use of our training ranges and operating areas and testing weapon systems. The Navy has demonstrated stewardship of our natural resources. We will continue to promote the health of lands entrusted to our care. We recognize our re-

sponsibility to the Nation in both of these areas and seek your assistance in balancing these two requirements.

I thank the committee for your continued strong support of our Navy and I ask for your consideration of the RRPI legislation. Passage of RRPI will help the Services sustain military readiness today in this time of war and in the future. 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 these goals.

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STATEMENT OF COLONEL FRANK C. DIGIOVANNI, CHIEF, RANGES, AIRFIELDS AND AIRSPACE OPERATIONS AND REQUIREMENTS DIVISION, AIR COMBAT COMMAND, UNITED STATES AIR FORCE

*Introduction*

Mr. Chairman, members of the committee, I greatly appreciate the opportunity to address you today on the Readiness and Range Preservation Initiative (RRPI) and the potential benefits it offers to our ability to train if it were enacted into law.

I'd like to start off by giving you a bit of my background. I have over 2000 hours in the B-52H, the F-15A and A-37B (close air support) aircraft and have almost 11 years of experience in the range community. I commanded the 99th Range Support Squadron at Nellis Air Force Base which is responsible for the management of the 3.1 million acre Nevada Test and Training Range. I also worked combat training range equipment requirements at the major command level and range policy at the HQ Air Force level. I currently serve as the Chief of Ranges, Airfields and Airspace Operations and Requirements Division at Headquarters Air Combat Command (ACC).

Our ranges and training airspace are critical national assets that allow the Air Combat Command to develop new tactics and train our air forces to be lethal and survivable. At a time when increased OPSTEMPO, aging equipment, and personnel challenges are threatening our readiness, it is critical we have to the maximum extent possible, unencumbered use of these valuable resources to prepare our warfighters for combat operations.

The loss or restricted use of ranges and operating areas forces us to find workarounds or to delay and reschedule needed training. These constraints inhibit our ability to test and train realistically and degrade our combat readiness. As pressures due to encroachment continue to grow, managing the operational and financial risks without compromising our mission will become increasingly difficult.

The Air Combat Command, in partnership with our counterparts in the other Services and the community, is committed to addressing these challenges. We are confident in our ability to provide the necessary balance between operational needs, environmental protection and the needs of the community and RRPI will help us do that.

The Readiness and Range Preservation Initiative will provide changes to specific environmental statutes needed by the military services and protect access to our training resources while continuing to protect the environmental resources of the lands entrusted to us by the public.

*Species and Habitat Protection*

The critical habitat clarification of RRPI is a very important component of this initiative. We have over 25 Federal listed threatened and endangered species and 64 species of concern on approximately 4.5 million acres of ACC rangeland. My Division is composed of an interdisciplinary team of aviators, PhD biologists, civil engineers, a public affairs officer, airspace managers and an environmental attorney all charged with the objective of maximizing the use of the ranges we manage while protecting the priceless natural and cultural resources that we have on our ranges.. Additionally, ACC ranges employ nearly 50 full-time natural and cultural resource management personnel throughout the command who assist the headquarters with this charter. We also consult extensively with U.S. Fish and Wildlife Service (FWS) and the State game and fish agencies on the development and implementation of our Integrated Natural Resource Management Plans. We ensure that these plans incorporate the best available science and credentialed expertise to minimize the impacts of our training operations.

Through the use of Integrated Natural Resource Management Plans, in partnership with the Department of Interior, we have had great success in managing the lands entrusted to us by the public. For example, the Nevada Test and Training Range supports the Bureau of Land Management's wild horse program on 390,000 acres of the NTTR. In the southern portion of the range we have fenced target areas

to ensure the endangered desert tortoise is not adversely affected by our operations. On the Barry M. Goldwater Range (BMGR) in Arizona, which is used extensively by ACC A-10 aircraft, Luke Air Force Base personnel assigned to the Air Education and Training Command track the movement of Sonoran pronghorn on the range. The DoD flies about 70,000 sorties yearly on the BMGR, and our biologists monitor the target areas for pronghorn movements. If any are spotted within a 2-hour period prior to bombing, the live 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 Pronghorn.

We are constantly upgrading and reconfiguring our ranges. For example, just prior to OPERATION ENDURING FREEDOM, both the NTTR and the Utah Test and Training Range (UTTR) constructed simulated cave targets similar to those in use by the Taliban and Al Qaeda. These realistic target simulations were used to provide our warfighters with critical, mission rehearsal training, thereby improving their lethality in combat. These skills proved very valuable during our attacks on Taliban and Al Qaeda strongholds.

We would not have had the required flexibility to conduct this essential training on NTTR and UTTR if we had designated critical habitat for the desert tortoise or other species in and around the simulated cave targets. This is because the time required to prepare biological assessments and complete consultations with FWS would not have been sufficient given the quickness in which wartime operations were commenced after 9/11.

Given these examples, superimposing critical habitat designation on top of our integrated management plans does not appear to provide added benefit to T&E species. However, a critical habitat designation, would have an adverse impact on our ability to quickly adapt and reconfigure the training environment to respond to evolving real world combat situations.

#### *Range Residue Removal*

As a range manager, the clarifications proposed in the RRPI regarding military munitions are also critically important to me. Most of the weapons we drop on our ranges are training munitions, either wholly inert or with a spotting charge. We maintain our ranges by periodically clearing off all these items, demilitarizing them, then sending the metals off to steel mills for recycling or to permitted landfills.

The RRPI will mirror the existing Military Munitions Rule by clarifying that munitions used for their intended purpose—dropped on an operational range—will not be considered a hazardous waste under the Resource Conservation and Recovery Act (RCRA) nor a release under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This would allow us to manage our ranges safely, responsibly and cost effectively while protecting the environment and the public.

ACC has instituted a command-wide, range residue removal regime in which we invest approximately \$4 M annually. This regime consists of a four-step process. First our explosive ordnance disposal experts and range operations and maintenance contractors clear the munitions and residue from the range target areas. Unexploded items are rendered safe and inert items are consolidated at a holding area on the range. Second, the munitions and residue are demilitarized by shearing or crushing with specialized equipment and then are certified free of energetic material. Next a “third party” explosive ordnance disposal expert validates the first certification. Fourth and finally, a government quality assurance inspector oversees the entire operation. In the five and half years since ACC instituted this program, we have had zero mishaps or environmental violations and have successfully removed an estimated 79 million pounds of residue from our ranges.

If these materials were considered hazardous waste then we would not be able to conduct these operations without cost-prohibitive permits and infrastructure. Securing these permits and building the infrastructure would not add any additional environmental protection.

RRPI does confirm that, in the rare instance, that any munitions or munitions constituents land or travel off-range, that they would be regulated under the Comprehensive Environmental Restoration, Compensation and Liability Act (CERCLA). If munitions-related-material moves off the range, it still must be addressed promptly under existing environmental laws. Moreover, if munitions cause an imminent and substantial endangerment on-range, EPA would retain authority to address it on range under CERCLA.

These clarifications would allow us to conduct realistic, cost effective training on our operational ranges yet continue to be good stewards of the lands entrusted to us.

*Summary*

Military training ranges are protected lands and vital national resources. Each range typically has small impact areas where munitions are employed, surrounded by large safety buffers where wildlife thrives in relatively undisturbed natural habitat. In fact, our ranges have been frequently described as "islands of biodiversity". By closely managing these areas, in cooperation with the FWS and the State game and fish agencies, we are ensuring that our training activities are compatible with the continued existence of these species.

*Conclusion*

The Readiness and Range Preservation Initiative will provide needed clarification to specific environmental statutes and protect access to our training resources while continuing to protect the environmental resources of the lands entrusted to us by the public.

As we speak, the men and women of Air Combat Command are risking their lives over southwest Asia as part of our nation's global war on terrorism. Coalition air forces successes are due in large measure to the high fidelity training enabled by access to these tremendous national resources. These assets ensure our national defense by allowing these brave airmen go into combat with the unique confidence that they are the finest trained Air Force in the world. This essential confidence exists because of a continuing commitment by the U.S. Government and the people of this country to provide the very best training resources to our warfighters. We believe that the provisions of the Readiness and Range Preservation Initiative will help us to continue to provide our airmen the training environment needed to ensure their lethality and survivability when prosecuting our national military objectives in the future.

Association of State and Territorial  
**ASTSWMO**  
 Solid Waste Management Officials

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April 16, 2002

The Honorable W.J. "Billy" Tauzin  
 Chairman  
 The Committee on Energy and  
 Commerce  
 2125 Rayburn House Office Building  
 Washington, DC 20515-6115

The Honorable John D. Dingell  
 Ranking Minority Member  
 The Committee on Energy and  
 Commerce  
 2322 Rayburn House Office Building  
 Washington, DC 20515-6115

Dear Messrs:

It is our understanding that there is an emerging Department of Defense proposal for modification of a number of basic environmental statutes 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 States and Territories of the U.S. Our members generally have engineering and science backgrounds, and implement both delegated federal waste 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 motivations of the drafters to seek greater flexibility for military training, we believe that it provides insufficient protections 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 damage 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 judgements 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 debate, 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 F. Giesfeldt  
ASTSWMO President



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April 30, 2002

The Honorable Bob Smpg  
 Chair  
 The Committee on Armed Services  
 2120 Rayburn House Office Building  
 Washington, DC 20515-6035

The Honorable Ike Skelton  
 Ranking Minority Member  
 The Committee on Armed Services  
 2120 Rayburn House Office Building  
 Washington, DC 20515-6035

Dear Messrs:

We are sure that you have received many communications concerning the proposed Department of Defense (DoD) legislative proposal that the Department has developed to obtain relief from problems of range encroachment affecting military readiness. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is a non-profit, non-partisan organization representing the interests of State waste and remedial managers. We want to ensure that we convey to you our views as regulators directly affected by DoD's suggested changes to the Resource Conservation and Recovery Act (RCRA), and to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

First, let us dispose of any misinterpretation of our strong support for military readiness, especially in this time of international crisis. Despite our criticism of the specific changes being proposed to RCRA and CERCLA, we want to find workable, necessary steps to assist DoD in finding ways to work through any barriers they believe they have encountered to effective training of our military forces. 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.

However, our examination of the April 19<sup>th</sup> package DoD has titled the "Readiness and Range Preservation Initiative" leads us to question 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 created a readiness shortfall 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. On its face, this is not a real, but a potential problem of arguable probability. The absence of any report of

empirical situations involving actual RCRA barriers seems to confirm our belief that RCRA regulation has not impeded military training on operational ranges in material ways.

- ▶ As a practical matter, the application of inhibiting 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. Consequently, we see no disparity between State authority and current practice that would require change.
- ▶ A more common State interest is the application of RCRA and State hazardous waste statutes to cleanup requirements for closed and closing ranges that will be reused for non-range activities, or even transfer to 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 definition 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 responsibility for cleanup. We concede the possibility that such concerns might prove unfounded as the proposed DoD language is examined and debated, but we believe it is essential that a full and public debate be allowed before serious consideration is given to such fundamental changes to these protective statutes. Our experience is that RCRA definitional issues are very complex, and require close examination by many expert stakeholders and regulators before an informed decision is possible.
- ▶ We also are disturbed by the absence of any DoD discussion of why these proposed legislative changes to RCRA and CERCLA are necessary, vis-a-vis the existing authorities which provide extraordinary Presidential authority to suspend application of these statutes for national interests, [i.e., RCRA Section 6001 or CERCLA Section 120(j)(1)]. Congress has already provided these remedies, and if they are insufficient, it seems a justification needs to be put forth.

Consequently, we strongly recommend that should some members of Congress believe that there is need to incorporate these DoD legislative proposals affecting the nation's primary waste statutes, Congress should first provide full opportunity for public debate by directing hearings in the committees of jurisdiction for those statutes. We are aware of a number of hearings on the general problem of range encroachment, but no hearings have been held on this specific legislative language. Hearings would allow the vital opportunity to examine the testimony of witnesses from all parties concerned, including statutory experts and State regulators, and allow Congress to make an informed judgment on these contentious proposals. We think the

Congressional traditions of fairness and transparency of lawmaking demand such an opportunity before these fundamental statutory changes are made.

In summary, we do not believe DoD has made a convincing case concerning the need for the proposed changes to RCRA and CERCLA, and if such changes are to be seriously considered, we believe Congress first owes the nation full, open legislative hearings allowing all parties to debate the merits and trade-offs inherent in such fundamental change. We trust that you will weigh our recommendations as you reach your decisions on these matters, and we appreciate your consideration of our views.

Sincerely,

  
Mark F. Giesfeldt  
ASTSWMO President

cc: Rep. W.J. "Billy" Tauzin-LA  
Rep. John D. Dingell-NY  
Rep. Don Young-AK  
Rep. James L. Oberstar-MN  
Rep. Paul E. Gillmor-OH  
Rep. Frank Pallone, Jr.-NJ  
Rep. John J. Duncan-TN  
Rep. Peter A. DeFazio-OR

STAPPA/ALAPCO

March 12, 2003.

The Honorable DUNCAN HUNTER, *Chairman,*  
*Armed Services Committee,*  
*U.S. House of Representatives,*  
*2120 Rayburn House Office Building,*  
*Washington, DC 20515.*

The Honorable IKE SKELTON, *Ranking Member,*  
*Armed Services Committee,*  
*U.S. House of Representatives,*  
*2120 Rayburn House Office Building,*  
*Washington, DC 20515.*

DEAR CONGRESSMEN HUNTER AND SKELTON: 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 of State and local air pollution control officials in 54 States and territories and more than 165 major metropolitan areas across the country, we 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 upcoming debate over the "National Defense Authorization Act for Fiscal Year 2004."

As part of your committee's deliberations over this bill, amendments to various environmental and public health statutes will be considered. We understand that there will be a hearing on such proposed amendments in your committee tomorrow. These amendments, which were based on recommendations by DOD, would provide broad statutory exemptions for purposes of military readiness, including sweeping exemptions from the CAA. Our associations opposed these CAA exemptions when they were proposed last year and we are writing again now to oppose them just as forcefully. We are pleased that Congress rejected adoption of the CAA exemptions last year and we urge you to do so again this year.

STAPPA and ALAPCO believe that the proposed CAA exemptions are unwarranted and will impede local, State and Federal efforts to attain and maintain health-based National Ambient Air Quality Standards (NAAQS) and deliver healthful air to our citizens. Such exemptions would also interfere with our efforts to protect air quality in national parks and other important ecosystems. Section 2018 of the bill exempts air pollution caused by military readiness activities from State and Federal implementation plans designed to meet the health-based NAAQS. For non-attainment areas, the exemption would last for 3 years, while for attainment and unclassifiable areas, the exemption appears to be permanent.

These exemptions would allow military readiness activities, alone among air pollution activities that our members regulate, to cause or contribute to violations of health-based NAAQS, increase the frequency or severity of such violations or delay timely attainment of the standards or interim milestones. Further, the bill's response to these sweeping exemptions is to allow EPA to approve areas as being in attainment with the ozone, carbon monoxide and PM<sub>10</sub> air quality standards—even when those areas in fact are not in attainment with those standards—if the area would be in attainment but for air pollution from military readiness activities.

We believe these exemptions and the bill's response are unjustified and would improperly compromise the CAA's mission and the responsibilities of State and local officials to protect public health and safeguard air quality. We oppose any approach that would undermine the integrity of health-based air quality standards by designating air quality to be healthy when it is not. Moreover, this approach would impose inequitable burdens upon the industries we regulate, as well as on the public. State and local air pollution control officials will still feel the responsibility to deliver truly healthful air to the public we serve and, therefore, we will have no choice but to call upon other sectors in order to obtain the emission reductions we can no longer secure from military facilities.

In addition, STAPPA and ALAPCO believe that such exemptions are unnecessary, in that the CAA already provides DOD ample flexibility to carry out its duties. 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, additionally, permit DOD to con-

duct 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 either of us or STAPPA/ALAPCO Executive Director S. William Becker at (202) 624-7864.

Sincerely,

LLOYD L. EAGAN,  
*STAPPA President.*

ELLEN GARVEY,  
*ALAPCO President.*

