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The Impact of Environmental Extremism On Military Readiness: The Encroachment Problem

Executive Summary

- **This paper explains the impact of "encroachment" on military training ranges at home and abroad.** "Encroachment" hampers the kind of military training that is critical to assuring combat readiness, winning wars, and protecting lives. The Department of Defense (DoD) defines encroachment as the cumulative effect of outside impediments to testing of weapons and training for our nation's fighting forces. Among the most burdensome are environmental laws and lawsuits which prevent the military from fully achieving readiness.

- **Military leaders provide many examples of encroachment's potentially dangerous effects.** The U.S. Navy, for example, has suffered delays in deployment of a key Navy sonar developed to track quieter submarines. For the past six years, a lawsuit on behalf of marine mammals has prevented the use of this new sonar to track the newer, ultra-quiet submarines operated by China, North Korea, and Iran. These submarines pose a significant threat to U.S. and allied fleets.

- **The encroachment problem is growing,** as the testing of new weapons systems and expanded joint training exercises require larger, integrated, and more modern ranges to meet military needs. With the global war on terrorism and the military action in Iraq, now is the time to address the impact of court rulings and the spate of lawsuits that threaten the full use of military ranges and the deployment of new military technologies urgently needed for the country's defenses.

- **Defense Secretary Rumsfeld is seeking a common-sense legislative approach** to address the encroachment problem. The legislation would balance environmental protection with the critical need for readiness and realistic training for the U.S. armed forces. Enactment of DoD's range-preservation legislation would help ensure adequate training of soldiers and testing of weapons for combat.

Introduction

Our nation is engaged in a global war against terrorism and military action in Iraq, yet our soldiers are not as prepared for combat as they could be. Why? The answer, in a word: "encroachment."

The Department of Defense (DoD) defines encroachment as the cumulative effect of outside impediments to weapons testing and training for our nation's fighting forces. Among the most burdensome are environmental laws and lawsuits that hinder or even ban military training and testing – thereby impairing readiness. The Department of Defense is a good steward of the land, and in fact must comply with a plethora of environmental laws, many of which do not apply to the private sector (such as the National Environmental Policy Act). Experience has shown, however, that there is a decided incompatibility between some environmental requirements and the military's ability to fight and win wars. This no longer can go unaddressed.

Because the evidence of detrimental impact is ample, the Defense Department seeks legislative relief from specific aspects of several environmental laws (described beginning on p. 6). The military's goal is to achieve a better balance between environmental protection and the urgent need for readiness and realistic training for the U.S. armed forces. The following is a discussion of the effect on readiness of military compliance with such provisions of law as designations of critical habitat, protection of marine mammals, air pollution controls, and management of munitions and unexploded ordnance.

Readiness: The Need to "Train as We Fight"

Military leaders make a strong case that realistic training saves lives in combat. On March 13, in testimony before the Senate Armed Services Committee, the nation's top military leaders appealed for legislative relief from Congress. Army Vice Chief of Staff, General John Keane, warned of a coming "train wreck" as a result of environmental laws and lawsuits hampering military training and testing. General Keane made the case for readiness:

> "This state of readiness, however, does not just happen. It requires tough realistic training under demanding battlefield-like conditions to effectively meld soldiers and equipment into the best fighting force in the world. . . . Our soldiers cannot fight with confidence without realistic live-fire and maneuver training. And we need training areas – maneuver-land and live-fire ranges – to make this happen. The first time soldiers conduct a realistic operation cannot, cannot, be during time of war. We must train as we intend to fight. And it is becoming increasingly difficult to do so under such environmental restrictions."[1]

The nation's Vice Chiefs of Staff asserted in Congressional testimony last year that good training is the key to readiness; it is crucial to a war fighter's ability to succeed and survive in a combat

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[1]Army Vice Chief of Staff, General John Keane, in testimony before the Senate Armed Services' Readiness Subcommittee, March 13, 2003.

environment. For example, during the Vietnam war, the ratio of enemy aircraft shot down by U.S. aircraft improved from less than 1:1 to 13:1 after the Navy established its Fighter Weapons School, known as TOPGUN. And training today is even more important because of the greater sophistication and complexity of combat training and skills. For example, recent data has shown that aircrews who receive realistic training have twice the hit-to-miss ratio as those who do not.[2]

The Marine Corps last year conducted a scientific study to measure the proficiency of Marine training. Initial results of the Camp Pendleton Quantitative Survey showed three combat- arms elements accomplishing only 69 percent of established standards for non-firing field training. This deficient outcome (a readiness condition that would enable combatants to only meet a low threat) was due in large part to the impact of range encroachment – in this case, the obligation to curtail training exercises on the ranges to comply with laws protecting endangered species and their habitats.[3]

Defense Department officials contend that encroachment hurts readiness on U.S. military training ranges across the country. Training "as we intend to fight" means realistic exercises which replicate the stress, discomfort, and physical conditions of combat. That, they contend, is what will safeguard soldiers' lives in wartime.

A Look at the Impact of Range Encroachment

Military ranges cover nearly 30 million acres, about one percent of the land encompassing the Lower 48 States, making the Department of Defense the third largest federal landholder (after the Department of the Interior and the U.S. Forest Service). Just as all other federal agencies are required to comply with environmental laws, regulations, and ensuing legal challenges, so too is the Defense Department. The range-encroachment problem is growing, in part because modern weapons systems and expanded joint training needs require larger, integrated, and more modern ranges to meet the military's needs, and in part because of urban sprawl and development coming closer to military facilities. The Defense Department notes that its ranges now provide sanctuary to some 300 species of wildlife listed as threatened or endangered.

The following are examples of encroachment problems stemming from environmental laws that come from the U.S. military services and that encompass the globe:

- At Fort Bragg, North Carolina, home of the Army's 82nd Airborne Division, the Army has been ordered to protect trees for the red-cockaded woodpecker. As a result, there is a 200-foot buffer around each tree containing a cavity that might host the bird. The training restrictions associated with these buffers include: no bivouacking or occupation for more than two hours at a

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[2] Admiral William J. Fallon, Vice Chief of Naval Operations, in testimony before the Senate Environment and Public Works Committee, May 9, 2002.

[3] Dr. Paul W. Mayberry, Deputy UnderSecretary of Defense for Readiness, in testimony before the House Armed Services Subcommittee on Military Readiness, March 14, 2002.

time; no use of camouflage; no weapons firing other than 7.62mm and 50-caliber blank ammunition (no artillery or rockets); no use of generators, riot agents, or smoke grenades; and no digging of tank ditches or fighting positions. During maneuvers, no vehicles can come closer than 50 feet to the protected trees.[4] These restrictions result in unrealistic training which does not instill combat skills; the military labels this "negative" training.

- In February of this year, the Fish and Wildlife Service designated "critical habitat" on the Pacific Missile Range Facility in Kauai, Hawaii. The designation was to protect a particular endangered grass species which, the Navy notes, does not even exist on the facility. Yet, the designation of "critical habitat" imposes a multitude of restrictions on testing and training and opens the door to further litigation. This range is the world's largest military range and is essential to fleet training in many warfare areas. Navy leaders foresee that "critical habitat" designation will severely compromise testing that is imperative for achieving an operational ballistic missile defense capability. The building of a radar station, for example, will now be contingent on consultation with the Fish and Wildlife Service, the National Oceanic and Atmospheric Agency, or other federal agencies. Such consultation means a lengthy permit process, at the end of which the radar station may or may not be constructed.[5]

- Another suit is aimed at denying deployment of a key Navy sonar. The sonar tracks the newer generation of quieter, diesel-powered, and potentially hostile, submarines, including those from rogue states, operating in shallow waters. The Navy has been prevented from deploying the new sonar, called the LFA (Low Frequency Active), to track these quieter submarines, which are often armed with torpedoes and cruise missiles. In this example, the Navy's testing efforts have been doubly burdened: not only are lawsuits pending, but it took the Navy six years to obtain a "take permit" from the National Marine Fisheries Service to allow the so-called "harassment" of marine mammals incidental to operation of the system. (Note that "harassment" in the Marine Mammal Protection Act is vaguely defined as "annoyance" or [having the] "potential to disturb.")[6] The legal assaults continue despite a $10-million research project by independent scientists who concluded that LFA operations are not expected to have an adverse effect on marine mammals.[7]

- The Fish and Wildlife Service, under threat of lawsuit in February 2000, was prepared to designate vast tracts of Miramar Marine Corps Air Station in San Diego, California and more

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[4]General John Keane, Army Vice Chief of Staff, testimony before the Senate Environment and Public Works Committee, May 9, 2002.

[5]Admiral William Fallon, Vice Chief of Naval Operations, testimony before the Senate, March 13, 2003.

[6]DoD Deputy UnderSecretaries Mayberry and DuBois, in testimony before the House Government Reform Committee, May 16, 2002.

[7]DoD Deputy UnderSecretary Mayberry, in testimony before the House Armed Services Subcommittee, March 14, 2002.

than one-half of nearby Camp Pendleton (including the runways and supporting aviation facilities) as "critical habitat." The military, recognizing the readiness implications, worked with the Fish and Wildlife Service and developed a species-protection plan that would also permit readiness activities. As a result, the Fish and Wildlife Service then decided against the "critical habitat" designation, a decision which is now the subject of pending litigation by the Natural Resources Defense Council (NRDC).[8]

- Camp Pendleton is under further assault: of its 17 miles of beach line between Orange and San Diego Counties, only 500 yards can be used for mock amphibious operations out of respect for legal protections of endangered species.[9]

- The problem goes beyond the nation's geographic boundaries: Key training for the USS Carl Vinson Battle Group was cancelled when there was insufficient time to process a permit to "potentially disturb" seals – a possibility if target drones fly over these animals. As a result of the cancelled training, three ships of the Battle Group were denied the benefit of anti-cruise-missile training before deployment in support of Operation Enduring Freedom (Afghanistan).[10]

- And the problem is not new. The Vieques military range in Puerto Rico, when in full use as a training range, found itself host to nesting sea turtles. Biologists conducted constant aerial surveillance of the range, and would halt an entire exercise for a Carrier Battle Group if a single sea turtle was observed either on the range or within 1,000 yards of shore; compliance costs per exercise were approximately $300,000.[11]

On their own, the situations described above would not necessarily be unmanageable. Together, however, they seriously impair the ability of units to attain combat readiness.

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[8]Major General Edward Hanlon, Jr., in testimony before the Senate Armed Services Readiness Subcommittee, March 20, 2001; Major General Michael J. Williams, in testimony before the Senate Environment and Public Works Committee, July 9, 2002.

[9]Admiral William J. Fallon, Vice Chief of Naval Operations, in testimony before the Senate Armed Services Readiness Subcommittee, March 13, 2003.

[10]Admiral William J. Fallon, Vice Chief of Naval Operations, in testimony before the Senate Environment and Public Works Committee, July 9, 2002.

[11]Vice Admiral James Amerault, Deputy Chief of Naval Operations, in testimony before the House Armed Services Subcommittee on Readiness, March 20, 2001.

The Administration's Readiness and Range Preservation Initiative

Lawsuits continue to hinder military readiness. The Clinton Administration recognized the problem and implemented modest changes in procedures to permit the military to continue essential operations. Under the Bush Administration, the DoD has determined that there is a need to build upon those efforts, in order to foreclose some of the more questionable avenues of legal attack and lift some of the most onerous regulatory burdens that hamper readiness.

Earlier this year, Secretary Rumsfeld proposed the "Readiness and Range Preservation Initiative" to provide the armed forces some relief from specific provisions of existing law dealing with: 1) conservation of wildlife habitat; 2) protection of marine mammals; 3) management of munitions and unexploded ordnance; and 4) air pollution controls.

Specifically, the Readiness and Range Preservation Initiative would:

1) Codify a policy of the Clinton Administration that allowed the Defense Department to cooperate with the Fish and Wildlife Service in responsibly managing wildlife habitat. Use of this policy obviated new designations of "critical habitat" – and all of the prohibitions on critical readiness activity that such designation brings.

During the Clinton Administration, the U.S. Fish and Wildlife Service found a legitimate way to protect endangered species without invoking the Endangered Species Act. Instead of new "critical habitat" designations, the Administration began using "Integrated Natural Resource Management Plans" (INRMPs), which are developed in close cooperation with the Fish and Wildlife Service and state wildlife agencies. INRMPs – a product of the Sikes Act Improvement Amendments of 1997 – ensure that readiness operations and natural resource conservation are both accommodated consistent with stewardship and legal requirements. INRMPs provide for extensive public notice and comment. They take a comprehensive approach to ecosystem management that the Fish and Wildlife Service has repeatedly determined to be sufficient to protect endangered species and their habitats.

However, the use of an INRMP as an alternative to a "critical habitat" designation is under attack in the above-mentioned suit concerning Miramar. The Readiness and Range Preservation Initiative seeks to codify the use of INRMPs, thereby strengthening the legal defense of these plans in court. Specifically, the Initiative provides that an INRMP on a military installation can be deemed sufficiently rigorous ecosystem management such that a designation of "critical habitat" is not needed for that installation.

It is important to note that the Administration's proposal would not alter existing designations: military ranges already deemed "critical habitat" under the ESA remain in that designation.

2) Follow the recommendation of the National Academy of Sciences' National Research Council to clarify that the definition of "harassment" of marine mammals in the Marine Mammal

Protection Act (MMPA) applies only to biologically "significant" changes in animal behavior. Benign changes in animal behavior would no longer be considered "harassment."

The delay in deployment of the Navy's above-mentioned LFA sonar was due to the ambiguity of the MMPA's definition of "harassment." It took the Navy six years to obtain a "take permit" from the National Marine Fisheries Service to allow the vaguely defined "harassment" of marine mammals incidental to operation of the system.

Clarification of this definition will lessen the regulatory burden on the DoD by relieving it from having to obtain MMPA permits for military readiness operations that are benign in their effect on marine mammals. The Navy notes that its operations account for about 10 deaths or injuries per year of marine mammals, compared to 4,800 deaths or injuries annually caused by the commercial fishing industry.[12]

3) Confirm that the cleanup of military munitions is not required as long as they remain on operational ranges. DoD's obligation to clean up off-range munitions, those that cause imminent danger on-range, and those on ranges that have been closed, would remain intact.

Some litigants have taken into court a maximalist reading of the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) with regard to munitions on live-fire training ranges.[13] Under this reading, which contradicts the regulatory policy of EPA and every state, materials left on a firing range, after even a single round is fired, would immediately require application of the clean-up provisions of RCRA and CERCLA. The DoD contends that munitions fired on operational ranges are not solid waste or releases requiring environmental cleanup, and that the adoption of such an interpretation of the law would effectively halt training activities.

This clarification of law would preserve existing state and federal regulatory policy by insuring that RCRA and CERCLA do not apply to "munitions deposited and remaining on operational ranges" during live-fire training. However, if training is found to have significant off-range environmental consequences, existing authority under Superfund and the Safe Drinking Water Act could be applied.[14] Clean-up of munitions on a range that has been closed would still be the responsibility of the DoD.

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[12] Raymond DuBois, UnderSecretary of Defense for Installations and Environment, in testimony before the House Resources' Fisheries Subcommittee, June 13, 2002.

[13] Note that the Army is currently facing a lawsuit alleging violation of these laws in the firing of munitions at Eagle River Flats Range, Fort Richardson, Alaska. The DoD has warned that the Fort Richardson litigation, if successful, could set a precedent fundamentally affecting military training and testing at virtually every test and training range.

[14] Senator Robert C. Smith (NH), statement for the Senate Environment and Public Works Committee hearing, May 9, 2002.

4) Maintain DoD's commitment to federal and state air-quality standards while still meeting training and readiness obligations.

According to defense officials, compliance with deadlines for meeting Clean Air Act emissions standards has constrained the DoD's ability to move weapons systems. For example, relocating F-14 aircraft from Miramar to Lemoore in California was only possible because DoD closed nearby Castle Air Force Base, which yielded the necessary emission-reduction offsets (entities can increase certain emissions as long as they reduce emissions from other sources). To provide military planners the flexibility they need, the initiative seeks three additional years for DoD to find offsetting emission reductions to meet state air-quality standards. The additional time would apply only to military readiness activities, which characteristically generate small amounts of emissions.[15]

Suing Under the Migratory Bird Act Cut Off Critical Training

In April 2002, the Administration submitted a legislative package similar to this year's Readiness and Range Preservation Initiative, seeking relief under the laws noted above, and under the Migratory Bird Treaty Act (MBTA). Without sufficient time to explore the issue fully, Congress amended only the MBTA – and that was in response to a ruling by a federal district judge in Washington, D.C. that would have put at risk all U.S. military aviation, telecommunications, and live-fire training worldwide.

The judge's decision came in March 2002, in response to a lawsuit brought by the Center for Biological Diversity. He ordered a halt to all military training on a small, uninhabited island 70 miles north of Saipan. The training range on the island of Farallon de Medinilla (FDM) is the site of the only U.S.-controlled live-fire range in the Western Pacific, and is closest to the Afghanistan theater of operations. It is the last opportunity for Navy and Marine Corps pilots and ships to train with live ordnance before entering the theater.[16]

The Center for Biological Diversity, which has sought to block all low-level military flight training in the United States, sued the Navy and the Secretary of Defense to stop training on Farallon de Medinilla because the training allegedly threatened migratory bird species. In claiming a violation of the Migratory Bird Treaty Act, the group was invoking a law that was passed largely to regulate commercial duck hunting. The MBTA prohibits the "taking" of any migratory birds which are not endangered species. The U.S. Fish and Wildlife Service is authorized under the Act to grant permits to "take" birds intentionally for hunting, scientific study, or population control, but not for "unintentional takes," such as those which might occur during flight training.

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[15]Readiness activities typically account for less than 0.5 percent of total emissions in air regions. DoD UnderSecretary Raymond DuBois, House Government Reform Committee, June 16, 2002.

[16]Vice Admiral James Amerault, Deputy Chief of Naval Operations, in testimony before the House Armed Services Subcommittee on Readiness, March 20, 2001.

The Navy's Seventh Fleet forces, having halted their exercises while the judge's decision was in effect, were temporarily deprived of training needed to maintain the highest readiness levels. The U.S. Court of Appeals for the District of Columbia Circuit stayed the decision, allowing training to resume. This was followed by Congress granting relief to the DoD from the "unintentional takes" provision of the MBTA, and directing federal agencies to develop regulations addressing the DoD's needs. Because the D.C. Circuit court is the court of jurisdiction for the Defense Department, the ruling, if left in place, would have harmed readiness implications worldwide, not just on this Pacific island training range.

Environmentalists Oppose the Administration's Proposal

Environmentalists argue that if the encroachment problem is serious, the Administration could invoke "national security" exemptions within existing statutes. The Defense Department's first response is that not all environmental laws contain such a national-security exemption; in fact, the Marine Mammal Protection Act and the Migratory Bird Treaty Act don't.

Moreover, the exemptions that do exist are intended for specific activities at individual sites; they are not intended to be the legal basis of routine military readiness activities. Existing law envisioned that use of emergency exemptions would be rare, would be used as a last resort, and would be applied only for brief periods. A very high standard is set for these exemptions. Their use is to be reserved for immediate threats to national survival.

The Administration also recognizes that a broader application of national-security exemptions would be unwieldy, requiring the issuing and renewing of scores or possibly hundreds of certifications annually, to be reviewed and signed by the President or the Defense Secretary.

Environmentalists also argue that the military should make use of other properties for training or relocate. The Defense Department responds that training ranges have unique infrastructure with sunk investments and are utilized on a regular basis by the nearby installations and bases. Costs involved in relocation would be sizeable, both to the government and to communities nearby whose economies are linked to the military facilities.

Conclusion

Military leaders have asked Congress to lessen the military's burden in complying with environmental laws which handicap the adequate training of soldiers to fulfill their duties. The military implications are serious and growing. The Defense Department's legislative package offers a rational approach, balancing environmental stewardship with the combat training needs of the U.S. Armed Forces.