

TESTIMONY BEFORE THE
SUBCOMMITTEE ON READINESS AND
MANAGEMENT SUPPORT, SENATE
ARMED SERVICES COMMITTEE

HEARING ON THE READINESS AND
RANGE PRESERVATION INITIATIVE

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Good morning, Chairman Ensign, Senator Akaka and Members of the Subcommittee. 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 potentially 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 FY 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 one 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 two 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 eight 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% 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 FY04 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 conservation 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.