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SENATE ARMED SERVICES
COMMITTEE

STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT
OF THE
SENATE ARMED SERVICES COMMITTEE
ON
ENVIRONMENTAL SUSTAINMENT
MARCH 13, 2003

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INTRODUCTION

Mr. Chairman 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 prior to sending American Sailors into combat. I appreciate your attention to this vital and timely topic, which is of great importance to national security and the environment.

READINESS

I am pleased to report today that the readiness of the Navy is excellent, as evidenced by the large percentage of our fleet that is forward deployed in support of the Global War on Terrorism and defending our vital interests elsewhere in the world. Indeed, 208 of our 305 ships--representing fully 68% of our force--are underway, including 7 aircraft carrier battle groups, 10 amphibious ready groups, and numerous other combat and supporting units, totaling over 76,000 Sailors. Most of these units are preparing for possible combat operations in Iraq.

The high quality of training we provide to these Sailors is largely unseen and often taken for granted, 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 harm's way, we must be uncompromising in our obligation to prepare them to fight, survive, and win. This, in turn, 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 who receive realistic training in the delivery of precision-guided munitions have twice the hit-to-miss ratio as those who do not receive such training.

Similar training demands also exist at sea. New ultra-quiet diesel-electric submarines armed with deadly torpedoes and cruise missiles are proliferating widely. New technologies such as these could significantly threaten our fleet as we deploy around the world to assure access for joint forces, project power from the sea, and maintain open sea-lanes for trade. To successfully defend against such threats, our Sailors must train realistically with the latest technology, including next-generation passive and active sonars.

We rely on full use of our ranges, facilities, and advanced technology to ensure our forces have a decisive advantage in conflict. As we prepare for possible conflict today and look to the future, I am increasingly 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 flexibility, and drives up costs.

Encroachment issues have increased significantly over the past three decades. Training areas that were originally located in isolated areas are today surrounded by recreational facilities, urban and suburban 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

Meanwhile, the Navy continues its commitment to good stewardship of the environment. Indeed, our culture reflects this, as the men and women manning our fleet grew up in a generation with a keen awareness of environmental issues. The Navy environmental budget request for FY-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 that stewardship, as opposed to commercial exploitation of private land--particularly along the nation's coasts--that military lands present favorable habitats for plants and wildlife, including many protected species. Ironically, our own successful stewardship programs have helped increase the number of protected species on our ranges, which has resulted in less training flexibility.

Navy Environmental Stewardship

- San Clemente Island, CA: Navy spends \$2.5 million per year on habitat preservation and a captive breeding program that increased the number of endangered Loggerhead Shrike twelve fold.
- Navy spent \$400 million to develop, install and maintain plastic waste processors on all surface ships to avoid discharging plastics overboard.
- American Bird Conservancy recently hailed DoD and Navy's participation in the Partners in Flight initiative, praising its efforts to "defend the stepping stones of bird migration."
- Navy is spending \$7M annually pursuing various multi-year marine mammal research projects that include efforts to detect, classify, and monitor behaviors, habitat, and migration routes of marine mammal populations using underwater sound propagation.

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 and weapons systems testing, notwithstanding 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 I 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 ESA issued a court order that strictly 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 what the court viewed as flaws in regulatory agency implementation of the MMPA and ESA, and despite the Navy’s unprecedented efforts to comply with NEPA, the court issued a preliminary injunction restricting Navy’s deployment of SURTASS LFA to a small area in the western Pacific. As a result of the inherent structural flaws in the laws themselves as applied to world-wide military readiness activities, the 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 that is specifically designed to deny the Navy use of the system. Future testing and employment of SURTASS LFA (and potentially other Navy training and testing programs) are in jeopardy because 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 and did not address military readiness concerns.

The Navy has immediate need for SURTASS LFA. The Chief of Naval Operations has stated that Anti-Submarine Warfare (ASW) is essential to sea control and maritime dominance. Many nations are capable of employing submarines to deny access or significantly delay execution of

joint and coalition operations in support of our vital interests. The submarine threat today is real and in some ways has become more challenging than during the Cold War. Of the approximately 500 non-U.S. submarines in the world, almost half that number are operated by non-allied nations. Of greatest concern are the new ultra-quiet diesel-electric submarines armed with deadly torpedoes and cruise missiles being produced or acquired by the People's Republic of China, Iran, and North Korea.

These diesel submarines are very difficult to detect outside the range at which they can launch attacks against U.S. and allied ships using passive sonar systems. Active systems like SURTASS LFA, when used in conjunction with other anti-submarine sensor and weapons systems, are necessary to detect, locate and destroy or avoid hostile submarines before they close within range of our forces. To ensure our Sailors are properly prepared to counter this growing submarine threat, we must make certain they train with the best systems available.

In meeting its obligations under current environmental laws for deploying SURTASS LFA, the Navy undertook the most comprehensive and exhaustive environmental planning and associated scientific research effort ever conducted to support a major seagoing combat system. 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 independent 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 monumental effort, NMFS concluded that the planned SURTASS LFA operations would have negligible impacts on marine mammals.

Despite this extraordinary effort in terms of time, money and resources to comply with existing environmental laws, Navy now finds itself with a Federal court order defining the limits of operation of a key system needed to address a clear, present and growing national security threat. Notably, there is no evidence of any negative impact on marine mammals in the one area in which we are currently operating.

SURTASS LFA Scientific Research Effort

- Evaluated affects of Low Frequency sound on marine species
- Marine mammal research involved world-renowned experts and representatives from Cornell University, University of Washington, University of California Santa Cruz, Hubbs Sea World Research Institute, Marine Acoustics, Inc., National Marine Fisheries Service, Marine Mammal Commission, Harvard Medical School, Bodega Marine Laboratory, Woods Hole Oceanographic Institution, Scripps Institution of Oceanography, Raytheon, Office of Naval Research, Naval Facilities Engineering Service Center
- Scientific Research Project alone, which involved 3 phases over 2 years, cost **\$10 Million**
- Scientific effort concluded that LFA could be operated safely.*

While recognizing the national security need for SURTASS LFA, the court nevertheless felt constrained by the broad language of a law which was not drafted with application to military readiness activities in mind. Notwithstanding the plaintiffs' failure to produce scientific evidence contradicting the independent scientific research sponsored by the Navy in coordination with numerous outside experts that the system could be operated with negligible harm to marine mammals, the court opined that Navy 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. Quoting from the opinion, the judge said, "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 would 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.

<p style="text-align: center;">EIS Outreach</p> <ul style="list-style-type: none">-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
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Highlighting how difficult it would be to apply the MMPA to world-wide 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 is an absolute number that must be determined to be "small." The court's far-reaching opinion underscores shortcomings in the MMPA which apply to any world-wide 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 may 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 (similar to a commercial fish finder) in detecting migrating Grey Whales off the coast of California. The court's order stopped research on the development of a promising mitigation measure to avoid harming marine mammals from acoustic sources.

To address these issues, I ask for your consideration of the narrowly focused amendments to the MMPA proposed in the FY04 National Defense Authorization Act, which has now been

transmitted by the President to Congress. Our proposal to clarify the definition of “harassment” and allow authorization of activities under the MMPA which would have a negligible impact on a stock or species follows recommendations of the National Research Council of the National Academy of Sciences, and would reinstate regulatory policies adopted prior to or during the Clinton Administration. Our proposal to include a national security exception, similar to that in the Endangered Species Act, is directly responsive to numerous comments we received from environmental organizations commenting on national security exemptions in environmental laws.

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 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.

For example, in 1996, when forty percent of the Chocolate Mountain Aerial Gunnery Range was designated as critical habitat, Navy SEAL training was negatively impacted. Before designation, Navy SEALs conducted realistic live-fire defense and attack training with multiple avenues of approach. Today, Navy SEALs training at this important range must restrict firing weapons to a narrow sector away from the critical habitat, undermining training realism. The ability to react to hostile forces coming from any direction is essential to a combat-effective SEAL and the range cannot provide that training under the critical habitat restrictions.

Due to environmental restrictions and encroachment from other sources (e.g., urban sprawl, state and Federal-designated recreation areas and access limitations) at Camp Pendleton, California where the Navy and Marine Corps jointly train, only 1500 meters of the 17 miles of beach is available to practice amphibious landings and movement from the beach using the full range of Marine Corps combat vehicles. Rehearsal of standard line abreast (side-by-side) formations of landing craft--to prevent the enemy from being able to concentrate fire on a specific beach location--has been dropped to mitigate potential disruption to birds and their nests on the beach. Even within this 1500-meter beach, all military vehicles are restricted to designated roads, and digging and earth moving is constrained to very limited areas.

Similar ESA-based restrictions have led to significant curtailment of Navy training at other important locations, such as the Naval Amphibious Base at Coronado, California, which has been home to Navy frogmen and SEALs since their inception in World War II. All of their basic training and many necessary skills (from diving to hydrographic reconnaissance) are taught on its beaches and in the bays surrounding the base. A substantial amount of the SEAL training conducted at this base has had to be relocated as a result of requirements to mark and avoid ESA-protected bird nests on the beach that have flourished under dedicated Navy stewardship. At

Tinian in the Marianas Islands in the Pacific, ESA-based restrictions to protect sea turtles and bird nesting areas resulted in a decision this year to cancel use of air cushion landing craft during a major fleet exercise, although this is the best heavy lift capability the Navy has to support Marine landings.

In some cases, the challenge of critical habitat designation has become an issue even when the relevant endangered species are not currently present. Under litigation pressure brought by environmental groups in Federal court, the U.S. Fish and Wildlife Service (USFWS) has proposed part of Guam as critical habitat for the Marianas Crow, Marianas Kingfisher, and Marianas Fruit Bat. The areas under consideration for designation are 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. None of the animals for which the habitat would be designated currently live on the land. Just last month USFWS designated critical habitat for a species of grass at the Pacific Missile Range Facility (PMRF) in Hawaii. PMRF is a long, 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 those proposed on Guam, establishes critical habitat for species which do not even exist there. While the Guam and Hawaii critical habitat designations are noteworthy current examples, the real challenge is that special interest groups will use litigation to force designation of more and more military land as critical habitat even as other training alternatives become more scarce due to commercial development and urban growth.

The Administration has proposed a legislative solution to this challenge which would specify that Integrated Natural Resource Management Plans (INRMPs) be used in lieu of designating critical habitat. DoD is already obligated under the Sikes Act 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.

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 ten-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 the RRPI would better balance training needs with the protection of threatened or endangered species. Changing the law to clearly establish that an approved INRMP plan provides sufficient species protection -- rather than designating more and more military land as critical

habitats -- would retain flexibility for the Services in places where training needs and endangered species protection must coexist.

LEGISLATIVE PROPOSALS

I would like to call your attention to several other important legislative proposals which would, if enacted, enable the Navy to meet both its legal obligations to provide ready forces under Title 10 and to conserve environmental resources.

The Readiness & Range Preservation Initiative is a top Department of Defense and Navy priority. It would provide legislative relief for military readiness activities under various environmental statutes without compromising environmental protection. Each of these provisions would provide a significant benefit to readiness at a negligible cost to the environment.

- Modifications to MMPA which would clarify the MMPA's definition of "harassment" as a biologically significant response and authorize permits under the MMPA when there is a negligible impact on the stock of marine mammals.
- Modifications to ESA so that an approved INRMP for management of all natural resources now required under the Sikes Act precludes designation of critical habitat on military lands.
- Clarifying and confirming the longstanding regulatory policy of EPA and the states that firing of munitions on an operational range does not constitute a "release" under the Superfund statute or the creation of solid waste under the Resource Conservation and Recovery Act (RCRA)—a commonsense policy now being challenged in court. If the challenges are successful, such an interpretation could inhibit or even preclude live-fire training on our existing operational ranges.
- Provide modest additional flexibility under the Clean Air Act to the activities and the states in accommodating new military readiness activities like beddown of new weapons systems.

SUMMARY

We face an enemy today which threatens 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 -- arming our Sailors and other servicemen and women with experience necessary to safeguard their lives and our national interests. This requires full use of our ranges, operating areas, and weapon systems. The Navy has demonstrated its able stewardship of our natural resources, and we will continue to promote the health of lands entrusted to our care. We recognize our responsibility 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.