

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

BEFORE THE
SENATE ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON MILITARY READINESS

April 1, 2003

**NOT FOR PUBLICATION
UNTIL RELEASED
BY THE COMMITTEE ON
ARMED SERVICES**

**TESTIMONY OF BENEDICT S. COHEN, DEPUTY GENERAL COUNSEL
(ENVIRONMENT AND INSTALLATIONS),
U.S. DEPARTMENT OF DEFENSE
BEFORE THE SENATE ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON MILITARY READINESS**

**RANGE ENCROACHMENT
APRIL 1, 2003**

INTRODUCTION

Mr. Chairman and distinguished members of this Subcommittee, 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% 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.¹ No element of this allegation is accurate.

¹ 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

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.

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, 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”).

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 USC 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 USC 2014, which allows a delay of at most five 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 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 three 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.² Although our review of our proposals has persuaded us that

² 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

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 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).³

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

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]).

³ 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 decision making 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.

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 cleanup 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 172nd 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 cleanup 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.⁴

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

⁴ 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.

retains the authority to take any action necessary 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.⁵ 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.⁶

⁵ 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;"

⁶ 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

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.
- 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 USC 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

not been put to a new use that is incompatible with range activities."

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 decision-making – 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 FY 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 FY 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

This year’s Marine Mammal Protection Act (MMPA) proposal includes new provisions as well. 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 B 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 world-wide 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 reciting 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 towards 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 six 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% 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.

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 five 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% of the 12,000-acre Marine Corps Air Station (MCAS) Miramar and over 56% 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 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 three-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% of total emissions in air regions.

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. 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 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.

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 ongoing 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, 2002.⁷ 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;

⁷ 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.

- 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.