

# **The Pentagon's 2003 Sustainable Ranges Agenda and its Effect on Public Health and Environmental Laws and Regulations**

## **An Analysis Prepared by the Democratic Staffs of the House Committee on Energy and Commerce and the House Committee on Resources**

April 7, 2003

The Department of Defense (DOD) prepared the Sustainable Ranges proposal to “counteract the effects of encroachment on military bases and to posture DOD ranges for long-term mission sustainment.”<sup>1</sup> The Administration is reinitiating its legislative effort<sup>2</sup> to weaken or eliminate the DOD’s responsibilities under several important public health, pollution and conservation statutes within our Committees’ jurisdiction. These statutes include the Resource Conservation and Recovery Act (RCRA)<sup>3</sup> and the Clean Air Act, both of which are primarily implemented by the States, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA-Superfund), implemented by the Environmental Protection Agency (EPA) in partnership with the states. In addition, the DOD is seeking changes to the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA), administered by the Departments of the Interior and Commerce. Again arguing that military training and readiness are greatly constrained by these laws, DOD is seeking statutory exemptions. In the case of MMPA and ESA, the proposed exemptions are even broader than those sought in the 107<sup>th</sup> Congress.<sup>4</sup>

While most Federal environmental laws apply to Federal facilities, Congress has included exemptions or discretion in the administration of these statutes in order that military training needs and national security are not compromised.<sup>5</sup> Public Law 105-85 also gives the Secretary of Defense the authority to suspend any administrative rule or regulation that “would have a significant adverse effect on the military readiness of any of the armed forces. . . .”<sup>6</sup>

The strategy has worked quite well to ensure that our armed services are combat ready and that our homeland environment remains safe, clean, and healthy.<sup>7</sup> The General Accounting Office (GAO) found that training readiness remains high at most military installations.<sup>8</sup> This finding was echoed by military officials, such as Army Chief of Staff General Eric Shinskei who told the Senate Armed Services Committee on February 25, 2003, “The Army is ready. We have the best Army in the world. Not the largest, but the best: the best led, the best trained, the best equipped.”

Nevertheless the country’s public health and environmental laws are under direct attack. This white paper critiques the “Sustainable Ranges” proposal and provides an analysis of its potential harmful consequences.

## I. Overview

- The DOD has not cited any examples or instances where RCRA, CERCLA, or the Clean Air Act has ever caused an actual adverse affect on military readiness.
- On February 26, 2003, EPA Administrator Christine Todd Whitman testified that she was “not aware of any particular area where environmental protection regulations are preventing the desired training.”<sup>9</sup> In addition, the Administrator stated “we have been working very closely with the Department of Defense and I don’t believe that there is a training mission, anywhere in the country that is being held up or not taking place because of environmental protection regulation.”
- Each of the statutes (RCRA Sec. 6001; CERCLA Sec. 120j; CAA Sec. 118) contains national security exemptions that allow the President to exempt DOD from its statutory or regulatory requirements on a case-by-case basis. To date, DOD has not used such exemptions to any extent to address encroachment concerns. President Bush, however, in a three paragraph finding (66 *Fed. Reg.* 78425, (Dec. 24, 2002) and 50807 (Oct. 4, 2001)), for the past two years has exempted the Air Force facility “near Groom Lake, Nevada from any RCRA provision that would require the disclosure of classified information concerning the operating location of any authorized person.” Executive Orders 12088 and 13148 contain procedures for Federal agencies to follow when requesting Presidential exemptions.
- On March 7, 2003, Deputy Secretary of Defense, Paul Wolfowitz, sent a memorandum to the Secretaries of the Army, Navy, and Air Force which acknowledged that nine environmental laws already contain provisions allowing for national security exemptions. He further indicated that “it is time for us to give greater consideration to requesting such exemptions in cases where environmental requirements threaten our continued ability to properly train and equip the men and women of the armed forces.” Mr. Wolfowitz stated that “In the vast majority of cases, we have demonstrated that we are able both to comply with environment requirements and to conduct military training and testing”<sup>10</sup> and DOD should seek such administrative exemptions in the exceptional cases where there is a conflict.
- In addition, Section 6001(b) of RCRA and 10 USC 2014 of the United States Code explicitly provide that when an order or administrative action is issued by EPA or another Federal agency that would have an adverse effect on military readiness, there is an opportunity for DOD to raise the issue within the executive branch to the Commander in Chief before any such order becomes final.
- The Endangered Species Preservation Act of 1966, predecessor to the ESA, required the Secretaries of the Interior, Agriculture and Defense to preserve endangered species habitat but only insofar as practical and consistent with the agencies primary missions. When Congress adopted

the ESA in 1973, it chose not to limit the conservation obligations of DOD or any other Federal agency, and required agencies to give endangered species conservation the highest priority. Similarly, when Congress passed the Marine Mammal Protection Act in 1972, it chose to treat all Federal agencies equally under the prohibition against taking marine mammals.<sup>11</sup>

- Beginning with the Clean Air Act Amendments of 1970, Congress established the national policy of requiring the Federal Government to comply with Federal, state, interstate, and local requirements respecting control and abatement of air pollution to the same extent as any person. This same policy of requiring Federal agencies to comply with our environmental laws to the same extent and in the same manner as states, local governments, and private industry was enacted for the Superfund program in the Superfund Amendments and Reauthorization Act of 1986 and in 1976 for RCRA. The national policy for RCRA was strongly reaffirmed in 1992, with the passage of the Federal Facility Compliance Act. During the campaign of 2000, President Bush announced that he would “direct active Federal facilities to comply with all environmental protection laws and hold them accountable.” At the same time, the President noted that the “Federal government is considered the nation’s worst polluter.”<sup>12</sup>
- According to the National Governors Association, “Federal facilities and former Federal facilities are among the worst contaminated sites in the Nation. This condition is a legacy of the lack of regulatory oversight at these sites for most of their history. The double standard of separate rules applying to private citizens and the Federal government continues to have a detrimental effect on public confidence in government at all levels. Federal facilities should be held to the same standard of compliance as other parties.”<sup>13</sup>
- The Attorneys General of Arizona, California, Colorado, Massachusetts, Nevada, Idaho, New Mexico, Utah, New York, Oregon, and Washington have stated in Congressional testimony that “the language of DOD’s proposed amendments would create wide loopholes and jeopardize environmental protection, without any corresponding benefit to readiness.”<sup>14</sup> The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) has informed Congress that they “question the need and wisdom for the proposed changes to RCRA’s definition of solid waste and to CERCLA’s definition of release” and “do not believe DOD has made a convincing case concerning the need for the proposed changes to RCRA and CERCLA.”<sup>15</sup>

## **II. Background**

The DOD has created, and is responsible for cleaning up, the largest number of toxic waste sites of any person or entity in the United States. For example, the DOD has 131 facilities on the Superfund National Priorities List (NPL) or 72% of all the Federal sites on the NPL. Six additional DOD facilities are currently proposed for the NPL. All together, DOD is responsible for addressing over 28,500 potentially contaminated sites across the country.<sup>16</sup> This figure does not include thousands of contaminated or potentially contaminated Formerly Used Defense Sites (FUDS) in the United States and its territories

and possessions. FUDS are properties that were formerly owned, leased, possessed, or operated by DOD or its components. GAO recently estimated that unexploded ordinance contamination may exist at over 1,600 FUDS.<sup>17</sup>

Unexploded ordinance contamination, both at facilities under DOD’s jurisdiction and at FUDS, represents an environmental problem of huge dimensions. In addition to the obvious explosive hazards, some constituents of explosive and munitions contamination have toxic or potential carcinogenic effects and cause groundwater contamination. Five common explosives or munitions constituents are perchlorate, trinitrotoluene (TNT), Dinitrotoluene (DNT), Royal Demolition Explosive (RDX), and white phosphorous. For example, live-fire training at the Massachusetts Military Reservation (MMR) over several decades has contaminated large amounts of groundwater in the sole source drinking water aquifer for Cape Cod – affecting drinking water supplies for 200,000 year round and 500,000 seasonal residents of upper Cape Cod.<sup>18</sup>

A broad range of explosives and chemical compounds was detected in the groundwater under the Training Range and Impact Area, including RDX, which is classified by the EPA as a possible human carcinogen. Studies have estimated that between 45 and 60 billion gallons of drinking water have already been contaminated by pollution from MMR.<sup>19</sup> Eleven large plumes of contaminated groundwater have been identified, causing the shutdown of public and private water supply systems. The Army has acknowledged that it has 13 installations, with active ranges, that are located over or are adjacent to sole-source drinking water aquifers.

Aside from its responsibility to clean up the sites it has polluted, DOD also manages approximately 25 million acres of land on more than 425 major military installations throughout the United States. In addition, the U.S. Army Corps of Engineers operates a wide variety of civil works projects on approximately 12 million acres of land.<sup>20</sup> As a result, DOD is one of our Nation’s most significant land managers.

### **III. Resource Conservation and Recovery Act (RCRA)/Solid Waste Disposal Act**

#### **✓ *In General***

The DOD proposal set forth in Section 2019(a)(2) (Range Management and Restoration) removes “explosives, unexploded ordinance, munitions, munitions fragments, or constituents thereof” from the core definition of “solid waste” used in the Solid Waste Disposal Act. This definition change to the term “solid waste” also affects whether munitions-related and explosives related wastes are subject to regulation as a hazardous waste because Section 1004(5) of the Solid Waste Disposal Act defines hazardous waste as a “solid waste, or combination of solid wastes” that exhibit certain characteristics or meet certain listing criteria. Only in the very limited circumstances set forth in section 2019(a)(1) will munitions remain a solid waste.

Under section 2019(a)(1), munitions are solid wastes only under the following circumstances: (1) they are or have been deposited, incident to their normal and expected use, *on* an operational range, *and* then one or three things happens: they are removed from the range; or are recovered and than buried: or migrate off range and are not addressed under CERCLA; or (2) they are deposited, incident to their normal and expected use, *off* an operational range, and are not promptly addressed.<sup>21</sup>

State officials have testified “that by redefining solid waste in very limited fashion, DOD’s proposed amendments will likely preempt state authority over munitions, explosives, and the like not only at operational ranges, but – contrary to DOD’s assertions – also at FUDS, at DOD sites other than ranges, and even at private contractor sites.”<sup>22</sup>

The EPA commented that “exempting used or fired munitions on operational ranges from the definition of solid waste would, among other things, prevent the Agency from exercising its authority to order the abatement of an imminent and substantial endangerment of health or the environment caused by the handling of ‘solid waste’ when the Agency determines that such a condition exists on an operational range.”<sup>23</sup> In addition, Section 2019, would limit the exercise of the same authorities by states and citizens.”<sup>24</sup> Section 7002 of RCRA provides the only Federal authority states and citizens have to address groundwater or other contamination from unexploded ordinance or munitions that may present an imminent and substantial endangerment to public health and the environment.

The exemption that DOD is seeking would also eliminate the authority of EPA and authorized states under Section 3004(u) and (v) and 3008(h) to require corrective action for releases of hazardous waste or constituents thereof leaching into the groundwater at solid waste management units on ranges where the facility has received a permit to store, treat or dispose of hazardous waste. Currently 39 states are authorized to implement corrective action authority.

Where contaminants associated with munitions, explosives, and unexploded ordinance have migrated off an operational range, Section 2019(a)(1)(A)(i)(III) would likely eliminate the EPA’s authority to determine whether such contamination is being properly addressed at a DOD Superfund site. Currently many such contaminants are considered a hazardous substance under Superfund because they are a “solid waste” under RCRA and also exhibit the characteristics of a hazardous waste. Under existing law, EPA has the obligation to oversee the cleanup and concur in or select the remedial action at DOD Superfund sites. However, Section 2019(a)(1)(A)(i) III would place DOD in charge of determining when “explosives, unexploded ordinance, munitions, munitions fragments, or constituents thereof” have migrated off an operational range and “are not addressed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 . . .” The DOD determination would then be dispositive of whether these munitions, explosives, unexploded ordinance, munitions fragments, and constituents thereof, which have resulted in off-range contamination, would be considered to be a solid waste under RCRA. Under Section 2019, DOD, as the entity responsible for the pollution, would be in control of determining whether proper action is being taken to address off-range contamination which in turn would determine whether the munitions, explosives, unexploded ordinance, munitions fragments, or constituents thereof

which caused the contamination are a solid waste subject to the authorities of RCRA. Accountability of the DOD to state and Federal authorities charged with protecting public health and the environment will be significantly diminished.

Proposed section 2019 (a)(2) also exempts from the definition of solid waste explosives and munitions “used in research, development, testing, and evaluations of military munitions, weapons systems.” This provision appears to create a wholesale exemption for explosives and munitions. It is not limited to ranges or even property owned by DOD. It applies to *any* facility with such wastes, including private contractor sites and Department of Energy facilities. It arguably even extends to the chemical munitions scheduled for destruction at various military installations around the country.<sup>25</sup>

Separately, DOD is proposing to define the term “operational range” to include “a range” that is not currently being used for range activities, but that is still considered by the Secretary concerned to be a range, is under the jurisdiction, custody, or control of the Secretary concerned, and has not been put to a new use that is incompatible with range activities. This would allow a range which was last used for live fire training in World War I and has been inactive for almost 90 years to qualify as an operational range. Under the DOD proposal, munitions that were (1) fired and exploded on such a range, or (2) were fired but failed to explode and were subsequently blown in place, or (3) were fired and failed to explode, would be exempted from RCRA, even if they are leaching toxic chemicals into groundwater.

As mentioned above, there is no known case where RCRA has ever adversely affected military readiness. There are a number of examples, however, including operational ranges, where constituents of military munitions or explosives such as perchlorate, RDX, or TNT have contaminated public and private drinking water supplies and created public health concerns. Two examples are Aberdeen Proving Ground, Maryland, and Massachusetts Military Reservation, Massachusetts.

✓ ***National Security Exemption Already Exists in RCRA***

Section 6001 of the RCRA statute already authorizes the President to exempt any Federal facility from compliance when it is “in the paramount interest of the United States to do so.”

The process is simple and straightforward. Most recently, President Bush used it in December 2002 to exempt the Air Force facility in Groom Lake, Nevada, from any Federal, state, or local provision respecting the control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information concerning the operating location to any authorized person (166 *Fed. Reg.* 78425, December 24, 2002). Previously, President Bush and President Clinton authorized exemptions for this Air Force facility every year since 1995. The RCRA Statutory authority to issue Presidential exemptions has been upheld by the judicial branch (*Kasza vs. Browner*, 133 F. 3rd 1159, United States Court of Appeals for the Ninth Circuit, (1998)). Further, in 1980, President Carter completely exempted Ft. Allen, Puerto Rico, from RCRA and other environmental laws by Executive Order (45 *Fed. Reg.* 66, 443 (Oct. 7, 1980)).

✓ ***Environmental Compliance and Military Readiness are Compatible***

The DOD observed in its 1999 environmental report to Congress that “Healthy Land, Air, and Water are critical to the defense mission because they provide safe and realistic training environments to help us ensure readiness.”<sup>26</sup>

✓ ***DOD has Erroneously Cited Fort Richardson, Alaska, Lawsuit in Support of the RCRA Exemption***

DOD’s entire argument for preempting state and EPA authority under RCRA is premised on the fact that some environmental groups and Alaskan Native Tribes filed a citizen suit regarding Fort Richardson, Alaska. The State of Alaska is not a party to this suit.

According to General Keane’s testimony:

“The Army at Fort Richardson, Alaska, is currently facing a lawsuit alleging violations of the Clean Water Act, RCRA, and CERCLA associated with Firing munitions at Eagle River Flats range. The RCRA allegation is that munitions fired into or onto Eagle River Flats are RCRA statutory solid wastes that present an imminent and substantial endangerment to health or the environment . . .”<sup>27</sup>

A state enforcement official, however, has stated that General Keane’s testimony is in error in several respects:

“I disagree with General Keane’s testimony in several respects. First, there is no RCRA imminent and substantial endangerment allegation on the Ft. Richardson citizen suit. Plaintiffs in that suit did allege violation of an Alaska statutory provision that prohibits pollution. The cited provision is not part of Alaska’s hazardous waste regulatory program; indeed, Alaska does not have a state hazardous waste program, much less an authorized program under RCRA. Plaintiffs in this case have never even alleged that used or fired munitions are a RCRA statutory solid waste. Thus, if this case were decided adversely to the Army, it would not set any precedent regarding RCRA.”<sup>28</sup>

It should be further noted that the plaintiff and the Army jointly filed a motion to stay the lawsuit in November 2002, and again on February 3, 2003. The Army and the plaintiffs stated that “the parties continue to make substantial progress in negotiating a settlement of this case and are hopeful that the case can be resolved through settlement within the next 60 days.”

✓ ***DOD Erroneously Claims The Legislative Proposals Codify Current Policy***

In 1992, the Federal Facilities Compliance Act added Section 3004(Y) to RCRA which required the EPA Administrator to promulgate regulations “identifying when military munitions become hazardous waste for the purposes” of regulation under Subtitle C as a hazardous waste. The rule was proposed in 1995 and finalized on February 12, 1997 (62 Fed. Reg. 6625) (codified at 40 CFR 266.200). Taking language in an administrative regulation and elevating it to statutory language creates very different consequences within an overall statutory framework. Some of the differences are the following:

- The munitions rule does not change the statutory definition of solid waste in any respect. The DOD proposal specifically amends the definition of solid waste to create a significant exemption for explosives, unexploded ordinance, munitions, munitions fragments, or constituents thereof.
- The munitions rule does not affect the statutory authority of EPA (Section 7003) or States and citizens (Section 7002) to bring an action to address groundwater or other contamination from explosives, unexploded ordinance, munitions, munitions fragments, or constituents thereof that may present an imminent and substantial endangerment to human health or the environment. The DOD legislative proposal eliminates such authority in a very significant manner on and off operational ranges.
- The munitions rule does not preempt the authority of the states to adopt different or more stringent regulations. The DOD legislative proposal would preempt such state authority.
- The munitions rule does not apply to “constituents thereof” of explosives, munitions or unexploded ordinance. The DOD legislative proposals apply to constituents thereof which are the chemicals inside the munitions that may be leaching into the surface water or groundwater. These chemicals include perchlorate, RDX, DNT, TNT, and white phosphorus. In contrast, EPA explicitly used the term “military fragments” instead of “constituents” to ensure that contaminated soil or groundwater could be addressed through appropriate RCRA or CERCLA remedial authorities.

**IV. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)**

✓ ***In General***

The DOD proposal in Section 2019(b)(2) would redefine the key CERCLA term “release” to exclude “the deposit or presence on an operational range of any explosives, unexploded ordinance,

munitions, munitions fragments, or constituents thereof that are or have been deposited thereon incident to their normal and expected use and remain thereon.” Separately, DOD is proposing to define the term operational range to include a range that is not currently being used for range activities, but that is still considered by the Secretary concerned to be a range, is under the jurisdiction, custody, or control of the Secretary concerned, and has not been put to a new use that is incompatible with range activities. This would allow a range which was last used for live-fire training in World War I and has been inactive since to qualify as an operational range. Munitions that were (1) fired and exploded or, (2) fired but failed to explode and were subsequently blown in place, or (3) fired and failed to explode would be exempted from CERCLA in such circumstances even if they are leaching chemicals and contaminating groundwater. The DOD is also seeking to expand the definition of the term “range” to include a “designated land or water area set aside to train military personnel, in ‘operations or tactics’ as well as one used to train military personnel in the use and handling of ordinance or weapon systems.

The proposed amendment would:

- Exempt operational ranges from CERCLA’s release reporting and preliminary assessment requirements for munitions, explosives, and unexploded ordinance.
- Would eliminate section 104 removal and remedial authority for munitions-related and explosives-related contamination which remains on an operational range.
- Would remove cleanup of munitions-related and explosives-related contamination from the scope of CERCLA Section 120 interagency agreement for sites on the NPL. This means that EPA will no longer have authority to select (or concur in) remedies for munitions- and explosives-related contamination on operational ranges at NPL sites.
- Restrict the ability of the Agency for Toxic Substances and Disease Registry (ATSDR) to protect the public against adverse health effects from exposure to potentially highly toxic constituents released into the environment since ATSDR’s authority to conduct health assessments and perform epidemiological studies is tied to “releases.”
- Further, according to testimony of state officials:

“The change in the definition of ‘release’ also may narrow the scope of state authority under state superfund-type laws, because it may narrow CERCLA’s waiver of immunity. CERCLA’s waiver of immunity includes state laws ‘concerning removal and remedial action.’ CERCLA’s definitions of ‘removal’ and ‘remedial action’ are limited by the definition of ‘release.’ Thus, by excluding the ‘deposit or presence on an operational range of any explosives, unexploded ordinance, munitions, munitions fragments, or constituents thereof that are or have been deposited thereon incident to their normal and expected use from the definition of ‘release,’ this provision arguably precludes state superfund authority

over munitions, etc., on operational ranges.”<sup>29</sup>

The changes to the definition of release under CERCLA and to the definition for solid waste under RCRA would require EPA, and delegated states under RCRA, to wait for human health and environmental effects to occur beyond the boundaries of the operational range before the Agency or a state could take action. This ignores the significant benefits to public health or the environment, including reduced costs to respond, that could be attained under a RCRA/CERCLA response prior to contamination migrating off an operational range. In addition, the provision of 2019(a)(2)(B) would exempt unexploded ordinance, munitions, munitions fragments or constituents thereof from existing RCRA authorities available to states, citizens, and the Federal government at private industrial facilities or other governmental agencies where surface or groundwater contamination has occurred because of “research, development, testing, and evaluation of military munitions weapons or weapons systems.”

✓ ***National Security Exemption Already Exists in CERCLA***

CERCLA has long been recognized as a remedial statute designed to address releases or threatened releases of hazardous substances. Under CERCLA, the decision on whether a facility needs remediation and the scope of such remediation resides in the discretion of the President and the EPA Administrator. Contrary to DOD assertions, no citizen suit under CERCLA can force the cessation of live-fire training because of remediation actions.

As in RCRA, there are no examples where CERCLA authorities have adversely affected military readiness or national security. If there was ever such a case, the President has clear authority in section 120(j) to issue “orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the United States at that site or facility.” Such orders may include, where necessary to protect such interests, an exemption from any requirement of CERCLA.

**V. The Clean Air Act**

✓ ***In General***

Under Section 176 of the Clean Air Act, the Federal Government must ensure that actions it seeks to undertake or fund conform to requirements of the applicable state implementation plan, thereby ensuring that Federal actions will not cause or contribute to any violation of the applicable National Ambient Air Quality Standard. In addition, Section 118 of the Clean Air Act already makes clear that the Federal Government is required to comply with the requirements of the Act like any other polluter. These provisions clearly establish that Federal entities, like DOD, cannot add to dirty air problems and must do their part to reduce air pollution. The DOD bill runs counter to this policy and forces citizens located near military bases to breathe unhealthy air in the name of military readiness.

✓ ***The DOD Bill Would Create Special “Dirty Air” Areas Near Military Bases***

DOD seeks to create special dirty air areas in which emissions from military sources would be completely overlooked. Under the DOD bill, “any state that can establish . . . that it would have attained the national ambient air quality standard . . . **but for** emissions emanating from military readiness activities . . . shall not be subject” to applicable provisions of the Clean Air Act. This would mean that the air citizens breathe could continue to be unhealthy and a source, for instance, of excess asthma and premature mortality, but only because of emissions from military sources. This would violate a bedrock principle of the Clean Air Act, that clearly states the goal of the Act is to actually attain and maintain air that is “requisite to protect public health” throughout the Nation, not just in areas geographically removed from military bases.

✓ ***The Clean Air Act Already Provides Sufficient Flexibility Specifically for DOD***

Moreover, the Clean Air Act already provides ample flexibility for DOD to perform its mission in times of war and emergency. This flexibility was included in the existing statute and regulations at DOD’s request:

- Section 118 of the Clean Air Act already allows the President to exempt DOD from Clean Air Act requirements upon a finding of “paramount national interest.” This exemption can last up to one year and be extended for additional years by the President.
- The general conformity regulations that DOD seeks to avoid also contain additional flexibility. These regulations, promulgated after extensive consultation with DOD, already allow DOD to set aside clean air requirements for up to six months in response to “emergencies,” which, by definition, include responses to terrorist activities and military mobilizations. This exemption is renewable every six months through a written determination by DOD (40 C.F.R. 93.153(d)(2), 93.153(e); 40 C.F.R. 152).
- These regulations also allow DOD to perform “routine movement of mobile assets, such as ships and aircraft” so long as they do not construct new support facilities (40 C.F.R. 93.153(c)(viii)).

DOD’s language would obviate the need for these exemptions and allow DOD, on a recurring basis, and for up to three years at a time, to conduct readiness activities and construct support facilities without regard to air quality impacts. During the time of the proposed exemption, DOD would be allowed to emit hundreds of tons of emissions into the relevant airshed; no corresponding offset would ever be required and despite the sustained and costly efforts of other sources in the airshed, people living in the vicinity of such emissions would continue to breathe unhealthy air. This two-tier standard would undermine public confidence in the Clean Air Act, increase pressure on private sources to further reduce and create

considerable difficulty for state and local governments that seek to ensure clean air for everyone.

✓ ***The DOD Bill Could Undermine State Planning Efforts***

The DOD bill would allow areas to avoid implementing needed control measures such as Reasonably Available Control Technology (RACT) and enhanced inspection and maintenance (I&M), so long as they could argue that emissions from military readiness activities were the reason an area failed to attain. In addition, areas could avoid being “bumped up” to higher classifications, so long as they could argue that their failure to meet air quality standards was due to DOD emissions. Depending upon the reliability of emissions estimates and modeling, this could provide a perverse incentive for DOD to increase their emissions and for industry sources to argue that failure to attain was due to the DOD contribution. The end result is that necessary area-wide control measures such as RACT, I&M and higher attainment category requirements, could be completely avoided, even though the air remained dirty and unhealthy.

✓ ***The Emissions from DOD Activities Are Not DeMinimus***

Under the Clean Air Act rules, activities are exempt from conformity if emissions are below certain thresholds. For instance in the D.C. area, which is a severe area, the threshold is 50 tons per year. In 1996, there were approximately 50,000 takeoffs and landings, amounting to 67 tons of volatile organic compounds (VOC) and eight tons of Nitrogen Oxide (NO<sub>x</sub>) emissions that year. Based on these figures, in order to meet the 50 ton trigger, military flights would have to increase by approximately 40,000 takeoffs and landings per year and by nearly six times that amount for NO<sub>x</sub>. As is evident, this is a substantial amount of increased emissions.

## **VI. The Marine Mammal Protection Act (MMPA)**

✓ ***In General***

Congress passed the MMPA in 1972 (Public Law 92-522) in recognition of the international significance of marine mammals, especially great whales, and to address the multiple human threats that had decimated global marine mammal populations. Congress also recognized that our very limited understanding of marine mammal populations in the wild required a precautionary approach to management in order to recover and sustain healthy marine mammal populations.<sup>30</sup> Since passage, many marine mammal population have stabilized; some have recovered so that they are no longer listed as threatened or endangered. Nevertheless, many populations remain depleted and at significant risk of extirpation or outright extinction.<sup>31</sup>

In the 107<sup>th</sup> Congress, the DOD proposed a subtly worded but significant change to the MMPA’s definition of harassment.<sup>32</sup> The Navy sought to modify the definition to differentiate between immediate

injury and longer term significant physiological and behavioral effects. If it had been enacted, this change would have represented a significant departure from the MMPA's primary purpose of protection first. The Pentagon's proposal to substitute more legally exacting, but no less ambiguous, language in the definition would stand the existing standard of protection on its head. Such a shift in the burden of proof would have been completely contrary to the intent of Congress and would have represented a significant breach in the legal protection of marine mammals.<sup>33</sup> This provision was never adopted by the 107<sup>th</sup> Congress.

In the 108<sup>th</sup> Congress, DOD is making a more brazen proposal to rid itself of complying with the MMPA's take requirements and shield itself from citizen lawsuits.<sup>34</sup> The Pentagon again is proposing to weaken the definition of harassment by introducing a loophole that would allow numerous activities to fall outside any review. DOD now also seeks to strike the requirement that any take be limited to a small number of animals in a specific geographic location. Additionally, DOD is asking for open-ended blanket exemption authority that could be applied to virtually any military activity or technology at any time. DOD also seeks to weaken the existing regulatory process through the creation of a separate permitting track for readiness activities which would have weakened criteria to evaluate take, severe time restrictions for public review and comment, and information restrictions to shield classified documents from environmental review. If enacted, this proposal would have significant repercussions, most notably less protection for marine mammals, far less monitoring and mitigation, and constrained public review and comment. Most likely it would result in less protection for marine mammals, less monitoring and mitigation of DOD activities, and far less transparency and public review and comment.

✓ ***DOD's Proposal is Unnecessary. Under the Existing Incidental Take Permit Process, National Marine Fisheries Service Has Never Denied a Small Take Permit Requested by the Navy***

Currently, the MMPA waives the standing moratorium against taking marine mammals to allow for the incidental take of marine mammals by either "small take permits" or "incidental harassment authorizations" if the best available scientific evidence reveals that such take would not disadvantage a specific marine mammal population.<sup>35</sup> These permits are common. In terms of the Navy's SURTASS LFA sonar system, the Navy formally initiated a request for authorization on August 12, 1999. The National Oceanic and Atmospheric Administration issued a letter of authorization of take for deployment and operation of the sonar system on July 15, 2002. For a proposal of this magnitude and complexity this permitting time period was a little above the mean average for comparable permit applications.<sup>36</sup>

✓ ***The Navy's Proposal Is An End Run Around to Evade the Normal MMPA Reauthorization Process***

The Navy has sought to amend the definition of harassment almost from the time the new definition was adopted by Congress as part of the 1994 MMPA reauthorization. Yet the Navy has selected now to again seek an indirect and even broader legislative fix rather than to allow the matter to be addressed within the traditional context of MMPA reauthorization and before the legitimate Congressional committees

of jurisdiction. Given the degree of controversy surrounding the proposed changes to the definition of harassment alone, controversy can only increase with the additional changes proposed in 2003. Congress would be ill-advised to rush through any amendments to fundamental protections under the MMPA in a process that circumvents the normal legislative order and shuts out the views and concerns from all other stakeholders.

✓ ***DOD's Claims of Scientific Certainty are Suspect at Best***

It is generally accepted that marine mammal science remains poorly developed due to the significant logistical and technological constraints, the expense of conducting research over vast ocean distances, and the fact that marine mammals are infrequently observable. At present, science can only partially answer many fundamental questions concerning behavior, biology, and ecology, let alone make conclusive determinations of actual or potential harm. Simply raising the bar for scientific review and reversing the burden of proof does nothing to clarify or answer questions of science that remain unanswerable for Federal regulators. DOD regularly cites a 2000 report recommendation made by a National Research Council panel to burnish its proposed definition change as scientifically sound.<sup>37</sup> DOD, however, fails to note the broader context within which this panel's recommendation was made or even mention that it is far from being a consensus opinion among the scientific community.<sup>38</sup>

✓ ***Establish Unfair Dual Regulatory Processes and Increase Confusion***

DOD's proposal, sold last year as an attempt to clarify "harassment" for military readiness, would now compound the confusion for the regulating agencies by establishing a parallel, but decidedly less stringent, incidental take permit process for military readiness. This would create circumstances patently unfair to other stakeholders who would be held to a different standard of performance regardless of the proposed activity and irrespective of its potential to harm marine mammals. Other key stakeholders, such as the oil and gas, marine transit, or telecommunications industries might request similar regulatory treatment, and this could prompt a bureaucratic nightmare of confusing new Federal regulations and excessive costs for permitting and enforcement.

**VII. Endangered Species Act and Sikes Act**

✓ ***In General***

Enacted in 1973, the ESA provides comprehensive protection for endangered and threatened species of plants and animals, and their habitat. Designed to prevent extinction by conserving "the ecosystems upon which endangered and threatened species depend,"<sup>39</sup> the statute includes provisions to aid species recovery. On the same lands where the military trains soldiers and test weapons, the DOD is required to conserve threatened and endangered species and their habitat pursuant to the ESA. More than 300 threatened and endangered species live on DOD-managed lands.<sup>40</sup> When a species is listed as threatened or endangered, the Secretary of the Interior or Commerce<sup>41</sup> is required to designate critical

habitat, land essential to the survival and recovery of the species. Each Federal agency is required to avoid any action that would destroy or adversely modify critical habitat.

In contrast to the ESA, the Sikes Act Improvement Act of 1997 only requires the Secretary of each military department to prepare and implement an integrated natural resources management plan (INRMP) for each military installation with significant natural resources. While the plan is to provide “to the extent appropriate and applicable” for fish and wildlife management, it also must be consistent with the use of military installations to ensure the preparedness of the Armed Forces.<sup>42</sup> There is nothing in the Sikes Act mandating funding of an INMRP, ensuring that the plan will provide for the conservation of species, or that the INRMP be monitored to determine its effectiveness. Of the 10 military installations the DOD Inspector General examined in its review of INRMPs, none “have methods in place to adequately monitor the implementation of the plans.”<sup>43</sup>

Seeking to avoid or exempt itself from the critical habitat requirement in ESA, the DOD proposal would prohibit critical habitat designation on any lands covered by an INRMP that addresses endangered or threatened species. There are several problems with this approach.

✓ ***Replaces Enforceable, Mandatory Protections of the ESA with Unenforceable, Undefined, Provisions of the Sikes Act***

The Sikes Act planning process is not the same as the designation of critical habitat under the ESA. There are no express standards or requirements with respect to endangered or threatened species in an INRMP. The INRMP is only required “to the extent appropriate and applicable” to provide for fish and wildlife management, land management, and other resources but with “no net loss” in the capability of military installation lands to support the military mission of the installation.<sup>44</sup>

In contrast, critical habitat designation is developed based on the best available scientific information with the conservation of endangered species in mind.<sup>45</sup> The designation of critical habitat is specifically focused on the identification and protection of habitat essential to the survival and recovery of endangered and threatened species. Federal agencies are required, in consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, to avoid actions that may affect a listed species or destroy or adversely modify its critical habitat.

Despite its language stating that it does not affect the duty to consult under Section 7 of the ESA, the DOD legislative proposal could substantially reduce the DOD’s obligation to consult on lands unoccupied by endangered or threatened species. Under Section 3 of the ESA, the Secretary is to designate critical habitat for a listed species upon a determination that the lands are essential for the conservation of the species. Section 3 of the ESA also requires the Secretary to designate critical habitat in areas that are not currently occupied by a listed species, but which contain habitat essential for the

conservation of the species. On military lands that are not currently occupied by a listed species, DOD's proposal could reduce its obligation to conduct Section 7 consultation, even if DOD sought to train on such lands.

✓ ***National Security Exemption Already Exists in ESA***

Ironically, the DOD proposal admits “national security exemption clauses exist in many of this Nation’s environmental statutes that would allow senior officials (typically the President, or in the case of the ESA, the Secretary of Defense) to exclude DOD from certain provisions of the operative statute under certain conditions. To date, DOD has not used such exemptions to any extent to address encroachment concerns.”<sup>46</sup>

Section 7(j) of the ESA provides an exemption for any agency action, including actions that would impact critical habitat, if the Secretary of Defense finds that the exemption is necessary for reasons of national security. If protecting critical habitat was truly hampering national security, DOD could seek an exemption under Section 7(j) at any time, yet it never has. Recognizing this tool, the DOD proposal says “it is important that DOD establish the criteria and processes necessary to use them in the future, if and when warranted.” DOD is developing guidance to the military on how to assess and process exemption requests in appropriate situations.

Additionally, Section 4(b)(2) of the ESA arguably gives the appropriate Secretary the discretion not to designate critical habitat after taking into consideration the economic impact and “any other relevant impact.” In some instances, such as at Camp Pendleton in California, the critical habitat designation was significantly limited due to concerns raised by the military about the impact designation would have on training activities. Of the 186,659 acres used by the Marines at the Camp Pendleton installation, only 1,854 acres or approximately one percent is designated critical habitat.<sup>47</sup>

## End Notes

1. *Sustainable Ranges, 2003 Decision Briefing to the Deputy Secretary of Defense.* Recommendations of the Senior Readiness Oversight Council and the Sustainable Ranges Integrated Product Team. December 10, 2002. Hereafter referred to as *DOD proposal*.
2. The Department of Defense transmitted the National Defense Authorization Act of Fiscal Year 2004 to the Congress on March 3, 2003.
3. The Resource Conservation and Recovery Act and the Solid Waste Disposal Act are the same statute.
4. See H.R. 4546 as passed by the House on 25 July, 2002.
5. U.S. Library of Congress, Congressional Research Service. *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY 2003* [By David M. Bearden]. CRS Report for Congress. Washington, D.C. Updated December 20, 2002.
6. See 10 USC §2014.
7. Notwithstanding the requirements in our environmental statutes – one of which pre-dates World War I – the military has effectively maintained its readiness as evidenced by the Persian Gulf War and other excursions including the Baltic Region and most recently in Afghanistan.
8. *DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges.* GAO-02-614. Washington, D.C. June 2002.
9. Testimony of Environmental Protection Agency Administrator Christine Todd Whitman before the Senate Environment and Public Works Committee, February 26, 2003.
10. Memorandum from Deputy Secretary of Defense, Paul Wolfowitz, to Secretaries of the Army, Navy, and Air Force, dated March 7, 2003, entitled “Consideration of Requests for Use of Existing Exemptions Under Federal Environmental Laws.”
11. 16 USC 1372
12. George W. Bush campaign speech, Pittsburgh, Pennsylvania, April 3, 2000.
13. National Governors Association Superfund Policy (Section 4.9 Federal Facilities), 2003.
14. Testimony of Daniel S. Miller, First Assistant Attorney General of Colorado, before the Senate Committee on Environment and Public Works, July 9, 2002.

15. Letters dated March 15, 2002, from Mr. Mark Giesfeldt, President, Association of State and Territorial Solid Waste Management Officials to Representatives Dan Burton and Henry Waxman.
16. *Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress*, page 19.
17. “Environmental Contamination: Cleanup Actions at Formerly Used Defense Sites,” GAO-01-557 (July 2001), page 1.
18. Testimony of Steven J. Shimberg, Associate Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, before the House Committee on Armed Services Subcommittee on Military Readiness, March 14, 2002.
19. Testimony of Steven J. Shimberg, Associate Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, before the House Armed Services Subcommittee on Military Readiness, March 14, 2002.
20. See Department of Defense, 2002, *Partners In Flight Strategic Plan*, page 15
21. Testimony of Daniel S. Miller, First Assistant Attorney General of Colorado, before the Senate Committee on Environment and Public Works, July 9, 2002.
22. Testimony of Daniel S. Miller, First Assistant Attorney General of Colorado, before the Senate Committee on Environment and Public Works, July 9, 2002.
23. EPA’s comments on DOD’s FY 2004 Legislative Proposals to the National Defense Authorization Act.
24. EPA’s comments on DOD’s FY 2004 Legislative Proposals to the National Defense Authorization Act.
25. Testimony of Daniel S. Miller, First Assistant Attorney General of Colorado before the Senate Committee on Environment and Public Works, July 9, 2002.
26. Testimony of Steven J. Shimberg, Associate Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, before the House Committee on Armed Services Subcommittee on Military Readiness, March 14, 2002.
27. Testimony of General Keane before the Senate Committee on Environment and Public Works, July 9, 2002.
28. Letter response dated December 30, 2002, from Daniel S. Miller, First Assistant Attorney General Colorado to supplemental questions to the Committee’s July 9, 2002, hearing received from Senator Bob Smith.

29. Testimony of Daniel S. Miller, First Assistant Attorney General of Colorado, before the Senate Committee on Environment and Public Works, July 9, 2002.
30. See at 16 U.S.C. 1361.
31. For example, National Marine Fisheries Service 2001 Stock Assessment Data for the Western North Atlantic Right Whale estimates the population size at 291 animals, a level extremely low compared to the historical optimal population size. This population remains listed as endangered, both domestically and internationally.
32. The MMPA at 16 U.S.C. 1362(18) defines “harassment” to mean any act of pursuit, torment or annoyance which: (i) has the potential to injure a marine mammal or marine mammal stock in the wild, or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding or sheltering. Level A harassment is described in (i) and Level B harassment in paragraph (ii).
33. Please refer to Committee on Resources report 107-65 concerning a October 11, 2001 MMPA oversight hearing before the Subcommittee on Fisheries Conservation, Wildlife and Oceans at pages 277-278. In written responses to the subcommittee by Dr. John Reynolds III, Chairman, Marine Mammal Commission, he notes that the [panel’s] definition [of harassment] would “reverse the precautionary burden of proof that has been a hallmark of the MMPA since its inception in 1972.”
34. As noted in “*Sustainable Ranges 2003 Decision Briefing to the Deputy Secretary of Defense*”, the DOD referenced recent “court setbacks in the SURTASS LFA case” as the rationale for these amendments. The case referenced is NRDC v. Evans, Civ. No. 02-3805-EDL. On a preliminary motion the court found that DOD was likely to have violated the MMPA, ESA, National Environmental Policy Act, and Administrative Procedures Act.
35. See 16 U.S.C. 1371(a)(5)(A) for permits to allow the taking of small numbers of marine mammals incidental to activities other than commercial fishing. See 16 U.S.C. 1371(a)(5)(D) for the process to obtain small take authorizations when the taking will be by incidental harassment only. The latter is functionally similar to the process required to obtain scientific research permits.
36. According to National Marine Fisheries Service regulated small take authorization data, the SURTASS LFA permit process last 2 years, 8 months. This is roughly equivalent to the 2 years, 6 month time period for completion of the Navy’s 1998 SEAWOLF Shock Test permit process; the period is far less than the 6 year period to complete a 1995 permit for offshore oil rig removal in the Gulf of Mexico.
37. National Research Council, 2000. *Marine Mammals and Low Frequency Sound: Progress Since 1994* at page 4.

38. Please see endnote 16. In written responses to the subcommittee, Reynolds also notes that the [panel's] definition would provide no improvement over the existing definition and that it is "premised on the unrealistically high assessment of our ability to differentiate between biologically significant and insignificant responses." Reynolds also states that the new definition might create "possibly insurmountable enforcement difficulties for the regulatory agencies."

39. Public Law 93-205.

40. U.S. Fish and Wildlife Service, *Report to Congress, Sikes Act and Integrated Natural Resources Management Plans Activities and Expenditures in FY 2002*. March 2003

41. Responsibility for terrestrial and freshwater species rests with the Secretary of the Interior, while responsibility for marine species and anadromous fish rests with the Secretary of Commerce.

42. Public Law 105-85.

43. Department of Defense, Office of the Inspector General, *DOD Integrated Natural Resources Management Plans (D-2003-001)*, October 1, 2002.

44. 16 U.S.C. 670a(b).

45. U.S. Library of Congress, Congressional Research Service. *The Endangered Species Act, Migratory Bird Treaty Act, and Department of Defense Readiness Activities: Current Law and Legislative Proposals*. [By Pamela Baldwin]. CRS Report for Congress. Washington, D.C. November 14, 2002.

46. DOD proposal, page 9.

47. U.S. Library of Congress, Congressional Research Service, *Critical Habitat Designated on Military Installations*, Memorandum prepared by M. Lynne Corn and David Bearden, February 14, 2003.