

April 2008

Green Peace? Protecting Our National Treasures While Providing for Our National Security

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Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 Wm. & Mary Env'tl L. & Pol'y Rev. 803 (2008),
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GREEN PEACE? PROTECTING OUR NATIONAL TREASURES WHILE PROVIDING FOR OUR NATIONAL SECURITY

MARCILYNN A. BURKE*

[T]his concept of “national defense” cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals [and resources] which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties [or destruction of natural resources] . . . which make[] the defense of the Nation worthwhile.¹

Introduction 805

I. DoD’s Requests for Exemptions from Natural Resources Laws 811

 A. The Readiness and Range Preservation Initiative . 812

 1. The Marine Mammal Protection Act 812

 2. The Endangered Species Act 813

 3. The Migratory Bird Treaty Act 816

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¹ United States v. Robel, 389 U.S. 258, 264 (1968) (quoting the late U.S. Supreme Court Chief Justice Earl Warren).

B.	Responses to the RRPI	817
1.	Democrats	817
2.	Republicans	818
3.	Environmental Groups	819
4.	The Federal Wildlife Agencies	821
a.	The Fish and Wildlife Service	822
b.	The National Marine Fisheries Service	822
II.	Amendments to Natural Resources Laws and the Aftermath	823
A.	The Marine Mammal Protection Act: Harassment and Incidental Takes	823
1.	NRDC's Challenges	826
a.	NRDC-RIMPAC	828
b.	NRDC v. Winter II	829
2.	The California Coastal Commission's Challenge	835
3.	Ocean Mammal Institute v. Gates	837
B.	The Endangered Species Act: Critical Habitat and Encroachment	839
1.	Integrated Natural Resources Management Plans	839
a.	Exemptions in Action	842
b.	Critiques of the Exemption Process ..	846
2.	Recovery Credit Trading Systems	848
C.	The Migratory Bird Treaty Act: Incidental Takes ..	853
III.	DoD's Reporting to Congress After the Amendments	855
A.	Section 366 Reports Under the Bob Stump National Defense Authority Act for Fiscal Year 2003	857
B.	Section 320 Reports Under the National Defense Authorization Act for Fiscal Year 2004	859
IV.	"War Is too Important To Be Left to the Generals": Where Do We Go From Here?	862
A.	DoD as an Exceptional Agency	864
B.	Consultation with Wildlife Agencies	866
C.	The Role of the Precautionary Principle	869
	Conclusion	874

INTRODUCTION

In the wake of the terrorist attacks on 9/11, the Bush Administration sought many changes and additions to the nation's laws for the sake of national security. The legislative and executive branches of the federal government developed the USA PATRIOT Act,² the new Transportation Safety Administration,³ the National Security Administration's Warrantless Wiretapping,⁴ and the new e-passports with computer chips,⁵ to name just a few of the post-9/11 initiatives. There has been much written about what many believe to be the overreaching of the Bush Administration post-9/11.⁶ And environmental and natural resources laws were not excluded from this effort to make legislative changes in the name of national security.

Post-9/11, the Department of Defense ("DoD")⁷ renewed its earlier efforts to convince Congress that national security would be compromised if Congress did not relieve the military of its obligation to comply with many of the nation's environmental and natural resources laws. DoD presented its case through the "Readiness and Range Preservation Initiative."⁸ The

² See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)* of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

³ See *Aviation and Transportation Security Act*, Pub. L. No. 107-71, 115 Stat. 597 (2001).

⁴ See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

⁵ *Passports*, 22 C.F.R. § 51 (2006).

⁶ See, e.g., Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 429 (2006); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb-Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Administration*, 52 DUKE L.J. 403 (2002) (discussing the Bush administration's sweeping expansion of the executive privilege); see also John Markoff, *Questions Raised for Phone Giants in Spy Data Furor*, N.Y. TIMES, May 13, 2006, at A1 (describing allegations that major telephone companies had granted the National Security Administration's request for telephone calling records without being served any warrants); Scott Shane & Adam Liptak, *Shifting Power to a President*, N.Y. TIMES, Sept. 30, 2006, at A1 (discussing the detainee treatment bill which broadens presidential authority without a check and balance by the legal branch of the government).

⁷ This Article monolithically refers to the Department of Defense. However, the author recognizes that no government agency is of a single mind, and indeed, in this instance, there is some evidence to suggest that officials at the Pentagon initiated this campaign rather than base commanders.

⁸ *Hearing Before the S. Comm. on Environment and Public Works*, 107th Cong. 3-4 (2002) (statement of Michael J. Williams, U.S. Marine Corps Asst. Commandant of the Marine

argument was that compliance with environmental and natural resources laws hampered the Armed Forces' readiness for combat by limiting use of its training ranges.⁹ For example, Benedict S. Cohen, a deputy general counsel at the Pentagon, stated "[t]he department felt it was appropriate, rather than to wait for a range to be shut down by a court injunction, to warn Congress that this problem is looming."¹⁰ Glenn Flood, a spokesman for DoD, further explained that "[a]sking the president to grant an exemption every time the military needs to train is not practical."¹¹ Additionally, DoD claimed that even though it sought exemptions, it would work with the relevant environmental and natural resources agencies and non-governmental entities to ensure environmental protection without impairing the military's ability to prepare effectively for the national security challenges that lay ahead.¹²

Environmentalists balked at the notion that DoD needed such relief to prepare troops adequately, noting the existing flexibility in the law. "Michael J. Bean, a lawyer with Environmental Defense, said that

Corps) (testifying about the RRPI and referencing previous testimony in 2001 by members of the armed forces about encroachment's negative impact on readiness), *available at* http://epw.senate.gov/107th/Williams_070902.htm [hereinafter Statement of Gen. Michael J. Williams].

⁹ See *id.* (testifying about the presence of endangered species on the Marine Corps' bases as encroachment having a negative impact on readiness); see also Katharine Q. Seelye, *Pentagon Seeks Exemption from Environmental Law*, N.Y. TIMES, Mar. 30, 2002, at A11 (quoting Representative Joel Hefley, a Colorado Republican and Chairman of the Subcommittee on Military Readiness, who "highlighted [environmental] protections [employed on military bases] that some people might easily consider extreme and trivial when weighed against military needs"); see also Michael Janofsky, *Pentagon Asks Lawmakers to Loosen Environmental Laws*, N.Y. TIMES, May 11, 2005, at A16 (quoting Paul W. Mayberry, a deputy under secretary of defense, as stating that "[w]orkarounds, while sounding reasonable and feasible, cannot sacrifice realistic combat training. All too often, such workarounds chip away at basic fabric and underpinnings of the training objectives").

¹⁰ Felicity Barringer, *Pentagon is Pressing to Bypass Environmental Laws for War Games and Arms Testing*, N.Y. TIMES, Dec. 28, 2004, at A18.

¹¹ *Id.*

¹² See Statement of Gen. Michael J. Williams, *supra* note 8 (explaining the Marine Corps worked with the U.S. Fish and Wildlife Service ("FWS") to develop the policy and that its "responsibility to the American people is to maintain a high state of readiness while preserving and protecting the environment of the Nation"); see also *Hearings Before the Subcomm. on Military Readiness, H. Comm. on Armed Services*, 107th Cong. (2002) (testimony of Craig Manson, Assistant Secretary for Fish and Wildlife, Department of the Interior, listing examples of partnerships between FWS and DoD at at least seven different sites including United States Air Force Academy, Colorado; Camp Pendleton, California; Fort Hood, Texas; Fort Bragg, North Carolina; Fort McCoy, Wisconsin; Pearl Harbor, Hawaii; and Air Force activities in Alaska).

most environmental laws, including the Endangered Species Act, allowed for the defense secretary to declare unilateral exemptions but that no secretary had ever done so.”¹³ Thus, he argued, “[i]f they’ve got a problem, they should use the existing authority.”¹⁴ Environmentalists also understandably expressed great concern that the military, if exempted, would not prove to be the steward of natural resources that it professed to be.¹⁵

For some members of Congress, the decision was quite simple to make, though perhaps difficult to peddle in some political circles. As Representative Bob Barr, Republican from Georgia, then Vice Chairman of the House of Representatives’ Committee on Government Reform, explained before 9/11:

We need some tough leadership from the Department of Defense. We need hard decisions that, while perhaps not politically correct, are correct when it comes to doing what is right for our men and women in combat. What is right is what will better prepare our warriors to win and survive on the battlefield, not limiting training so we don’t run a risk of trampling blades of grass or upsetting the nesting habits of a cockamamie warbler.

When things go wrong on the battlefield, people, and the importance of the Marine Mammal Protection Act, the Migratory Bird Treaty Act or the Noise Control Act pale in comparison.

I have yet to speak to a soldier, sailor, airman or Marine who would prefer a migratory bird or marine mammal merit badge to coming home in one piece from the battlefield. The United States is at war and we need to proceed with that in mind.¹⁶

¹³ Katharine Q. Seelye, *Defense Department Forum Focuses on Environment*, N.Y. TIMES, Feb. 6, 2003, at A28.

¹⁴ *Id.*

¹⁵ *E.g.*, Suzanne Struglinski, *Enviros Spell Out Objections to Military Proposal for Changes to Law*, GREENWIRE, Mar. 13, 2003, <http://www.eenews.net/Greenwire/2003/03/13/archive/7> (expressing concern about exempting military lands in compliance with the Sikes Act because the act “does not set any biological thresholds, basically leaving species protection actions up to the military”); Cat Lazaroff, *U.S. Military Seeks Broad Exemptions From Environmental Laws*, Apr. 25, 2002, ENVTL. NEWS SERVICE., available at <http://www.ens-newswire.com/ens/apr2002/2002-04-25-07.asp> (more than twenty conservation groups expressing concern that these exemptions would give the military “carte blanche to pollute”).

¹⁶ *Critical Challenges Confronting National Security—Continuing Encroachment Threatens*

Though probably intended to be a thought-terminating cliché—“[t]he United States is at war”¹⁷—such rhetoric did not end the debate. For example, Representative Nick J. Rahall II of West Virginia, senior Democrat on the House Resources Committee, stated that “[t]he American people respect and support our military, but they do not believe, nor do I, that the Pentagon should be unaccountable or exempt from the laws which apply to us all.”¹⁸

DoD eventually secured significant exemptions, notably from natural resources law—law concerning plants and animals generally—and not environmental law—law concerning pollution.¹⁹ This Article will focus on exemptions from portions of three natural resources laws: the Marine Mammal Protection Act (“MMPA”), the Endangered Species Act (“ESA”), and the Migratory Bird Treaty Act (“MBTA”).

To comprehend the significance of these changes to natural resources law, it is helpful to recognize the magnitude of the military’s land holdings. According to its 2007 inventory of real estate, “[t]he Department of Defense remains one of the world’s largest ‘landlords’ with a physical plant consisting of more than 577,500 facilities (buildings, structures and linear structures) located on more than 5,300 sites, on over 32 million acres.”²⁰ And in this country, its lands provide habitat for 300 listed species that are protected under the Endangered Species Act.²¹ Thus, in evaluating

Force Readiness: Hearing Before the H. Comm. on Government Reform, 107th Cong. 7-8 (2002) (statement of Rep. Bob Barr, Vice Chairman, House Committee on Government Reform), available at <http://bulk.resource.org/gpo.gov/hearings/107h/80496.pdf> [hereinafter *Critical Challenges Confronting National Security*].

¹⁷ *Id.*

¹⁸ Carl Hulse, *House Approves Increasing Defense Department’s Waivers of Environmental Rules*, N.Y. TIMES, May 22, 2003, at A26.

¹⁹ The Administration sought exemptions from pollution laws again in the fiscal year 2008 national defense authorization bill as well as an exemption from the Federal Land Policy and Management Act to allow the Navy to conduct exercises in parts of Nevada. National Defense Authorization Act for Fiscal Year 2008, S. 567, 110th Cong. §§ 314, 315, 2933 (2007). Senator Carl Levin, Democrat from Michigan, Chairman of the Armed Services Committee, along with Ranking Member, Senator John McCain, Republican from Arizona, introduced the Administration’s request, noting that “[a]s is the case with any bill that is introduced by request, we introduce this bill for the purpose of placing the administration’s proposals before Congress and the public without expressing our own views on the substance of these proposals.” 153 CONG. REC. S1911-12 (daily ed. Feb. 13, 2007) (statement of Sen. Levin).

²⁰ OFFICE OF THE DEPUTY UNDER SEC’Y OF DEF. (INSTALLATIONS & ENV’T), DEP’T OF DEF., BASE STRUCTURE REPORT (A SUMMARY OF DOD’S REAL PROPERTY INVENTORY), FISCAL YEAR 2007 BASELINE 2 (2007).

²¹ Jim Garamone, *Training, Environment Needs Not Mutually Exclusive, DoD Says*,

these changes in law, it is important to remember the expansive territory that DoD controls and the number of listed species that these changes will impact because of the importance of DoD's land to those species. Moreover, those thirty million acres do not include the miles of ocean in which the military conducts training exercises impacting protected marine species.

In prior work, I have examined legislative responses to "political rhetoric."²² This rhetoric often consists of narratives that are told to justify new laws or amendments to existing laws based on stories that do not describe the actual situation on the ground.²³ When Congress drafts laws based on stories that are inaccurate or misleading at best, it easily may draft laws that are inefficient, unjust, and/or unwise.²⁴ Accordingly, this Article evaluates whether changes to natural resources law are inefficient, unjust, and/or unwise. To do that, it examines the effects these laws purportedly have had on national security or military readiness and their real impacts on the natural world.

The environmental compromises that these amendments represent may cause enormous and irreparable harm to our nation's natural resources. It is still early in the process, as DoD has been operating under these exemptions for only a few years, and thus it is not possible to determine exactly what the environmental impacts of these changes will be. Regardless, it is unclear whether the amendments were warranted and whether they have been effective or efficient in terms of their stated goals for military readiness.

Short of repealing or significantly reshaping the exemptions, this Article concludes that at a minimum, Congress should require and provide funding for DoD to engage in a meaningful study of the impacts of compliance with environmental and natural resources law. Though Congress directed DoD to report back annually on its progress in dealing with

AMER. FORCES PRESS SERV., May 14, 2002, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=44066>.

²² Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 441, 443 (2004) [hereinafter Burke, *Klamath Farmers and Cappuccino Cowboys*].

²³ Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 672-73 (2006) [hereinafter Burke, *Much Ado About Nothing*].

²⁴ See, e.g., *id.* at 675-77; *Klamath Farmers and Cappuccino Cowboys*, *supra* note 22, at 467-77.

environmental and other "encroachment" challenges,²⁵ DoD's compliance with that directive has been less than optimal or enlightening.²⁶

This Article is not intended to suggest that trade-offs or compromises in environmental and natural resources law for the sake of national security will never be appropriate or necessary. However, this Article does argue that DoD has not demonstrated that the exemptions are necessary or appropriate under the current circumstances. Faced with such lack of evidence, Congress should proceed more cautiously before abandoning protection of the country's natural resources in this manner.

We collectively need to give these issues greater thought and study, and this symposium is a very important step in that direction.²⁷ This

²⁵ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 320, 117 Stat. 1392, 1435-37 (2003) (requiring reports on the impact of encroachment by the civilian community, plans to address the encroachment, and the impact of certain legal requirements on military installations and ranges); Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 366, 116 Stat. 2458, 2522-23 (2002) (requiring reports on a training range sustainment plan, a global status of resources and training system, and a training range inventory).

²⁶ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY TRAINING: IMPROVEMENT CONTINUES IN DOD'S REPORTING ON SUSTAINABLE RANGES, BUT OPPORTUNITIES EXIST TO IMPROVE ITS RANGE ASSESSMENTS AND COMPREHENSIVE PLAN (2007); U.S. GEN. ACCOUNTING OFFICE, MILITARY TRAINING: DOD REPORT ON TRAINING DOES NOT FULLY ADDRESS CONGRESSIONAL REPORTING REQUIREMENTS (2004); see also U.S. GEN. ACCOUNTING OFFICE, MILITARY TRAINING: DOD APPROACH TO MANAGING ENCROACHMENT ON TRAINING RANGES STILL EVOLVING (2003) [hereinafter DOD STILL EVOLVING]; U.S. GEN. ACCOUNTING OFFICE, MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES (2002) [hereinafter DOD LACKS COMPREHENSIVE PLAN].

²⁷ For example, Paul E. Nachtigall, Director, Marine Mammal Research Program, Hawaii Institute of Marine Biology at the University of Hawaii, acknowledged the use of the precautionary principle as reasonable, but urged Congress to amend the MMPA to allow for additional research on the impact of sound on marine mammals.

We have basic information on the hearing of some species of marine mammals and from that data the most reasonable thing to do is to extrapolate to the rest. While that is currently the most reasonable thing to do, I would certainly be more comfortable in defining harassment from sound if our data set encompassed a good many more species in order to increase the precision of our extrapolation.

National Security Readiness Act, Hearing on H.R. 1835 Before the H. Comm. on Resources, 108th Cong. 109 (2003) (statement of Paul E. Nachtigall, Director, Marine Mammal Research Program, Hawaii Institute of Marine Biology, University of Hawaii), available at <http://republicans.resourcescommittee.house.gov/archives/108/testimony/paulnachtigall.htm> [hereinafter *National Security Readiness Act*]. See also *id.* at 112-13 (statement of Dr. Darlene R. Ketten, Senior Scientist, Assistant Professor, Biology Department, Department of Otology and Laryngology, Woods Hole Oceanographic Institution, Harvard Medical School) (lauding the application of the precautionary principle with respect to the MMPA, but advocating for more research about the impact of sound on marine mammals).

Article does not propose thought and study as a stalling technique or “analysis paralysis.”²⁸ Instead it proposes this approach in the name of the “precautionary principle.” In this instance, the precautionary principle exhorts that if exemptions may cause severe or irreparable harm to the public through the destruction of natural resources, decisionmakers should protect natural resources, even if some cause and effect relationships are not fully established scientifically. Following this principle is particularly appropriate when there are no quantifiable benefits from these exemptions.

Part I of this Article will review the legislative proposals to amend the natural resources statutes and the reactions from Democrats, Republicans, environmental groups, and wildlife agencies. Following that discussion, Part II will outline the amendments that Congress enacted and how they have operated thus far. Part III reviews and analyzes the information that DoD subsequently provided in support of its requests for continuing and further statutory relief. Part IV will examine the exceptional factors involved in allocating the decisionmaking authority in this context, and in light of these exceptional factors, makes recommendations for going forward. The Article then concludes, emphasizing the importance of continuing the dialogue about the appropriate balance among these competing interests.

I. DOD’S REQUESTS FOR EXEMPTIONS FROM NATURAL RESOURCES LAWS

Though DoD had complained previously of the constraints placed upon readiness training by compliance with environmental laws,²⁹ it was not until approximately seven months after 9/11 that its campaign gained the requisite traction. DoD introduced the Readiness and Range Preservation Initiative (“RRPI”) to Congress in the spring of 2002.³⁰ Set out below are brief summaries of the statutory changes that DoD requested with respect to the MMPA, the ESA, and the MBTA, as well as summaries of the justifications DoD proffered for those changes. Following those summaries

²⁸ See, e.g., Burke, *Klamath Farmers and Cappuccino Cowboys*, *supra* note 22, at 499.

²⁹ E.g., *Challenges to National Security: Constraints on Military Training: Hearing Before the H. Comm. on Government Reform*, 107th Cong. 14-15 (2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:75041.pdf.

³⁰ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002) (introduced in the Senate on April 23, 2002 at the request of the Bush Administration).

is an exploration of the responses to the RRPI from Congress, environmentalists, and the federal wildlife agencies.

A. *The Readiness and Range Preservation Initiative*

1. The Marine Mammal Protection Act

The Marine Mammal Protection Act of 1972³¹ prohibits, with certain exceptions, the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas.³² The Act defines take as “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill” any marine mammal.³³ National Oceanic and Atmospheric Administration (“NOAA”) Fisheries (otherwise known as the National Marine Fisheries Service, or “NMFS”), the agency responsible for enforcing the MMPA, may authorize the “incidental, but not intentional taking” of “small numbers” of animals within a “specified geographical region” for up to five years if the taking will have only a “negligible impact on [the] species or stock.”³⁴

The exemption to the MMPA that DoD requested in the RRPI arose from the U.S. Navy’s use of a new low-frequency sonar system for training, testing, and routine operations that has been found under certain circumstances to violate the MMPA.³⁵ This new technology, Surveillance Towed Array Sensor System (“SURTASS”) Low Frequency Active (“LFA”) Sonar, sends out intense sonar pulses at low frequencies that travel hundreds of miles to detect enemy submarines.³⁶ DoD maintains that use of this technology is essential to securing the country from the threats posed by such submarines.³⁷ Hence, DoD requested exemptions from certain provisions of the MMPA regarding the “harassment” and “incidental taking” of marine mammals.³⁸

³¹ 16 U.S.C. §§ 1361-1421(h) (Supp. V 2005).

³² 16 U.S.C. § 1371(a)(3) (2000).

³³ *Id.* § 1151(m).

³⁴ 16 U.S.C. § 1371(a)(5)(A) (Supp. V 2005).

³⁵ *Hearing Before the H. Armed Services Comm. Subcomm. on Military Readiness*, 108th Cong. 1 (2003) (statement of Raymond F. DuBois, Deputy Under Secretary of Defense for Installations and Environment), available at http://www.globalsecurity.org/military/library/congress/2003_hr/03-03-13dubois.htm.

³⁶ U.S. DEPT OF THE NAVY, RECORD OF DECISION FOR SURTASS LFA SONAR SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (2007), available at http://www.surtass-lfa-eis.com/docs/FSEIS_ROD_8-15-07.pdf.

³⁷ *Id.*

³⁸ *Id.*

2. The Endangered Species Act

The stated purposes of the Endangered Species Act “are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”³⁹ The ESA provides several mechanisms through which the Secretary⁴⁰ may accomplish these goals.

Section 4(a) of the ESA requires the Secretary to determine whether any species’ continued existence is “threatened” or “endangered.”⁴¹ Section 4(a) of the ESA also requires the Secretary to designate critical habitat “to the maximum extent prudent and determinable,” for every listed threatened or endangered species.⁴² Critical habitat is comprised of “the specific areas within the geographical area occupied by the species, at the time it is listed . . . [and] on which are found those physical or biological features . . . essential to the conservation of the species and which may require special management considerations.”⁴³ Before designating a particular area as critical habitat, the Secretary had to first consider “the economic impact, . . . and any other relevant impact, of” such a designation.⁴⁴

With respect to the ESA, DoD requested that its lands be excluded from any designation of critical habitat under section 4(a) of the act. Lands that DoD owns or controls are home to many of the country’s threatened and endangered species.⁴⁵ DoD’s lands are expansive and less developed than the land surrounding them, allowing plant and animal species to thrive on them.⁴⁶ As Deputy Under Secretary DuBois explained, dense urban development has contributed to the prevalence of those species on military land.

³⁹ 16 U.S.C. § 1531(b) (2000).

⁴⁰ References to “the Secretary” mean the Secretary of the Interior or the Secretary of Commerce except as otherwise provided. *See id.* § 1532(15).

⁴¹ 16 U.S.C. § 1533(a) (Supp. V 2005). An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6) (2000). A threatened species is “any species which is likely to become an endangered species within the foreseeable future” *Id.* § 1532(20).

⁴² 16 U.S.C. § 1533(a)(3)(A).

⁴³ 16 U.S.C. § 1532(5)(A)(i) (2000).

⁴⁴ 16 U.S.C. § 1533(b)(2) (Supp. V 2005).

⁴⁵ Press Release, Dep’t of Def. & NatureServe, U.S. Military Lands Are Habitat for Hundreds of Species at Risk, Study Finds (Aug. 24, 2004), *available at* <http://www.natureserve.org/aboutUs/PressReleases/nr040824.pdf>.

⁴⁶ *Id.*

During World War II, the United States built a large number of isolated installations to train the 10-million-man armed forces. . . .

The problem is the isolation didn't last, DuBois said. . . . San Diego and Los Angeles have essentially 'met,' forming a megalopolis in Southern California. Ranges and training areas on land and at sea are becoming the last refuge of many species that are being crowded out of their natural range.⁴⁷

Thus, DoD sought relief from encroachment by human development and the wildlife that followed.

Post-9/11, DoD argued that none of its land should be subject to designation as critical habitat if it met certain requirements.⁴⁸ DoD claimed that designation of critical habitat would make the land more expensive to use and would render some land unavailable for certain kinds of training.⁴⁹ DoD argued that for any base that adopted an "integrated natural resources management plan" ("INRMP") under the Sikes Act,⁵⁰ a designation of critical habitat would be unnecessary.⁵¹

As partial justification for its legislative agenda, DoD claimed that Congress never intended for some environmental laws to apply to operational testing and training ranges.⁵² Thus, according to DoD, it merely sought "statutory clarifications,"⁵³ claiming that "[t]he provisions are

⁴⁷ Garamone, *supra* note 21.

⁴⁸ *Critical Challenges Confronting National Security*, *supra* note 16, at 134 (statement of Raymond F. Dubois, Jr., Deputy Under Secretary of Defense for Installations and Environment).

⁴⁹ See, e.g., *Impact of Environmental Encroachment on Military Training: Hearing Before the Subcomm. on Readiness and Management Support of the S. Comm. on Armed Servs.*, 108th Cong. (2003) (statement of General John M. Keane, U.S. Army Vice Chief of Staff), available at <http://armed-services.senate.gov/statemnt/2003/March/Keane.pdf>.

⁵⁰ 16 U.S.C. § 670a(a)(1)(B) (2000).

⁵¹ Raymond F. DuBois, *The Readiness Preservation Initiative*, ENVTL. F. (Envtl. L. Inst.), Sept.-Oct. 2002, at 43, 43-44.

⁵² Department of Defense, Transcript of Roundtable on Range and Readiness Preservation Initiative 1-3 (2004) (statement of Paul Mayberry, Deputy Under Secretary of Defense for Readiness), available at <http://www.defenselink.mil/transcripts/2004/tr20040406-0582.html> (discussing the Resource Conservation Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Clean Air Act, but using the MBTA as an example of a law that Congress had to clarify because it had the potential to restrict testing and training).

⁵³ *Critical Challenges Confronting National Security*, *supra* note 16, at 134 (statement

necessary to safeguard existing practices against litigation seeking to overturn them.”⁵⁴ For example, DoD claimed that the proposed amendments to the ESA would confirm the Clinton Administration’s policy to examine on a case-by-case basis whether a base’s INRMP sufficiently protects listed species, eliminating the need to designate a critical habitat on that base.⁵⁵ The Deputy Under Secretary of Defense for Installations and Environment, Raymond DuBois, Jr., further explained that these provisions “would merely restore the legal and regulatory status quo as it has existed for over 80 years.”⁵⁶ Note that though the U.S. Fish and Wildlife Service (“FWS” or “Service”) under the Clinton Administration excluded some military installations from designations of critical habitat, a federal court found the agency’s interpretation of the definition of “critical habitat” to be “nonsensical.”⁵⁷

In response to criticisms that it had never sought an exemption already provided by the law, DoD explained that it would be inappropriate to use those exemptions for routine training exercises, since it thought Congress intended them to be used “sparingly.”⁵⁸ Instead, DoD argued that Congress should, for example, codify the Clinton Administration’s policy with respect to INRMPs and critical habitat.⁵⁹

of Raymond F. Dubois, Jr., Deputy Under Secretary of Defense for Installations and Environment).

⁵⁴ *Id.* at 131.

⁵⁵ DuBois, *supra* note 51, at 43. For example, during the Clinton Administration, FWS excluded lands on the Miramar Marine Corps Base from the designation of critical habitat for the coastal California gnatcatcher because the base had a completed and approved INRMP that FWS believed would meet the needs of the species and thus the land would not fit the statutory definition of critical habitat. Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. 63,680, 63,688 (Oct. 24, 2000).

⁵⁶ *Critical Challenges Confronting National Security*, *supra* note 16, at 131 (statement of Raymond F. Dubois, Jr., Deputy Under Secretary of Defense for Installations and Environment).

⁵⁷ *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1098 (D. Ariz. 2003) (ordering FWS to re-propose critical habitat for the Mexican spotted owl).

⁵⁸ DuBois, *supra* note 51, at 44 (referring to the process of requesting an exemption from the Endangered Species Committee, otherwise known as the “God Squad,” under 16 U.S.C. § 1536(e)). The Endangered Species Committee consists of seven members—the Secretaries of Agriculture, Army, and Interior; the Administrators of the Environmental Protection Agency and NOAA; the Chairman of the Council of Economic Advisors; and an individual from the affected state, appointed by the President. 16 U.S.C. § 1536(e)(3) (2000). The Committee is required to “grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.” *Id.* § 1536(j).

⁵⁹ DuBois, *supra* note 51, at 44.

3. The Migratory Bird Treaty Act

The Migratory Bird Treaty Act is a criminal statute that generally prohibits the taking or killing of any migratory birds included in the terms of various treaties the United States has entered with Great Britain (Canada), Mexico, Japan, and the former Soviet Union.⁶⁰ However, the MBTA authorizes the Secretary of the Interior to promulgate regulations "compatible with the terms of the conventions" to allow the hunting, killing, or taking of migratory birds.⁶¹ The resultant regulations provided for permits that allow the killing of migratory birds in an "emergency"⁶² or for a "special purpose" based on a "compelling justification."⁶³

With respect to the MBTA, DoD requested an exemption from the act's prohibition against harming or killing migratory birds.⁶⁴ Before the exemption, there was a circuit split concerning whether the MBTA applied to the federal government, including the military.⁶⁵ However, in 2002 a federal district court held that the MBTA did apply to the military.⁶⁶ The Court of Appeals for the District of Columbia ultimately vacated and remanded this decision with instructions to dismiss,⁶⁷ but with the district court's ruling, the Pentagon seized the opportunity to step up its efforts to acquire an exemption from the act.⁶⁸

⁶⁰ 16 U.S.C. §§ 703-712 (Supp. V 2005).

⁶¹ 16 U.S.C. § 704(a) (2000).

⁶² 50 C.F.R. § 13.4 (2005).

⁶³ *Id.* § 21.27.

⁶⁴ DAVID M. BEARDEN, CRS REPORT FOR CONGRESS NO. RS22149, EXEMPTIONS FROM ENVIRONMENTAL LAW FOR THE DEPARTMENT OF DEFENSE: AN OVERVIEW OF CONGRESSIONAL ACTION 2 (2005), available at <http://digital.library.unt.edu/govdocs/crs/permalink/met-crs-7305:1>.

⁶⁵ *Compare* Humane Society v. Glickman, 217 F.3d 882 (D.C. Cir. 2000) (holding that the MBTA applies to federal agencies), *with* Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997) (holding that the MBTA does not apply to federal agencies), *and* Newton County Wildlife Assoc. v. U.S. Forest Service, 113 F.3d 110 (8th Cir. 1997) (also holding that the MBTA does not apply to federal agencies).

⁶⁶ *See* Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161 (D.C. Cir. 2002) (finding that the military violated the MBTA); Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113 (D.C. Cir. 2002) (enjoining the military from engaging in any activity on the island that could potentially wound or kill migratory birds), *superseded by statute*, Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 315, 116 Stat. 2458, 2509-10 (2002) (codified at 16 U.S.C. § 703), *as recognized in* Ctr. for Biological Diversity v. England, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

⁶⁷ Ctr. for Biological Diversity v. England, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

⁶⁸ *See, e.g.,* DuBois, *supra* note 51, at 43-44.

B. Responses to the RRPI

Responses to DoD's requests for exemptions from environmental and natural resources laws have been predictable. Democratic members of Congress generally opposed the exemptions as did environmental groups. Republican members of Congress, as to be expected, aligned themselves chiefly with the Bush Administration in support of DoD's requests, as did the federal wildlife agencies. Representative Christopher Shays, Republican from Connecticut, colorfully encapsulated the backdrop against which DoD asked Congress to legislate.

To be sure, we will hear a good deal today about the loss of training ground and about the cost and inconvenience of environmental stewardship on training ranges. In this and in future hearings, we may well also hear about some notable and regrettable lapses in DoD natural resource management. Neither point of view justifies succumbing to the false choice between national security and environmental security.

As one Army study put it, "Reconciling these interests is not a question of black and white, but a more complex and subtle matter requiring appreciation of many shades of green."⁶⁹

The discussion below provides the basic contours of these varied responses.

1. Democrats

As in the past, initially Democrats in Congress were unreceptive to DoD's requests. Their response to DoD was that some environmental laws already provided for national security exemptions on a case-by-case basis,⁷⁰ and DoD had not demonstrated that readiness had been impaired significantly or that broad exemptions were necessary to address any readiness deficiencies.⁷¹ They expressed concern that DoD had provided,

⁶⁹ *Challenges to National Security: Constraints on Military Training: Hearing Before the H. Comm. on Government Reform*, 107th Cong. 14-15 (2001) (statement of Representative Christopher Shays), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:75041.pdf.

⁷⁰ *Critical Challenges Confronting National Security*, *supra* note 16, at 18-19 (statement of Representative Thomas H. Allen).

⁷¹ *Id.*

rather unsystematically, accounts only of isolated instances in which the Armed Forces had to work around environmental laws. For example, Representative Thomas Allen, Democrat from Maine, cautioned that Congress should not "govern by anecdote."⁷² He challenged the Bush Administration to demonstrate the need for exemptions from environmental laws.

The administration has yet to make a balanced, coherent, well-defended case that environmental laws that DoD finds inconvenient should be changed. It may be that some laws should be modified, but until this Congress has the opportunity to hear from all sides, and [has] enough time to make well-informed decisions, we should not accede to DoD's last-minute request.⁷³

The premises upon which DoD based its pleas for relief were unsubstantiated in the view of Democratic members of Congress.

2. Republicans

The Republican response was consistent with previous concerns about environmental laws, particularly the ESA. Before 9/11, some Republican members of Congress urged DoD to address encroachment as it impacted readiness. While acknowledging DoD's efforts to do so, Representative Bob Barr, then Vice Chairman of the House of Representative's Committee on Government Reform, berated DoD for turning the study of the problem into a bureaucratic "'career field' in itself."⁷⁴ Instead, he said, "[w]e need to interject some common sense answers to our questions, and demand leadership to put our troops first, not some plant life or bird egg, or the sex life of some turtle."⁷⁵ Further, Representative Richard Pombo, former chairman of the House Committee on Resources, among others, has been working systematically to dismantle the ESA with respect to all activities—military, civilian, or otherwise—especially the provisions for critical habitat.⁷⁶

⁷² *Id.* at 19.

⁷³ *Id.*

⁷⁴ *Id.* at 6 (statement of Representative Bob Barr, Vice Chairman, House Committee on Government Reform).

⁷⁵ *Id.*

⁷⁶ *See, e.g.*, Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. § 5 (2005) (eliminating the provisions for the designation of critical habitat). *See*

3. Environmental Groups

Environmental groups roundly denounced DoD's requests for relief from compliance with environmental and natural resources laws. In response to DoD's argument that the amendments would merely clarify existing law, John Kostyack, senior counsel for the National Wildlife Federation, remarked that the proposed change to the ESA exempting lands with an approved INRMP was "not a clarification but a major rollback."⁷⁷

Given her background, Senior Vice President for Conservation Programs at the National Wildlife Federation ("NWF"), Jamie Clark's testimony is of particular note.⁷⁸ Before working for NWF, Clark worked for the U.S. Fish and Wildlife Service for thirteen years, serving the last four as the director of the agency.⁷⁹ Before that, she also held two different environmental and natural resources positions with the military.⁸⁰ Regarding the proposed amendments to the ESA, Clark testified:

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

This approach of working through compliance issues on an installation-by-installation basis really does work. As DoD [itself has] acknowledged, our Armed Forces are as prepared today as they have ever been in their history. Their state of readiness has been achieved without broad sweeping exemptions from environmental laws.⁸¹

generally Jacob Eaton, *The Threatened and Endangered Species Recovery Act, or "The Wildlife Extinction Bill"*, 20 J. NAT. RESOURCES & ENVTL. L. 259 (2005-06) (analyzing the proposed legislation section by section).

⁷⁷ Struglinski, *supra* note 15.

⁷⁸ See *Environmental Laws: Encroachment on Military Training?: Hearing Before the S. Comm. on Environment & Public Works*, 108th Cong. 48 (2003) (statement of Jamie Clark, Senior Vice President for Conservation Programs, National Wildlife Federation and former Director, U.S. Fish and Wildlife Service), available at <http://a257.g.akamaitech.net/7/257/2422/01mar20061330/www.access.gpo.gov/congress/senate/pdf/108hr/91745.pdf> [hereinafter *Environmental Laws: Encroachment on Military Training?*].

⁷⁹ *Id.* at 48.

⁸⁰ *Id.*

⁸¹ *Id.*

Clark concluded her testimony by urging Congress to “pay close attention to those who are crafting solutions at the installation level, and reject the Pentagon’s efforts to undermine these solutions with broad-based exemptions to the Endangered Species Act.”⁸²

A coalition of environmental groups—including Defenders of Wildlife, Earthjustice, the Humane Society of America, the National Audubon Society, the National Environmental Trust, NWF, the Natural Resources Defense Council (“NRDC”), and the World Wildlife Fund—formed to oppose DoD’s efforts.⁸³ With respect to the ESA, the coalition argued that “DoD has a long history of successful compliance with the ESA” and that in the instances where designation of critical habitat would interfere with training, DoD could ask the Services to exercise their discretion under section 4(b)(2) of the ESA to exclude the necessary training grounds.⁸⁴ The coalition cites the exclusion of 95% of Camp Pendleton’s land from designation as critical habitat for any species, and the complete exclusion of Camp Pendleton’s and Marine Corps Air Marine Base Miramar’s land from designation of critical habitat for the endangered gnatcatcher.⁸⁵ Moreover, the coalition opposed granting a blanket exemption that would include all locations, even if there existed no conflict between training needs and species protection.⁸⁶ Given the past successes of the Services and DoD working together, the coalition concluded that the exemption was unjustified.⁸⁷

With respect to the MMPA, Karen Steur, a senior policy advisor for the National Environmental Trust, testified on behalf of her organization and eight others. She admitted that there are problems with permitting and other processes, but testified that those problems do not

⁸² *Id.* at 49.

⁸³ Am. Rivers et al., *Environmental Coalition Opposes the Pentagon’s ‘Readiness and Range Preservation Initiative*, <http://www.envirosagainstawar.org/sayno/EcoCoalitionvsRaRPI.pdf> (last visited Apr. 1, 2008). The coalition consists of American Rivers, the Center for Biological Diversity, the Center for Public Environmental Oversight, Defenders of Wildlife, the Earth Island Institute, Earthjustice, the Endangered Species Coalition, the Humane Society of America, the Military Toxics Project, the National Audubon Society, the National Environmental Trust, the National Wildlife Federation, NRDC, the Oceana Public Employees for Environmental Responsibility, Seaflow, the Sierra Club, U.S. PIRG, and the World Wildlife Fund.

⁸⁴ *Id.* at 6.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

justify amending the definition of “harassment” as DoD urged.⁸⁸ Moreover, in her prepared statement Steur argued that

DoD should not be exempt from complying with laws intended to apply equally to all Americans, and the public should not be asked to shoulder the additional conservation responsibilities that will result if the original DoD amendments are enacted. But to use DoD’s lack of cooperation or NMFS inconsistencies in the review process as an excuse for the Committee to propose sweeping changes to the MMPA outside of the reauthorization process is simply irresponsible.⁸⁹

The environmental coalition also opposed amending the definition of “harassment” as well as DoD’s request to eliminate the requirement that takes of marine mammals be limited to “small numbers” in a “specified geographic region” and its request to avoid the review process entirely.⁹⁰ The coalition predicted that “[t]he likely result of these dramatic changes would be far less protection for marine mammals, less mitigation and monitoring of impacts, less transparency, and even more public controversy and debate.”⁹¹

4. The Federal Wildlife Agencies

The NMFS within the U.S. Department of Commerce administers the MMPA and has responsibilities under the ESA for mostly marine and anadromous species. FWS of the U.S. Department of the Interior administers the MBTA and has primary responsibility for administering the ESA for the rest of the listed species, mostly terrestrial and freshwater species. Below are summaries of those agencies’ reactions to the RRPI.

⁸⁸ *National Security Readiness Act*, *supra* note 27, at 126-27 (statement of Karen Steur, Senior Policy Advisor, National Environmental Trust). Steur testified on behalf of the National Environmental Trust, Greenpeace, the Humane Society of the United States, the International Wildlife Coalition, NRDC, Oceana, the Sierra Club, the Ocean Conservancy, and World Wildlife Fund.

⁸⁹ *Id.* at 129.

⁹⁰ Am. Rivers et al., *supra* note 83, at 7.

⁹¹ *Id.*

a. The Fish and Wildlife Service

FWS supported the proposed changes to the ESA as a codification of its policy to exclude military bases from the designation of critical habitat if the base had an approved INRMP that addressed the species at issue.⁹² Craig Manson, Assistant Secretary for Fish and Wildlife and Parks testified before Congress on behalf of FWS. Manson served for more than thirty years as a member of the Air Force, the Air Force Reserve, and the Air National Guard.⁹³ He testified in support of DoD, stating that the Department of the Interior's bureaus, one of which is FWS, "have actively and successfully sought to work with the Department of Defense to meet the requirements of various natural resources laws without impacting the military's ability to train."⁹⁴

In response to criticisms that DoD had never sought a national security exemption under section 7(j) of the ESA, Manson argued in his prepared statement that the absence of such a request "speaks very well to the creativity of our military and natural resources professionals."⁹⁵ But he cautioned that the nation should not punish DoD for its good deeds, nor unfairly shift the burden of conservation onto the military.⁹⁶

b. The National Marine Fisheries Service

Dr. Rebecca Lent, NOAA's Deputy Assistant Administrator for Regulatory Programs, testified before the Senate Committee on Armed Services' Subcommittee on Readiness and Management Support with respect to the RRPI in 2003.⁹⁷ Although NOAA Fisheries has responsibilities

⁹² *Environmental Laws: Encroachment on Military Training?*, *supra* note 78, at 25 (statement of H. Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior). For example, FWS excluded lands at Camp Roberts and Fort Hunter Liggett from critical habitat designation as a matter of policy because the bases were being managed to address the conservation needs of the listed species (purple amole) and thus would not meet the definition of critical habitat under the ESA. Endangered And Threatened Wildlife and Plants; Final Designation of Critical Habitat for *Chlorogalum purpureum*, a plant from the South Coast Ranges of California, 67 Fed. Reg. 65,414 (Oct. 24, 2002) (to be codified at 50 C.F.R. pt. 17).

⁹³ *Environmental Laws: Encroachment on Military Training?*, *supra* note 78, at 24.

⁹⁴ *Id.*

⁹⁵ *Id.* at 105.

⁹⁶ *Id.*

⁹⁷ *FY 2004 Defense Authorization: Hearing Before Subcomm. on Readiness and Management Support, S. Comm. on Armed Servs.*, 108th Cong. (2003) (statement of Dr. Rebecca Lent, Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service), 2003 WL 1747485 (F.D.C.H.).

under the ESA, Dr. Lent limited her comments to DoD's request to amend the definition of "harassment" and to change the requirements for incidental take permits under the MMPA. Dr. Lent testified that "[a]lthough the existing regime under the MMPA and ESA is fairly flexible, the Administration recognizes that the definition of harassment under the MMPA needs clarification."⁹⁸ She further testified that in evaluating the impact of the proposed amendments, the important point to realize was DoD would still have to demonstrate that its activities would have a negligible impact on the marine mammal species and populations. Moreover, authorizations for takes would remain subject to applicable provisions of the ESA, the National Environmental Policy Act ("NEPA"), and the Administrative Procedures Act ("APA"). Thus, she "predict[ed] that the proposed amendments to the MMPA would have no adverse impact on the protection of marine mammals."⁹⁹

Accordingly, NOAA Fisheries supported the RRPI with respect to the MMPA, concluding that the RRPI took into account "the interests of the American people in military readiness and in environmental protection."¹⁰⁰ Dr. Lent stated that she was "confident that DoD and NOAA can work together within the framework of the proposed law to ensure that America's armed forces are able to train to carry out their national security mission and that the Agency is able to carry out its marine conservation responsibilities."¹⁰¹

II. AMENDMENTS TO NATURAL RESOURCES LAWS AND THE AFTERMATH

After several attempts, DoD finally convinced Congress that blanket exemptions from portions of the MMPA, the ESA, and the MBTA were warranted and appropriate. The discussion below explicates the content of those exemptions, reviews the litigation that has ensued, and analyzes the practical effects of those exemptions thus far.

A. *The Marine Mammal Protection Act: Harassment and Incidental Takes*

The controversy under the MMPA arose from some court determinations that the Navy's use of new, low-frequency sonar systems violates

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

the MMPA in certain circumstances.¹⁰² Powerful evidence suggests that the operation of older, mid-frequency sonar systems has caused injuries to marine mammals.¹⁰³ For example, a study conducted by the Department of Commerce and the Navy determined that the use of the mid-frequency sonar system caused bleeding of the inner-ear and disorientation of whales that led to mass beaching off the coast of the Bahamas in 2000.¹⁰⁴ There has also been recent evidence of the negative impact on whales off the coast of Hawaii during Navy training exercises in July 2004. "The National Marine Fisheries Service concluded the Navy's sonar transmissions were a 'plausible, if not likely, contributing factor to the animals entering and remaining in the bay.'"¹⁰⁵ Some environmentalists and state regulators are concerned that the new technology will pose similar risks.¹⁰⁶

Nonetheless, Congress obliged DoD in the National Defense Authorization Act for Fiscal Year 2004 ("NDAA FY 2004")¹⁰⁷ and significantly amended the MMPA. The NDAA FY 2004 changes the definition of "harassment" with respect to military readiness activities, designating fewer activities as "harassment" in violation of the law.¹⁰⁸ The amendment also provides for incidental taking of marine mammals during military readiness activities *without* restricting the take to "small numbers" or "a specified geographical region."¹⁰⁹ And finally, the most important change

¹⁰² *Hearing Before H. Armed Service Comm. Subcomm. on Military Readiness*, 108th Cong. 1 (2003) (statement of Raymond F. DuBois, Deputy Under Secretary of Defense for Installations and Environment).

¹⁰³ See generally Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 759, 763-78 (2008).

¹⁰⁴ U.S. DEPT OF COMMERCE & SEC'Y OF THE NAVY, JOINT INTERIM REPORT, BAHAMAS MARINE MAMMALS STRANDING EVENT OF 15-16 MARCH 2000, at 16 (2001), available at http://awionline.org/oceans/Noise/Interim_Bahamas_Report.pdf.

¹⁰⁵ Press Release, Center for Biological Diversity, Lawsuit Filed to Protect Endangered Whales from Navy Sonar (May 16, 2007), available at <http://www.biologicaldiversity.org/swcbd/press/sonar-05-16-2007.html>.

¹⁰⁶ See, e.g., The Humane Society of the United States, Sonar: Acoustic Harassment, http://www.hsus.org/marine_mammals/what_are_the_issues/noise_pollution_and_acoustic_harassment/sonar_acoustic_harassment.html (last visited Apr. 1, 2008); MICHAEL JASNY ET AL., SOUNDING THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING AND INDUSTRIAL OCEAN NOISE ON MARINE LIFE iv-v (2005), available at <http://www.nrdc.org/wildlife/marine/sound/sound.pdf>.

¹⁰⁷ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

¹⁰⁸ *Id.* § 319(a), 117 Stat. at 1433.

¹⁰⁹ *Id.* § 319(c)(3), 117 Stat. at 1435.

authorizes the Secretary of Defense—not the Secretary of the Interior nor the Secretary of Commerce—to exempt, initially for up to two years, “any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirements of this Act, if the Secretary determines that it is necessary for national defense.”¹¹⁰ Moreover, the Secretary of Defense may issue additional exemptions for the same action or category of actions if he makes a new determination that further exemptions are necessary for national defense.¹¹¹ As discussed below, the Secretary of Defense has not hesitated to exercise that authority when faced with legal challenges to the Navy’s use of the low-frequency sonar.

The MMPA is up for reauthorization,¹¹² and these provisions are perhaps the most likely to be narrowed by the newly-elected Congress. In its report on the National Defense Authorization Act of Fiscal Year 2008, House Bill 1585, the House Committee on Armed Services expressed concern about the Navy’s use of its exemptions from the MMPA.¹¹³ In the

¹¹⁰ *Id.* § 319(b), 177 Stat. at 1434.

¹¹¹ Proclamation 8031, 71 Fed. Reg. 36,443, 36,446-47 (June 15, 2006).

¹¹² There has been some legislative activity regarding the MMPA after the NDAA FY 2004. For example, on July 18, 2006, the U.S. House of Representatives passed the Marine Mammal Protection Act Amendments of 2006 to reauthorize the MMPA. Marine Mammal Protection Act Amendments of 2006, H.R. 4075, 109th Cong. (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4075rfs.txt.pdf. On December 6, 2006, the Senate passed legislation to implement the provisions of the agreement between the United States and the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population. United States-Russia Polar Bear Conservation and Management Act, H.R. 4075, 109th Cong. § 501 (2006) (as passed by Senate, Dec. 6, 2006), *available at* <http://www.govtrack.us/data/us/bills/text/109/h/h4075.pdf>. Though the Senate’s bill states that H.R. 4075 passed, the Senate amended H.R. 4075 to strike everything after the enacting clause and inserted the polar bear treaty provisions. *Id.*

¹¹³ The Committee is concerned that the Deputy Secretary of Defense authorized a two-year National Defense Exemption from the Marine Mammal Protection Act . . . on January 23, 2007. . . . The committee recognizes that this exemption is intended to span the duration of time during which the Department of the Navy is working to come into full compliance with the MMPA. Until such time as the Navy achieves full compliance with the MMPA, the committee directs the Secretary of the Navy to document those specific activities undertaken under the authority of the National Defense Exemption. Further, the committee directs the Secretary of the Navy to submit a report on those activities to the Senate Committee on Armed Services and the House Committee on Armed Services by February 1, 2008.

H.R. REP. NO. 110-146, at 299 (2007).

meantime, there are at least five pending or recently resolved lawsuits regarding the Navy's use of sonar and its impact on natural resources. The plaintiffs in these cases are (1) the NRDC and other environmental public interests groups (three cases),¹¹⁴ (2) the California Coastal Commission (one case),¹¹⁵ and (3) the Ocean Mammal Institute and several nonprofit environmental and recreational groups (one case).¹¹⁶ Below are summaries of those actions and an analysis of the implications for protection of marine mammals.

1. NRDC's Challenges

NRDC currently has three pending or recently settled cases against the Navy for its use of sonar in U.S. waters. Two of those cases concern the use of mid-frequency active ("MFA") sonar off the southern coast of California. The first case, *NRDC v. England*, now styled *NRDC v. Winter* ("*NRDC v. Winter I*"), which NRDC and other environmental groups, as well as Jean-Michel Cousteau, filed in October 2005, seeks declaratory and injunctive relief to prohibit the Navy from using mid-frequency active sonar off the southern coast of California.¹¹⁷ The plaintiffs alleged that in using its MFA sonar, the Navy has failed to comply with NEPA, the MMPA, and the ESA.¹¹⁸ The plaintiffs also requested that the court direct "the Navy to propose within 60 days a plan to remedy the violations of law alleged . . . including a mitigation plan for uses of its mid-frequency active sonar during testing and training activities."¹¹⁹

The Navy moved for dismissal in that case, but the court stayed the motion pending discovery regarding jurisdiction and standing.¹²⁰ In response to plaintiffs' discovery requests, the Navy asserted a "state secrets privilege" in March 2007.¹²¹ Following extensive negotiations, the parties

¹¹⁴ *NRDC v. Winter*, No. 8:07-CV-07-00335, 2007 WL 2481037 (C.D. Cal. Aug. 7, 2007); *NRDC v. Winter*, CV 06-4131 (C.D. Cal. July 3, 2006); *NRDC v. Winter*, CV 05-7513 (C.D. Cal. Oct. 19, 2005) (originally styled *NRDC v. England*).

¹¹⁵ *Cal. Coastal Comm'n v. U. S. Dep't of the Navy*, CV-07-01899 (C.D. Cal. Mar. 22, 2007).

¹¹⁶ *Ocean Mammal Inst. v. Gates*, No. 1:2007 CV 00254 (D. Haw. May 16, 2007).

¹¹⁷ Complaint for Declaratory and Injunctive Relief, *NRDC v. Winter*, CV-05-7513 (C.D. Cal. Oct. 19, 2005).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Order Re: Jurisdictional Discovery at 2-4, *NRDC v. Winter*, No. CV-05-7513 (C.D. Cal. filed May 15, 2006).

¹²¹ *Navy Asserts 'State Secrets' Privilege in Lawsuits Over Use of Mid-Frequency Sonar*, DAILY ENVT. REP., Mar. 22, 2007, at A-13, available at <http://subscript.bna.com/SAMPLES/>

reached an agreement concerning the Navy's objections to NRDC's discovery requests.¹²²

The same plaintiffs filed the second case concerning California, *NRDC v. Winter* ("NRDC v. Winter II"), in March 2007.¹²³ The plaintiffs alleged violations of NEPA, the ESA, and the Coastal Zone Management Act ("CZMA").¹²⁴ In August 2007, the district court issued a preliminary injunction; however, in November 2007, a panel of the Court of Appeals for the Ninth Circuit remanded the case to the district court to tailor its injunction.¹²⁵ Upon reconsideration, the district court issued another preliminary injunction, to which DoD responded with some executive branch chicanery, described below.

The third case, *NRDC v. Winter* ("NRDC-RIMPAC"), which NRDC filed in July 2006, dealt with training exercises off the coast of Hawaii.¹²⁶ NRDC alleged that the Navy had violated NEPA and the MMPA.¹²⁷ Though the Secretary of Defense issued a National Defense Exemption to the Navy with respect to the MMPA,¹²⁸ the case continued with the allegations of a violation of NEPA. The parties reached a settlement after the district court granted the plaintiffs' request for a preliminary injunction and ordered the parties to negotiate.¹²⁹

The following discussion will focus upon *NRDC v. Winter II* and *NRDC-RIMPAC*. Note that ultimately these cases have not proceeded on the basis of alleged violations of MMPA because DoD exercised its new "National Defense Exemption."¹³⁰ Instead, Plaintiffs have prevailed on claims regarding violations of NEPA and the CZMA.

den.nsf/3404b46f853d5cc985256b57005ac042/b36644e2348628cb852572a6000d7c66?OpenDocument.

¹²² Joint Notice of Agreement Resolving Jurisdictional Discovery Dispute over Invocation of the Military and State Secrets Privilege, *NRDC v. Winter*, No. 05-CV-07513 (C.D. Cal. May 30, 2007).

¹²³ Complaint for Declaratory and Injunctive Relief, *NRDC v. Winter*, No. CV-07-0334 (C.D. Cal. Mar. 22, 2007).

¹²⁴ *Id.* at 8.

¹²⁵ *NRDC v. Winter*, 502 F.3d 859, 865 (9th Cir. 2007).

¹²⁶ Complaint for Declaratory and Injunctive Relief, *NRDC v. Winter*, CV-06-4131 (C.D. Cal. June 28, 2006), available at http://docs.nrdc.org/water/wat_06062801A.pdf.

¹²⁷ *Id.*

¹²⁸ News Release, Dep't of Def., National Defense Exemption to MMPA Authorized for Navy (June 30, 2006) (order granting preliminary injunction), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=9706> [hereinafter Nat'l Def. Exemption to MMPA Authorized for Navy].

¹²⁹ *NRDC v. Winter*, No. CV-06-4131 (C.D. Cal. July 3, 2006), available at <http://www.nrdc.org/media/docs/060703.pdf>.

¹³⁰ Nat'l Def. Exemption to MMPA Authorized for Navy, *supra* note 128.

a. NRDC-RIMPAC

In the summer of 2006, NRDC, other environmental groups, and John-Michel Cousteau sought an injunction to stop the U.S. Navy's use of high-intensity MFA sonar in Pacific Rim training exercises off the coast of Hawaii ("RIMPAC").¹³¹ During the international training exercise, the Navy would broadcast sonar into the Papahānaumokuākea Marine National Monument (formerly known as the Northwestern Hawaiian Islands Marine National Monument) created by President George W. Bush two weeks before the filing of the lawsuit.¹³² Plaintiffs alleged violations of the MMPA, NEPA, and the APA.¹³³ With respect to the MMPA, plaintiffs asked the court to vacate NOAA Fisheries' "Incidental Harassment Authorization" under the MMPA for the training exercises¹³⁴ and declare both the Navy and NOAA Fisheries in violation of the MMPA.¹³⁵

While the suit was pending, DoD granted the Navy a "National Defense Exemption" ("NDE") for six months, relieving it of its obligations to comply with the MMPA.¹³⁶ The court ruled in favor of the plaintiffs, however, finding a likelihood of success on the claims under NEPA regarding failure to prepare an Environmental Impact Statement ("EIS") for the training activities before proceeding. The court also ordered the parties to negotiate.¹³⁷ The parties reached a settlement in which the Navy agreed to (1) avoid sonar use in a twenty-five-nautical-mile buffer zone around the new Papahānaumokuākea Marine National Monument, and (2) increase

¹³¹ Complaint for Declaratory and Injunctive Relief, *supra* note 126. Interestingly, First Lady Laura Bush traveled to this area in March 2007 "to 'increase public awareness' of the surrounding marine ecosystem." Allison Winter, *Laura Bush to Visit Northwest Hawaiian Islands*, GREENWIRE, Feb. 16, 2007, <http://www.eenews.net/Greenwire/2007/02/16/#17>.

¹³² Complaint for Declaratory and Injunctive Relief at n.1, NRDC v. Winter, CV-06-4131, (C.D. Cal. June 28, 2006), *available at* http://docs.nrdc.org/water/wat_06062801A.pdf; *see also* Proclamation No. 8031, 50 C.F.R. 404.1-12 (June 15, 2006).

¹³³ Complaint for Declaratory and Injunctive Relief, *supra* note 132, at 6.

¹³⁴ *Id.* at 4. *See generally* Small Takes of Marine Mammals Incidental to Specified Activities; Rim of the Pacific Anti-submarine Warfare Exercise Training Events Within the Hawaiian Islands Operating Area, 71 Fed. Reg. 38,710 (July 7, 2006). NMFS issued the Incidental Harassment Authorization on June 27, 2006. Nat'l Marine Fisheries Serv., Nat'l Oceanic & Atmospheric Admin., Dep't of Commerce, Incidental Harassment Authorization (June 27, 2006), *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/rimpac_iha_signed.pdf.

¹³⁵ Complaint for Declaratory and Injunctive Relief, *supra* note 132, at 41.

¹³⁶ Nat'l Def. Exemption to MMPA Authorized for Navy, *supra* note 128.

¹³⁷ Temporary Restraining Order at 7, NRDC v. Winter, No. CV-06-4131 (C.D. Cal. July 3, 2006), *available at* <http://www.nrdc.org/media/docs/060703.pdf>.

its whale monitoring by using underwater detection microphones, aerial surveillance, and more observers on ships.¹³⁸

DoD then announced in January 2007 a two-year NDE for all “naval activity involving mid-frequency active sonar use, and a new sensor that uses small explosive charges, during major training exercises and on established ranges and operating areas.”¹³⁹ “The Navy’s position is that continued training with active sonar is absolutely essential in protecting the lives of our Sailors and defending the nation. Increasingly quiet diesel-electric submarines continue to proliferate throughout the world.”¹⁴⁰ According to the Navy, the exemption serves as a “bridge” for its long-range plan to ensure that the Navy complies with all environmental laws.¹⁴¹ The exemption will sunset as the plan is completed for each training area.¹⁴² Although the Secretary of Defense exempted the Navy, it must comply with the mitigation measures NOAA Fisheries outlined.¹⁴³

b. NRDC v. Winter II

In March 2007, NRDC, other environmental groups, and John-Michel Cousteau, filed *NRDC v. Winter II* over the Navy’s proposed training exercises off the southern coast of California.¹⁴⁴ In June, the plaintiffs sought a preliminary injunction against the use of MFA sonar in the Southern California Operating Area (“SOCAL”) exercises until the Navy adopted “mitigation measures that would substantially lessen the likelihood of serious injury and death to marine life.”¹⁴⁵ The plaintiffs alleged, among other things, that the Navy violated NEPA, the CZMA, the APA, and the ESA. The Navy then filed a motion to dismiss or stay the suit.¹⁴⁶

¹³⁸ Press Release, NRDC, Sonar Lawsuit Settlement: Navy Will Limit Needless Harm to Whales: Common Sense Measures in New Accord Include Sonar-Free Buffer Around Newly Created Marine National Monument (July 7, 2006), available at <http://www.nrdc.org/media/pressreleases/060707.asp>.

¹³⁹ News Release, Def. Dep’t Documents, U.S. Navy Release, New National Defense Exemption to MMPA Authorized by Navy (Jan. 23, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10427>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ NRDC v. Winter, CV-07-00335 (C.D. Cal. Mar. 22, 2007).

¹⁴⁵ NRDC v. Winter, CV-07-00335 (C.D. Cal. June 22, 2007).

¹⁴⁶ NRDC v. Winter, No. 8:07-CV-07-00335, 2007 WL 2481037, at *2 (C.D. Cal. Aug. 7, 2007). The Navy sought a dismissal on the grounds that the suit was duplicative of *NRDC v. Winter I*. Alternatively, the Navy requested a stay pending the resolution of *California*

In August 2007, the district court issued a preliminary injunction prohibiting the Navy from continuing its use of MFA sonar as planned through January 2009.¹⁴⁷ The court found that the injunction was appropriate with respect to the plaintiffs' causes of action for violations of NEPA, the CZMA, and the APA.¹⁴⁸ However, a panel of the Court of Appeals for the Ninth Circuit granted the Navy's motion for a stay of injunction pending appeal.¹⁴⁹ In granting the stay, the panel found that "[t]he district court did not explain why a broad, absolute injunction against the use of the medium frequency active sonar in these complex training exercises for two years was necessary to avoid irreparable harm to the environment."¹⁵⁰ However, upon hearing oral arguments in November 2007, the panel—though allowing the Navy to complete the current exercises—lifted the stay of the injunction and remanded the matter to the district court to design a more narrowly tailored injunction.¹⁵¹ The appellate court concluded that "[i]n light of the Navy's past use of additional mitigation measures to reduce the harmful effects of its active sonar during its 2006 exercises in the Pacific Rim," a tailored remedy was appropriate.¹⁵²

On remand, with its findings regarding probability of success on the plaintiffs' claims under NEPA, the APA, and the CZMA undisturbed, the district court proceeded to issue a more narrowly tailored preliminary injunction.¹⁵³ The court ordered the Navy to implement the following seven mitigation measures:¹⁵⁴

1. maintenance of a twelve-nautical-mile exclusion zone from the coast of California,¹⁵⁵
2. cessation of use of MFA sonar when marine mammals are observed within 2200 yards,¹⁵⁶

Coastal Commission v. U.S. Department of the Navy, CV-07-01899 (C.D. Cal. Mar. 22, 2007). *Id.*

¹⁴⁷ *Id.* at *11.

¹⁴⁸ *Id.*

¹⁴⁹ *NRDC v. Winter*, 502 F.3d 859 (9th Cir. 2007).

¹⁵⁰ *Id.* at 864.

¹⁵¹ *Id.* at 887.

¹⁵² *Id.*

¹⁵³ *NRDC v. Winter*, 530 F. Supp. 2d 1110, 1118 (C.D. Cal. 2008).

¹⁵⁴ *Id.* at 1119-21.

¹⁵⁵ *Id.* at 1119.

¹⁵⁶ *Id.*

3. monitoring aboard the ships and aerially for the presence of marine mammals before and during the exercises,¹⁵⁷
4. monitoring from helicopters for marine mammals ten minutes before using “active dipping sonar,”¹⁵⁸
5. powering down sonar by six decibels when “surface ducting” conditions are detected,¹⁵⁹
6. refraining from use of MFA sonar in the Catalina Basin because of the high density of marine mammals there,¹⁶⁰ and
7. continuation of the mitigation measures listed in the 2007 National Defense Exemption to the extent that those measures are not in conflict or less stringent than those imposed by the court’s injunction.¹⁶¹

The Navy, however, with the assistance of the Secretary of Commerce and the White House Council on Environmental Quality (“CEQ”),¹⁶² sought to circumvent the district court’s injunction. On January 11, 2008, the Secretary of Commerce requested that the President exempt the Navy from section 307(c)(1)(A) of the CZMA, 16 U.S.C. § 1456(c)(1)(A), certifying that mediation under § 1456(h) was not likely to result in compliance with § 1456(c)(1)(A).¹⁶³ President Bush determined that

[c]ompliance . . . would undermine the Navy’s ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of carrier and expeditionary strike groups. This exemption will enable the Navy to train effectively and to certify carrier and expeditionary strike groups for deployment in support of world-wide

¹⁵⁷ *Id.* at 1120.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1120-21. “Surface ducting” conditions are when “sound travels further than it otherwise would due to temperature differences.” *Id.* at 1120.

¹⁶⁰ *Id.* at 1121.

¹⁶¹ *Id.*

¹⁶² Congress established CEQ as part of NEPA to help the President develop national environmental policy. 42 U.S.C. §§ 4341-47 (2000).

¹⁶³ Press Release, The White House, Memorandum for the Secretary of Defense and the Secretary of Commerce (Jan. 15, 2008), available at <http://www.whitehouse.gov/news/releases/2008/01/20080116.html>.

operational and combat activities, which are essential to national security.¹⁶⁴

Accordingly, in response to the Secretary of Commerce's request and the determination above, on January 15, 2008, President Bush exempted from the CZMA the Navy's use of MFA sonar off the coast of southern California under 16 U.S.C. § 1456 (c)(1)(B).¹⁶⁵

In addition to the Secretary of Commerce's request, the Navy requested "alternative arrangements"¹⁶⁶ from CEQ to exempt the sonar training exercises from review under NEPA.¹⁶⁷ As support for its request, the Navy submitted NOAA Fisheries' January 9, 2008 determination that the training exercises would not "result in adverse population effects for any of the marine mammal populations."¹⁶⁸ Finding "emergency circumstances," CEQ granted the Navy's request.¹⁶⁹ Secretary of the Navy Donald C. Winter issued a memorandum decision on January 15, 2008 agreeing to those arrangements, including "adaptive management measures, more thorough reporting procedures and increased public participation."¹⁷⁰

Armed with these two new executive exemptions, the Navy filed an emergency motion in the Court of Appeals for the Ninth Circuit, petitioning the court to vacate the district court's preliminary injunction or to stay that injunction partially.¹⁷¹ The court of appeals remanded the case back to the district court to consider these developments and whether they warranted a vacatur or partial stay of the injunction.¹⁷² The district court

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ("Presidential Exemption from the Coastal Zone Management Act"). The New York Times editorial board commented, "[f]rom our perspective this looks less like a matter of national security than of convenience for the Navy, which resists efforts to constrain its activities no matter the harm to marine life." Editorial, *Whales in Navy's Way*, N.Y. TIMES, Jan. 22, 2008, available at <http://www.nytimes.com/2008/01/22/opinion/22tue2.html>.

¹⁶⁶ 40 C.F.R. § 1506.11 (2007) (allowing "action with significant environmental impact [to be taken] without observing" NEPA's regulations).

¹⁶⁷ U.S. Navy, *Navy Granted Authority to Use Sonar in Training Off California*, Jan. 16, 2008, http://www.navy.mil/search/display.asp?story_id=34381 [hereinafter *Navy Granted Authority*].

¹⁶⁸ Letter from James L. Connaughton, Chairman, Council on Environmental Quality, to Donald C. Winter, Secretary of the Navy (Jan. 15, 2008), available at http://www.whitehouse.gov/ceq/Letter_from_Chairman_Connaughton_to_Secretary_Winter.pdf.

¹⁶⁹ *Id.*

¹⁷⁰ *Navy Granted Authority*, *supra* note 167.

¹⁷¹ NRDC v. Winter, No. 08-55054, at 2 (9th Cir. 2008).

¹⁷² *Id.* at 5.

temporarily, partially stayed its injunction, pending consideration of the Navy's motion.¹⁷³

Not surprisingly, plaintiffs argued that Bush's action was of no legal consequence.

"The President's action is an attack on the rule of law," said Joel Reynolds . . . at NRDC "By exempting the Navy from basic safeguards under both federal and state law, the President is flouting the will of Congress, the decision of the California Coastal Commission, and a ruling by the federal court."¹⁷⁴

Similarly, at a hearing on January 22, 2008, attorneys for the California Coastal Commission, which joined the case in October 2007,¹⁷⁵ argued that Bush's action to exempt the Navy from the CZMA violated the doctrine of separation of powers. "The notion that the president can act like some medieval autocrat and impose the law as he sees it violates the fundamental basis of the American Constitution," said Atty. Gen. Jerry Brown "There are three branches of government. Each of the branches has to be respected."¹⁷⁶ They further argued that the exemption is invalid because "Bush provided only a 'cursory basis' for his decision and did not provide an explanation from the Secretary of Commerce, as required" by the CZMA.¹⁷⁷

And Senator Barbara Boxer, Democrat from California and chairwoman of the Senate Environment and Public Works Committee, also expressed her displeasure with Bush's action.

'Once again the Bush administration has taken a slap at our environmental heritage, overriding a court that was very mindful to protect marine wildlife, including endangered whales,' the California senator said in a statement.

¹⁷³ NRDC v. Winter, No. 8:07-CV-00335, 2007 WL 2481037, at *1 (C.D. Cal. Jan. 17, 2008).

¹⁷⁴ *Bush Attempts Illegal Override of Court Order Protecting Whales from Sonar*, U.S. FED. NEWS, Jan. 16, 2008, available at 2008 WLNR 1026086.

¹⁷⁵ Docket, NRDC v. Winter, No. 07-56157 (9th Cir. Oct. 25, 2007) (order granting California Coastal Commission's motion to intervene).

¹⁷⁶ Kenneth R. Weiss, *Bush's Sonar Order is Unconstitutional, Coastal Panel Says*, L.A. TIMES, Jan. 23, 2008, available at <http://www.latimes.com/news/science/environment/la-me-sonar23jan23,0,7580697.story>.

¹⁷⁷ *Id.*

'Unfortunately, this Bush administration action will send this case right back into court, where more taxpayer dollars will be wasted defending a misguided decision.'¹⁷⁸

On February 4, 2008, the district court lifted the stay of its own injunction and denied DoD's application to vacate the injunction,¹⁷⁹ finding CEQ's approval of "emergency alternative arrangements" under NEPA invalid.¹⁸⁰ The court held that neither the training exercises nor the injunction were sudden or unanticipated events.¹⁸¹ Instead, the court found that "[t]he Navy's current 'emergency' is simply a creature of its own making, *i.e.*, its failure to prepare adequate environmental documentation in a timely fashion."¹⁸² The court also found that CEQ and the Navy's interpretation of the pertinent regulation "produces the absurd result of permitting agencies to avoid their NEPA obligations by re-characterizing ordinary, planned activities as 'emergencies' in the interests of national security, economic stability, or other long-term policy goals."¹⁸³ The court further reasoned that CEQ's reading of the regulation would turn what was "conceived as a narrow regulatory exception to the . . . requirements [of NEPA into something that] would swallow those requirements whole. This cannot be consistent with Congressional intent."¹⁸⁴ The court did not reach the question of whether President Bush's attempt to exempt the Navy from the CZMA was unconstitutional as the plaintiffs argued, because the court determined that its ruling rested firmly on NEPA grounds.¹⁸⁵

¹⁷⁸ *Boxer, Environmentalists Challenge Bush On Sonar*, CONG. DAILY, Jan. 17, 2008, available at 2008 WLNR 891526.

¹⁷⁹ Order Denying Defendants' Ex Parte Application to Vacate Preliminary Injunction or to Partially Stay Pending Appeal and Order Vacating Temporary Stay at 1, *NRDC v. Winter*, No. 8:07-CV-00335 (C.D. Cal. Feb. 4, 2008).

¹⁸⁰ *Id.* at 2; Press Release, Natural Resources Defense Council, Federal Court Rejects Bush Sonar Waiver: Judge Reaffirms Order that Navy Must Reduce Harm to Whales from Intense Sound Blasts (Feb. 4, 2008), available at <http://www.nrdc.org/media/2008/080204b.asp>.

¹⁸¹ Order Denying Defendants' Ex Parte Application to Vacate Preliminary Injunction or to Partially Stay Pending Appeal and Order Vacating Temporary Stay, *supra* note 179, at 16-17.

¹⁸² *Id.* at 17.

¹⁸³ *Id.* at 23.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 34. The court does note that the exemption is "constitutionally suspect" because of when the President issued it and the fact that it does not weigh any additional considerations that were not before the court. *Id.* at 31-33.

The Navy appealed the district court's ruling, but the Court of Appeals for the Ninth Circuit upheld the preliminary injunction,¹⁸⁶ with only modifications to two of the mitigation measures ordered by the district court.¹⁸⁷ The Navy filed a petition for a writ of certiorari in the U.S. Supreme Court in March 2008.¹⁸⁸ In view of the determination that the plaintiffs had demonstrated probable success on the merits of their claim that the Navy violated NEPA by failing to prepare an EIS for the SOCAL exercises,¹⁸⁹ the Navy also issued a draft EIS in April 2008.¹⁹⁰ Counsel for NRDC, Joel Reynolds, is not impressed with the Navy's draft, however. While he acknowledges that even making an effort to complete an EIS is an advancement, he has two major criticisms of the draft. First, he believes that the Navy has understated grossly the number of species that would be harmed during the exercises.¹⁹¹ Second he argues that the Navy's draft does not "build upon the measures that the federal courts in California have already deemed inadequate 'Unfortunately, they don't seem to be making any progress, they don't seem to have learned anything.' Reynolds said. 'That is a prescription for future litigation.'"¹⁹² Stay tuned.

2. The California Coastal Commission's Challenge

In October 2006, before DoD exempted sonar exercises from the MMPA, the Navy sought the California Coastal Commission's permission under the CZMA and the California Coastal Act of 1976 ("CCA") to conduct training exercises off the coast of southern California. The CZMA requires that "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is *consistent* to the maximum extent

¹⁸⁶ NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008).

¹⁸⁷ NRDC v. Winter, No. 08-55054, 2008 WL 565682 (9th Cir. Feb. 29, 2008).

¹⁸⁸ NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008), *petition for cert. filed*, 76 U.S.L.W. 3539 (U.S. Mar. 31, 2008) (No. 07-1239), *available at* <http://www.usdoj.gov/osg/briefs/2007/2pet/7pet/2007-1239.pet.aa.pdf>.

¹⁸⁹ See NRDC v. Winter, No. 8:07-CV-07-00335, 2007 WL 2481037, at *4-*7 (C.D. Cal. Aug. 7, 2007).

¹⁹⁰ U.S. Dep't of the Navy, Southern California Range Complex Draft Environmental Impact Statement/Overseas Environmental Impact Statement, *available at* <http://www.socalrangecomplexeis.com/default.aspx>.

¹⁹¹ Allison Winter, *Calif. Sonar Could Affect 94,000 Marine Mammals a Year—Navy*, E&E NEWS PM, Apr. 4, 2008, <http://www.eenews.net/eenewspm/2008/04/04/archive/1>.

¹⁹² *Id.*

practicable with the enforceable policies of approved State management programs.”¹⁹³ The Navy submitted its “consistency determination” for its training exercises for a two-year period beginning in January 2007.¹⁹⁴

Pursuant to its authority under the CZMA, the California Coastal Management Program, and the CCA, the Commission reviewed the Navy’s consistency determination and found that it would be consistent only if the Navy met certain conditions to protect marine mammals and sea turtles.¹⁹⁵ The Navy and NOAA Fisheries, however, agreed that California had no power to regulate the Navy’s proposed sonar activities.¹⁹⁶ The Navy rejected twelve of the fourteen additional restrictions the Commission sought to impose, saying the precautions it planned to take were sufficient.¹⁹⁷ In response to the Navy’s refusal to comply with the conditions, the chairman of the Commission, Patrick Kruer, said,

This is baffling, because the conditions are so easy to implement, and they haven’t shown us any evidence that they can’t do them By refusing to cooperate with us, they are challenging the jurisdiction of the entire Commission and undermining the [California] Coastal Act and federal coastal protection laws that apply to all coastal states. That has implications way beyond this case.¹⁹⁸

¹⁹³ Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(A) (2000) (emphasis added).

¹⁹⁴ CAL. COASTAL COMM’N, CD086-06, STAFF RECOMMENDATION OF CONSISTENCY DETERMINATION (2006), available at <http://documents.coastal.ca.gov/reports/2006/12/F8c122006.pdf>; see also Letter from C.J. Mossey, Rear Admiral Chief Executive Officer, U.S. Navy Fleet Civil Eng’r, to Peter Douglas, Executive Director, Cal. Coastal Comm’n (Feb. 12, 2007), available at <http://www.coastal.ca.gov/fedcd/sonar/navy-response-sonar-3-22-2007.pdf> [hereinafter Letter from C.J. Mossey].

¹⁹⁵ Complaint for Preliminary and Permanent Injunctive Relief; Declaratory Relief and Writ of Mandamus at 2-3, Cal. Coastal Comm’n v. U.S. Dep’t of the Navy, CV-07-01899 (C.D. Cal. Mar. 22, 2007).

¹⁹⁶ The Navy provided three reasons for why it would not comply with the Commission’s conditions. First, the Navy argued, the use of sonar was not a part of the consistency determination and thus was not before the Commission, triggering the CZMA or the CCA. Second, even if the exercises were before the Commission, the Navy would conduct the activities consistent “to the maximum extent practicable with the enforceable policies of the California Coastal Management Program.” Letter from C.J. Mossey, *supra* note 194. And finally, the Navy argued that the Commission’s conditions failed “to recognize and consider the authority of the NMFS to manage marine animals and endangered species protected under the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA).” *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Press Release, Cal. Coastal Comm’n, Coastal Commission Sues U.S. Navy Over Use of

The California Coast Commission filed suit against the Navy in March 2007, alleging a violation of the CZMA.¹⁹⁹ The Commission later filed a motion to intervene in *NRDC v. Winter II* when the case was before the Court of Appeals for the Ninth Circuit,²⁰⁰ and the court granted its motion in October 2007.²⁰¹ The Commission's individual action is on hold pending the resolution of that case. Before the Executive Branch issued the two above-discussed exemptions in January 2008, California's Assistant Attorney General handling the case stated that if the parties could not reach an agreement regarding mitigation, the Commission's original action would proceed.²⁰²

3. Ocean Mammal Institute v. Gates

In May 2007, the Ocean Mammal Institute, and several non-profit environmental and recreational groups,²⁰³ sued the Navy and NMFS to stop testing of high-intensity MFA sonar off the coast of Hawaii.²⁰⁴ The suit charges that the twelve planned tests potentially may harm several endangered species, including Hawaiian monk seals and whales.²⁰⁵ The tests would occur near or within two protected areas: 1) the Hawaiian Islands Humpback Whale National Marine Sanctuary and 2) the Papahānaumokuākea Marine National Monument.²⁰⁶ The plaintiffs allege that the Navy has violated NEPA, the CZMA, and the National Marine Sanctuaries Act.²⁰⁷ The plaintiffs also allege that NMFS violated the ESA.²⁰⁸

Undersea Sonar Activities (Mar. 22, 2007), available at <http://www.coastal.ca.gov/fedcd/sonar/pr-3-22-2007-sonar.pdf>.

¹⁹⁹ Complaint for Preliminary and Permanent Injunctive Relief; Declaratory Relief and Writ of Mandamus at 2, *supra* note 195.

²⁰⁰ Docket, *NRDC v. Winter*, No. 07-56157 (9th Cir. Sept. 27, 2007) (order granting California Coastal Commission's motion to intervene).

²⁰¹ Docket, *NRDC v. Winter*, No. 07-56157 (9th Cir. Oct. 25, 2007) (order granting California Coastal Commission's motion to intervene).

²⁰² E-mail from Bettina Luis, Research Assistant, Univ. of Houston Law Ctr., to Marcilynn Burke, Assistant Professor, Univ. of Houston Law Ctr. (Nov. 29, 2007) (conveying information from telephone interview with Jamee Jordan Patterson, Deputy Attorney General, State of California Attorney General Office on Nov. 29, 2007) (on file with author).

²⁰³ The groups include the Animal Welfare Institute, KAHEA, the Center for Biological Diversity, and Surfrider Foundation Kaua'i Chapter. Complaint for Declaratory Judgment and Injunctive Relief, *Ocean Mammal Inst. v. Gates*, 1:07CV254 (D. Haw. May 16, 2007).

²⁰⁴ *Id.* at 4-5.

²⁰⁵ *Id.* at 29-31.

²⁰⁶ *Id.* at 40.

²⁰⁷ *Id.* at 3-4.

²⁰⁸ *Id.*

The Navy responded to the latest suit as follows:

'The Navy takes its environmental responsibilities very seriously. We live on the world's oceans and have high regard for that precious resource. The Navy also has a responsibility to train the sons and daughters of America who may be called upon to go in harm's way,' said Jon Yoshishige, Navy Pearl Harbor-based public affairs officer.

'We go to great lengths to minimize any potential effects on marine life through the use of protective measures, and make every effort to safeguard marine mammals when exercises are conducted,' he said. The training is critical to the readiness of the U.S. fleet, he said.²⁰⁹

Paul Achitoff, an attorney for Earthjustice, which is representing the coalition, called it "bewildering" that the Navy would not avoid scheduling these training exercises during the season when humpback whale mothers and calves are in Hawaiian waters or that it would not take other protective measures as it has in the past.²¹⁰ The director of the Office of Protected Resources for NMFS, Jim Lecky, said that the agency is working with the Navy to complete environmental studies regarding anti-submarine warfare exercises. According to him, the Navy agreed to post more look-outs on ships to watch for marine mammals and to turn off its sonar when marine mammals are too close.²¹¹

Just before the Navy was to resume its exercises in March 2008, the district court for the District of Hawaii partially granted the plaintiffs' motion for a preliminary injunction.²¹² The court ordered the Navy to implement seven mitigation measures that were similar to those imposed in *NRDC v. Winter II*.²¹³ The district court issued its order without the benefit of the Court of Appeals for the Ninth Circuit's holding in *NRDC v. Winter II*²¹⁴ with respect to the executive exemption discussed above.

²⁰⁹ Jan TenBruggencate, *Lawsuit Seeks to Bar Navy Exercise*, HONOLULU ADVERTISER, May 17, 2007, available at <http://the.honoluluadvertiser.com/article/2007/May/17/lh/FP705170350.html>.

²¹⁰ *Id.*

²¹¹ Audrey McAvoy, *Navy Sued Over Sonar Drills Off Hawaii: Environmental Groups Sue Navy Over Sonar Exercises Off Hawaii*, ABC NEWS, May 16, 2007, available at <http://abcnews.go.com/print?id=3182909>.

²¹² *Ocean Mammal Inst. v. Gates*, 1:07CV254, 2008 WL 564664 (D. Haw. Feb. 29, 2008).

²¹³ *Id.* at *29-*32.

²¹⁴ The decisions were issued on the same day.

Though the district court acknowledged the possibility that the Ninth Circuit's ruling could have some bearing on the case before it,²¹⁵ it was "uncertain given the differences in circumstances here and in the California case what practical precedential impact that decision, once issued, will have."²¹⁶ Given that the Ninth Circuit upheld the injunction in *NRDC v. Winter II*, the parties have not asked the court to revisit the injunction in this case.

B. The Endangered Species Act: Critical Habitat and Encroachment

The NDAA FY 2004 amended the ESA in two significant ways. First, it now requires the Secretary of the Interior to explicitly take into account the potential impact on "national security" when designating critical habitat.²¹⁷ Second, the ESA now prohibits the Secretary from designating critical habitat on "any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use" if the lands are subject to an INRMP that the Secretary deems beneficial to the species.²¹⁸

The following discussion will evaluate the impact of the exemptions and reliance upon INRMPs for protection of listed species. It will also review some of the ways in which the Bush Administration seeks to further relieve DoD of its responsibility to preserve habitat for listed species.

1. Integrated Natural Resources Management Plans

To exempt a military installation from the designation of critical habitat, FWS must determine whether an INRMP meets the requirements for a statutory exemption.²¹⁹ FWS uses the same three criteria that it uses when it considers whether a geographic area meets the definition of critical habitat under section 3(5)(A) of the ESA.²²⁰

²¹⁵ *Ocean Mammal Inst. v. Gates*, 1:07CV254, 2008 WL 564664, at *28.

²¹⁶ *Id.* at n.26.

²¹⁷ 16 U.S.C.A. § 1533(b)(2) (Supp. V 2005).

²¹⁸ *Id.* § 1533(a)(3)(B)(I).

²¹⁹ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318, 117 Stat. 1392, 1433 (2003).

²²⁰ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Topeka Shiner, 69 Fed. Reg. 12,619, 12,622 (Mar. 17, 2004) (codified at 50 C.F.R. pt. 17). This final rule appears to be the first instance in which FWS provided the criteria it uses

(1) A current INRMP must be complete and provide a benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing the periodic monitoring and revisions (adaptive management) as necessary.²²¹

The criteria are essentially the same ones that the Clinton Administration used in 2000 to exclude Marine Corps Air Base Miramar from the designation of critical habitat for the coastal California gnatcatcher.²²² FWS used its authority under sections 3(5)(A) and 4(b)(2) of the ESA to exclude the military's land. Section 3(5)(A) defines "critical habitat" and FWS determined that lands covered by approved INRMPs would not meet the definition of critical habitat.²²³ FWS also exercised its discretion under section 4(b)(2) of the ESA to exclude the base because it determined that benefits of excluding the base from the designation outweighed the benefits of designating the base as critical habitat.²²⁴

The Sikes Act²²⁵ requires approximately 379 military installations to develop INRMPs²²⁶ in cooperation with the Secretary of the Interior (working through the Director of FWS).²²⁷ The Sikes Act also provides that "[t]he Secretary of a military department may enter into cooperative agreements with States, local governments, nongovernmental organizations, and individuals to provide for the maintenance and improvement of natural resources on, or to benefit natural and historic research on, Department of Defense installations."²²⁸ In fiscal year 2005, FWS "worked with 200

to implement the Bob Stump amendment by exempting the stream segments on the Fort Riley Military Installation, Kansas.

²²¹ See, e.g., Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*), 70 Fed. Reg. 19,562, 19,594 (Apr. 13, 2005) (codified at 50 C.F.R. Part 17).

²²² Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. 63,680, 63,688 (Oct. 24, 2000). The only difference is the addition of the term "adaptive management."

²²³ *Id.*

²²⁴ *Id.*

²²⁵ 16 U.S.C. §§ 670-670f (2000 and Supp. V 2005).

²²⁶ U.S. Fish & Wildlife Service, The Sikes Act—A Dynamic Partnership http://www.fws.gov/habitatconservation/sikes_act.htm (last visited Apr. 1, 2008).

²²⁷ 16 U.S.C. § 670a(a)(2) (2000).

²²⁸ *Id.* § 670c-1(a).

military installations to develop, review, and/or implement INRMPs.”²²⁹ To date approximately 350 installations have completed the plans, and FWS has approved them as compliant with the Sikes Act.²³⁰

Before passage of the NDAA FY 2004, the Secretary found that the INRMPs provided inadequate precautions for protected species in a number of instances.²³¹ After passage of the authorization act, however, the Secretary has determined that each INRMP reviewed, save one, “provides a benefit to” the species for which critical habitat is proposed for designation.²³² The exception was the INRMP for the Camp Navajo Army Depot in Arizona that the Service reviewed in connection with designation of critical habitat for the Mexican Spotted Owl.²³³ The depot finalized the INRMP without consulting FWS or the Arizona Fish and Game Department²³⁴ as required by the Sikes Act.²³⁵ Moreover, when the Service reviewed the early drafts it found that they “did not provide a conservation benefit to the owl.”²³⁶ Accordingly, it designated the Camp Navajo Army Depot as critical habitat.²³⁷ Otherwise, the Secretary has excluded all DoD lands that have been under active consideration.

²²⁹ FISHERIES & HABITAT CONSERVATION DIV. OF HABITAT & RES. CONSERVATION, U.S. FISH & WILDLIFE SERV., REPORT TO CONGRESS: SIKES ACT AND INTEGRATED NATURAL RESOURCES MANAGEMENT PLANS, ACTIVITIES AND EXPENDITURES FOR FY 2005, at 3 (2006), available at <http://www.fws.gov/habitatconservation/FY%2005%20Sikes%20Report%20to%20Congress.pdf> [hereinafter SIKES ACT REPORT 2005].

²³⁰ OFFICE OF THE DEPUTY UNDER SEC’Y OF DEF. INSTALLATIONS & ENV’T, DEFENSE ENVIRONMENTAL PROGRAMS FISCAL YEAR 2006 ANNUAL REPORT TO CONGRESS app. G (2007), available at <http://www.denix.osd.mil/portal/page/portal/denix/environment/cleanup/ARC/FY2006>.

²³¹ *E.g.*, 68 Fed. Reg. 9,116 (Feb. 27, 2003); 67 Fed. Reg. 63,968 (Oct. 16, 2002); 67 Fed. Reg. 3940 (Jan. 8, 2002).

²³² *E.g.*, Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*), 70 Fed. Reg. 19,562, 19,594 (Apr. 13, 2005) (codified at 50 C.F.R. pt 17); Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Mariana Fruit Bat and Guam Micronesian Kingfisher on Guam and the Mariana Crow on Guam and in the Commonwealth of the Northern Mariana Islands, 69 Fed. Reg. 62,944 (Oct. 28, 2004) (codified at 50 C.F.R. pt. 17).

²³³ Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl, 69 Fed. Reg. 53,182, 54,225 (Aug. 31, 2004).

²³⁴ *Id.*

²³⁵ 16 U.S.C. § 670a(a)(2) (2000).

²³⁶ Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl, 69 Fed. Reg. at 54,225.

²³⁷ *Id.*

a. Exemptions in Action

In 2004, the Secretary of the Interior designated approximately 6,400 acres as critical habitat for three endangered species on Guam and Rota in the Mariana Islands.²³⁸ Initially, FWS recommended approximately 25,000 acres for critical habitat for the island of Guam.²³⁹ However, after the exemptions took effect, FWS excluded almost 11,000 acres from Southern Guam because the acreage is covered by an INRMP.²⁴⁰ The agency also excluded almost 8,300 acres of the Navy's land under the "national security" exemption.²⁴¹ Ultimately, the Service designated a whopping 376 acres as critical habitat for the species.²⁴² Thus, by virtue of the exemption, the Service reduced the acreage designated as critical habitat by approximately 98.5% on the island of Guam. The other 6,033 acres of critical habitat are on the island of Rota.²⁴³

Another example of the exemption's impact on critical habitat designation is the arroyo toad in California. After a lawsuit challenging an initial designation of 182,360 acres of critical habitat, primarily by builders,²⁴⁴ the Service proposed 138,173 acres of critical habitat,²⁴⁵ one-third of what the agency first proposed in the year 2000.²⁴⁶ In its second "final" rule, the

²³⁸ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Mariana Fruit Bat and Guam Micronesian Kingfisher on Guam and the Mariana Crow on Guam and in the Commonwealth of the Northern Mariana Islands, 69 Fed. Reg. 62,944 (Oct. 28, 2004) (codified at 50 C.F.R. pt. 17).

²³⁹ *Id.* at 62,945.

²⁴⁰ *Id.* at 62,974.

²⁴¹ *Id.* at 62,974-75. The agency also excluded approximately 2,000 acres of private land and 3,000 acres of land owned by the government of Guam. The agency excluded those lands "to maintain and enhance effective working relationships with these entities . . . to allow continued meaningful collaboration on recovery projects, and to provide conservation benefits to Guam lands that might not occur otherwise." Natalie M. Henry, *FWS Designates Habitat for Three Mariana Island Creatures*, GREENWIRE, Nov. 1, 2004, <http://www.eenews.net/Greenwire/2004/11/01/archive/18>.

²⁴² Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Mariana Fruit Bat and Guam Micronesian Kingfisher on Guam and the Mariana Crow on Guam and in the Commonwealth of the Northern Mariana Islands, 69 Fed. Reg. at 62,944.

²⁴³ *Id.*

²⁴⁴ *Bldg. Indus. Legal Def. Found. v. Norton*, 231 F. Supp. 2d 100 (D.D.C. 2002); Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9414 (Feb. 7, 2001) (designating 182,360 acres as critical habitat).

²⁴⁵ Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*), 70 Fed. Reg. 19,562, 19,562-63. (Apr. 13, 2005) (codified at 50 C.F.R. Part 17).

²⁴⁶ After a lawsuit by the Southwest Center for Biological Diversity, the Center for

Service identified 104,699 acres as habitat essential to the conservation of the arroyo toad.²⁴⁷ In the end, however, the Service only designated approximately 11,695 of those acres as critical habitat for the toad.²⁴⁸ It excluded approximately 8,850 acres on the Fallbrook Naval Weapons Station and 3,780 acres on Marine Corps Base Camp Pendleton.²⁴⁹ It also excluded approximately 80,374 acres that were covered by habitat conservation plans under section 10 of the ESA or part of Fort Hunter Liggett.²⁵⁰ Though it is unclear how much of the 80,374 acres excluded were a part of Fort Hunter Liggett, "[t]he arroyo toad occupies an approximately 17-mi (27.4-km) segment of the San Antonio River at Fort Hunter Liggett."²⁵¹

The Service exempted the lands within Camp Pendleton and Fallbrook Naval Weapons Station because the installations had "legally operative INRMPs that provide a benefit to the arroyo toad."²⁵² More specifically, the Service stated that based upon Camp Pendleton's past conservation funding history and its program under the Sikes Act,

we believe there is a high degree of certainty that Camp Pendleton: (1) will continue to have the necessary staffing, funding levels, funding sources, and other resources to implement their INRMP, (2) has the legal authority, legal procedural requirements, authorizations, and regulatory mechanisms to implement their INRMP and other conservation efforts, and (3) will implement the INRMP in coordination with the California Department of Fish and Game and with the Service.²⁵³

The Service also expressed confidence that Camp Pendleton would continue to cooperate with the Service through the consultation process under

Biological Diversity, and Christians Caring for Creation, the Service proposed almost 478,400 acres for the critical habitat of the toad. Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Arroyo Southwestern Toad; Proposed Rule, 65 Fed. Reg. 36,512, 36,515 (June 8, 2000).

²⁴⁷ Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*), 70 Fed. Reg. at 19,593.

²⁴⁸ *Id.* at 19,562-63.

²⁴⁹ See *id.* at 19,593, 19,595. The Service exempted a total of 12,630 acres on Camp Pendleton and Fallbrook Naval Weapons Station. Fallbrook is approximately 8,850 acres, with the remaining 3,780 acres excluded on Camp Pendleton.

²⁵⁰ *Id.* at 19,593.

²⁵¹ *Id.* at 19,595.

²⁵² *Id.* at 19,594.

²⁵³ *Id.* at 19,594-95.

section 7 of the ESA to avoid and minimize the impact on listed species. "[W]e can ensure that conservation efforts identified in the INRMP for the arroyo toad will: (1) address the nature and extent of threats, (2) provide for monitoring and reporting progress on implementation, and (3) incorporate the principles of adaptive management."²⁵⁴ The Service made the same determination with respect to Fallbrook Naval Weapons Station based upon its program under the Sikes Act.²⁵⁵

At the time of the exemption, Fort Hunter Liggett had not completed its INRMP.²⁵⁶ However, the Service excluded essential habitat on the installation based upon its "completed Endangered Species Management Plan [ESMP] for the arroyo toad."²⁵⁷ Moreover, the Service stated that it had evaluated the installation's ESMP "in relation to the three criteria listed above for evaluating management plans, and we find that the ESMP meets the criteria and will provide a benefit to the arroyo toad."²⁵⁸ Yet, the exemption that Congress enacted does not reference ESMPs—only INRMPs, so the Service had to continue its analysis to consider the benefits of including the land at the installation versus the benefits of excluding the land.²⁵⁹ Ultimately, the Service concluded that the benefits of excluding the land at Fort Hunter Liggett outweighed the benefits of including it and that exclusion of the land would not result in the extinction of the toad.²⁶⁰

The final rule, however, does not provide enough information to determine exactly how many acres the Service excluded at Fort Hunter Liggett. The Service excluded the 6,775 acres of critical habitat "unit 1" of the San Antonio River and its adjacent uplands.²⁶¹ "The vast majority of the lands within this unit are owned by the Army."²⁶² The combined exclusions from Camp Pendleton, Fallbrook Naval Weapons Station, and Fort Hunter Liggett reduced the acreage for critical habitat for the toad by approximately 19% at the very least.

Consider next the Lane Mountain milk-vetch, an endangered plant species, found in the Mojave Desert in San Bernardino County, California.²⁶³

²⁵⁴ *Id.* at 19,595.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 19,594.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 19,595.

²⁵⁹ *See id.* at 19,595-96.

²⁶⁰ *Id.* at 19,596.

²⁶¹ *Id.* at 19,583.

²⁶² *Id.*

²⁶³ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for

Of the approximately 21,395 acres of known habitat for that plant, 11,378 acres, or approximately 53% of that acreage, is located at the Army's Fort Irwin and the National Training Center in California.²⁶⁴ In 2000, Congress authorized \$75 million "to the Secretary of the Army for the implementation of conservation measures necessary for the final expansion plan for the National Training Center to comply with the Endangered Species Act of 1973."²⁶⁵ General John Keane testified that after expending those funds "to acquire and manage additional land for preservation of and mitigation measures for the Desert Tortoise and Lane Mountain Milkvetch," the Army would be able to use the training areas.²⁶⁶

Against that backdrop, FWS initially determined that it was not "prudent" to designate critical habitat for this endangered species. However, two environmental groups challenged that decision, and a federal district court ordered FWS to reconsider its "not prudent" determination.²⁶⁷ Upon reconsideration, FWS proposed designating almost 30,000 acres as critical habitat in April 2004, and lands at Fort Irwin in California were among this acreage.²⁶⁸ After the passage of the NDAA FY 2004, however, DoD asked the Service to apply the national security exemption and exclude DoD's lands at Fort Irwin.²⁶⁹ At the time of the rulemaking, Fort Irwin had not completed its INRMP and accordingly did not qualify for an exclusion under section 4(a)(3)(B) of the ESA.²⁷⁰ In making its request for exclusion under section 4(b)(2),

DoD stated that the National Training Center (NTC) at Fort Irwin is essential to national security in that it provides the only military installation suited for live maneuver training of heavy brigade and battalion task forces. Should

Astragalus jaegerianus (Lane Mountain milk-vetch), 70 Fed. Reg. 18,220, 18,220 (Apr. 8, 2005).

²⁶⁴ *Id.* at 18,223.

²⁶⁵ Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 323, 114 Stat. 2763, 2763A-187 (2000).

²⁶⁶ *The Impact of Environmental Encroachment on Military Training: Hearing Before the Subcomm. on Readiness and Management Support of the S. Comm. on Armed Servs.*, 108th Cong. 5 (2003) (statement of Gen. John M. Keane, U.S. Army Vice Chief of Staff), available at <http://armed-services.senate.gov/statemnt/2003/March/Keane.pdf>.

²⁶⁷ *Sw. Ctr. for Biological Diversity v. Norton*, No. 01-CV-2101 (S.D. Cal. Nov. 15, 2001).

²⁶⁸ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus jaegerianus* (Lane Mountain milk-vetch), 70 Fed. Reg. at 18,223.

²⁶⁹ *Id.* at 18,236.

²⁷⁰ *Id.* at 18,237.

restrictions to maneuver training result from the designation of critical habitat, such as reducing flexibility in use of training lands, closing of areas, or training delays to allow for reinitiation of consultation for critical habitat, it will have a direct impact on the Army's training cycle, unit readiness, and national security.²⁷¹

The Service concluded that military training activities at Fort Irwin would result in the loss of up to 4,600 acres, which comprised approximately 21.5% of the total known habitat for the species.²⁷² Nevertheless, not only did the Service exclude DoD's lands, it ultimately designated zero acres as critical habitat for this endangered species.²⁷³

b. Critiques of the Exemption Process

Environmentalists and some scholars alike worry that INRMPs do not provide as much protection as critical habitat.²⁷⁴ To cite one example, Professor John Kunich of the Roger Williams University School of Law testified before Congress on the limitations of INRMPs:

Integrated Natural Resources Management Plans are just that, plans. They often may be prepared by well-intentioned, dedicated professionals. They may be crafted in consultation with Fish and Wildlife Service or National Marine Fisheries Service. At their best, they may take into account a wide range of relevant issues. But they are still plans, not commitments. They are subject to the whims and preferences of the people writing them. There is no guarantee that they will actually be funded and implemented. And they have much less rigor and enforceability than substantive statutory mandates such as the critical habitat provisions of the Endangered Species Act.²⁷⁵

²⁷¹ *Id.* at 18,223.

²⁷² *Id.*

²⁷³ *Id.* at 18,236-37. The Service considered three units for designation and excluded all three. One unit was Fort Irwin, one unit was land leased by NASA within Fort Irwin, and one unit was land managed by the U.S. Department of the Interior's Bureau of Land Management. *Id.* at 18,231.

²⁷⁴ *E.g., Environmental Laws: Encroachment on Military Training?*, *supra* note 78 (statement of Jamie Rappaport Clark, Senior Vice President for Conservation Programs, National Wildlife Federation, and former Director U.S. Fish and Wildlife Service).

²⁷⁵ *National Security Readiness Act, Hearing on H.R. 1835 Before the H. Comm. on*

One of the “assurances that the conservation management strategies will be implemented” that FWS has relied upon in approving INRMPs in lieu of designating critical habitat is a determination that the installation has the necessary funding to implement the plan.²⁷⁶ However, there are no legally binding commitments to continue funding at an adequate level.

Professor Kunich also explained another critical difference between the protection provided through designation of critical habitat and the protection provided under INRMPs. The ESA contains substantive, enforceable provisions. INRMPs, however, are *plans* and federal courts have been quite deferential in their judicial review under other planning statutes such as NEPA, the Federal Land Policy Management Act, and the National Forest Management Act.²⁷⁷

Note that although the Sikes Act requires the Secretary of Defense “to provide for the conservation and rehabilitation of natural resources on military installations,”²⁷⁸ the Act provides for at least two significant caveats. First, any conservation program or INRMP must be “[c]onsistent with the use of military installations to ensure the preparedness of the Armed Forces.”²⁷⁹ Second, INRMPs must provide for “no net loss in the capability of military installation lands to support the military mission of the installation.”²⁸⁰ Thus, the Secretary of Defense must conserve natural resources only to the extent that such conservation does not interfere with the preparedness of the military or any military mission.

Moreover, with INRMPs, there is no requirement that the Department of the Interior monitor DoD’s compliance with its plans nor is there a mechanism for the Department of the Interior to enforce the plans.²⁸¹

Resources, 108th Cong. 120 (2003) (statement of John Charles Kunich, Associate Professor of Law, Roger Williams University School of Law).

²⁷⁶ *E.g.*, Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*), 70 Fed. Reg. 19,562, 19,594 (Apr. 13, 2005).

²⁷⁷ *National Security Readiness Act, Hearing on H.R. 1835 Before the H. Comm. on Resources*, 108th Cong. 133 (2003) (statement of John Charles Kunich, Associate Professor of Law, Roger Williams University School of Law); *see, e.g.*, *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999) (“[A]lthough the Forest Service’s monitoring duty is mandatory under the Plan [under the National Forest Management Act], legal consequences do not necessarily flow from that duty, nor do rights or obligations arise from it”).
²⁷⁸ 16 U.S.C. § 670a(a)(1)(A) (2000).

²⁷⁹ *Id.* §§ 670a(a)(3), 670a(b). As one senior DoD official told me, the military would never allow compliance with environmental and natural resources law to interfere with readiness, despite its protestations to the contrary before Congress.

²⁸⁰ *Id.* § 670a(b)(1)(J).

²⁸¹ *Id.* § 670a(b)(2) (requiring only a review of the plan).

Each year the Secretary of Defense must provide to “the committees”²⁸² . . . an assessment of the extent to which the plans comply with” the Sikes Act.²⁸³ The Sikes Act does require a review of the INRMP “by the parties thereto on a regular basis, but not less often than every 5 years.”²⁸⁴ The last formal reviews and revisions were due by November 2006.²⁸⁵ In an attempt to distribute the workload more evenly, DoD and FWS have decided to update INRMPs informally on an annual basis by seeking feedback from FWS and the states on “the implementation and effectiveness of the plans.”²⁸⁶ Although DoD’s guidelines recommend these annual informal reviews, FWS contends that funding limitations and competing priorities limit its ability to participate in the annual reviews.²⁸⁷

Note, moreover, that these informal annual reviews do not provide for direct public participation. Although FWS’s March 2004 report to Congress concerning its INRMPs expenditures states that the Service “will also be required to establish procedures to ensure that stakeholders and Congress are assured that INRMPs will provide a benefit to the species,”²⁸⁸ it has not established any such procedures as of this Article. It is disconcerting to have the public, environmental interest groups, and other stakeholders involved only every five years. Conceivably, irreparable harm may occur during the five years in between each public review.

2. Recovery Credit Trading Systems

In October 2007, President Bush announced the launching of a “recovery credit trading” system.²⁸⁹ While touted as “innovative,”²⁹⁰ FWS describes the program as “similar in principle to conservation banking and

²⁸² *Id.* § 670a(f)(1). “[T]he committees” are the Committee on Resources and the Committee on Armed Services in the U.S. House of Representatives, and the Committee on Armed Services and the Committee on Environment and Public Works in the U.S. Senate. *Id.* § 670a(f)(3).

²⁸³ *Id.* § 670a(f)(1)(C).

²⁸⁴ *Id.* § 670a(b)(2).

²⁸⁵ SIKES ACT REPORT 2005, *supra* note 229, at 4.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 5.

²⁸⁸ *Id.* at 4. Also, it is unclear whether the “stakeholders” include the public or if they are simply DoD and the state fish and wildlife agencies.

²⁸⁹ Press Release, President Bush Discusses Migratory Bird Conservation (Oct. 20, 2007), available at <http://www.whitehouse.gov/news/releases/2007/10/20071020-2.html>.

²⁹⁰ *Id.*

habitat conservation plans.”²⁹¹ Recovery credit trading systems would provide a means by which federal agencies could accrue credits by financing conservation on non-federal land.²⁹² Federal agencies could accumulate or “bank” these credits for use whenever their activities on federal lands negatively impacted protected species. FWS has modeled the program after a pilot program at Fort Hood, Texas.

Fort Hood is unique in several aspects. “The rolling, semiarid terrain is ideal for multifaceted training and testing of military units and individuals. Fort Hood is ‘The Army’s Premier Installation to train and deploy heavy forces.’”²⁹³ Fort Hood also “is home to the largest known population of the endangered golden-cheeked warbler within its breeding range.”²⁹⁴ Similarly, it provides habitat for the black-capped vireo.²⁹⁵ Both of these birds are protected under the ESA.²⁹⁶ Unfortunately, live-fire training and maneuvering of tanks and other combat vehicles are incompatible with preservation of the birds’ habitat.²⁹⁷ When FWS discovered populations of these birds at Fort Hood, it prohibited training on approximately one-third of the base.²⁹⁸

In the pilot program at Fort Hood, DoD, FWS, the Texas State Department of Agriculture, Environmental Defense, the Nature Conservancy, the Texas Cattlemen’s Association, and other state and private entities have partnered to establish conservation and restoration projects for golden-cheeked warblers and black-capped vireos on more than 7,000

²⁹¹ Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. 62,258, 62,259 (Nov. 2, 2007).

²⁹² Eryn Gable, *Endangered Species: FWS Program Allows Outsourcing of Conservation Efforts*, LAND LETTER, Nov. 15, 2007, available at <http://www.eenews.net/Landletter/2007/11/15/archive/3>.

²⁹³ U.S. Army, Fort Hood Fact Sheet, <http://www.hood.army.mil/docs/FortHoodQuickFacts.mht> (last visited Apr. 1, 2008).

²⁹⁴ *Id.*

²⁹⁵ Ben Ikenson, *Training Soldiers, Protecting Birds Go Hand in Hand at Army Base*, FISH AND WILDLIFE NEWS, April/May/June 2001, at 29, available at http://library.fws.gov/FWNews/fwnews_spring01.pdf (“A 1993 Service biological opinion said portions of Fort Hood contain essential nesting habitat for two endangered neotropical migratory songbirds: the golden-cheeked warbler and black-capped vireo.”).

²⁹⁶ Endangered and Threatened Wildlife and Plants; Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53,153 (Dec. 27, 1990); Endangered and Threatened Wildlife and Plants; Determination of the Black-capped Vireo To Be an Endangered Species, 52 Fed. Reg. 37,420 (Oct. 6, 1987).

²⁹⁷ *Can Tanks and Songbirds Coexist? U.S. Army Comes to the Rescue of an Endangered Warbler in Texas*, SOLUTIONS (Envtl. Def.), Sept. 2006, at 12 [hereinafter *Can Tanks and Songbirds Coexist?*].

²⁹⁸ Blair Fannin, *Making Room for Wildlife*, LIFESCAPES, Summer 2006, at 6, 7.

acres of private land surrounding Fort Hood.²⁹⁹ The Army has provided the funding for the projects.³⁰⁰ "The system works by assigning landowners a credit value based on the amount and quality of habitat on their land. Landowners then bid against each other for funding provided by Fort Hood The lowest bidder with the best project wins."³⁰¹ As explained by Environmental Defense's biologist, David Wolfe,

the system works much like an insurance policy for Fort Hood. By investing money in private lands, the Army accrues credits in a 'bank,' which it can later use. For example, instead of having to stop training exercises and consult with the Fish and Wildlife Service after a wildfire temporarily degrades habitat on the base for the warbler, the Army can use some of the credits from its bank.³⁰²

In the new recovery credit trading program, the action agency would have to demonstrate that the combined effect of the adverse agency activity on federal land and the beneficial action it takes elsewhere provides a *net* benefit to the protected species.³⁰³ "The goal of a recovery crediting system is to enhance the ability of Federal agencies to promote the recovery of listed species on non-Federal land and offset adverse effects to listed species from proposed actions."³⁰⁴ More specifically, the "[o]bjectives are (1) to produce a net conservation benefit for the target species that advances its recovery, (2) to increase the flexibility of Federal agencies to accomplish their missions while meeting their requirements under the ESA, and (3) to promote effective Federal/non-Federal partnerships for species recovery."³⁰⁵

As one would expect, the pilot program has its supporters and detractors. For example, a ranch owner in Texas describes the program at Fort Hood as "a win-win-win situation," with benefits accruing to the Army, the landowners, and the protected species.³⁰⁶ John Herron, director

²⁹⁹ Gable, *supra* note 292; Allison Winter, *Mixed Reviews for Bush's Conservation Proposals*, GREENWIRE, Oct. 22, 2007, <http://www.eenews.net/Greenwire/2007/10/22#15>.

³⁰⁰ Gable, *supra* note 292.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. 62,258 (Nov. 2, 2007).

³⁰⁴ *Id.* at 62,259.

³⁰⁵ *Id.*

³⁰⁶ Gable, *supra* note 292.

of conservation for the Texas chapter of the Nature Conservancy, believes that the program serves as a good model for the rest of the country, though he points out the need to find the appropriate balance between protecting private landowners' privacy while still providing a transparent process.³⁰⁷ The National Association of Homebuilders believes that the pilot is a good first step but would like to have the Service extend the program to allow state, county, or private landowners to buy credits (rather than only allowing federal agencies to do so).³⁰⁸ John Kostyack of the National Wildlife Federation is cautiously optimistic about the plan, saying that it "could be a boon to birds and other endangered species, as long as it focuses on contiguous habitat and there is strong program oversight by the wildlife agency."³⁰⁹

The Services touts the program as having many benefits. For example, the draft guidance states, "[w]e expect this process to increase incentives for Federal agencies to use their authorities to further the purposes of the ESA."³¹⁰ Note, however, that section 7(a)(1) of the ESA, sometimes known as "the sleeping giant" of the ESA,³¹¹ requires all federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [listed species]."³¹² Yet section 7(a)(1) remains a "monumental underachiever."³¹³

Skeptics include the policy director of the Center for Biological Diversity, Kieran Suckling. Suckling argues that

one of the major problems with the Fort Hood program is that public knowledge and oversight of the program is very restricted. 'The public is not permitted to know which landowners are participating, what land is involved, what management is taking place, and when monitoring occurs, the public is not permitted to see the monitoring reports,' he said.

³⁰⁷ *Id.*

³⁰⁸ Winter, *supra* note 299.

³⁰⁹ *Id.*

³¹⁰ Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. at 62,258.

³¹¹ J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1110 (1995).

³¹² 16 U.S.C. § 1536(a)(1) (2000).

³¹³ Ruhl, *supra* note 311, at 1128.

These limitations make the program 'a fantastic giveaway of federal dollars to private landowners with absolutely no accountability at all,' Suckling said. It probably also makes the program illegal because there is no way of verifying whether it meets the 'best science' test established by the Endangered Species Act, he said.³¹⁴

Wolfe from Environmental Defense counters this argument, stating that monitoring reports will be published in the next few years and the Service, which the public entrusts to manage wildlife, will have access to all the information, except the names of the landowners and the exact locations of the ranches.³¹⁵ With respect to monitoring, the Service states that

[u]ltimately, the Federal action agency is responsible for accounting for credits and compliance with the debiting process as determined through the programmatic biological opinion. The Service should provide technical assistance in the monitoring plan, and will be responsible for periodic review of the species' environmental status, either through an established protocol or more conventional methods (e.g., 5-year review, programmatic biological opinions, etc.).³¹⁶

Wolfe does concede, however, that though the program could create a great incentive for private landowners to conserve habitat, "the devil is in the details, which we don't know yet."³¹⁷

Suckling is also concerned about shifting conservation efforts from federal lands to private lands where, he asserts, the government has very little control.³¹⁸ In 2006, private landowners received \$500,000 for improving habitat for warblers.³¹⁹ "A number of ranchers are 'in the

³¹⁴ Gable, *supra* note 292, at 2. For less sophisticated, though perhaps no less accurate criticisms of Bush's proposal, see Chicago Tribune's Bush, Lunch with Cheney, Speaking up for the Birds, http://weblogs.chicagotribune.com/news/politics/blog/2007/10/bush_lunch_with_cheney_speakin.html (Oct. 20, 2007, 12:32 EST).

³¹⁵ Gable, *supra* note 292.

³¹⁶ Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. 62,258, 62,263 (Nov. 2, 2007).

³¹⁷ Press Release, Environmental Defense, Environmental Defense Supports Effort to Create National Conservation Banking for Endangered Species Habitat (Oct. 20, 2007), available at <http://www.edf.org/pressrelease.cfm?contentID=7255>.

³¹⁸ Gable, *supra* note 292, at 2.

³¹⁹ *Can Tanks and Songbirds Coexist?*, *supra* note 297, at 12.

chute,' says Steve Manning, a fifth-generation cattle rancher who helped develop the program. 'We're not going to have a problem finding willing participants.'³²⁰

In November 2007, FWS proposed "guidance on the development, management, and use of recovery credits as a measure for mitigating adverse effects to and contributions to the recovery of species listed as threatened or endangered under the Endangered Species Act."³²¹ The Service is also requesting comments on whether it should extend the program beyond federal agencies, making it available to states, private landowners, tribes, and other non-federal entities.³²²

C. *The Migratory Bird Treaty Act: Incidental Takes*

DoD was successful in its quest for an exemption from the MBTA in 2002. The Bob Stump Act provides that section 2 of the MBTA prohibiting the take of migratory birds does not apply to the incidental taking of migratory birds by the military during readiness activities.³²³ Congress instructed the Department of the Interior not later than December 2003 to "prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities."³²⁴ In the meantime, the Act provided the Department of Defense with "interim authority" for incidental takes persisting until the Secretary of the Interior promulgated new regulations.³²⁵

In June of 2004, the Department, acting through FWS, proposed a rule containing a blanket exemption from the penalties associated with an incidental taking during readiness activities.³²⁶ The proposed rule stalled for several years, but FWS finally promulgated the regulations in February 2007.³²⁷ The new regulations permit the taking of migratory birds and require conservation and monitoring under certain conditions.

³²⁰ *Id.*

³²¹ Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. 62,258 (Nov. 2, 2007).

³²² *Id.* at 62,259.

³²³ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 315(a), 116 Stat. 2458, 2509 (2002).

³²⁴ *Id.* § 315(d), 116 Stat. at 2509.

³²⁵ *Id.* § 315(c), 116 Stat. at 2509.

³²⁶ Migratory Bird Permits; Take of Migratory Birds by Department of Defense, 69 Fed. Reg. 31,074 (June 2, 2004).

³²⁷ Migratory Bird Permits; Take of Migratory Birds by Department of Defense, 72 Fed. Reg. 8931 (Feb. 28, 2007).

[T]he Armed Forces may take migratory birds incidental to military readiness activities, provided that, for those on-going or proposed activities that the Armed Forces determine may result in a significant adverse effect on a population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.³²⁸

If, after consultation with the Secretary of Defense and the Secretary of State, the Secretary of the Interior determines that the incidental take of migratory birds during a specific readiness activity is incompatible with any of the migratory bird treaties to which the United States is a party, the Secretary of the Interior must suspend authorization of that take.³²⁹

One commenter on the proposed rule argued that DoD should not have the sole authority to determine whether readiness activities would result in a significant adverse effect.³³⁰ The Service responded that it expected DoD to confer with it when any activity “even arguably triggers this requirement.”³³¹ Indeed, the Service believes that the confer and coordinate requirement will create greater benefits for migratory birds than the previous “status operandi.”³³² Furthermore, according to the Service, DoD would share such information with the Service regardless to comply with NEPA, the Sikes Act, and possibly the ESA.³³³ Though the Service states that each base “will invite annual feedback from the Service” on the INRMPS,³³⁴ the new regulations do not require such an invitation.

Environmentalists’ reaction to the new regulations was guarded. For example,

[t]he bird preservationists who brought the earlier suit say the rules appear to have some solid built-in protections, but these advocates are skeptical about how Defense

³²⁸ 50 C.F.R. § 21.15(a) (2007).

³²⁹ *Id.* § 21.15(b).

³³⁰ Migratory Bird Permits; Take of Migratory Birds by Department of Defense, 69 Fed. Reg. at 8934.

³³¹ *Id.*

³³² *Id.* at 8940.

³³³ *Id.* at 8934-35.

³³⁴ *Id.* at 8934, 8939. DoD’s guidance regarding the Sikes Act requires installations to review annually their INRMPS with the Service. *Id.* This guidance, however, does not have the force of law.

may go about implementing them. 'I fear it's a blank check masquerading as some sort of cooperative relationship between agencies,' says Peter Galvin, conservation director at the Center for Biological Diversity.³³⁵

Galvin said that he would raise the exemption in Congress again. Alex A. Beehler, Assistant Deputy Undersecretary for Environment, Safety and Occupational Health, responded, however, that the migratory birds would not need "a fresh lobbying push. 'The Department of Defense strives every day to protect the natural resources under its stewardship.'"³³⁶

There has been little or no activity under the MBTA since the Service promulgated the new regulations. Given that it was the first natural resources law that Congress sacrificed for the sake of readiness, and no environmental groups have made it the subject of lawsuits, it is unclear whether there will be any changes to the MBTA in the foreseeable future.

The next section examines DoD's reporting to Congress as required by the national defense authorization acts for fiscal years 2003 and 2004.

III. DOD'S REPORTING TO CONGRESS AFTER THE AMENDMENTS

As aforementioned in Part II of this Article, one of the chief arguments against granting the exemptions was that DoD had not demonstrated that the exemptions were necessary to preclude negative impacts upon military readiness. As one scholar has argued, "[t]he inescapable conclusion is that DoD has not yet made a convincing case that the environmental sacrifices it seeks are necessary."³³⁷ During the congressional debates of the 107th and 108th Congresses, the United States Government Accountability Office ("GAO")³³⁸ released two reports concerning encroachment upon training ranges. The first report in June 2002, entitled *Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges*, found that although the installations it visited reported some lost training range "capabilities in terms of the time training

³³⁵ Shawn Zeller, *Winged Defeat*, CONG. WKLY., Mar. 10, 2007, available at 2007 WLNR 5065647.

³³⁶ *Id.*

³³⁷ Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. LAW & POL'Y REV. 1, 12 (2005).

³³⁸ The United States General Accounting Office's name changed to the United States Government Accountability Office effective July 7, 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814 (2004).

ranges were available or the types of training that could be conducted,” DoD’s reporting with respect to readiness did “not indicate the extent to which encroachment has significantly affected reported training readiness.”³³⁹ Moreover, despite providing in congressional hearings and other fora anecdotal evidence of the impairment caused by encroachment, DoD’s data also did not adequately document the extent to which training work-arounds affect readiness or training costs.³⁴⁰ GAO’s report recommended “executive action that requires the Department of Defense to finalize a comprehensive plan for managing encroachment issues, develop the ability to report critical encroachment-related training problems, and develop and maintain inventories of its training infrastructure and quantify its training requirements.”³⁴¹

In the wake of those criticisms, DoD conducted one rudimentary study of the impact of compliance with environmental law on readiness at Marine Corps Base Camp Pendleton in California.³⁴² While that study may be of questionable value, it was an important first step. Unfortunately, after Congress acquiesced in DoD’s requests for exemptions, DoD has little incentive to pursue aggressively its efforts to determine the extent to which compliance with natural resources law has a negative impact on military readiness.

GAO’s second report in April 2003, entitled *Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving*, also noted the lack of a comprehensive plan for addressing encroachment.³⁴³ GAO’s report did not make any new recommendations because section 366 of the Bob Stump Act requires a report on encroachment and a review by GAO.³⁴⁴ However, as discussed below, DoD’s reporting remains incomplete and unconvincing. And it is unclear what action Congress will take if DoD continues to fall short in this regard.³⁴⁵

³³⁹ DOD LACKS COMPREHENSIVE PLAN, *supra* note 26, at 3.

³⁴⁰ *Id.* at 15-17.

³⁴¹ *Id.* at 5.

³⁴² See *Spotlight on Stan Norquist: Camp Pendleton’s Natural Resources Manager Tackles Encroachment Challenges*, CURRENTS, Spring 2003, at 16, available at http://www.enviro-navair.navy.mil/currents/spring2003/Spr03_Spotlight_On_Norquist.pdf (describing the report and discussing an SRS Technologies study on encroachment impacts on training and readiness at Marine Corps Base Camp Pendleton).

³⁴³ DOD STILL EVOLVING, *supra* note 26, at 3.

³⁴⁴ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 366, 116 Stat. 2509, 2522 (2002); DOD STILL EVOLVING, *supra* note 26, at 4.

³⁴⁵ The House Committee on Armed Services has asked for further review:

This section of the Article will review DoD's compliance with its reporting requirements after receiving exemptions from parts of the MMPA, ESA, and MBTA. This section also will summarize some of GAO's conclusions with respect to that compliance.

A. *Section 366 Reports Under the Bob Stump National Defense Authority Act for Fiscal Year 2003*

In the Bob Stump Act, Congress directs DoD to report back to it on the progress of comprehensive plans to address operational constraints on training and readiness "caused by limitations on the use of military lands, marine areas and airspace."³⁴⁶ As part of the preparation of the plan, the Secretary of Defense is to assess the current and future requirements for training ranges and evaluate the adequacy of DoD's current resources to meet those requirements.³⁴⁷ The report to Congress should contain the result of the assessment and evaluation, as well as any recommendations for legislative or regulatory changes to address the identified training constraints.³⁴⁸

The Act required DoD to submit that report along with the President's budget for fiscal year 2004, which the Administration submitted in 2003.³⁴⁹ However, DoD did not comply with the deadline.³⁵⁰ Instead, it

The committee directs the Comptroller General of the United States to conduct a study on the extent to which the current environmental laws, regulations and exemptions are affecting the Department's training activities, readiness, and the environment. The study shall include the following: a determination of the full set of exemptions available to the Department; a review of how the exemptions have been used; an assessment of what incremental benefits to military readiness and impacts to the environment have resulted; and the extent to which the Department has systematically documented the effects of exemptions from environmental laws and regulations on training, readiness, and the environment. The report shall be submitted to the Senate Committee on Armed Services and the House Committee on Armed Services by February 1, 2008.

H.R. REP. NO. 110-146, at 300 (2007).

³⁴⁶ Bob Stump National Defense Authorization Act for Fiscal Year 2003, § 366(a)(1), 116 Stat. at 2522.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ DOD STILL EVOLVING, *supra* note 26, at 4; U.S. DEP'T OF DEF., REPORT TO CONGRESS, IMPLEMENTATION OF THE DEPARTMENT OF DEFENSE TRAINING RANGE COMPREHENSIVE PLAN: ENSURING TRAINING REQUIREMENTS (2004), available at http://www.defenselink.mil/prhome/docs/rpt_congress.pdf.

submitted its first section 366 report to Congress on February 27, 2004,³⁵¹ and it has submitted one to Congress in each subsequent year.³⁵² The Act also required DoD to submit a report on plans to improve reporting with respect to readiness no later than June 30, 2003.³⁵³ DoD similarly did not meet this deadline. Moreover, when it did report to Congress in February 2004, it did not provide plans to improve reporting on readiness.³⁵⁴

Reviewing each of those reports, GAO has criticized DoD's efforts to comply with Congress's request. For example, in 2004 and 2005 GAO issued reports stating that DoD's reports lacked sufficient information to form a baseline for developing a comprehensive training range plan as required by section 366.³⁵⁵ In 2006, GAO reported that while DoD had not addressed all the elements of Congress's reporting requirements, DoD had improved its reporting by better describing the encroachment challenges and their effects on readiness.³⁵⁶ In 2007, GAO explained that although DoD still had not addressed all the elements that section 366 requires, DoD continued to improve its reporting in each successive year.³⁵⁷

This reporting was to endure until 2008; however, in the John Warner National Defense Authorization Act for Fiscal Year 2007, Congress extended the requirement for five additional years, through 2013.³⁵⁸ The

³⁵¹ *Id.*

³⁵² U.S. DEP'T OF DEF., REPORT TO CONGRESS ON SUSTAINABLE RANGES (2007), available at <https://www.denix.osd.mil/portal/page/portal/content/range/Policy/Reports/srr2007.pdf>; U.S. DEP'T OF DEF., REPORT TO CONGRESS ON SUSTAINABLE RANGES (2006) (on file with author) [hereinafter 2006 REPORT TO CONGRESS ON SUSTAINABLE RANGES]; U.S. DEP'T OF DEF., REPORT TO CONGRESS, IMPLEMENTATION OF THE DEPARTMENT OF DEFENSE TRAINING RANGE COMPREHENSIVE PLAN: ENSURING TRAINING RANGES SUPPORT TRAINING REQUIREMENTS (2005).

³⁵³ Bob Stump National Defense Authorization Act for Fiscal Year 2003, § 366(a)(1), 116 Stat. at 2522.

³⁵⁴ U.S. GEN. ACCOUNTING OFFICE, MILITARY TRAINING: DOD REPORT ON TRAINING RANGES DOES NOT FULLY ADDRESS CONGRESSIONAL REPORTING REQUIREMENTS 5 (2004).

³⁵⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, SOME IMPROVEMENTS HAVE BEEN MADE IN DOD'S ANNUAL TRAINING RANGE REPORTING, BUT IT STILL FAILS TO FULLY ADDRESS CONGRESSIONAL REQUIREMENTS 3 (2005); U.S. GEN. ACCOUNTING OFFICE, MILITARY TRAINING: DOD REPORT ON TRAINING RANGES DOES NOT FULLY ADDRESS CONGRESSIONAL REPORTING REQUIREMENTS 5 (2004).

³⁵⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, IMPROVEMENT CONTINUES IN DOD'S REPORTING ON SUSTAINABLE RANGES, BUT ADDITIONAL TIME IS NEEDED TO FULLY IMPLEMENT KEY INITIATIVES (2006).

³⁵⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, IMPROVEMENT CONTINUES IN DOD'S REPORTING ON SUSTAINABLE RANGES, BUT OPPORTUNITIES EXIST TO IMPROVE ITS RANGES ASSESSMENTS AND COMPREHENSIVE PLAN 2 (2007).

³⁵⁸ The John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 348, 120 Stat. 2083, 2159 (2007).

conference report accompanying the legislation referred to GAO's assessment that, year after year, DoD's reports failed to meet the specific requirements of the authorization acts.³⁵⁹ And in extending the requirements, Congress took DoD to task for its posture of noncompliance.

The conferees also note, with great concern, that this assessment also indicates that some of the requirements of section 366 have not been met because Department officials consider them overly burdensome or impractical. If the Department believes that it cannot comply with some requirements of the law, or that the requirement is overly burdensome, the conferees expect the Department to ask Congress to modify the appropriate portion of the law, not to ignore the requirements of the law.³⁶⁰

B. Section 320 Reports Under the National Defense Authorization Act for Fiscal Year 2004

In the NDAA FY 2004, Congress directed DoD to study the impact of civilian encroachment and environmental compliance on readiness activities and report back to Congress. Unfortunately, Congress only directed DoD to study the effects with respect to the CAA, RCRA, and CERCLA.³⁶¹ However, if thoroughly conducted, this reporting may provide some insight into the impact on readiness of encroachment and compliance with the provisions of the natural resources laws from which DoD is now exempt.

Notwithstanding Congress's request that DoD submit an interim report no later than January 31, 2004,³⁶² followed by annual reports no later than January 31, 2006 and every January 31 thereafter through 2010,³⁶³ DoD submitted its first report under Section 320 in February 2006 as part of its report under Section 366 of the Bob Stump Act.³⁶⁴

With respect to encroachment, Section 320 requires the Secretary of Defense to develop

³⁵⁹ H.R. REP. NO. 109-702, at 693 (2007) (Conf. Rep.).

³⁶⁰ *Id.*

³⁶¹ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 320(a), 117 Stat. 1391, 1435 (2003).

³⁶² *Id.* § 320(e)(1).

³⁶³ *Id.* § 320(e)(2)(3).

³⁶⁴ 2006 REPORT TO CONGRESS ON SUSTAINABLE RANGES, *supra* note 352.

1. a list of all military installations being encroached upon,
2. a description and analysis of the types and degree of encroachment,
3. an analysis of the current and potential future impacts of encroachment on operational training and other activities,
4. an estimate of the costs to create buffer zones to prevent further development around military installations included on the list, and
5. recommendations for possible legislative or budgetary changes to mitigate current and anticipated future problems from encroachment by the civilian community.³⁶⁵

Within its first report, DoD reported separately on the Army's,³⁶⁶ Navy's,³⁶⁷ U.S. Marine Corps',³⁶⁸ and Air Force's³⁶⁹ compliance with section 320. Though the report briefly described many initiatives, the most developed programs involved the buffer zones. Importantly, by February 2006 DoD was still in the process of "developing analytical models and tools aimed at quantifying encroachment, evaluating encroachment impacts at installations, and prioritizing incompatible land uses."³⁷⁰

With respect to environmental compliance, the Secretary must develop

1. a list of all military installations encountering problems with environmental compliance,
2. a description and analysis of the types and degree of problems with compliance,
3. an analysis of the current and potential future impacts of compliance on operational training and other activities, and
4. a description of the trends of such problems with compliance and potential future negative impacts on readiness resulting from such problems.³⁷¹

³⁶⁵ National Defense Authorization Act for Fiscal Year 2004, § 320(b), 117 Stat. at 1435-36.

³⁶⁶ 2006 REPORT TO CONGRESS ON SUSTAINABLE RANGES, *supra* note 352, at 6-1 to 6-11.

³⁶⁷ *Id.* at 7-14 to 7-16.

³⁶⁸ *Id.* at 8-10 to 8-15.

³⁶⁹ *Id.* at ES-3.

³⁷⁰ *Id.* at 9-2 to 9-10.

³⁷¹ National Defense Authorization Act for Fiscal Year 2004, § 320(c), 117 Stat. at 1436.

Although the environmental reporting requirements only apply to pollution laws, those requirements should also apply to the natural resources laws from which DoD sought and received certain exemptions. If DoD were required to report on the impact on readiness of compliance with natural resources laws, Congress may discover that it bowed too quickly and deferentially to the Bush Administration's pressure. A brief review of the reporting with respect to pollution laws, however, may prove illuminating.

In its report to Congress, DoD characterizes as a possible encroachment the mere application of environmental laws and regulations to "uniquely military activities."³⁷² The report discusses the aspects of such encroachment associated with compliance with the CAA, RCRA, and CERCLA.³⁷³ With respect to the CAA, the Department of Defense reports that "[w]hile the general conformity requirement has *not yet* prevented readiness actions, it has the *potential* to threaten the deployment of new weapons systems."³⁷⁴ DoD further states that ambiguity surrounding the definition of "solid waste" under RCRA "*could* threaten training and readiness."³⁷⁵ And finally, with respect to CERCLA, DoD reports that just as with RCRA, "ambiguities in CERCLA *could* jeopardize activities at operational ranges, *potentially* threatening training and readiness requirements."³⁷⁶ DoD "is concerned that application of CERCLA within the boundaries of operational ranges *will* lead to a degradation in force readiness by restricting the Department's ability to conduct realistic military training and weapons testing."³⁷⁷

With respect to the "ambiguities" of RCRA and CERCLA, more specifically, the DoD believes that currently it is "vulnerable to citizen suits that could threaten [its] ability to use operation ranges for critical readiness testing and training."³⁷⁸ As evidence of its vulnerability, DoD cited one commenter on a proposed rule regarding munitions. According to DoD, the commenter stated that munitions become "solid waste" under RCRA when they hit the ground and thus become subject to requirements for corrective and remedial action even when the ranges were still operational.³⁷⁹ This comment arose in the context of rulemaking in 1997.³⁸⁰ EPA

³⁷² 2006 REPORT TO CONGRESS ON SUSTAINABLE RANGES, *supra* note 352, at 3-1, n. 8.

³⁷³ *Id.* at 3-1 to 3-7.

³⁷⁴ *Id.* at 3-3 (emphasis added).

³⁷⁵ *Id.* at 3-5 (emphasis added).

³⁷⁶ *Id.* at 3-6 (emphasis added).

³⁷⁷ *Id.* (emphasis added).

³⁷⁸ *Id.* at 3-5.

³⁷⁹ *Id.*

³⁸⁰ Military Munitions Rule: Hazardous Waste Identification and Management, 62 Fed.

described the comment as a suggestion for "limited standards for ranges (at least for active ranges) so as not to interrupt range activities related to the military mission."³⁸¹ Though the suggestions were limited, EPA rejected them.³⁸² DoD reported that even though private plaintiffs have initiated litigation on this point, ultimately those plaintiffs have not prevailed.³⁸³ But in this report, DoD was concerned that *if future* plaintiffs were successful, such litigation *could* require remediation at ranges and *could* set a precedent for almost all ranges in the United States.³⁸⁴

Despite providing no significant evidence in this 2006 report to Congress that compliance with pollution laws has impacted the military's readiness, DoD continues in each successive legislative session to request relief in the form of exemptions from certain provisions of those laws.³⁸⁵ DoD's weak showing should cause Congress to reexamine the value of the anecdotes DoD has provided to support of its request. The next section of the Article will consider future steps in light of the last five years of DoD's operations under these natural resources law exemptions.

IV. "WAR IS TOO IMPORTANT TO BE LEFT TO THE GENERALS"³⁸⁶: WHERE DO WE GO FROM HERE?

After securing exemptions from certain provisions of the MMPA, the ESA, and the MBTA, DoD reported that it had been "working with both governmental and nongovernmental organizations to promote environmental conservation, because military readiness and conservation are inextricably linked."³⁸⁷ Then Secretary of Defense Donald Rumsfeld said, "[c]onservation is much more than a duty. It is really a proud part of the

Reg. 6622, 6629-30 (Feb. 12, 1997).

³⁸¹ *Id.* at 6630.

³⁸² *Id.*

³⁸³ 2006 REPORT TO CONGRESS ON SUSTAINABLE RANGES, *supra* note 352, at 3-5.

³⁸⁴ *Id.* at 3-6 (emphasis added).

³⁸⁵ See National Defense Authorization Act for Fiscal Year 2008, H.R. 4986, 110th Cong. §§ 314-15 (2007); National Defense Authorization Act for Fiscal Year 2007, S. 2507, 109th Cong. §§ 313-14 (2006).

³⁸⁶ This quote is attributed to Georges Clemenceau, Prime Minister of France, during World War I. Wikiquote.com provides a slightly different translation of the original French: "War is too serious a matter to entrust to military men" ("La guerre! C'est une chose trop grave pour la confier à des militaires."), Wikiquote.com, Georges Clemenceau, http://en.wikiquote.org/wiki/Georges_Clemenceau (last visited Apr. 1, 2008).

³⁸⁷ Sgt. Sara Wood, *Rumsfeld: Military Readiness Linked to Conservation*, AM. FORCES PRESS SERVICE, Aug. 29, 2005, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=16773>.

Department of Defense's heritage."³⁸⁸ Despite this "confluence of interests,"³⁸⁹ this Article calls into question whether DoD will indeed avoid unnecessary harm to natural resources.

Without a doubt, DoD capitalized upon fears about the possibility of another terrorist attack on American soil to advance its legislative agenda that had emerged well before 9/11. Though the risks of future terrorism deserve considerable attention, it also may be the case that Congress succumbed to what Professor Cass Sunstein has dubbed the "phenomenon of 'probability neglect'"—when "people focus on the worst case, and neglect the probability that it will actually occur."³⁹⁰ Professor Sunstein posits that "[i]n democratic nations, the law responds to people's fears" of worst case scenarios.³⁹¹ "As a result, the law can be led in unfortunate and even dangerous directions."³⁹²

Given the dangerous possibilities, Professor Stephen Dycus argued in his prescient book, *National Defense and the Environment*, that

We need a settled procedure for determining *when* we must choose between environmental protection and national defense. This procedure should include a clear articulation of the issues and evaluation of the stakes. It should describe *who* will be entrusted with the fateful decision and *how* he or she will go about making it.³⁹³

Congress and DoD seemed to have answered the question of *when*; the time is now—the post-9/11 world. There is considerable disagreement about the validity of that conclusion. For example, Professor Hope Babcock concludes, "the military is using the 'war on terrorism' as a Trojan horse to get out from under thirty years of constraining environmental laws it has never fully accepted."³⁹⁴ However, the following discussion assumes that the right time is in fact upon us. Accordingly, it will attempt to begin to

³⁸⁸ Donald H. Rumsfeld, U.S. Secretary of Defense, Address Before the White House Conference on Cooperative Conservation (Aug. 29, 2005), available at <http://www.defense.link.mil/transcripts/transcript.aspx?transcriptid=3119>.

³⁸⁹ STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 187 (1996).

³⁹⁰ CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 6 (2005).

³⁹¹ *Id.* at 1.

³⁹² *Id.*

³⁹³ DYCUS, *supra* note 389, at 3.

³⁹⁴ Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 110 (2007).

answer the question of *who* should make that decision and *how* the entity or entities should do so.

With the recent changes in natural resources law, Congress appears to have designated DoD as the *who* (the decisionmaker) and thrown up its hands, providing little or no guidance as to the *how*, leaving it up to discretion for the sake of military readiness. This discussion argues that Congress may not have made the wisest choices with respect to the *who* and *how*, and yet the better answers may not be what one might imagine at first blush. The discussion does conclude, however, that the precautionary principle, even with its acknowledged limitations, should be one of the guiding principles for the decisionmaker(s).

A. *DoD as an Exceptional Agency*

DoD is an exceptional agency.³⁹⁵ It has a unique duty to protect the country from external threats, with terrorism looming today perhaps as its chief concern. But DoD also has a unique opportunity and responsibility to protect the nation's natural resources because of the size and nature of its land holdings. These roles may be two different sides of the same exceptionalist coin.³⁹⁶ Regardless of how DoD's lands became some of the last havens for threatened and endangered species and migratory birds, it is a reality that the nation confronts and cannot avoid. And while the Navy is not the only contributor to increased noise off the nation's

³⁹⁵ Erin Truban, Comment, *Military Exemptions From Environmental Regulations: Unwarranted Special Treatment or Necessary Relief*, 15 VILL. ENVT. L.J. 139, 140 (2004); Thomas N. Ledvina, *Defending America—A Question of Balance: The Department of Defense's Range and Readiness Preservation Initiative*, SJ023 ALI-ABA 163, 165-66 (2003).

³⁹⁶ Consider the concept of "American exceptionalism" with respect to the country's history, culture, political and religious institutions, economy, geography, and natural resources. As one historian explains:

[T]he vast continent of virgin land that offered America an escape from republican decay assumed increasing, and mythic, importance. Since the time of discovery, Europeans had projected utopian fantasies onto the New World; Locke could, as a matter of course, envision it as his state of nature. In the romantic age, the American West was endowed with the energies of dynamic nature and became identified with America's millennial future.

Dorothy Ross, *Historical Consciousness in Nineteenth-Century America*, 89 AMER. HIST. REV. 909, 913 (1984). Note that Ross is critical of this idea of "American exceptionalism, the idea that America occupies an exceptional place in history, based on her republican government and economic opportunity . . . guaranteed by a continent of virgin land." DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* xiv, xviii (1991).

coasts that is negatively impacting marine mammals, it is a readily identifiable one.

Admittedly, DoD has some environmental success stories,³⁹⁷ but it also has environmental horror stories.³⁹⁸ Given its mixed history, we may need a different “framework for determining when environmental sacrifices are necessary to protect us from sovereign aggression or terrorism.”³⁹⁹ While it is true that no species have gone extinct since DoD received these exemptions, the irreversibility of that possible outcome militates in favor of a greater margin of safety.⁴⁰⁰ And the appropriate use of the precautionary principle, as discussed below, should lead to a more desirable level of regulation for natural resources’, and ultimately the nation’s sake.

Professor Stephen Dycus, writing more than a decade ago, argued that there is some reason for optimism, however. In his estimation, the public knows more and tolerates less, and government officials are more sensitive to these issues.⁴⁰¹

Now we recognize that, with rare exception, we can maintain a strong, effective defense without endangering the public health or destroying our natural resources. . . . Yet despite daunting political, financial, and technological challenges, there is plenty of reason for optimism that we can maintain a strong natural defense that is also environmentally sound.⁴⁰²

“For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more.”⁴⁰³ There is some evidence to suggest that DoD is falling short of this expectation. Thus, one might argue that the federal wildlife agencies should have at least concurrent authority with respect to these exemptions. Yet, the following discussion suggests that the wildlife agencies may also fall short.

³⁹⁷ *E.g.*, Sustainable Fort Bragg: Bringing All Our Resources to Bear, to Sustain the Mission, <http://www.bragg.army.mil/Sustainability/successStories.htm> (last visited Apr. 1, 2008).

³⁹⁸ *E.g.*, *U.S. v. Dee*, 912 F.2d 741 (4th Cir. 1990) (upholding criminal convictions of three engineers at the U.S. Army’s Aberdeen Proving Ground for violations of RCRA).

³⁹⁹ DYCUS, *supra* note 389, at xiv.

⁴⁰⁰ *See* SUNSTEIN, *supra* note 390, at 6.

⁴⁰¹ DYCUS, *supra* note 389, at 186-87.

⁴⁰² *Id.* at 185-86.

⁴⁰³ *Luke* 12:48.

B. *Consultation with Wildlife Agencies*

At first blush, one concerned about DoD's authority under the new exemptions might advocate mandatory consultation with the wildlife agencies similar to consultation under section 7 of the ESA. But as explained in Part I.B.4. of this Article, the wildlife agencies supported DoD's requests for these exemptions. Moreover, evidence suggests that when it came to DoD's compliance with natural resources law in the past, the wildlife agencies were less than vigorous in their enforcement.

For instance, NRDC characterizes NOAA Fisheries' enforcement of the MMPA as uneven.⁴⁰⁴ NRDC reports that NOAA Fisheries has never pursued the Navy in an enforcement action after a noise-producing activity has caused harm to marine mammals.⁴⁰⁵ And the report posits that the close working relationship between NOAA Fisheries and the Navy calls into question the integrity of NOAA Fisheries' environmental review of the Navy's permit applications.⁴⁰⁶ The report further submits that while NOAA Fisheries has attempted to be a kinder, gentler regulatory authority, it is unlikely to produce full compliance with the MMPA⁴⁰⁷ because "the agency has tied its own hands . . . appear[ing] to have taken the position that it cannot act preemptively to keep a violation of the Marine Mammal Protection Act from occurring."⁴⁰⁸

FWS may also provide little hope to environmentalists who oppose the exemptions.⁴⁰⁹ For example, with respect to the designation of critical habitat, the Service has maintained for more than a decade that it adds very little to the protection of species in relation to its costs. It even goes so far as to begin many of its rulemakings designating critical habitat—usually kicking and screaming as the result of losing a lawsuit—with a repudiation of the value of designation.⁴¹⁰ And, perhaps as DoD has argued,

⁴⁰⁴ JASNY ET AL., *supra* note 106, at 50.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* (citing e-mail correspondence among staff of NOAA Fisheries as well as with DoD).

⁴⁰⁷ *See id.* at 49-50.

⁴⁰⁸ *Id.* at 51.

⁴⁰⁹ Rebecca Claren, *Inside the Secretive Plan to Gut the Endangered Species Act*, SALON, Mar. 27, 2007, available at http://www.salon.com/news/feature/2007/03/27/endangered_species/index.html?source=sphere (quoting former FWS scientist, Bob Hallack who lamented, "The optimism we had when this agency started has absolutely been dashed.").

⁴¹⁰ *E.g.*, Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Alabama Beach Mouse, 72 Fed. Reg. 4329, 4330-31 (Jan. 30, 2007); Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rota Bridled White-Eye (*Zosterops rotensis*), 71 Fed. Reg. 53,589, 53,589-90 (Sept. 12, 2006); Endangered

it has been the recent practice of the Service to exclude DoD's lands from designation anyway.

With respect to the MBTA, it also appears that FWS would be reluctant to prosecute DoD's "unintentional" violations of the act that occur during readiness activities. For example, in *Center for Biological Diversity v. Pirie*, a case involving training exercises on the island of Farallon de Medinilla in which the court found DoD guilty of violating the MBTA, the Service stated that it would not prosecute DoD.⁴¹¹ Craig Manson, Assistant Secretary for FWS, explained to Congress the Service's approach to "enforcement" of the MBTA with respect to DoD:

The Fish and Wildlife Service has worked to provide the necessary authorizations to enable readiness training and operational flexibility for the military. For example, we routinely issue permits authorizing military personnel to take birds that pose a risk to aircraft safety at airfields. . . . Also, the Fish and Wildlife Service uses *enforcement discretion*, rather than a permitting program, to allow activities such as live fire military training that take birds incidentally.

Implementing the MBTA in this fashion has enabled us to focus our limited resources on working cooperatively with various parties, including the military, to avoid or minimize the take of migratory birds, and target enforcement actions against those parties that choose not to cooperate with us to conserve migratory bird populations.⁴¹²

The exemptions do not appear to disturb this cooperative relationship. Thus, relying upon consultation with the Service to advance conservation likely would not result in a different outcome.

and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon; Re-evaluation of Non-Economic Exclusions From August 2003 Final Designation, 70 Fed. Reg. 11,140, 11,141-42 (Mar. 8, 2005); Robert Wiygul & Heather Weiner, *Critical Habitat Destruction*, ENVTL. F. (Envtl. L. Inst.), May-June 1999, at 13 (describing Secretary Bruce Babbitt's efforts in the Clinton Administration to limit the designation of critical habitat).

⁴¹¹ Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 177 (D.D.C. 2002).

⁴¹² *Hearings Before the Subcomm. on Military Readiness, H. Comm. on Armed Services*, 107th Cong. (2002) (testimony of Craig Manson, Assistant Sec'y for Fish & Wildlife, Dep't of the Interior) (emphasis added), available at <http://www.doi.gov/ocl/2002/esa.htm>.

More generally, a report by Department of the Interior Office of Inspector General found "weak management oversight" in FWS's law enforcement program and "general mistrust of senior management" in the program.⁴¹³ One of the enforcement agents told an inspector that the "ship is rudderless at the top."⁴¹⁴ FWS reorganized the program six years ago "to separate sensitive investigations from political interference."⁴¹⁵ However, describing the program as a "headless horseman," Jeff Ruch, Executive Director of Public Employees for Environmental Responsibility ("PEER"), said that politics still interferes with law enforcement.⁴¹⁶ PEER found that criminal referrals and prosecutions have decreased dramatically since the current administration began in 2000. According to PEER, information from the U.S. Department of Justice indicates that criminal referrals dropped by more than 50% and prosecutions fell by 42%.⁴¹⁷

And finally, recent evidence suggests that politics is improperly influencing some decisions by the Service under section 4 of the ESA.⁴¹⁸ Admittedly, many of the decisions the Service makes must combine science and policy, but charges abound that political appointees have been making decisions based on their allegiance to certain interest groups rather than the Service's mission of conservation.⁴¹⁹ In one instance, the Service

⁴¹³ OFFICE OF INSPECTOR GEN., DEP'T OF THE INTERIOR, ASSESSMENT OF THE U.S. FISH AND WILDLIFE SERVICE OFFICE OF LAW ENFORCEMENT 3 (2007), *available at* www.doi.gov/upload/FWS_OLGAssessmentFINAL021507.pdf.

⁴¹⁴ *Id.*

⁴¹⁵ Allison Winter, *IG Report Finds Law Enforcement Office a 'Rudderless Ship,'* LAND LETTER, Feb. 22, 2007, <http://www.eenews.net/Landletter/2007/02/22/7/>.

⁴¹⁶ Press Release, Pub. Employees for Envtl. Responsibility, Federal Wildlife Enforcement Is Leaderless and in Decline—New Inspector General Decries "Rudderless" Program as Prosecutions Drop (Feb. 20, 2007), *available at* http://www.peer.org/news/news_id.php?row_id=825.

⁴¹⁷ *Id.*

⁴¹⁸ See generally Union of Concerned Scientists & Pub. Employees for Envtl. Responsibility, U.S. Fish & Wildlife Service Survey Summary, February 2005, *available at* http://www.peer.org/pubs/surveys/2005_fws_survey.pdf.

⁴¹⁹ Felicity Barringer, *Interior Official Steps Down After Report of Rules Violation*, N.Y. TIMES, May 2, 2007, at A18 (cataloging Department of the Interior's connections to disgraced lobbyist, Jack Abramoff; an FWS scientist's resignation in the face of disagreements over his scientific reports; and a timber lobbying group's use of one of the Department's internal working documents not generally available to the public); OFFICE OF INSPECTOR GEN., DEP'T OF THE INTERIOR, INVESTIGATIVE REPORT ON ALLEGATIONS AGAINST JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS (2007), *available at* http://wyden.senate.gov/DOI_IG_Report.pdf (finding that former deputy assistant secretary Julie MacDonald violated federal rules under 5 C.F.R. § 2635.703 (use of non-public information) and 5 C.F.R. § 2635.101 (basic obligation of public service, appearance

recently reviewed eight decisions that former Deputy Assistant Secretary for Fish, Wildlife and Parks, Julie MacDonald, made under the ESA.⁴²⁰ The review was prompted by questions about MacDonald's use of science in her decisionmaking, as well as questions about whether she consistently applied the law.⁴²¹ A federal district judge called her conduct "inexcusable," noting that although she was not a scientist, she "had a well-documented history of intervening in the listing process to ensure that the 'best science' supported a decision *not* to list the species."⁴²² After its review the Service determined that it should revise seven of those eight decisions.⁴²³

And though Ms. MacDonald resigned from her post, there are indications that she was not alone in her efforts to press the agendas of regulated industries. As Kieran Suckling of the Center for Biological Diversity remarked, "MacDonald was the administration's attack dog, not its general."⁴²⁴ Moreover, the district court that took MacDonald to task found more generally, at least with respect to one listing decision, that the Service 1) consulted with experts but did not include them in the decision-making, 2) created no detailed record of the scientists' findings, and 3) ignored the findings that were preserved in the record.⁴²⁵ Such charges are not new for the Bush Administration,⁴²⁶ and regardless of who wins the presidential election in 2008, this behavior illuminates the precarious nature of relying solely upon the wildlife agencies to serve as watchdogs over DoD.

C. *The Role of the Precautionary Principle*

In the post-9/11 world of risk, uncertainty, and fear, "the process of deciding how to defend ourselves without destroying the environment

of preferential treatment) by giving industry groups internal agency documents and intimidating the Service's scientists in an attempt to make them issue reports in favor of regulated industries' positions).

⁴²⁰ Press Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service to Review 8 Endangered Species Decisions (July 20, 2007), *available at* http://www.fws.gov/endangered/pdfs/macdonald/ESA_Review_NR_FINAL.pdf.

⁴²¹ *See id.*

⁴²² *W. Watersheds Project v. U.S. Forest Serv.*, No. 06-277, 2007 WL 4297476, at * 1 (D. Idaho Dec. 4, 2007) (emphasis added).

⁴²³ Letter from Kenneth Stansell, Acting Dir., U.S. Fish & Wildlife Serv., Dep't of the Interior, to Representative Nick J. Rahall, II, Chairman, Comm'n on Natural Res. (Nov. 23, 2007), <http://www.fws.gov/endangered/pdfs/macdonald/rahallsigned.pdf>.

⁴²⁴ Barringer, *supra* note 419, at A18.

⁴²⁵ *W. Watersheds Project v. U.S. Forest Serv.*, 2007 WL 4297476, at *1.

⁴²⁶ Burke, *Klamath Farmers and Cappuccino Cowboys*, *supra* note 22, at 478.

that sustains us can be infuriatingly complex.⁴²⁷ The challenge is to strike the appropriate balance among different and often competing interests. This Article suggests that Congress and the Bush Administration have not found the appropriate balance with respect to laws protecting the nation's natural resources. One possible way to establish that balance is to use the "precautionary principle."

There are many versions of the precautionary principle, and they are often articulated in international environmental agreements such as the United Nations Framework Convention on Climate Change,⁴²⁸ the Convention on Biological Diversity,⁴²⁹ and the 1996 Protocol to the London Convention of 1972,⁴³⁰ to name just a few. The 1992 Rio Declaration on Environment and Development, for example, states in Principle 15: "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."⁴³¹

Though there are many versions of the principle, "they all share the normative assumption that when a government is balancing and

⁴²⁷ DYCUS, *supra* note 389, at 2.

⁴²⁸ The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.

United Nations Framework Convention on Climate Change art. 3, para. 3, May 8, 1992, 31 I.L.M. 851, *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁴²⁹ United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822, 822 ("[W]here there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.").

⁴³⁰ Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.

1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. 3, para. 1, Nov. 7, 1996, 36 I.L.M. 1.

⁴³¹ United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, princ. 15, June 13, 1992, 31 I.L.M. 874.

integrating scientific, economic, political, and social values for the purpose of risk management, environmental protection is to be a paramount value.⁴³² At first blush, the principle may not seem very controversial, but those familiar with attempts to apply it know differently. For example, in response to the international "Biosafety Protocol," a Wall Street Journal editorial declared that "[t]he precautionary 'principle' is an environmentalist neologism, invoked to trump scientific evidence and move directly to banning things they don't like—biotech, wireless technology, hydrocarbon emissions. In other words, science got in their way, so they shoved it aside."⁴³³ Would-be regulated entities also resist application of the principle on the grounds that the science in support of regulation is incomplete and inconclusive.⁴³⁴ Supporters of the principle explain that

[t]he problem very often is that long before the science does come in, the harm has already been done. And once a technology has entered the marketplace, the burden of bringing in that science typically falls on the public rather than on the companies selling it.

If introduced into American law, the precautionary principle would fundamentally shift the burden of proof. The presumptions that flow from the scientific uncertainty surrounding so many new technologies would no longer automatically operate in industry's favor. Scientific uncertainty would no longer argue for freedom of action but for precaution and alternatives.⁴³⁵

Even for those who may favor more environmental regulation, this strong conception of the precautionary principle is problematic. The strong version of the principle is a double-edged sword to be wielded by both environmentalists and DoD alike. Both parties are asking Congress

⁴³² Phillip M. Kannan, *The Precautionary Principle: More than a Cameo Appearance in United States Law?*, 31 WM. & MARY ENVTL. L. & POLY REV. 409, 418 (2007).

⁴³³ *Fear of the Future*, WALL ST. J., Feb. 10, 2000, at A18. In the past eight years, the Wall Street Journal has published thirty articles, editorials, and letters that are hostile to the principle. See Lexis Nexis Wall Street Journal Database from July 28, 1999 through Oct. 7, 2007.

⁴³⁴ See David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 ENVTL. HEALTH PERSPECTIVES 9 (2001), available at <http://www.jstor.org/view/00916765/ap060247/06a00190/0>.

⁴³⁵ Michael Pollan, *The Year in Ideas: A To Z; Precautionary Principle*, N.Y. TIMES, Dec. 9, 2001.

to act in the face of different uncertainties and with different understandings (both perhaps narrow ones) of what is at stake. On the one hand, environmentalists invoking the principle argue that in the absence of proof that compliance with natural resources laws has impaired or will impair the military's readiness, the law should err on the side of protection of wildlife. Conversely, DoD, implicitly urging application of the principle, argues that in the face of unspecified, yet inevitable, terrorist attacks here and abroad in the future, the military should be free of certain obligations to engage in uninhibited training.

In "Ark of the Broken Covenant,"⁴³⁶ Professor John Kunich of Roger Williams University School of Law suggests an alternative to the strong conception of the precautionary principle, introducing a method similar to Blaise Pascal's famous wager about whether to believe in God.⁴³⁷ He calls it the "Hotspots Wager"⁴³⁸ and describes the methodology as follows:

We need to take into account the consequences, good and bad, of right or wrong decisions on all key variables where the actual value is unknown. If we guess right in deciding what to do about each of the unknowns, what are the benefits we will reap? And if we guess wrong, what is the price we would pay for our error?⁴³⁹

Another thoughtful critique of the precautionary principle focuses on improving the manner in which policymakers apply it, rather than rejecting its intuitive premise. For example, Professor Cass Sunstein argues that in its strong form the precautionary principle is "incoherent," providing no direction.⁴⁴⁰ Instead of providing meaningful guidance, it can lead to paralysis. Decisionmakers often focus on just one risk at a time, but then when they consider the risks attendant to solving the

⁴³⁶ JOHN CHARLES KUNICH, *ARK OF THE BROKEN COVENANT: PROTECTING THE WORLD'S BIODIVERSITY HOTSPOTS* 173-84 (2003).

⁴³⁷ Pascal's wager is that

one ought to wager one's life on the truth of the proposition that God exists; he believed, that is, that the existence of God is a good bet and that one ought to organize one's life around it and to act at all times as if God existed. He believed that what one risked in such a bet is trifling and that the outcome, if one were right, would be infinitely good.

LESLIE ARMOUR, "INFINI RIEN": PASCAL'S WAGER AND THE HUMAN PARADOX 1 (1993).

⁴³⁸ KUNICH, *supra* note 436, at 173-84.

⁴³⁹ *National Security Readiness Act*, *supra* note 27.

⁴⁴⁰ SUNSTEIN, *supra* note 390, at 14.

primary risk, they can become paralyzed.⁴⁴¹ Thus, he concludes that if “taken literally [the principle] is offended by regulation as well as by non-regulation.”⁴⁴² Professor Sunstein suggests as an alternative an “Anticatatrophe Principle, designed for special circumstances in which it is not possible to assign probabilities to potentially catastrophic risks.”⁴⁴³ To reconstruct the precautionary principle into something that is useful, Professor Sunstein suggests that we must identify all relevant risks and the available regulatory tools and “impose margins of safety that are closely attuned both to the ‘target’ risk and to the risks associated with reducing it.”⁴⁴⁴ Sunstein says that “[s]ometimes those tasks are daunting, but in many cases a little attention to the central inquiries should go a long way toward resolving heavily contested questions for both ordinary citizens and nations.”⁴⁴⁵ Reframing the regulatory calculus in this way could help us to counteract the risk that DoD’s exploitation of the public’s fear about future terrorist acts in the United States will result in significant and irreversible losses of some of the nation’s natural resources.

According to Professor Christopher Schroeder, an expert in environmental law and policy at Duke University School of Law, three elements of the precautionary principle must be specified in order for the principle to inform decisionmaking:

The principle rejects waiting for definitive proof of a causal connection between actions and harm, but short of such proof, what kind and quantity of evidence—and evidence of what kind of harm—is required to trigger precautionary action?

The principle speaks of precautionary action, but what sort of action is appropriate—product bans, product labels, use restrictions, further experimentation, reductions in the amount or frequency of the risky action, or something else?

The principle authorizes precautionary action in advance of accepted evidence of harm, but how temporary or final is the decision, and when should it be revisited?⁴⁴⁶

⁴⁴¹ See *id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 5.

⁴⁴⁴ *Id.* at 122.

⁴⁴⁵ *Id.*

⁴⁴⁶ Christopher Schroeder, *The Precautionary Principle*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspectives/precaution.cfm>.

This Article suggests that the time to revisit Congress's decisions regarding these natural resources laws is now.

CONCLUSION

President Dwight Eisenhower cautioned, "[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist."⁴⁴⁷ In 1996 Professor Stephen Dycus opined that

[n]ow that the Cold War is over, we have begun to realize that the values supported by a healthy environment—life, liberty, and freedom from fear and want—are the same ones for which we stand ready to fight and die. There is a growing consensus in this country that the environment itself is worth defending at home and abroad—that environmental protection is an aspect of national security.⁴⁴⁸

But on 9/11, the landscape changed once again. Terrorists robbed Americans of their sense of security on home soil, and DoD took advantage of the sense of fear and loss to engage in some dangerous internal pilfering. DoD sought and received from Congress exemptions from certain provisions of the MMPA, ESA, and MBTA. Environmentalists continue to argue that the exemptions are unmerited and could lead to disastrous, irreversible results. And while DoD asserts its need for this statutory relief to fulfill its obligation to defend this nation, it may be simultaneously abandoning much of what makes this country worth defending. Robert F. Kennedy, Jr. argues that

[o]ur government has abandoned its duty to safeguard our health and steward our national treasures, eroding not just our land, but our nation's moral authority and capacity to fulfill its historic mission—to create communities that are models for the rest of humankind. After all, we

⁴⁴⁷ Military-Industrial Complex Speech, PUB. PAPERS 1035-40 (1960), <http://coursesa.matrix.msu.edu/~hst306/documents/indust.html>.

⁴⁴⁸ DYCUS, *supra* note 389, at xiii.

protect nature not (as Rush Limbaugh likes to say) for the sake of the trees and the fishes and the birds, but because it is the infrastructure of our communities. If we want to provide our children with the same opportunities for dignity and enrichment as those our parents gave us, we've got to start by protecting the air, water, wildlife, and landscapes that connect us to our national values and character. It's that simple.⁴⁴⁹

This Article argues that Congress has not struck the appropriate balance in trying to prevent two potentially catastrophic harms: another terrorist attack for which the military is unprepared and irreversible loss of natural resources. Assigning the responsibility to the federal wildlife agencies alone would be inappropriate and ineffective. Perhaps in despair, Professor Babcock argues that neither Congress nor the courts will be reliable guardians of natural resources⁴⁵⁰ nor will they be "likely to have the power or the impetus to curb the military's excesses under the new exemptions."⁴⁵¹ This Article urges the public to insist that all three branches of government assume their respective responsibilities for protecting the nation in its entirety and demand that Congress lead the way by rescinding the exemptions that it granted DoD. It is just that simple.

⁴⁴⁹ ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE: HOW GEORGE W. BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY* 4-5 (2004).

⁴⁵⁰ Babcock, *supra* note 394, at 147-50.

⁴⁵¹ *Id.* at 148.