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H.R. 1835, "NATIONAL SECURITY READINESS ACT"

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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LEGISLATIVE HEARING ON H.R. 1835, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO LIMIT DESIGNATION AS CRITICAL HABITAT OF AREAS OWNED OR CONTROLLED BY THE DEPARTMENT OF DEFENSE, AND FOR OTHER PURPOSES. ("NATIONAL SECURITY READINESS ACT")

Tuesday, May 6, 2003
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to notice, at 2 p.m., in room 1324, Longworth House Office Building, Hon. Richard W. Pombo (Chairman of the Committee) presiding.

Present: Representatives Pombo, Gilchrest, Jones, Gibbons, Walden, Osborne, Renzi, Cole, Pearce, Nunes, Rahall, Kildee, Faleomavaega, Abercrombie, Pallone, Christensen, Tom Udall, Mark Udall, Grijalva, Bordallo, and Rodriguez.

STATEMENT OF HON. RICHARD POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Committee will come to order.

In accordance with Resources Committee Rule 4(G)(1), only the Chairman and Ranking Member may make opening statements. If any members want to insert statements in the record, I ask unanimous consent that they be allowed to do so. Without objection, so ordered.

You gentlemen just take a seat for the time being. We're going to have a couple of opening statements and then we'll go to the first panel.

Today we are holding a hearing on H.R. 1835, the National Security Readiness Act, a bill that amends the Endangered Species Act and the Marine Mammal Protection Act. H.R. 1835 is a product of the Department of Defense Authorization Act for the upcoming fiscal year.

The Department of Defense, in its reauthorization bill, proposed changes to laws under the jurisdiction of this Committee. The Administration proposed these same changes last year. However, the process was much different last year. The Committee on Resources waived its jurisdiction and was not involved in the decisionmaking

process. Rather than do that again this year, I requested that this Committee maintain its authority over those provisions within our jurisdiction. I was joined in that decision by our Ranking Member, Mr. Rahall, and I believe many members applauded that decision.

However, some members have questioned why we're holding this hearing at the full Committee and not at the Subcommittee level. There are a number of reasons. First and foremost is timing. While I want our Committee to remain relevant to this process, time is not on our side. If we are to remain relevant, we need to move a bill by this Wednesday, as our colleagues on the Armed Services Committee begin their action on the larger '04 reauthorization bill this Friday.

For those of you who are not entirely happy with the bill that we are considering today, I must reiterate that the only way to maintain jurisdiction and relevancy in this process, as the Committee with expertise on these subjects, is for us to take action rather than the Armed Services Committee, which does not have our level of expertise.

Secondly, legislation dealing with the Endangered Species Act has traditionally been held at full Committee. Since 1995, when the Republicans took control of the House and the Resources Committee became the primary Committee of jurisdiction over endangered species, this bill contains ESA amendments and therefore was held at the full Committee level. The majority of the ESA amendments contained in H.R. 1835 should be nothing new to most members on this Committee. This language was approved by the House last Congress.

In brief, H.R. 1835 codifies a policy started in 1997 under the Clinton Administration, and brought forward by the current administration. It allows DOD to cooperate with the U.S. Fish and Wildlife Service and State wildlife departments in responsibly managing habitat, all the while providing the Administration the ability to base critical habitat determination on confirmed scientific data.

Furthermore, H.R. 1835 clarifies the original intent of the ESA by providing balance to departments when they are confronted with having to weigh their primary missions up against mandates to protect species under the Act.

While the bill also contains provisions which amend the Marine Mammal Protection Act, these too, for the most part, should not be new issues for members. The Subcommittee on Fisheries, Conservation, and Wildlife and Oceans has held a number of hearings on these issues. In addition, the proposed change to the definition of harassment was first suggested by the National Research Council in 2000, and H.R. 1835 contains the exact language recommended by both the Clinton and Bush administrations.

Others might argue that we haven't looked sufficiently at some of these changes in the bill. The Subcommittee on Fisheries, Conservation, Wildlife and Oceans has held three hearings on the reauthorization of the Marine Mammal Protection Act and has heard from 42 witnesses. Since the harassment definition was first proposed during the Clinton administration, this issue has been adequately aired at these hearings. This is not a new issue.

The changes proposed to the Marine Mammal Protection Act in H.R. 1835 are based on scientific recommendations from the National Research Council and the Administration's managing agencies, the Department of Commerce and Interior. The agencies have told us that these amendments will provide them with one standard, which they prefer.

In addition, it will clarify certain provisions in the Marine Mammal Protection Act to allow them to better enforce and implement the law. If the agencies can better enforce the law, marine mammals will be better protected.

I look forward to hearing from our distinguished witnesses today, and I recognize the Ranking Member, Mr. Rahall, for his opening statement.

[The prepared statement of Mr. Calvert follows:]

Statement of The Honorable Ken Calvert, a Representative in Congress from the State of California

Mr. Chairman, Ranking Member Rahall, and distinguished Members of the Committee, I am pleased and honored to have Major General William G. Bowdon, III, Commanding General of the Marine Corps Base Camp Pendleton testifying on behalf of the Marine Corps regarding the effect of encroachment and the impact it has on the training and readiness requirements of our Marines. While only a small part of Camp Pendleton is in my district, the issue of encroachment and the ability of our military as a whole to train in a real-world environment is of great concern and a responsibility that I take very seriously.

The National Security Readiness Act represents a crucial balance between the stewardship of our lands and the ability for our military to train for combat missions. The proposal is the result of years of collaboration between the Department of Defense, the Fish and Wildlife Service and many other stakeholders and I commend their hard work.

The ability of our Armed Forces to achieve their mission and survive in combat depends directly on the quality of training they receive. We must provide for the best possible training environment, and encroachments have in fact degraded and continue to degrade our military's capability to provide for realistic combat training. Our military ranges and operation areas are irreplaceable national assets; their primary role is to help train our military forces and test equipment to sustain a strong defense. However, encroachment-induced restrictions are limiting realistic preparations for combat. Unrealistic training options or so-called "workarounds" that are used to satisfy regulatory rules designed for non-military activities are a "death-by-a-thousand-cuts" approach to encroachment and access problems on our ranges.

From 1992–2002, DoD has invested over $50 billion on environmental programs. Ecosystem management initiatives and species counts indicate that DoD is successfully managing and implementing environmental stewardship programs. It is clear that DoD is fully committed to effectively managing our natural resources. Additionally, military training has proven compatible with healthy ecoststems, endangered species populations and in compliance with applicable law.

In 2000, U.S. Fish and Wildlife Service (FWS) proposed to designate 57% of Camp Pendleton has critical habitat. Fortunately, the Marine Corps worked with Fish and Wildlife to develop a scientifically and legally based policy that precluded the need to designate vast training ranges as critical habitat that would effectively restrict almost two thirds of the base from military training use. Despite their hard work the compromise was challenged in court by special interest groups, causing Fish and Wildlife to withdraw the habitat designation rules in compliance with court dictates. Upon codifying existing FWS policy we can avoid similar attempts from special interests groups and allow DoD to cooperate with FWS to make critical habitat designation obsolete with the implementation of Integrated Natural Resources Management Plans. If this legislation is not passed, environmental litigation may still cause 57% of Camp Pendleton to be designated at critical habitat.

I believe that Integrated Natural Resources Management Plans present a viable alternative to critical habitat designation on our military training ranges. These management plans represent the very best of what can happen when government agencies work together. We must not impede on the military's ability to train effectively and precisely. I urge the Members of this Committee to pass this legislation

so that our nation's greatest strength can continue to perform at the level that our citizens require.

[The prepared statement of Mr. Gallegly follows:]

Statement of The Honorable Elton Gallegly, a Representative in Congress from the State of California

Thank you Mr. Chairman for holding this hearing today on the National Security Readiness Act of 2003. As you know, I introduced this bill to amend the Endangered Species Act of 1973 and the Marine Mammal Protection Act of 1972 to allow the military to train and test weapons systems while still protecting the environment and endangered species.

Military bases across the United States, including the two in my district, have stellar records on protecting the environment and endangered species. Under my bill, that will remain part of their mission.

But the National Security Readiness Act recognizes that the primary mission of military bases is to prepare and protect the United States from our enemies now and in the future. We endanger the American people if we fail to allow our bases to train our military men and women and test new weapons systems. I believe the provisions in this bill will provide our bases the freedom they need to keep us secure.

Section 2 of the National Security Readiness Act amends the Endangered Species Act to prohibit further designations of critical habitat for endangered species in military areas "" as long as an Integrated Natural Resources Management Plan has been prepared. It also requires regulatory agencies to consider national security concerns in addition to economic impact prior to designating areas of critical habitat.

Critical habitats are designed to protect one species. Management plans take an entire area's ecology into account to protect multiple species, which, after all, do not live in a bubble. It's holistic medicine for the environment.

The bill would not annul existing critical habitat designations, but it would permit the Secretary of the Interior to revise existing designations on military installations. No existing habitat could be revised, however, if it would result in the extinction of an endangered or threatened species. The Department of Defense (DOD) must still adhere to the Endangered Species Act.

This language passed the House of Representatives as part of the National Defense Authorization Act last year.

In addition, section 2 amends the Endangered Species Act to add "insofar as is practicable and consistent with their primary purposes" to ensure that the primary mission of an agency has been weighed when considering the designation of critical habitat. The bill also strikes "prudent and determinable" and inserts "necessary" in the ESA section that deals with designating critical habitat. This language change is needed to get the most value for species conservation by prioritizing the limited Federal resources devoted to the endangered species listing program.

Section 3 of the National Security Act clarifies the definition of "harassment" of marine mammals in the Marine Mammal Protection Act to improve agency enforcement. The Secretaries of Commerce and the Interior have had difficulty prosecuting violators due to the requirement that they must first determine if the violator pursued, tormented or annoyed a marine mammal or marine mammal population. If the Secretary can make that initial finding, then the Secretary can make the second finding of whether the activity constitutes level A or level B harassment. In many cases the Secretaries have been unable to make the first finding and therefore have been unable to prosecute.

This change was first proposed under the Clinton Administration and is endorsed by the National Research Council, which is within the National Academy of Sciences.

Section 4 of the bill also exempts the DOD from the Marine Mammal Protection Act for national defense reasons—after it consults with the Secretary of Commerce and Interior. The exemption cannot be effective for more than two years.

Finally, Section 5 of the National Security Act simplifies the procedure for the DOD and other parties to apply for an incidental take permit under the Marine Mammal Protection Act. The change would delete the "specific geographical area" and "small numbers" requirements and retain only the "negligible impact" finding.

Again, this removes micromanagement of small areas of the environment and applies a holistic approach to the problem.

This change was first proposed by the National Research Council as part of its 2000 report.

It is important to note that for the past 20 years, the Secretary, through the implementing regulations, has determined that if the negligible impact standard has been met then the small number standard has also been met. But then the Navy's permit to use its Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) came under question in Court. The Court disagreed with the Secretary's implementing regulations and required that the Secretary separately define "negligible impact" and "small numbers" and make separate findings on both the negligible impact standard and the small number standard. This ruling drastically limited where the Navy could test the SURTASS LFA system.

I believe this bill will help alleviate many impediments to our militaries readiness.

But I also believe it's the beginning of the process. Mr. Chairman, as you know, I had introduced the Encroachment on Military Bases Prevention Act earlier this year, which included some of the provisions in this current bill. Two provisions from that bill were removed from the current bill that address important challenges facing the Point Mugu Naval Air Station and Vandenberg Air Force Base in my district.

Specifically, my original bill would have amended the National Marine Sanctuary Act to prevent the Secretary of Commerce from designating a new national marine sanctuary, or expand the boundaries of a national marine sanctuary, into waters used for military readiness activities. This language would address NOAA's proposed quadrupling of the Channel Islands National Marine Sanctuary into both Point Mugu's and Vandenberg's missile test ranges.

Secondly, my original bill would have amended the National Park System General Authorities Act to allow the Secretary of Defense to object to active military lands being studied for suitability and feasibility as a national park unit. Most of Vandenberg's lands were studied as part of the National Park Service's Gaviota Coast Feasability Study. As you can imagine, should Vandenberg have become a national park, this would have a negative impact on the bases's mission.

I look forward to working with the Chairman to ensure that the language from my original bill is addressed. These problems are not unique to my district. Encroachment is one of the major concerns confronting our military installations across the United States.

Again, I thank the Chairman and yield.

STATEMENT OF HON. NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. Thank you, Mr. Chairman.

First I commend you very highly for protecting the jurisdiction of the Resources Committee. That allows today's hearing to take place and a further airing of this important issue.

I also want to note the absence of the dean of the House, who was scheduled to give opening testimony today, Mr. John Dingell. He is the "father" of the Endangered Species Act as well as the Marine Mammal Protection Act, and I would ask that the record be left open for submission of his testimony as, of course, all members would have the right to submit.

Mr. Chairman, the issue at hand represents a classic example of a solution in search of a problem. I say that because the DOD has spared no expense in the aftermath of 9/11 to assert that our Nation's environmental laws are undermining the training and readiness of our fighting forces. Yet, according to reports released by the General Accounting Office, the Pentagon has failed miserably to provide any compelling examples to verify this allegation. Moreover, the major environmental laws all contain a national security exemption which the military has not even bothered to utilize to address any real or perceived encroachment concerns.

These facts, however, have not gotten in the way of the DOD from throwing up the "boogie man" of Osama and Saddam to legislatively exempt itself from major environmental statutes

aimed at protecting all Americans and the natural resources we cherish.

Today, the Committee is considering H.R. 1835, the National Security Readiness Act of 2003. This bill includes provisions that really should be labeled as WME, "weapons of mass extortion". Make no mistake, it would gut provisions of the Endangered Species Act and the Marine Mammal Protection Act, going far beyond what even the military wants.

I say this because H.R. 1835 would provide exemptions to the ESA for all Federal agencies, not just the Department of Defense. It would make private property owners, States and local communities bear the burden for the recovery of threatened or endangered species. This is patently unfair.

In the case of MMPA, the bill would change the definition of harassment for all activities, not just military readiness activities. It says, "rev up the motor boat, buddy, and let's chase us some dolphins." In this regard, this bill does nothing less than put "Flipper" in the cross-hairs.

The Defense Department does not need H.R. 1835, and it is not seeking H.R. 1835. The bill overreaches. It is being used as a vehicle for those who have other agendas that transcend military readiness to gut the ESA and the MMPA through a back door approach. If enacted, this bill would go back to the future, turning the clock back almost 40 years.

In 1966, the Secretaries of the Interior, Defense and Agriculture only had to preserve endangered species insofar as consistent with their mission. Similarly, H.R. 1835 would have Federal agencies seek to conserve species "insofar as is practical and consistent with their primary purposes." As such, under the bill the Bonneville Power Administration could ignore the effect that operating hydroelectric dams may have on endangered salmon on the grounds that the agency's primary mission is to market hydroelectric power.

Mr. Chairman, this policy did not work in the Sixties and Seventies, and it will not work today. President Nixon recognized this, and for me to be reduced to quoting Richard Nixon, you know something is wrong. At the 1973 signing ceremony for the Endangered Species Act, President Nixon said—and I quote—"Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure of value to scholars, scientists and nature lovers alike, and it forms a vital part of the heritage we all share as Americans." End of quote from President Nixon.

Mr. Chairman, in my view, this bill comes down to this: without it, our military will continue to be prepared, as it was in Iraq—and I salute them for that—and as it was in every military exercise since the enactment of ESA and MMPA. With it, we lose sight of some of what our military is being called to protect right here at home.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dingell follows:]

Statement of The Honorable John D. Dingell, a Representative in Congress from the State of Michigan

Chairman Pombo, Ranking Member Rahall and all the distinguished members of the Committee, thank you for the opportunity to come before you today to express

my opposition to this needless proposal. I sincerely appreciate your willingness to hear my concerns.

As you know, there are five environmental laws the Department of Defense would like exemptions from. Three of those laws, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act—or Superfund, and the Clean Air Act fall under the jurisdiction of the Energy and Commerce Committee and I fully intend to continue fighting the Defense Department on the exemptions they seek from my perch on that Committee. However, as an author of the Endangered Species Act and the Marine Mammal Protection Act, I feel that my knowledge of these laws might be helpful to you as this Committee considers these sweeping exemptions that could have a profoundly detrimental effect on our Nation's conservation and environmental protection efforts.

While I am well aware that the bill before you today, H.R. 1835, goes beyond the issues of the military, I would prefer to address the real issue which is that the Department of Defense wants out from under our most important and effective environmental laws.

During the 2000 campaign, President Bush himself said that he would "direct active Federal facilities to comply with all environmental protection laws and hold them accountable." More recently, Deputy Secretary of Defense, Paul Wolfowitz stated in a March 7, 2003 memorandum that, "In the vast majority of cases, we have demonstrated that we are able to both comply with environment requirements and to conduct military training and testing. In those exceptional cases where we cannot and the law permits us to do so, we owe it to our young men and women to request an appropriate exemption."

Given the comments of President Bush and key Administration officials, it begs the question, why are these sweeping exemptions necessary?

Mr. Chairman, even you said in a recent interview, "I am somewhat hesitant to exempt certain parts of the Federal Government from these laws." Moreover, in your book, This Land is Our Land, you say, "If the Federal Government were merely wasting our money when managing public lands, that would be bad enough, but the evidence indicates that it pollutes its land far worse than private landowners."

Mr. Chairman, members of the Committee, we have won the war in Iraq. After all the fuss the Department of Defense has made over the years about how our environmental laws are infringing on training activities, our military still managed to bring down Saddam Hussein's regime in less than 2 months. I would have to say that this victory is a pretty good indication that our military is being trained rather well without these sweeping exemptions...and without endangering the habitat of our national symbol, the bald eagle.

Endangered Species Act

Ladies and Gentlemen, the Endangered Species Act is near and dear to my heart. I have accomplished much during my tenure in Congress, but the Endangered Species Act, which I wrote with Senator Pete Williams, is a law of which I am particularly proud.

In fact, there are a couple of exemption options open to the Department of Defense under this law if they need it.

Section 7 of the law allows the taking of listed species if the Fish and Wildlife Service or National Marine Fisheries Service determines that the action will not jeopardize the continued existence of a listed species. In a case like this, the agency may be required to adopt reasonable and prudent alternatives to its original proposed action and to comply with other terms and conditions required by the Secretary of the Interior.

Additionally, and perhaps even more compelling, Section 7 (j) requires that an exemption must be granted for an agency action if the Secretary of Defense finds the exemption is necessary for reasons of national security. This decision must go through a Committee process. I would note, however, that the Department of Defense has never sought an exemption under Section 7 (j) of the law.

Instead of seeking out the avenues already available to them, the Defense Department wants broad, sweeping exemptions that would require no work on their part. Indeed, they are willing to tell half-truths and use fuzzy numbers to get what they want. Whenever one hears the Defense Department talking about the constraints of the Endangered Species Act, it inevitably mentions the Marine base, Camp Pendleton, in California. The Defense Department will say that 57 percent of the land is off-limits to military operations to preserve habitat: in fact the Congressional Research Service indicates it is more like 3 percent.

The Defense Department, like all other Federal agencies, needs to be held accountable for what it does, just like any other citizen or any other Federal agency.

Marine Mammal Protection Act

This law, Ladies and Gentlemen, is about the taking of marine mammals. It requires that we recognize the significance of marine mammals and since its passage many marine mammal populations have been stabilized. Some species have recovered to the extent that they are no longer listed as threatened or endangered. This is a great accomplishment.

The legislation before you today would allow the Secretary of Defense to exempt any action, or category of actions, undertaken by the Department of Defense or its components from compliance with any requirement of the Marine Mammal Protection Act, if he finds it necessary for national defense. Unlike the title of this bill implies, this is not limited to just military training and readiness. These exemptions would be authorized without any environmental review and would be renewable at the Secretary's discretion. My friends, this is too much.

Now, the Marine Mammal Protection Act is the only one of the 5 statutes the Defense Department does not want to comply with that lacks a specific national security exemption. What it does have, however, is an "incidental take permit process." The Navy regularly applies for these permits and has never been denied. Distinguished Members of the Committee, if it ain't broke, don't fix it.

Conclusion

I think most of you here know that I am by no stretch of the imagination an extremist. In fact, there are those in my own party who would argue that I am not extreme enough. I also think most of you know that if our national security truly was being jeopardized by compliance with our environmental laws and regulations, I would look for ways to help.

That, however, is not the case.

I have been around here a long time and the Defense Department is constantly trying to get out from under the laws that every other citizen and every other Federal agency is required to comply with, simply because they do not want to be troubled. Well, there are many things I would prefer not to be troubled by, including fighting this battle, which is a waste of all our time. We have managed to run an extremely successful military thus far without giving the Defense Department an open season on our environmental laws.

Thank you for giving me the opportunity to express to you my opposition to this outrageous proposal.

The CHAIRMAN. Thank you.

I want to welcome our first panel of witnesses here today. If I could have you stand and raise your right hand. As is customary on the Committee, we swear in all witnesses.

[Witnesses sworn.]

Let the record show they all answered in the affirmative.

I welcome you here today. Before we start, I am sure that you're all familiar with the lights, the timing system. Your entire written testimony will be included in the record. Your oral testimony, we request that you keep that to 5 minutes. The lights that are in front of you, when the yellow light comes on, you have a minute left. At the red light, I would request that you wrap up at that time.

Again, I welcome you all here today. I'm going to start with Brigadier General Joseph F. Fil, Jr. We will start with you as our first witness.

STATEMENT OF BRIGADIER GENERAL JOSEPH F. FIL, JR., U.S. ARMY, COMMANDING GENERAL, NATIONAL TRAINING CENTER AND FORT IRWIN, CALIFORNIA

General FIL. Well, Mr. Chairman, and members of the Committee, thank you for providing me the opportunity to appear before your Committee today.

My name is Joseph Fil, and I'm the Commanding General of the National Training Center and Fort Irwin, California. My testimony

today describes the mission and training that takes place at the NTC, as well as some of the constraints placed on that training by requirements to manage threatened and endangered species.

I will try to impress upon you the impact of those constraints on our training, and will explain an alternative approach to managing the natural resources at NTC in a manner that balances the protection of the species with the vital training mission we must continue to execute for the good of this Nation.

The National Training Center has a rich military history, dating back to the days of Captain John C. Freemont's defense of Sante Fe, Mormon, Bitter Springs and Twenty Mule Team Trails, to the training of today's modern forces currently deployed in operations around the world.

Although the National Training Center was originally a military hub to defend trade routes, it is currently the United States Army's premier maneuver training area. It is tasked with providing an environment in which brigade combat teams employ all of their combat assets in a joint and combined arms environment in force on force engagements and live fire conditions for current and future maneuver forces. In fact, we just completed our first rotation with a Stryker Brigade Combat Team.

The remote location of the National Training Center provides a unique and vital training environment. A primary consideration in selecting the location of the NTC was the ability to train with all weapons systems in a realistic scenario, consistent with military training doctrine, from live ordnance delivered by close air support to screening smoke provided to mask combat maneuver from enemy fire, without disturbing local populated areas.

I am no newcomer to Fort Irwin and the NTC. I have served as a lieutenant colonel, a colonel, and now as its Commanding General. I have helped train rotational units for combat as a battalion senior trainer, brigade senior trainer, deputy commander and chief of staff, and now as the NTC's Commanding General. Additionally, as a rotational unit leader serving in staff and command positions in the grade of captain through colonel, I have witnessed first hand how the hard lessons learned through tough, demanding and realistic training at the NTC results in victory on the world's modern battlefields.

I have also seen the challenges facing Fort Irwin. If the NTC is to remain the crown jewel of Army training, and to provide a realistic and relevant battlefield to train the brigade combat teams of the future, we do need additional battle space. The NTC's quest to expand its usable training area began in the mid-1980's. The Army's leadership realized that the NTC would be challenged in providing a realistic training environment to the brigade combat teams of the future as technology and tactics increase the amount of terrain a brigade is held responsible for in combat.

Even though we have sought to increase our usable training area, it has, in fact, been decreased by 24,000 acres due to the designation as critical habitat for the Desert Tortoise, effectively closing one of our two maneuver corridors.

In January of 2001, Congress withdrew 110,000 acres to add to the National Training Center's training area, which we are cur-

rently addressing in an environmental impact statement and in consultation with the Fish and Wildlife Service.

I am here today to tell you that not only do we need this training land, we need to be able to manage it in a flexible, holistic manner that balances the environmental protection and military training. We think the best method for managing threatened and endangered species is the Integrated Natural Resource Management Plan, or INRMP. We believe INRMPs provide a more holistic approach to species management.

INRMPs take into account all species present on the installation, not just one particular threatened or endangered species, and they take into account multiple uses of the land—hunting, residential, and military training. INRMPs simply provide an overall, broader, and more over-arching review of the total natural resource package on a military installation. In this day and age of diminishing resources, when we are constantly challenged to do more with less, we believe that INRMPs are our best chance of meeting that challenge when it comes to managing our natural resources.

What we are trying to do with this RRPI proposal is to preserve our ability to strike the proper balance between training and environmental protection with our local fish and wildlife service, and with local stakeholders through the INRMP process. We fully recognize and will continue to honor our obligation to preserve the environment and protect threatened and endangered species and to follow the Endangered Species Act.

We are great stewards of the environment at Fort Irwin. We have lots of good people working on it, and we devote substantial resources to it, and we will continue to do so. Unfortunately, the Fish and Wildlife Service's INRMP policy process is being currently challenged in court. What we need is Congress to clarify its intent in this regard, rather than leave it up to Federal judges and private lawsuits.

Mr. Chairman, it is, indeed, a great honor to be here. I look forward to answering any questions that you may have.

[The prepared statement of General Fil follows:]

Statement of Brigadier General Joseph F. Fil, Jr., Commanding General, National Training Center and Fort Irwin, California

Mr. Chairman and members of the Committee: Thank you for providing me the opportunity to appear before your Committee today. My name is Joseph F. Fil, Jr. and I am the Commanding General of the National Training Center (NTC) and Fort Irwin, California. My testimony describes the mission and training that takes place at the NTC as well as some of the constraints placed on that training by requirements to manage threatened and endangered species. I will try to impress upon you the impact of those constraints on our training and will explain an alternative approach to managing the natural resources at NTC in a manner that balances the protection of species with the vital training mission we must continue to execute for the good of this nation. I will also explain the potential benefits to the NTC from two of the provisions that are part of the DoD Readiness and Range Preservation Initiative.

Mission and Capabilities of the National Training Center

Our mission at the NTC is to provide tough, realistic combined arms and joint training. The training is focused at the battalion task force and brigade level, to assist commanders in training the soldiers, leaders, and units of America's Army for combat success on the modern battlefield. We are tasked to provide feedback to improve Army doctrine, training methods, and to care for our soldiers, civilians, and family members living and working at Fort Irwin. We are also tasked with keeping pace with, and often leading, the Army's transformation training.

Currently, ten brigade-sized units, averaging four to six thousand soldiers each, deploy annually to the NTC for intensive combat training against a dedicated opposing force, or OPFOR. Each 28-day brigade training rotation is designed to replicate a contingency deployment to an overseas combat area. The NTC trains Army heavy and light forces in a joint and combined arms environment at the mid to high intensity level of combat operations. The NTC provides a capstone-training event for U.S. Army brigades and battalions that is realistic, rigorous, and demanding. We accomplish this through a combination of force-on-force and live fire training, while providing detailed observations and feedback. The NTC must provide the realistic and demanding environment for leaders and soldiers to ensure the hard lessons, historically learned in America's first battles at the expense of soldiers' lives, are gained in live training instead of in combat.

At the NTC, we employ four key elements, not available at unit home station training facilities, to train brigades. We have a full-time, dedicated Opposing Force (OPFOR) Regiment; professional full-time trainers to observe and provide feedback to the training units; a sophisticated instrumentation system to track the battles; and a realistic battlefield that replicates the stress and conditions of actual combat. We are constantly examining our training, equipment, and training area, to ensure they support potential future joint and combined combat environments and they provide the realistic geographic battlespace to train Brigade Combat Teams.

Requirements to Accomplish the Mission of NTC

Fort Irwin encompasses over 642,000 acres. It is the Army's largest instrumented maneuver installation, and is the only one capable of training heavy and light units on the ground at distances approximating realistic operating distances. The Army and Joint Service participants depend on Fort Irwin and its large expanse of maneuver training area to provide the realistic battlefield conditions our service men and women will face in combat. Operating over these distances challenges Brigade Combat Teams not only in force on force maneuver events, but also in Brigade Combat Team maneuver live-fires that fully integrate internal, attached, and joint assets. The NTC is the only Army Installation in CONUS offering force on force and live-fire training opportunities to Brigade Combat Teams and the only center in the world that can accomplish this combat essential training in a fully instrumented environment. For many leaders and soldiers, a National Training Center rotation is the first time their units are able to train at doctrinal distances. Digital and voice communications requirements, lines of communication and support relationships, situational awareness, and combat force maneuver prove difficult for forces that have never operated over such distances. In this regard, the mere physical size of the National Training Center Maneuver Area provides a more realistic battlefield that allows the Brigade Combat Team to face these challenges and learn from them in a training environment rather than war.

The National Training Center's 642,000 acres includes 350,000 acres of maneuver area. While this maneuver area met the doctrinal distances for units of the 1980s, current future Brigade Combat Teams operate at much more extended distances as recently demonstrated by the 3d Infantry Division during operation Iraqi Freedom. Expanded maneuver areas need to adequately stress battle field operating systems. The Army's Interim and Objective Forces will need even larger maneuver areas to train for combat. Although the NTC was capable of providing adequate training area for the Army Brigade Combat Teams that fought Desert Storm in 1991, the current NTC training area does not support the land requirements to fully train current and future Army Brigade Combat Team configurations.

As early as 1985, the Army recognized that changing tactics, organizations, and more capable equipment have created a demand for a larger training area to realistically conduct force-on-force training for brigade-sized units. Recognizing this requirement, the Army began the process of expanding the NTC. Due in large part to the complex requirements to protect the Desert Tortoise (a threatened species) and the Lane Mountain Milk Vetch (a recently listed endangered species), the effort to acquire additional land and meet this doctrinal training requirement remained incomplete for nearly 18 years. Thanks to recent congressional legislation, approximately 110,000 acres of additional training land has been withdrawn from the Bureau of Land Management for the NTC. With these additional 110,000 acres, the NTC will actually offer 520,000 acres (opening numerous corridors which are currently closed) of actual maneuver training area, which we believe is essential to our ability to provide a realistic training environment for the Interim and Objective Forces. We are currently evaluating the expansion under the National Environmental Policy Act and consulting with the U.S. Fish and Wildlife Service under the Endangered Species Act, with the objective of commencing training in the expansion area by fiscal year 06.

Impact of Endangered Species Act Compliance on the Mission of NTC

The Army recognizes its obligation to protect threatened and endangered species. We have in the past and will continue to be leaders in this respect. Although NTC is and will remain committed to environmental stewardship, pressure points exist that limit the effectiveness of training. One of the most challenging of these pressure points is the management of threatened and endangered species.

The threatened Desert Tortoise inhabits Fort Irwin. We take extraordinary measures to ensure we avoid them during our training operations. All soldiers training in the maneuver area are briefed on actions to take when a Desert Tortoise is sighted and we never exceeded our estimated limits of takes contained in the Biological Opinion per year over the past 10 years. Upon encountering a Desert Tortoise, training in the immediate area ceases, and soldiers are instructed to notify a National Training Center Observer Controller who then notifies the National Training Center Environmental Team. If a biologist is required to relocate or retrieve a tortoise after normal working hours or on weekends, they are required to drive 36 miles (from their residence) or further to accomplish this mission, resulting in soldiers remaining to observe the tortoise for hours.

In most cases, reporting the location and confirming the tortoise is out of immediate and future harms way is the only action taken. Physical handling of a Desert Tortoise is only done in cases of imminent danger. One of the Desert Tortoise defense mechanisms is urination, in which it empties it's bladder to ward off attackers. If a Desert Tortoise urinates, soldiers are trained to provide shade and contact National Training Center Environmental personnel. This is important as a tortoise that voided it's bladder has much less chance of surviving it's hibernation period. The Fort Irwin newspaper frequently publishes articles on environmental awareness, especially on Desert Tortoise and other wildlife, to educate soldiers, family members, and post employees who live in post housing and work in administrative areas.

In 1993, the National Training Center established a Desert Tortoise reserve in the southern portion of the training maneuver area to minimize training impacts on the species. This reserve was seen by the National Training Center Leadership as a environmentally responsible measure until mitigation requirements were identified and implemented. The reserve area was fenced using National Training Center funds to prevent vehicular traffic from entering the area in 1994. It was never the National Training Center's intent to permanently restrict this area from use for Brigade Combat Training Team maneuver, rather it was intended to provide U.S. Fish and Wildlife Service an area to determine possible future mitigation. As a result, U.S. Fish and Wildlife (USFWS) designated the reserve as Desert Tortoise critical habitat.

This loss of approximately 22,000 acres effectively moved our southern boundary north by three kilometers, effectively closing the southern brigade maneuver corridor; one of only two at the NTC. Because the southern brigade maneuver corridor is unavailable, our training is restricted to the central brigade maneuver corridor. The repeated use of this corridor concentrates and intensifies maneuver impact damage and repeatedly exposes rotational units to the same terrain during training. This is not conducive to sustainable land use and land management practices or to training realism. Repeated use of the same training area reduces the realistic evaluation and use of terrain by units and encourages habitual use of the same maneuver courses and fighting positions during training. It causes unrealistic familiarity with likely courses of action, enemy positions, and ambush points. It concentrates training impacts, driving up maintenance costs and creating additional environmental issues such as erosion. In general, it reduces total maneuver land available, which causes a reduction in the capability of the installation to support doctrinal training requirements.

The Lane Mountain Milk–Vetch is an endangered plant species present in the southwest corner of Fort Irwin and within lands withdrawn as part of the Fort Irwin Expansion legislation. The Milk–Vetch is a small perennial herb with a very short growing season of approximately 2 to 4 months. It generally grows within other plants that it appears to use as a support structure. The original listing by U.S. Fish and Wildlife Service indicated an estimated population of 1,200 plants, in three habitat areas of which two were on the NTC reservation and the third on land managed by BLM. The U.S. Fish and Wildlife Service indicated that the plant was justified for listing indicating that military training activity due to the Fort Irwin Expansion was a primary threat to the continued existence of the species. Recent surveys and research funded by the National Training Center, at a cost of over $1,300,000 in the past three years, indicate a far different picture than was presented in the listing package for the plant. Due to the Army survey, the known habitat was expanded from 13 square miles to over 32 square miles, a new

population was discovered, and an area thought previously to contain only a few hundred plants in a few acres was discovered to be the largest population with the largest habitat area of nearly 10,000 acres. This area is totally outside military boundaries located primarily on lands administered by the Bureau of Land Management. Due to the Army survey, the U.S. Fish and Wildlife Service population estimate of 1,200 plants has been increased to an estimate of 30,000—70,000 plants and we are discovering additional habitat and plants as we speak.

U.S. Fish and Wildlife Service, based on a court order, is required to designate critical habitat for the Lane Mountain Milk–Vetch by September 2004. Based on a population of the Lane Mountain Milk–Vetch on Fort Irwin (about 25% of the known habitat is on the Fort) the potential designation of critical habitat may remove from training enough land in the western expansion area to make this area totally unusable for Brigade Combat Team training by the NTC.

NTC Commitment to Environmental Stewardship

As I have articulated, the protection of threatened and endangered species is not without cost, both monetary and to our military capabilities. We perform a constant balancing act to satisfy all of the competing demands placed on the natural resources that comprise Fort Irwin. We do not shrink from this challenge; rather, we have and will continue to engage it head-on.

The NTC has a solid record in the area of environmental protection. The Army awarded its Pollution Prevention Installation Award for Fiscal Year 2002, Environmental Quality Award for Fiscal Year 2001, and Cultural Resources Team Award for Fiscal Year 1999 to the NTC. In 1996, Vice President Al Gore awarded the Vice President "s "Hammer Award" to the NTC for initiating Mojave Desert Ecosystem Program. In 2003, the EPA Region "IX recognized NTC as the Champion of Green Government for our Pollution Prevention efforts. In addition, we have a strong record in air quality management as evidenced by award of the Mojave Desert Air Quality Management District Award for 1999, 2000, 2001 and 2002. Annually, the NTC spends $1.2M for Installation Training Area Management and over $13M in environmental programs. The NTC employs a 34 person Environmental Staff (Civil Servants and Contractors) of which five are full time wildlife biologists, six archeologists, and a botanist who work as a team to conserve natural and cultural resources and to advance the training center's environmental stewardship program. All of Fort Irwin's programs to manage and conserve natural resources are integrated into the installation's Integrated Natural Resource Management Plan (INRMP). The INRMP will serve as the primary tool to coordinate all of the competing conservation requirements and ensure they are met in a manner that supports species protection and the sustainable use of Fort Irwin's training lands to support our mission.

Benefits of the Readiness and Range Preservation Initiative

With this background on the NTC's military mission and the environmental requirements that adversely impact our capability at the NTC, I want to address two RRPI provisions that would greatly assist us in balancing these competing requirements in the future: the provisions addressing Endangered Species Act critical habitat and Clean Air Act conformity requirements. While the RRPI will certainly not eliminate all of the problems that are impacting our ability to conduct the realistic training that is vital to combat effectiveness, it is an important step towards achieving a more effective balance between our mission and conservation objectives.

Endangered Species Act Critical Habitat

As you know, the Endangered Species Act provides for the designation of critical habitat that is essential to the conservation of a threatened or endangered species. Critical habitat designated based on the limited scientific information available to the Fish and Wildlife Service, is subject to special protections that primarily affect and limit Federal activities, as opposed to the activities of state and local governments and private citizens. As I will discuss, the NTC has first hand experience as to the adverse consequences of designating critical habitat on a military installation. We believe that the RRPI provision affords a much more effective means of achieving the conservation objectives of the Endangered Species Act, while at the same time affording us the flexibility to perform our military mission. As I explained earlier, 24,000 acres of NTC was later designated as Critical Habitat for the Desert Tortoise and, as a result, we lost the ability to use any portion of this land for our training.

Compounding our problems, we now must implement conservation measures for the Lane Mountain Milk Vetch. This plant was recently discovered on approximately 11,500 acres on Fort Irwin in the Southwest Expansion Area, which is vital to meeting our training requirements in the 21st Century. While we support efforts to ensure the survival of this species, we are greatly concerned over further

degradation of our ability to effectively train soldiers at the NTC. Designation of Critical Habitat for the Milk Vetch is required but the exact area is unknown. The potential designation of large areas of the NTC as Critical Habitat for the Milk Vetch poses a major future threat to our mission and makes the passage of the RRPI Endangered Species Act provision of vital importance to us.

The RRPI Endangered Species Act provision will ensure the availability of what we believe to be a valuable and necessary tool in achieving an effective balance between conservation and military mission. The RRPI provision codifies the highly beneficial U.S. Fish and Wildlife Service administrative practice of allowing an approved INRMP to substitute for designating Critical Habitat on a military installation. This important tool is now in jeopardy as a result of a recent Federal court decision.

RRPI would ensure that the NTC could use its INRMP to provide focused, carefully crafted management protections for the Milk Vetch, while at the same time avoiding unnecessary impacts on military mission. From a conservation perspective, critical habitat offers nothing that an approved INRMP cannot provide. We believe this approach positively contrasts to the inflexible approach, normally associated with the designation of critical habitat, that can impede realistic training.

Additionally, having an INRMP in lieu of designated critical habitat will have a major benefit in reducing the number of consultations we will have to initiate with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act. Considering the limited resources and personnel available at the NTC and the U.S. Fish and Wildlife Service for consultation and conservation activities, this savings, in terms of time, cost, and administrative burden, will be significant. The less time the NTC's Natural Resource Professionals are required to spend on administrative consultations, the more time they can devote to conservation activities that directly benefit the species.

While impediments to realistic training will remain, allowing us the flexibility to use our INRMP in lieu of critical habitat will greatly assist us in balancing our competing requirements. Moreover, we are optimistic that working closely with the U.S. Fish and Wildlife Service, our INRMP can and will afford the effective management that is needed to ensure the survival of the Milk Vetch. Of the $125 million in funding currently projected for our land expansion effort, up to $75 million has been authorized and is awaiting approval for the mitigation of endangered and threatened species. We currently expend approximately $3 million annually for the conservation of these species.

I think our success with the Desert Tortoise clearly demonstrates the effectiveness of the conservation measures that we undertake and will continue under our INRMP. We have a comprehensive program to educate soldiers and others on the installation on endangered species and the protections they must be afforded. We have pioneered the operation of the nation's only Desert Tortoise Headstart Program, which has released over 200 hatchling tortoises to the wild. Moreover, with all of the training activities at the NTC, we have never been cited for exceeding the estimates of take limits contained in the Biological Opinion in the past ten years—clear evidence of the effectiveness of the comprehensive measures we have implemented under our INRMP.

Clean Air Act Conformity

While we take all reasonable and practical mitigation measures, training in the desert inherently generates dust. As the Army transforms, the number of vehicles training at the NTC will increase, as will the resulting dust. For years, we have strived to meet the compliance requirements associated with the PM 10 National Ambient Air Quality Standard (NAAQS). This has been particularly difficult considering the background concentration of particulate matter in the air, emanating from the Los Angeles basin. While this has been a major challenge, we have successfully coped. The NTC spends about $400,000 annually as part of a cooperative effort with the Mojave Desert Air Quality Management District to monitor for particulate matter. Additionally, we spend about $1 million each year through our Installation Training Area Management program in efforts to mitigate dust and erosion.

With the emerging requirements associated with the new PM 2.5 NAAQS, we are greatly concerned over the future impact on our training operations. As a result of background levels from pollution from the Los Angeles basin, without any training activities at the NTC, the ambient air quality at the NTC exceeds this new standard. Consequently, the RRPI Clean Air Conformity provision, which would give the Army up to three years to demonstrate compliance with a state's implementation plan for air quality, is important to the NTC's future.

Conclusion

I am extremely proud of the great American soldiers and leaders who train so hard in the tough training environment we have established in the desert of NTC. Our Army recognizes that the National Training Center is a critical and irreplaceable component of the readiness of our Army. We train and coach units to the Army's doctrinal standards, and we adjust training conditions based on unit skills, knowledge and abilities. All the units that train at NTC depart immeasurably better for their hard work, and that of the soldiers and civilians who support their training. I am very proud of everyone at our training center, as we train soldiers and develop leaders in order to ensure no soldier goes into harm's way untrained.

I appreciate the strong support from Congress and particularly from this Committee. Mr. Chairman, thank you for the opportunity to speak today and I stand ready to answer the Committee's questions.

The CHAIRMAN. Thank you.

Our next witness is Rear Admiral Robert T. Moeller.

STATEMENT OF REAR ADMIRAL ROBERT T. MOELLER, U.S. NAVY, DEPUTY CHIEF OF STAFF FOR OPERATIONS/PLANS AND POLICY, U.S. PACIFIC FLEET

Admiral MOELLER. Mr. Chairman, distinguished members of the Committee, it is truly an honor to be here today. I am Rear Admiral Bob Moeller. I am the Deputy Chief of Staff for Operations/Plans and Policy for the Commander, U.S. Pacific Fleet.

I am a surface warfare officer and have actual forward deployed experience in the Atlantic, Mediterranean, Western Pacific and Persian Gulf, including command of an Aegis-class Tomahawk equipped cruiser. I know the importance realistic training plays in preparing to execute our assigned mission.

The primary mission of Commander, U.S. Pacific Fleet, is to provide combat-ready naval forces. The Pacific Fleet is comprised of approximately 200 ships, 1,500 aircraft, and 250,000 sailors, Marines and civilians.

Our ability to provide the training they need to be the best is the matter we're addressing today. How do we ensure their readiness? The reality is that we are facing an increasingly difficult task to provide this training because of the constant pressure associated with what we characterize as encroachment. Under the Marine Mammal Protection Act, the current definition of harassment of marine mammals can be interpreted as mere annoyance or potential to disturb, without biologically significant effects. As a result, any Navy test or training activity that results in such harassment must be permitted to do so. Such broad language in definitions, if taken to the extreme, could be interpreted to prevent any maritime activity in the vicinity of marine mammals.

Two examples illustrate the specific encroachment challenge we face in the area of anti-submarine warfare, a mission unique to the Navy and the No. 1 warfare priority for PacFleet.

For years, the Navy has been concerned about the MMPA. In November, 2002, a Federal District judge issued a court order that strictly limits employment of SURTASS LFA. This advanced system is designed to detect and track the growing number of state-of-the-art, quiet diesel submarines possessed by nations that could threaten our national security. The Navy now finds the deployment and operation of one of our most important national security assets

constrained by a Federal court, notwithstanding a 6-year effort on our behalf to comply fully with the MMPA.

The current reality is that we cannot test and train with SURTASS LFA in those areas of the Pacific where we would most likely need to use the system during hostilities and future testing and employment of SURTASS LFAs in jeopardy. Simply keeping the system on the shelf until we may actually need to use it is not a realistic option.

The Navy is also developing, as part of its littoral warfare advanced development, or LWAD program, other new sensors and tactics to track these quiet diesel submarines as they operate in littoral waters, like the Persian Gulf and Taiwan Strait. These submarines are proliferating worldwide, including Iran, China and North Korea. They are significantly harder to detect than the submarines that challenged the U.S. Navy during the cold war. Without these new, vital sensors, we would be unable to secure sea lines of communication and trade.

In the past 6 years, this program to develop and test systems and tactics has encountered challenges by environmental groups 78 percent of the time. In the last 3 years, nine of ten operational tests have been affected. One test was canceled and 17 related projects have been scaled back.

The Readiness and Range Preservation Initiative follows the National Research Council's recommendation that the current ambiguous definition of harassment of marine mammals under the MMPA be reworded to define more biologically significant effects. I ask that you keep in mind that this proposal does not create a blanket exemption for the Navy. We will still seek permits in those instances where our actions will have biologically significant impacts.

This language is the result of the interagency process. Therefore, Commerce and Interior support this proposal. Furthermore, this language is similar, I am told, to language proposed by the previous administration.

The U.S. Navy is very proud of its ability to respond to the President's call to be ready in the current global war on terror. As the President remarked just the other evening from the deck of the U.S.S. ABRAHAM LINCOLN, the war is not over. Indeed, law and the expectation of the American people require that their military services are ready.

A fundamental tenet of fleet readiness is to train as we fight. However, experience paid in lives has demonstrated that we fight as we train. There is a real need to better clarify and eliminate ambiguity in environmental laws without exempting the Department of Defense from compliance. As such, there remains an ongoing need for the Department of Defense to continue its dialog in partnership with regulatory agencies, in order to properly balance national defense requirements with conservation initiatives.

Finally, we appreciate the continued effort by the Congress to recognize our responsibility to realistically train America's sons and daughters for combat and to support the requirement for viable, unfettered range facilities to accomplish that mandate.

I welcome your questions. Thank you very much.

[The prepared statement of Admiral Moeller follows:]

Statement of Rear Admiral Robert T. Moeller, Deputy Chief of Staff for Operations/Plans and Policy, U.S.. Pacific Fleet, U.S. Navy

INTRODUCTION

Chairman Pombo, Representative Rahall, and Members of the Committee, thank you for this opportunity to share my views regarding the growing negative effects of encroachment on military readiness and training of our American Sailors as they prepare for combat. I appreciate your attention to this vital and timely topic, which is of great importance to national security and the environment.

THE U.S. PACIFIC FLEET

The mission of Commander, U.S. Pacific Fleet, is to support the U.S. Pacific Command's (PACOM) theater strategy, and to provide interoperable, trained and combat-ready naval forces to PACOM and other U.S. unified commanders. The U.S. Pacific Fleet area of responsibility (AOR) covers more than 50% of the earth's surface, encompassing just over 100 million square miles. Each day, Pacific Fleet ships are at sea in the Arabian Gulf, and the Pacific, Indian, and Arctic Oceans. Our AOR extends from the west coast of the U.S. to India. The Pacific Fleet is made up of approximately 200 ships, 1,500 aircraft and 250,000 Sailors, Marines and Civilians. Together they keep the sea-lanes open, deter aggression, provide regional stability, and support humanitarian relief activities. As the Deputy Chief of Staff for Operations/Plans and Policy, I develop initial naval combat plans and follow through until specific operations are completed.

The high quality of training we provide to these Sailors is perhaps unseen, yet it is an essential element of their impressive level of combat readiness. Clearly, before this nation sends its most precious asset—its young men and women—into harms way, we must be uncompromising in our obligation to prepare them to fight, survive, and win. This demands the most realistic and comprehensive training we can provide.

Realistic, demanding training has proven key to survival in combat time and again. For example, data from World Wars I and II indicates that aviators who survive their first five combat engagements are likely to survive the war. Similarly, realistic training greatly increases our combat effectiveness. The ratio of enemy aircraft shot down by U.S. aircraft in Vietnam improved to 13-to–1 from less than 1-to–1 after the Navy established its Fighter Weapons School, popularly known as TOPGUN. More recent data shows aircrews that receive realistic training in the delivery of precision-guided munitions have twice the hit-to-miss ratio as those who do not receive such training.

Similar training demands also exist at sea. New ultra-quiet diesel-electric submarines armed with deadly torpedoes and cruise missiles are proliferating widely. New technologies such as these could significantly threaten our Fleet as we deploy around the world to assure access for joint forces, project power from the sea, and maintain open sea lanes for trade. To successfully defend against such threats, our Sailors must train realistically with the latest technology, including next-generation passive and active sonars.

As combat operations for Operation Iraqi Freedom concludes, we must prepare for other possible conflict in the future. We should be concerned about the growing challenges in our ability to ensure our forces receive the necessary training with the weapon and sensor systems they will employ in combat. Training and testing on our ranges is increasingly constrained by encroachment that reduces the number of training days, detracts from training realism, causes temporary or permanent loss of range access, and drives up costs.

Encroachment issues have increased significantly over the past three decades. Training areas that were originally located in isolated areas are today surrounded by recreational facilities and urban sprawl. They are constrained by state and Federal environmental laws and regulations and cumbersome permitting processes which negatively impact our ability to train.

NAVY'S ENVIRONMENTAL STEWARDSHIP

The Navy continues its commitment to good stewardship of the environment. Indeed, our culture reflects this, as the men and women manning our fleet were raised in a generation with a keen awareness of environmental issues. The Navy environmental budget request for FY–2004 totals $1.0 billion. This funding supports environmental compliance and conservation, pollution prevention, environmental research, the development of new technologies, and environmental cleanup at Active and Reserve bases. It is precisely as a result of this stewardship that military lands present favorable habitats for plants and wildlife, including many protected species. Ironically, our successful stewardship programs have helped increase the number of

protected species on our ranges, which has resulted in less training capacity in some instances.

BALANCING MILITARY READINESS AND THE ENVIRONMENT

Sustaining military readiness today has become increasingly difficult because, over time, a number of factors, including urban sprawl, regulations, litigation, and our own accommodations to demands from courts, regulatory agencies and special interest groups have cumulatively diminished the Navy's ability to effectively train and test systems. Among the greatest threats to proper military training are some laws that include ambiguous provisions and cumbersome process requirements that result in unintended negative consequences, which inhibit realistic, timely and comprehensive training. These laws, and the court decisions which have interpreted and expanded them, have resulted in Federal courts and regulatory agencies curtailing essential training despite the "best available science" supportive of the Navy's ability to train without harm to the environment. As a result, military readiness requirements and environmental protection are out of balance.

The Administration's Readiness and Range Preservation Initiative (RRPI) proposes modest amendments to several environmental laws which will help restore the balance, meeting our national security needs and maintaining good stewardship of the environment. I ask for your help to address the challenges of most concern to the Navy under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA).

MARINE MAMMAL PROTECTION ACT

Last year before the Senate Environment and Public Works Committee, the Vice Chief of Naval Operations testified that the definition of the term "harassment" of marine mammals in the MMPA was a source of confusion because the definition is tied to vague and ambiguous terms such as "annoyance" and "potential to disturb." These terms arguably apply to even the slightest changes in marine mammal behavior and subject Navy training and testing at sea to the scrutiny and control of courts, regulatory agencies and special interests groups, even in the absence of evidence of adverse impacts on the marine mammals. The severity of the impact on Navy training and testing is strikingly more apparent now.

In November 2002, a Federal district judge in San Francisco presiding over a case brought by environmental groups alleging violation of the MMPA, National Environmental Policy Act (NEPA), and the Endangered Species Act issued a preliminary injunction that limits employment of the Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar system. This advanced system is designed to detect and track the growing number of quiet diesel submarines possessed by nations, which could threaten our vital national security. After highlighting flaws in regulatory agency implementation of the MMPA and ESA, the court issued a preliminary injunction restricting Navy's deployment of SURTASS LFA to a limited area in the western Pacific. Navy now finds the deployment and operation of one of our most important national security assets constrained by a Federal court as a result of litigation brought by environmental groups specifically designed to deny Navy use of the system. Future testing and employment of SURTASS LFA could be adversely affected. The MMPA was originally enacted to protect whales from commercial exploitation and to prevent dolphins and other marine mammals from accidental death or injury during commercial fishing operations. Military readiness concerns were not raised at the time of its enactment.

As a result of the preliminary injunction issued by the Federal district court, we are not allowed to test and train with LFA in the waters in which it will need to be employed. SURTASS LFA is a critical part of anti-submarine warfare (ASW). The Chief of Naval Operations has stated that ASW is an essential and core capability of the Navy. Testing and training with LFA is essential to our future success. By way of comparison, during the Cold War we made every effort to search, detect, and track Soviet nuclear submarines. In so doing, we learned their habits, went to school on their operational procedures, and worked hard to stay ahead of them. Today the nature of the submarine threat has changed. The challenge is different. Nevertheless, the preliminary injunction on testing and training with LFA issued by the Federal district court has severely limited our ability to do prepare for this challenge.

The Current Quiet Diesel Submarine Threat

As we enter the 21st century, the global submarine threat is becoming increasingly more diverse, regional, and challenging. The Russian Federation and the People's Republic of China have demonstrated that the submarine is a centerpiece of their respective navies. Published naval strategies and current operations of potential adversaries, including Iran and North Korea, have demonstrated the same

strategic doctrine. Diesel submarines are deemed a cost-effective platform for the delivery of several types of weapons, including torpedoes, anti-ship cruise missiles, anti-ship mines and nuclear weapons. In addition to the United States, Australia, Canada, and the United Kingdom, 41 other countries, including potential adversary nations such as China, North Korea, and Iran, have modern quiet submarines and many are investing heavily in submarine technology. Of the 380 submarines owned by these 41 countries, more than 300 are quiet diesel submarines.

Submarine quieting technology continues to proliferate, making submarines, operating in their quietest mode, difficult to detect even with the most capable passive sonar. The inability to detect a hostile submarine at long-range—in other words, at a sufficient "stand-off" distance before it can launch a missile or a torpedo—is a critical vulnerability that puts ships and our Sailors at risk. The threat of a quiet diesel submarine, in certain circumstances, could deny access to vital operational areas to U.S. or coalition naval forces. These threats to our Navy are a reality that the U.S. Pacific Fleet must consider as it carries out its responsibility to be able to conduct theater warfare in the Pacific Region.

Because of these threats, Navy identified the requirement to detect hostile submarines before they are close enough to use weapons. This capability is particularly critical where there exists a concentration of forces at sea, as recently occurred in the Sea of Japan for exercise Foal Eagle, or as is planned in support of Operational and Contingency Plans in the vicinity of Northeast Asia. When it becomes necessary to place carrier battle groups or amphibious task forces in harms way, these valuable national assets, their supporting ships and their crews have to transit constricted bodies of water or straits. These limited areas provide the perfect opportunity for quiet diesel submarines to stalk our ships. A pre-positioned diesel submarine, conducting a quiet patrol on battery power, is extremely difficult to detect with passive sonar. The most promising system to counter this threat to our Navy and national security is SURTASS LFA. To be effective, SURTASS LFA must be tested and evaluated for integration into the Fleet. It is not effective to be kept "on the shelf" in the event our forces need to use it in a real contingency.

Comprehensive Environmental Analysis

In meeting its obligations under current environmental laws for deploying SURTASS LFA, the Navy undertook a comprehensive and exhaustive environmental planning and associated scientific research effort. Working cooperatively with the National Marine Fisheries Service (NMFS)—the Federal regulatory agency tasked with protection and preservation of marine mammals—the Navy completed an Environmental Impact Statement (EIS), developed mitigation measures for protecting the environment, and obtained all required authorizations or permits pursuant to the MMPA and ESA. The scientific research and EIS involved extensive participation by independent scientists from a large number of laboratories and academic organizations. The Navy also undertook a wide-ranging effort to involve the public in the EIS process through public meetings and extensive outreach. Based on this effort, NMFS concluded that the planned SURTASS LFA operations would have negligible impacts on marine mammals.

Despite plaintiffs' failure to produce scientific evidence contradicting the independent scientific research that the LFA system could be operated with negligible harm to marine mammals, the court opined that Navy testing and training must be restricted. In reaching this conclusion, the court noted that under the definition of harassment, the phrase "potential to disturb" hinged on the word "potential" and extended to individual animals. Quoting from judge's opinion, "In fact, by focusing on potential harassment, the statute appears to consider all the animals in a population to be harassed if there is the potential for the act to disturb the behavior patterns of the most sensitive individual in the group." (Emphasis added.) Interpreting the law this broadly could require authorization (permits) for harassment of potentially hundreds, if not thousands, of marine mammals based on the benign behavioral responses of one or two of the most sensitive animals.

Highlighting how difficult it would be to apply the MMPA to world-wide military readiness activities under such a broad interpretation of harassment, the court pointed out that a separate structural flaw in the MMPA limits permits for harassment to no more than a "small number" of marine mammals. Overturning the regulatory agency's decades-old interpretation of the MMPA, the court also said that the "small number" of animals affected cannot be defined in terms of whether there would be negligible impact on the species, but rather is an absolute number that must be determined to be "small." The court's far-reaching opinion underscores shortcomings in the MMPA that apply to any world-wide military readiness activity, or any grouping of military training activities that might be submitted for an overall review of impact on the environment.

In addition to the decision to restrict deployment of the SURTASS LFA system, two other recent decisions by different Federal district courts have stopped scientific research due to concerns about acoustic impacts to marine mammals. In one case, a court enjoined a seismic air gun research on geological fault lines conducted by the National Science Foundation off the coast of Mexico based on the court's concern that the research may be harming marine mammals in violation of the MMPA and NEPA. In another case, a court enjoined a Navy funded research project proposed by the Woods Hole Oceanographic Institute designed to study the effectiveness of a high frequency detection sonar (similar to a commercial fish finder) in detecting migrating Grey Whales off the coast of California.

The legislation proposed by the Administration provides solutions to marine mammal issues on three levels. It defines harassment in terms of significant changes in natural behavior patterns, thereby providing a higher threshold when determining which military readiness activities require National Marine Fisheries Service authorization. The proposed legislation resolves the issues identified by the court in the LFA litigation by recognizing the unique nature of military systems and operations, allowing the Navy to address military readiness activities and the areas in which they are conducted in a manner that makes sense from an operational and training perspective. Finally, it creates a national defense exemption that can be exercised when conditions warrant by the Secretary of Defense after consulting with the Department of Commerce and/or the Department of Interior.

ENDANGERED SPECIES ACT

Negative impacts on military readiness activities have also resulted from the ESA. For example, the designation of land used for military training as critical habitat under the ESA can undermine the primary purpose for which these lands were set aside. Federal courts have held that critical habitat is intended not only as a safe haven for species survival, but also as a cradle for species recovery—even if the species is not currently present on the land. Under the ESA, Federal agencies are required to ensure that their activities do not adversely modify designated habitats. Hence designation as critical habitat can drastically limit land uses by placing inflexible restrictions on land that has been dedicated by our nation to maintain military readiness.

Guam

In some cases, the challenge of critical habitat designation has become an issue even when the relevant endangered species are not currently present. Under litigation pressure brought by environmental groups in Federal court, the U.S. Fish and Wildlife Service (USFWS) has proposed part of Guam as critical habitat for the Mariana Crow, Mariana Kingfisher, and Mariana Fruit Bat. Guam is the headquarters of Commander, Naval Forces Marianas (COMNAVMAR). Guam is a critical, forward deployed facility providing essential logistical and training support to our Fleet. This critical habitat designation proposal covers roughly 7,500 of the 8,840 acres that comprise the Naval Ordnance Annex. This Navy land is currently used as magazines for forward deployed ordnance storage, jungle training areas (special operations forces), and low-level aviation training areas by all military services. None of the species for which the habitat would be designated currently live on the land. Navy has formally objected to the proposed designation, noting in part that in 1994 the Navy and USFWS entered into a Cooperative Agreement to establish the Guam National Wildlife Refuge. This 22,426-acre Refuge was created in lieu of a previously proposed critical habitat designation involving the same three species and covers 12,237 acres of Navy lands.

The proposal under consideration calls into question what is meant by "special management consideration" under the ESA. We believe that under the Act's present wording, if no special management considerations are needed because of other conservation plans or measures then the designation of critical habitat should be unnecessary. Both the Guam National Wildlife Refuge and the U.S. Fish and Wildlife Service approved COMNAVMAR Installation and Natural Resource Management Plan for the Ordnance Annex provides such special management considerations for the species' habitats. Accordingly, designation of critical habitat should not be necessary.

Pacific Missile Range Facility (PMRF)

In February 2003, USFWS designated 177 acres of PMRF, Hawaii as critical habitat for a species of grass. PMRF is a long, relatively narrow strip of land on Kauai, critical to the testing and evaluation of weapons, and capable of supporting a broad range of training and testing, including amphibious landings and Missile Defense Agency efforts to rapidly achieve an operational ballistic missile defense capability. This designation, like those proposed on Guam, establishes critical habitat

for a species that does not exist there. While the Guam and Hawaii critical habitat designations are current examples, a concern is that special interest groups may use litigation to compel designation of more and more military land as critical habitat. We are further concerned that these particular critical habitat designations are intended to provide precedence for future efforts to persuade Navy to agree to introduce species onto Navy lands—that is, to use a military training facility as a laboratory that could carry with it a readiness and training loss associated with unnecessary critical habitat designation.

The Administration has proposed a legislative solution to this challenge that would rely on Integrated Natural Resource Management Plans (INRMPs) in lieu of designating critical habitat. DoD is already obligated to develop INRMPs for lands under military control. INRMPs address management of natural resources in the context of the missions for which the lands were placed under control of the military services. INRMPs are prepared in cooperation with the USFWS and state agencies, and these agencies recommend ways for DoD installations to better provide for species conservation and recovery.

There are examples that indicate that INRMPs are an effective tool for protecting the environment. For example, at Naval Amphibious Base Coronado, the primacy of the military mission has been balanced against the conservation of endangered species with very positive outcome. We have been able to ensure continued effective training while greatly increasing the number of endangered sea bird nests. Through the Navy's conservation and management programs, funded at $720,000 annually, Least Tern nests have increased from 187 to 825 (more than a four fold increase) and Western Snowy Plover nests have increased from 7 to 99 (nearly a 14 fold increase) in nine years. Similar good environmental stewardship by the Navy has been demonstrated in a Navy-wide sea-turtle conservation effort in which we invest about $1 million a year.

Adopting this recommended change to the ESA would better balance training needs with the protection of threatened or endangered species. Changing the law to establish clearly that an approved INRMP provides sufficient species protection—rather than designating more and more military land as critical habitats—would help retain an appropriate balance between the military Services' training needs and endangered species protection.

SUMMARY

We face numerous challenges and adversaries that threaten our way of life. The President has directed us to "be ready" to face this challenge. To fulfill this directive, we must conduct comprehensive and realistic combat training—providing our Sailors with the experience and proficiency to carry out their missions. This requires appropriate use of our training ranges and operating areas and testing weapon systems. The Navy has demonstrated stewardship of our natural resources. We will continue to promote the health of lands entrusted to our care. We recognize our responsibility to the nation in both of these areas and seek your assistance in balancing these two requirements.

I thank the Committee for your continued strong support of our Navy and on behalf of Commander, U.S. Pacific Fleet I ask for your consideration of the RRPI legislation. Passage of RRPI will help the Services sustain military readiness today in this time of war and in the future. It will also support our on-going efforts at environmental conservation. Achieving the best balance of these national imperatives is in the interests of all Americans, and your Navy is committed to achieving these goals.

The CHAIRMAN. Thank you.

Our next witness is Major General William G. Bowdon, III.

STATEMENT OF MAJOR GENERAL WILLIAM G. BOWDON, III, U.S. MARINE CORPS, COMMANDING GENERAL, MARINE CORPS BASE, CAMP PENDLETON, CALIFORNIA

General BOWDON. Chairman Pombo, Congressman Rahall, distinguished members of this Committee, thank you for the opportunity to come here today and express concerns about the problems of encroachment.

My responsibilities as base commander at Marine Corps Base, Camp Pendleton, are to provide the best training opportunities

possible for Marines and Marine units. We cannot be too well trained. We strive for training that emulates the way we think that we will fight. We schedule over 45,000 training activities a year at Camp Pendleton's 125,000 acres, which is home to the 1st Marine Expeditionary Force and 18 endangered species.

Encroachment is degrading our ability to provide realistic training. Training is burdened with regulatory restrictions. Artificialities in our training result from avoidance measures and work-arounds being forced upon the operators by various environmental regulations. Our anecdotal experiences have been quantified.

We have completed an 18-month quantification study. Over 700 required military occupational specialty and unit tasks were assessed. Realistic tactical training can only be completed to 68 percent of standard. Training most inhibited includes off-road vehicular activity, digging, and earth moving. The primary encroachment factors inhibiting training and restrictions are from the Endangered Species Act.

Yes, we are training, but the current work-arounds are problematic and the situation is only getting worse. Depletion of regional habitat continues. The regulators exclusions for critical habitat listings are being challenged in court. There is a clear trend toward regulation by litigation by special interest groups.

We have a good stewardship record at Camp Pendleton. Our training footprint over the last 60 years of operations is light and complementary to good land stewardship. That record will continue to be maintained. If no action is taken, more training will be crowded off the base.

We need your help. Your support is requested for DOD's readiness and range preservation initiative, specifically, the critical habitat preclusion based on our Integrated Natural Resource Management Plan.

In conclusion, we realize that urbanization will continue. We also realize that military training must not continue to be the bill payer for that. What do I need for your to do? First, we do not seek sweeping exemptions from the Endangered Species Act. We firmly believe that we can conduct realistic training and maintain our stewardship success through implementation of our Integrated Natural Resource Management Plan. These two missions are not exclusive of each other, but a balance is currently lacking. We need your legislative clarification, we need your legislative recognition and protection for our mission requirements at Camp Pendleton, such as are provided by the RRPI.

This is a national issue, with shared responsibilities to find solutions. Given those solutions, I can return to my base and effectively balance my responsibilities.

Again, the Marine Corps thanks you for your recognition of this important issue. I look forward to your questions.

[The prepared statement of General Bowdon follows:]

Statement of Major General William G. Bowdon III, Commanding General, Marine Corps Base Camp Pendleton, United States Marine Corps

Chairman Pombo, Congressman Rahall, and distinguished members of the Committee, thank you for the invitation to report on the effect encroachment is having on Camp Pendleton's ability to support the training and readiness requirements of Marines and units operating on and deploying from this vital Marine Corps training

installation. On behalf of the Marine Corps, I want to thank the Committee for its interest and support. Your attention reveals both a commitment to ensuring the common defense and a genuine concern for the welfare of our Marines and their families.

BACKGROUND

By way of background, Marine Corps Base, Camp Pendleton is the Marine Corps' only training installation on the West Coast for amphibious operations—operations that involve the projection of U.S. force from the sea, which is a principle mission of the Corps. Camp Pendleton is the home of the 1st Marine Expeditionary Force (MEF), which as you know is heavily engaged in Operation Iraqi Freedom. Major subordinate commands of the MEF, the 1st Marine Division, the 1st Force Service Support Group, and elements of the 3rd Marine Aircraft Wing are also based at and train on Camp Pendleton. Elements of the MEF, Marine Expeditionary Units (MEU) are continuously deployed year-round, in support of operations and contingencies in the western Pacific and southwest Asia.

Camp Pendleton's mission is to provide ranges, training lands, and facilities on which Marines can train to achieve the highest possible state of combat readiness. Mr. Chairman, I cannot state strongly enough that the ability of our Marines to achieve their mission and survive in combat depends directly and completely upon the quality of leadership and training they receive. If we cannot provide our Marines, who train on and deploy from Camp Pendleton, with the ability to train as they will be expected to fight in combat, then we (the Marine Corps) will not have met our obligation, either to the Nation or to the Marines that put their lives on the line when called to do so.

Within the past decade, the ability of Camp Pendleton to provide the realistic training environment necessary to prepare Marines for combat has eroded significantly. The factors that cause this degradation of mission capability are termed encroachment by the Department of Defense (DoD). Encroachments present an immediate, serious challenge to the capability of the Base to perform its military mission. Today, the encroachment factors with the potential to impede military training include urban growth, competing land uses, endangered species, cultural resources, and wetlands regulation, airspace restrictions, airborne noise, and air quality.

While we face all of these encroachment factors at Camp Pendleton, endangered species issues are among our most pressing concerns. Camp Pendleton is rich in natural resources and biodiversity, including 18 species listed as threatened or endangered, which have coexisted with our military training and operations for some 60 years now. Still, as the biodiversity of the region surrounding the Base has been steadily depleted by development, the value and regulation of Camp Pendleton's resources have increased. Predictably, restrictions on the military training and operations that occur and need to occur on the Base have increased correspondingly.

As you are aware, just over two years ago on March 20, 2001, congressional dialogue on encroachment impacts was opened by the Senate Armed Services Committee's Subcommittee on Military Readiness and Management Support. Well before 9/11, the Senate, and other congressional committees (such as the House Government Reform Committee and House Armed Services Committee) invited the Marine Corps to provide testimony on the subject of encroachment and its effect on our Title 10-mandated national security missions.

In past hearings, the Marine Corps reported on the impacts of encroachment by providing examples, primarily anecdotal, based on the experience of our trainers. We raised concerns with regard to an erosion of Camp Pendleton's capability to provide realistic combat training for Marines and other services that train on our installation and ranges. Simply stated, the Marines who train at Camp Pendleton and the leadership of the Base, we who are responsible for providing the best possible training environment, have observed that encroachments in fact have degraded and continue to degrade the Base's capability to provide for realistic combat training.

Our commanders have reported that their tactical decisions increasingly are being driven more by restrictions and prescriptions to avoid impacts to protected resources than by the application of sound military doctrine. On a broader scale, the primary determinant for Camp Pendleton's land use has been undergoing a fundamental and disturbing transition—from a Title 10-based, military driver with a responsibility for conservation, to a conservation-based driver within a military context. Marine commanders and small unit leaders should be taught to develop sound tactical schemes of maneuver based upon the mission, the enemy situation and disposition, the terrain, and sound tactics. Yet in the context of training at Camp Pendleton, they are required to plan their training scenarios to avoid protected species and resources and seek permissions and clearances to execute very rigid and tightly or-

chestrated events. This situation not only significantly diminishes the training value of the exercise but also can instill undesirable habits in our Marines.

QUANTIFYING ENCROACHMENT IMPACTS

To verify the operator's anecdotal experience, Marine Corp Base, Camp Pendleton has been engaged in an effort to develop a methodology and a mechanism that would help us to identify and quantify the encroachment factors that impact the Base's ability to train Marines.

A contracted study, just completed, conducted an assessment of 739 training tasks, as established by Marine Corps Orders, and concluded that encroachment has a measurable negative impact on field training at Camp Pendleton. The data indicated that all field training assessed at Camp Pendleton is affected to some degree by encroachment with ground training tasks being impacted the most. Realistic training is significantly degraded within prime maneuver corridors, training areas, and on the training beaches at Camp Pendleton due to encroachments. For 75 percent of the entities assessed within the context of a notional tactical scenario, the Base could support completion of required tasks to less than 85 percent of the established standard. For 37 percent of the entities assessed within the same scenario, the subject matter experts reported that Camp Pendleton could support the completion of required tasks to less than 70 percent of the established standard. The study determined that a Battalion Landing Team, which is the combat power of a MEU, could complete its required non-firing tasks to less than 68 percent of the Marine Corps standard in a notional tactical scenario. It is precisely the type of training that is required to prepare Marine Corps MAGTFs for deployment and combat that also is most affected by encroachments at Camp Pendleton.

As Figure 1 (A–1) reflects, the effects of encroachment on training increase according to the relative complexity and size of the training event. In general, when tactics are factored into the assessment, the larger the unit involved and the more advanced the task the more significant and adverse the impacts of encroachment on the task completion percentage. In the same vein, the study concluded that the more complex and integrated combat training, involving multiple combat elements, maneuver, and tactical operations, generally is more restricted by encroachment than intermediate unit level training. Intermediate unit training, in turn, generally is more restricted than individual training.

The quantification study confirms that the types of training most inhibited by encroachment include digging, earth-moving activities, and off-road vehicular movement. Limitations on digging have implications far beyond the simple foxhole or fighting position, as important as that is. If individual digging is highly restricted, or regulated, then imagine the difficulty of preparing company or battalion defensive positions. Earthmoving activities to construct emplacements for vehicle or weapons systems, such as artillery pieces, and vehicle recovery operations cannot be accomplished on any significant operational scale. In this case we find the data being reinforced by anecdote, by our operators' real world experiences.

In testimony in May of last year before the House Government Reform Committee, the Commanding Officer of the 15th MEU, who had just returned from Operation Enduring Freedom, Afghanistan, stated that "...The establishment of the security and defensive posture at this position was, in reality, the first time the Marines were able to actually dig and construct appropriate fighting positions required for protection." He added that "...This technique, which should be second nature to Marines in a combat theater, is rarely used in training due to environmental restrictions."

Our quantification effort also has revealed that regulatory restrictions to limit impacts or potential impacts to protected natural and cultural resources constitute over 70% of the primary encroachment factors affecting Camp Pendleton's capability to accommodate essential military training. Compliance with the Endangered Species Act is the leading encroachment factor impacting military training and operations at Camp Pendleton. Despite declarations to the contrary by some groups, our quantification analysis indicates that physical obstacles, such as Interstate 5 and the nuclear power generation plant, both of which have been in place for decades, are not the leading encroachment factors confronted by our forces as they train aboard Camp Pendleton. Our operators insist that the most significant degradation of their training has occurred over the last 10 to 15 years, coincidental with unfettered urbanization and the associated depletion of biodiversity and habitat fragmentation, and the resultant increase in numbers and regulation of endangered species and resources. Unlike infrastructure, which is fixed in time and space, most endangered species move, they often multiply when effectively managed, and additional species become listed as a result of factors over which the Marine Corps has little or no control.

Allow me to provide another real world experience that reinforces this finding. Recently, Marines of the 1st Marine Division approached my staff with a real-world operational requirement to conduct vehicle recovery operations in our Base's lake and ponds and in one of our most highly protected areas, the Santa Margarita River (SMR) estuary. The estuary training was most important to our Marines because it is the largest and only estuary with significant tidal action. There the crews would be subject to changing conditions associated with tidal flows, they could be trained to recognize the optimal crossing points that would support tracked vehicle operations with reduced risk of becoming mired, and to conduct recovery operations while maintaining the momentum of the advance. The estuary also is a prime nesting and management area for endangered California least terns and western snowy plovers; it also is considered essential fish habitat and is designated as critical habitat for the tidewater goby. The unit's request was initiated during the non-nesting period for the least terns and snowy plovers. From the time the request was received, it took two months, and a commitment to implement required avoidance measures, to process the request and receive regulatory clearances for our Marines to conduct their training in the lake and ponds. The process required four months, however, to accomplish the required surveys, prepare necessary documentation, conduct the consultation, and receive regulatory clearances for training in the SMR estuary. Thus, even with all parties providing expedited, priority handling of this operational requirement, the ultimate result was that recovery operations were limited to the lake, as the unit was mobilized and deployed to combat prior to being able to train in the estuary. This is not acceptable.

For years these units have been required to train for vehicle recovery operations by use of a single ditch, specifically established for such operations. One vehicle, one at a time, could pull into the ditch, get stuck and be pulled from the mire. In no conceivable way can this "canned" process be construed to prepare a Marine in vehicle recovery operations for a real-world theater situation. This limited level of training does not begin to replicate the dynamics of vehicle recovery operations while under fire or pressure to maintain the advance, the integrity of an assault and, ultimately, the capture of an objective.

The tragedy of this situation is that for many years Camp Pendleton Marines have accepted that they could not conduct these required operations on the Base—either individually or as a unit—within a tactical scenario. Hence, a critical skill set was allowed to atrophy. A related aspect of great concern, highlighted both by these incidents and by the quantification study, is not to be missed. That lesson is that these deficiencies are then carried over to and absorbed by the major commands to which the Marines are joined and with which they deploy for combat.

This is not to suggest that we can anticipate or should expect the opportunity to rehearse every potential complex, combat evolution. However, what we have learned over the past decade, now reinforced by our recent quantification study, is that we require key areas of Camp Pendleton to be capable of providing an optimal combat training environment. Unit commanders and small unit leaders must be able and, indeed, required to exercise and hone their tactical decision-making skills within the context of scenarios that allow for free play and require instantaneous and correct decision-making.

Restrictions on Camp Pendleton's amphibious landing beaches are well documented in the congressional records, so I will not restate them here except to note that amphibious assaults, raids, and withdrawals are core missions of our Marine Expeditionary Units, Special Operations Capable (MEUSOC's). In addition, the Navy and Marine Corps strategy of From-the–Sea and Over-the–Shore Projection of Force and Sustainment operations requires that we have beaches where realistic amphibious operations can be conducted. Our Marines must have some beach areas available where they can recreate conditions that they expect to encounter in the execution of their global contingencies. In that regard we continue to work closely with our regulatory agencies to reduce those restrictions related to protected resources on our primary training beaches and other areas of the Base to provide more open and realistic use of these crucial training areas.

We are concerned, however, that, in today's climate of regulation-by-litigation, certain laws may not support efforts to accommodate military training and mission requirements in regulatory determinations and opinions. Thus, we view the Department of Defense's Readiness and Range Preservation Initiative as pivotal in the effort to halt the steady erosion of the capability of our installations and ranges to provide realistic training experiences for present and future Marines, units and weapons systems.

READINESS AND RANGE PRESERVATION INITIATIVE

Migratory Bird Treaty Act

The provision enacted by Congress last year, as a result of DoD's Initiative, allows some take of migratory birds, incidental to military training, while requiring that such take be minimized. To operators in the field this provision provides significant benefit as our training activities were previously subject to potential litigation and injunction. Be assured that Camp Pendleton will, through its Integrated Natural Resource Management Plan process, continue to identify measures to monitor, minimize and mitigate—to the extent practicable—adverse impacts to migratory birds that may be attributable to our military readiness activities.

Buffer Acquisition

Through last year's Defense Authorization Bill, Congress granted the authority to military departments to partner with non-governmental organizations, and State and local governments to acquire land adjacent or proximate to military installations to prevent incompatible development, and to preserve habitat that may eliminate or relieve current or anticipated environmental restrictions that could interfere with military training, testing or operations. Already, Camp Pendleton has initiated a partnership effort, the South Coast Conservation Forum (SCCF), to investigate opportunities to acquire interest in lands that could assist in the conservation of many of the Federally protected species in the region. Participating in the SCCF are representatives of Orange, Riverside and San Diego Counties, and non-governmental conservation organizations such as The Nature Conservancy, Trust for Public Land, Sierra Club and Endangered Habitats League. Though driven by differing concerns and motivations, this group is quickly finding common purpose for acquiring lands available from willing sellers to support compatible land use and help achieve both encroachment relief and resource conservation objectives.

Critical habitat

Marine Corps concerns about the potential impacts of critical habitat on training at Camp Pendleton often have been described to the Congress, the U.S. Fish and Wildlife Service (Service) and the public. In February 2000, the Service proposed to designate nearly one-half of Camp Pendleton, including all or part of 26 training areas, as critical habitat for the coastal California gnatcatcher. Subsequent, geographically overlapping proposals for several additional species expanded the potential designation of critical habitat to include 57 percent of Camp Pendleton's 125,000 acres, Figure 2 (A–2). In response, the Marine Corps provided detailed comments voicing serious concerns about the impacts of these proposals on training at Camp Pendleton. In his letter forwarding these comments to the Director of the Service, the Commandant of the Marine Corps stated: "Increasingly, limitations on our land use flexibility present a major readiness issue. At stake is the success and survival of our Nation's Marines and Sailors in combat. The proposed critical habitat squarely implicates these urgent military readiness concerns." (Commandant of the Marine Corps, Letter to Director, U.S. Fish and Wildlife, April 6, 2000.)

In October 2000, after extensive inter-agency dialogue, both Camp Pendleton and MCAS Miramar were excluded from the final gnatcatcher critical habitat rule, on the basis of Integrated Natural Resources Management Plans (INRMPs) and the finding that for Camp Pendleton the benefits of exclusion outweighed the benefits of designation under ESA Section 4(b)(2). Subsequently, the Service applied these approaches to exclude military lands in critical habitat proposals for additional species on Camp Pendleton and MCAS Miramar, and to other military lands, including Vandenburg Air Force Base, Camp Parks and Camp San Luis Obispo, California.

The Natural Resources Defense Council (NRDC) immediately sued the Service alleging that the exclusion of Marine Corps lands from critical habitat violated the ESA. These contentions have not been resolved, but have been preserved after the Service petitioned to withdraw and re-examine the gnatcatcher critical habitat rule. As directed by the court, the Service has re-proposed critical habitat for the gnatcatcher and the San Diego fairy shrimp within this past week. The Service has broadly excluded Camp Pendleton from both proposals; approximately 7700 acres are currently proposed as critical habitat for the gnatcatcher and 850 acres of Base lands are proposed for the San Diego fairy shrimp. Similar to such exclusions previously applied to Camp Pendleton, the Service has indicated its understanding of the potential adverse impacts to military training and that those impacts outweigh the potential benefit to the species provided by designation of critical habitat for these species. While we recognize and appreciate the Service's efforts to consider the relevant impacts to our military mission, we have every expectation that, should the final rules for these species also exclude significant portions of Camp Pendleton,

there will be a renewal of litigation challenging those exclusions. Thus, the potential remains that 57% of Camp Pendleton lands could be designated as critical habitat, pending court determinations or a legislative remedy. In the meantime, developing case law has had much to say about critical habitat, with a Federal district court opinion holding that the Service's policy on critical habitat designation is unlawful.

Designation of military lands as critical habitat presents a complex public policy problem in sharp focus. The Service has thoughtfully attempted to address this problem through regulatory critical habitat exclusions. These efforts, however, repeatedly have been challenged, and undoubtedly will continue to be challenged, in litigation that disregards military readiness concerns. Having exhausted efforts at administrative and negotiated approaches to solutions, the Marine Corps looks to Congress for guidance. We believe that legislative exclusion of military lands from critical habitat rules is both appropriate and necessary, and is the only solution that will provide the certainty and flexibility we need to train effectively. The critical habitat provision of DoD's Readiness and Range Preservation Initiative proposal, which would exclude military installations and ranges with approved INRMP's in place from designation of such lands as critical habitat, would provide measured and much needed relief from related encumbrances on our military mission activities.

Findings

Among the most important aspects of DoD's RRPI for Camp Pendleton, and as Chairman of the West Coast Regional Review Board I speak for all Marine Corps installation commanders in the Southwest, are the findings that provide congressional recognition of the fundamental purpose for the existence of our installations and ranges. We consider codification of these findings to be absolutely essential to address core encroachment issues by affirming the principle that our military installations, ranges, and airspace exist to ensure military preparedness. Such language is necessary to establish the basis, the balance point, for inclusion of national security requirements in regulatory determinations. Although the basic principle that military lands exist for military purposes, as articulated by the RRPI's findings, would seem self-evident, we find that is generally not the case.

That said, we do not understand the RRPI to be seeking sweeping exemptions from our Nation's environmental laws. We see this initiative to be narrowly focused on a few important resource-related laws and only as they may relate to or unacceptably inhibit our military readiness capabilities that are required by Title 10, U.S.C. The RRPI does not lessen to any degree my responsibility to fully comply with laws that protect both the health and safety of the citizens of our neighboring communities and our natural resources. Camp Pendleton's record clearly reflects our commitment to compliance and responsible stewardship of this national treasure entrusted to our care. I can assure you that Camp Pendleton is committed to continue to advance both compliance and responsible management of our resources to support the sustainable use of our ranges.

STEWARDSHIP

In that regard, Camp Pendleton has a proven record of diligent and responsible stewardship of the environment, including the natural resources entrusted to our care. We remain committed to managing all of our resources, including listed species, in compliance with applicable law. Over the years, our military training has proven to be compatible with healthy ecosystems, and our stewardship both enhances that compatibility and provides assurance of sustainable use. A fundamental principal of our land use and management has been, and will remain, retention of the large, contiguous open spaces necessary for realistic training.

At Camp Pendleton, previous Base commanders and I have restricted infrastructure development to less than 15% of the Base. When additional facilities have been required, our preferred approach has been to refurbish or replace outdated facilities, or to build within existing developed areas. This disciplined land management, coupled with the fact that military training is a relatively low-impact land use (David S. Wilcove, et.al., Quantifying Threats to Imperiled Species in the United States, 48 Bioscience 607, (August 1998)), has resulted in the continuing presence of large tracts of natural habitat beneficial to the wildlife that occupies our lands. In marked contrast to the typical development practices found in other parts of the region, Camp Pendleton's experience is that species, both Federally listed and not listed, coexist with our operations and flourish under our management.

In October of 2001, Camp Pendleton published and began implementation of our Integrated Natural Resources Management Plan (INRMP). The import of the INRMP is that it addresses ecosystem requirements holistically, considering the human element (military mission) as an integral part of the ecosystem, and integrates our resource management with our mission essential training and operations.

Indeed, the Sikes Act Improvement Amendment (SAIA) requires that INRMP implementation support mission and not constitute a "net loss" in the capability of the installation to support mission requirements. So as land is managed to provide long term, renewal of resources, both the mission and species (listed and unlisted) benefit. It is important to note that implementation of INRMP's is complementary to the Endangered Species Act (ESA) and does nothing to diminish the requirement to comply with the ESA. In fact, Camp Pendleton's INRMP is structured to include all regulatory agreements and requirements established through consultation under the ESA, thereby providing heightened visibility for those commitments.

Over the past five years the Marine Corps has invested, on average, approximately $32 million per year in Camp Pendleton's environmental program. Generally, over $4 million per year has been applied to support our natural and cultural resources programs, with an average of $1.7 million applied directly to threatened and endangered species related requirements. The species depicted in Figure 3 (A–3) represent indicator species for the primary ecosystems that comprise Camp Pendleton—riparian, beaches, and uplands. The least Bell's vireo (riparian species), least tern (beach species) and coastal California gnatcatcher (uplands species) have enjoyed significant success under Base management. The Fish and Wildlife Service has established conservation goals, for some of the listed species we manage, in recovery plans and in the course of consultations under ESA. For the least Bell's vireo, the Base's goal of 300 breeding pairs was established in 1995. Today, we have exceeded that goal by 150%, with over 750 pairs of this species, even considering the significant drought conditions of the past three years. Similarly, for the least tern, the Service's 1980 recovery plan established the recovery objective for the entire species at 1200 pairs distributed in 20 areas over its entire range. Today, Camp Pendleton alone supports 1000 pairs of least terns.

As the populations of listed species increase on Base and as more species that use our habitats become listed, associated restrictions have and will continue to blanket our training lands with increasing limitations on our ability to support mission-essential training requirements. The presence of multiple listed species on Camp Pendleton and required avoidance and minimization measures impose significant constraints on where we train, when we train, and how we train. Hence our dilemma and the reason for my testimony before you today—the costs of endangered species compliance and our resource management programs transcend mere dollars. As our quantification assessment concludes, the true bill-payer is realistic combat training—and for Camp Pendleton, that has become a source of grave concern.

CONCLUSION

Camp Pendleton is the Marine Corps' only amphibious training base for the west coast, and the only west coast installation capable of supporting combined and comprehensive air, sea and ground combat training. Moreover, its proximity to the Navy's homeport at San Diego is strategically significant in supporting mobilizations and deployments to and contingencies for the western Pacific and Southwest Asia. The Base is a cornerstone of the Marine Corps' training range complex in the southwestern United States, which includes the Marine Corps Air Ground Combat Center in 29 Palms, the Barry M. Goldwater range near MCAS Yuma, Arizona, and the Chocolate Mountains range in the southeastern corner of California. Each installation plays an integral role in the training of Marines and MAGTFs for combat operations. Many of these ranges also are utilized by Marine units from Camp Pendleton to accomplish specific training requirements and as "workarounds" necessary to obtain required training that cannot be satisfactorily completed at Camp Pendleton. Workarounds are not a satisfactory solution. Since these events then must be accomplished in a segmented fashion that is isolated in time, space, and context, much of the tactical decision-making, timing, and training value is lost. Workarounds are insidious in nature, in that they provide the illusion that the training has been accomplished.

While encroachment concerns presently are acute at Camp Pendleton, the Marine Corps also is concerned about encroachments at all installations and ranges in the region. As training opportunities become more encumbered with restrictions or are lost altogether and as encroachment pressures continue to mount—locally, regionally, nationally, and overseas—threats to readiness from the loss of range capabilities are an immediate and serious concern.

Solutions are necessary. A 1992 study of military training in the context of environmental regulation concluded that potential conflicts present "an unusually profound public policy problem." ("Two Shades of Green: Environmental Protection and Combat Training" (Rand 1992).) At Camp Pendleton, we face this profound problem every day. Conflicts or potential conflicts between realistic training and environmental rules, the challenges presented by urban growth, and other competition for

scarce land, sea and airspace training resources must be resolved in a way that does not further degrade training.

Again, I thank you for the opportunity to present the Marine Corps' concerns though the eyes of one of its installation commanders. I trust that this testimony will be helpful to your distinguished Committee. Let me assure you that we at Camp Pendleton will continue to be a responsible, effective steward of our environment and our natural resources. We also will continue our efforts to identify and quantify the effects of encroachments on our Federally mandated missions. With your assistance and support of DoD's Readiness and Range Preservation Initiative, I am confident that we can achieve and maintain the appropriate balance between military readiness and competing demands for scarce resources. This we must do to ensure that your Marines and their units will be trained and ready to deploy at the highest possible readiness when called by our Nation to do so.

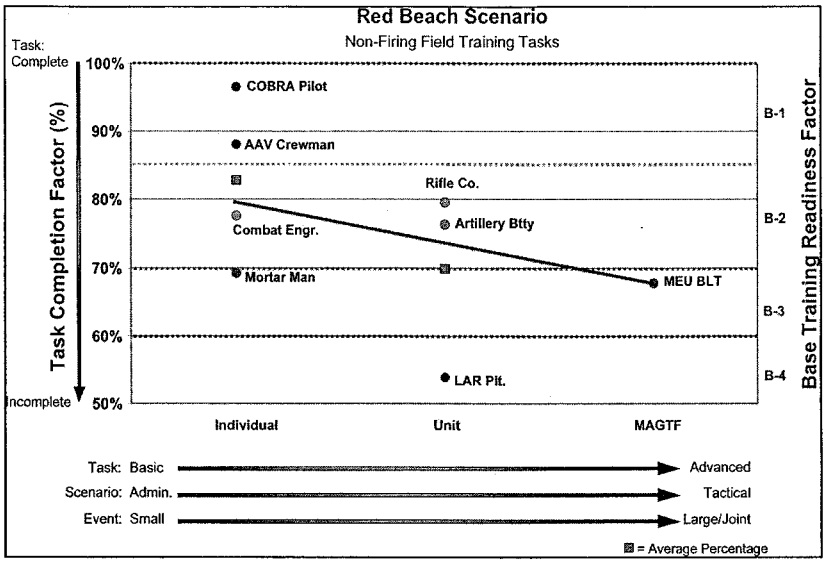
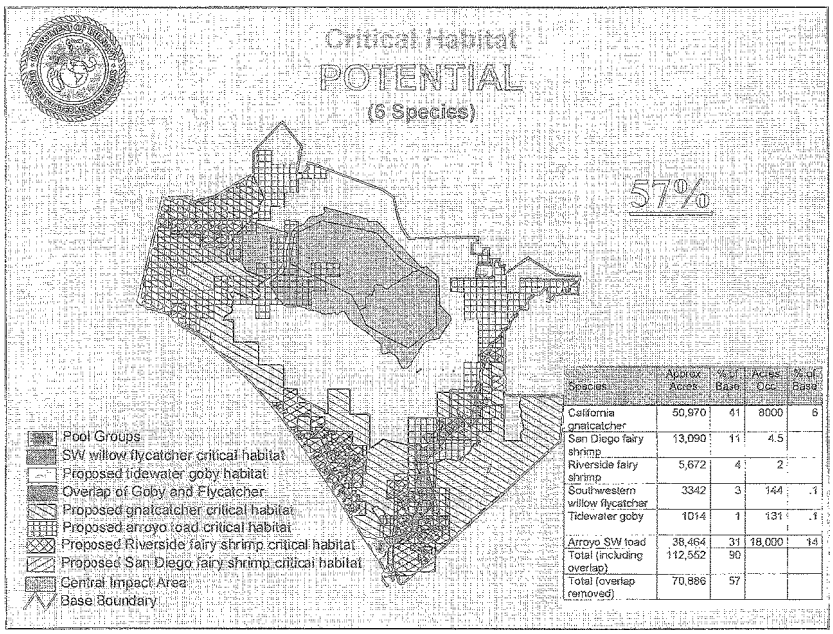


Figure 1. In-Scenario: Tactical Task Completion



Species	Approx Acres	% of Base	Acres Occ	% of Base
California gnatcatcher	50,970	41	8000	6
San Diego fairy shrimp	13,090	11	4.5	
Riverside fairy shrimp	5,672	4	2	
Southwestern willow flycatcher	3342	3	144	.1
Tidewater goby	1014	1	131	.1
Arroyo SW toad	38,464	31	18,000	14
Total (including overlap)	112,552	90		
Total (overlap removed)	70,886	57		

Figure 2. Potential Critical Habitat (proposedCY'01)

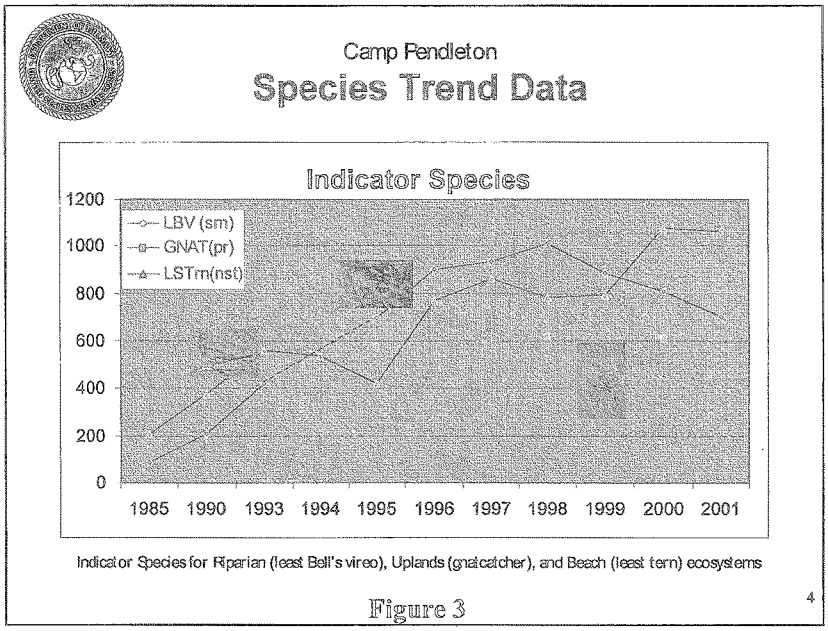


Figure 3

The CHAIRMAN. Thank you.

Our next witness is Colonel Frank C. DiGiovanni.

STATEMENT OF COLONEL FRANK C. DiGIOVANNI, U.S. AIR FORCE, CHIEF, RANGES, AIRFIELDS AND AIRSPACE, OPERATION AND REQUIREMENTS DIVISION, AIR COMBAT COMMAND

Colonel DIGIOVANNI. Mr. Chairman, distinguished members of this Committee, thank you for the opportunity to speak to you on this very important issue.

I would like to start off by giving you a bit of my background. I have 2,000 hours in the B-52H, the F-15A, and the A-37, a close air support aircraft. I have 11 years of experience in the combat training range community. I commanded the 99th Range Support Squadron at Nellis Air Force Base, responsible for the management of 3.1 million acres of the Nevada Test and Training Range. I worked combat training range equipment requirements at the major command level, and also range policy at the Air Force level. I currently serve as the Chief of Ranges, Airfields and Airspace Operations and Requirements at Headquarters, Air Combat Command, Langley Air Force Base, where we are responsible for the management of nine combat training ranges on 4.5 million acres of land.

How will the Integrated Natural Resource Management Plan Provision of the Readiness Range Preservation Initiative help the Air Force conduct its readiness training? First let me say that we're constantly upgrading and reconfiguring our ranges. Let me give you a few examples.

Prior to Operation Enduring Freedom, we built new target sets on the Nevada Test and Training Range, and also on the Utah Test and Training Range, that resembled Taliban caves and their encampments. These unique target sets were used to prepare our aircrew members for combat operations just prior to their deployment to Afghanistan.

Another example, prior to Operation Enduring Freedom—I'm sorry, Iraqi Freedom—bomber and fighter aircrew members worked extensively to develop new ground-directed attack tactics against urban target sets and highly mobile Scud missile systems on the Nevada Test and Training Range.

The effectiveness of these tactics was graphically demonstrated when an Air Force B-1 dropped four joint directed attack munitions on a Baghdad restaurant suspected to be a Saddam Hussein hideout. From notification to bombs on target, a mere 15 minutes.

In these two examples, U.S. Fish and Wildlife Service approved INRMPs provided us the flexibility to rapidly respond to worldwide contingencies while protecting threatened and endangered species, through a carefully thought out planning process.

Continued access to these tremendous national training resources is essential to our airmen going into combat, with the unique confidence that they are the finest trained Air Force in the world. Our measure of success is simple: we want a lethal, combat survivable warfighter that will come home when the hostilities are over.

Thank you for the opportunity to speak to you today, sir.

[The prepared statement of Colonel DiGiovanni follows:]

Statement of Colonel Frank C. DiGiovanni, Chief, Ranges, Airfields and Airspace, Operations and Requirements Division, Air Combat Command

Introduction

Mr. Chairman, members of the Committee, I greatly appreciate the opportunity to address you today on the Readiness and Range Preservation Initiative (RRPI) and the potential benefits it offers to our ability to train if it were enacted into law.

I'd like to start off by giving you a bit of my background. I have over 2000 hours in the B–52H, the F–15A and A–37B (close air support) aircraft and have almost 11 years of experience in the range community. I commanded the 99th Range Support Squadron at Nellis Air Force Base which is responsible for the management of the 3.1 million acre Nevada Test and Training Range. I also worked combat training range equipment requirements at the major command level and range policy at the HQ Air Force level. I currently serve as the Chief of Ranges, Airfields and Airspace Operations and Requirements Division at Headquarters Air Combat Command (ACC).

Our ranges and training airspace are critical national assets that allow the Air Combat Command to develop new tactics and train our air forces to be lethal and survivable. At a time when increased OPSTEMPO, aging equipment, and personnel challenges are threatening our readiness, it is critical we have to the maximum extent possible, unencumbered use of these valuable resources to prepare our warfighters for combat operations.

The loss or restricted use of ranges and operating areas forces us to find workarounds or to delay and reschedule needed training. These constraints inhibit our ability to test and train realistically and degrade our combat readiness. As pressures due to encroachment continue to grow, managing the operational and financial risks without compromising our mission will become increasingly difficult.

The Air Combat Command, in partnership with our counterparts in the other Services and the community, is committed to addressing these challenges. We are confident in our ability to provide the necessary balance between operational needs, environmental protection and the needs of the community and RRPI will help us do that.

The Readiness and Range Preservation Initiative will provide changes to specific environmental statutes needed by the military services and protect access to our training resources while continuing to protect the environmental resources of the lands entrusted to us by the public.

Species and Habitat Protection

The critical habitat clarification of RRPI is a very important component of this initiative. We have over 25 Federal listed threatened and endangered species and 64 species of concern on approximately 4.5 million acres of ACC rangeland. My Division is composed of an interdisciplinary team of aviators, PhD biologists, civil engineers, a public affairs officer, airspace managers and an environmental attorney all charged with the objective of maximizing the use of the ranges we manage while protecting the priceless natural and cultural resources that we have on our ranges.. Additionally, ACC ranges employ nearly 50 full-time natural and cultural resource management personnel throughout the command who assist the headquarters with this charter. We also consult extensively with U.S. Fish and Wildlife Service (FWS) and the state game and fish agencies on the development and implementation of our Integrated Natural Resource Management Plans. We ensure that these plans incorporate the best available science and credentialed expertise to minimize the impacts of our training operations.

Through the use of Integrated Natural Resource Management Plans, in partnership with the Department of Interior, we have had great success in managing the lands entrusted to us by the public. For example, the Nevada Test and Training Range supports the Bureau of Land Management's wild horse program on 390,000 acres of the NTTR. In the southern portion of the range we have fenced target areas to ensure the endangered desert tortoise is not adversely affected by our operations. On the Barry M. Goldwater Range (BMGR) in Arizona, which is used extensively by ACC A–10 aircraft, Luke Air Force Base personnel assigned to the Air Education and Training Command track the movement of Sonoran pronghorn on the range. The DoD flies about 70,000 sorties yearly on the BMGR, and our biologists monitor the target areas for pronghorn movements. If any are spotted within a two-hour period prior to bombing, the live missions projected for that area are diverted or canceled. Working hand-in-hand with the U.S. Fish and Wildlife Service (FWS) and the Arizona Department of Game and Fish, we strive to ensure the survival of this endangered subspecies of Pronghorn.

We are constantly upgrading and reconfiguring our ranges. For example, just prior to OPERATION ENDURING FREEDOM, both the NTTR and the Utah Test and Training Range (UTTR) constructed simulated cave targets similar to those in use by the Taliban and Al Queda. These realistic target simulations were used to provide our warfighters with critical, mission rehearsal training, thereby improving their lethality in combat. These skills proved very valuable during our attacks on Taliban and Al Queda strongholds.

We would not have had the required flexibility to conduct this essential training on NTTR and UTTR if we had designated critical habitat for the desert tortoise or other species in and around the simulated cave targets. This is because the time required to prepare biological assessments and complete consultations with FWS would not have been sufficient given the quickness in which wartime operations were commenced after 9/11.

Given these examples, superimposing critical habitat designation on top of our integrated management plans does not appear to provide added benefit to T&E species. However, a critical habitat designation, would have an adverse impact on our ability to quickly adapt and reconfigure the training environment to respond to evolving real world combat situations.

Range Residue Removal

As a range manager, the clarifications proposed in the RRPI regarding military munitions are also critically important to me. Most of the weapons we drop on our ranges are training munitions, either wholly inert or with a spotting charge. We maintain our ranges by periodically clearing off all these items, demilitarizing them, then sending the metals off to steel mills for recycling or to permitted landfills.

The RRPI will mirror the existing Military Munitions Rule by clarifying that munitions used for their intended purpose—dropped on an operational range—will not be considered a hazardous waste under the Resource Conservation and Recovery Act (RCRA) nor a release under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This would allow us to manage our ranges safely, responsibly and cost effectively while protecting the environment and the public.

ACC has instituted a command-wide, range residue removal regime in which we invest approximately $4 M annually. This regime consists of a four-step process. First our explosive ordnance disposal experts and range operations and maintenance contractors clear the munitions and residue from the range target areas. Unexploded items are rendered safe and inert items are consolidated at a holding area on the range. Second, the munitions and residue are demilitarized by shearing or crushing with specialized equipment and then are certified free of energetic material. Next a "third party" explosive ordnance disposal expert validates the first certification. Fourth and finally, a government quality assurance inspector oversees the entire operation. In the five and half years since ACC instituted this program, we have had zero mishaps or environmental violations and have successfully removed an estimated 79 million pounds of residue from our ranges.

If these materials were considered hazardous waste then we would not be able to conduct these operations without cost-prohibitive permits and infrastructure. Securing these permits and building the infrastructure would not add any additional environmental protection.

RRPI does confirm that, in the rare instance, that any munitions or munitions constituents land or travel off-range, that they would be regulated under the Comprehensive Environmental Restoration, Compensation and Liability Act (CERCLA). If munitions-related-material moves off the range, it still must be addressed promptly under existing environmental laws. Moreover, if munitions cause an imminent and substantial endangerment on-range, EPA would retain authority to address it on range under CERCLA.

These clarifications would allow us to conduct realistic, cost effective training on our operational ranges yet continue to be good stewards of the lands entrusted to us.

Summary

Military training ranges are protected lands and vital national resources. Each range typically has small impact areas where munitions are employed, surrounded by large safety buffers where wildlife thrives in relatively undisturbed natural habitat. In fact, our ranges have been frequently described as "islands of biodiversity". By closely managing these areas, in cooperation with the FWS and the state game and fish agencies, we are ensuring that our training activities are compatible with the continued existence of these species.

Conclusion

The Readiness and Range Preservation Initiative will provide needed clarification to specific environmental statutes and protect access to our training resources while continuing to protect the environmental resources of the lands entrusted to us by the public.

As we speak, the men and women of Air Combat Command are risking their lives over southwest Asia as part of our nation's global war on terrorism. Coalition air forces successes are due in large measure to the high fidelity training enabled by access to these tremendous national resources. These assets ensure our national defense by allowing these brave airmen go into combat with the unique confidence that they are the finest trained Air Force in the world. This essential confidence exists because of a continuing commitment by the U.S. government and the people of this country to provide the very best training resources to our warfighters. We believe that the provisions of the Readiness and Range Preservation Initiative will help us to continue to provide our airmen the training environment needed to ensure their lethality and survivability when prosecuting our national military objectives in the future.

The CHAIRMAN. Thank you.

Our next witness is Rear Admiral Jeff Hathaway.

STATEMENT OF REAR ADMIRAL JEFFREY J. HATHAWAY, U.S. COAST GUARD, U.S. DEPARTMENT OF HOMELAND SECURITY

Admiral HATHAWAY. Thank you, Mr. Chairman. On behalf of the Coast Guard Commandant, Admiral Tom Collins, I thank you for this opportunity to appear before the Committee today.

Before I begin my brief statement, I will point out that, although I sit here today alongside my DOD uniform brethren, the Coast Guard is part of the new Department of Homeland Security.

The Endangered Species Act and the Marine Mammal Protection Act helped form the foundation for the Coast Guard activities supporting our strategic goal, protecting America's natural resources. The Coast Guard is a primary maritime enforcement agency for regulations related to both Acts. The applicable regulations require a delicate balance between day to day operations and full compliance with the Act.

Ironically, enforcement actions, which are of great benefit to marine mammals and other protected species, oftentimes place the Coast Guard units at greatest risk of violating the Acts. For example, Coast Guard units in New England enforce dynamic area management zones designed to protect northern right whales. To accomplish this, units must enter areas where right whales are certain to be found to ensure fishermen comply with regulations designed to reduce the probability of entanglements. Another example is when Coast Guard units in Florida enforce manatee speed zones and marine sanctuaries.

The Coast Guard has established specific guidelines and procedures to ensure our operations are currently conducted at minimal risk to protected species and their habitats. These include relocating training areas away from protected species habitats, training shipboard lookouts in marine mammal identification, and requiring Coast Guard vessels to reduce speed when marine mammals are present.

The proposed amendments impact another Coast Guard strategic goal, however, and that is national defense. As you are well aware, the Coast Guard defends the Nation as one of our five armed services, taking full advantage of its unique and relevant maritime

capabilities to support the national security strategy. Coast Guard units and personnel use Department of Defense facilities and ranges to maintain military readiness, and our concerns regarding the ability to maintain military readiness levels parallel those of the Department of Defense and some of the oral statements that you just heard from my DOD cohorts.

We in the Coast Guard have carefully reviewed the proposed amendments, specifically focusing on our strategic goals of protection of the natural resources and national defense. These amendments promote a balance, in our opinion, that ensures the Nation's military readiness is not compromised, while still providing adequate protection for marine mammals and endangered species. The Coast Guard requests that you support the proposed amendments.

Thank you.

[The prepared statement of Admiral Hathaway follows:]

Statement of Rear Admiral Jeffrey J. Hathaway, Director of Operations Policy, Department of Homeland Security, U.S. Coast Guard

Good afternoon, Mr. Chairman and distinguished members of the Committee. It is a pleasure to appear before you today to discuss H.R. 1835, which is still under review by the Administration. As you know the Administration has recently introduced its own Readiness and Range Preservation Initiative, which includes some similar provisions to H.R.1835.

Since one of the Coast Guard's five strategic goals is Protection of Natural Resources, we take very seriously the provisions of the Endangered Species Act and the Marine Mammal Protection Act. Not only does the Coast Guard develop operational guidance and procedures to ensure our compliance with the acts, we also enforce the regulations associated with these Acts in conjunction with National Oceanic and Atmospheric Administration (NOAA) Fisheries and the U.S. Fish and Wildlife Service.

Many of the Coast Guard's responsibilities require our units to conduct operations which have the potential to disrupt marine mammal and endangered species behavior patterns. The Coast Guard frequently operates in areas where marine mammals or endangered species are present. When so doing, the Endangered Species Act and the Marine Mammal Protection Act can come into play because the mere presence of our ships and aircraft have the potential to disrupt protected species behavior. Ironically, this includes Coast Guard activities undertaken to protect marine mammals, protected species and other living marine resources. Our efforts to enforce fisheries regulations, right whale approach regulations, Steller sea lion and sea turtle critical habitat areas, whale watching regulations, harbor porpoise pinger regulations, and manatee speed zones ensure a rich, diverse sustainable ocean environment that promotes survivability of protected species.

Beyond law enforcement duties, Coast Guard buoy tenders occasionally find seals and sea lions hauled out on navigational aids (buoys) that must be serviced or replaced. By servicing navigational aids, we protect marine mammal and endangered species habitats from the impact of potential ship groundings and collisions. However, we also thereby raise the specter of operating in violation of the Acts. In addition, responding to non-emergent Search and Rescue and oils spills place our assets in potential conflict with both Acts.

To ensure that we comply with both the Marine Mammal Protection Act and the Endangered Species Act while engaged in our day-to-day operations, we have established specific guidelines and procedures to ensure our operations mitigate risks to protected species and their habitats. Examples include relocating training operations away from protected species habitats, conducting operations such as engine trials during non-intrusive times of the year, training shipboard lookouts in marine mammal identification, and operating ships at reduced speeds when marine mammals are present. Nonetheless, except for emergency search and rescue operations, none of our operations, including those that ensure military readiness and those that benefit marine mammal and endangered species populations are exempt from the Endangered Species Act and some may not be covered by the provisions under which taking may be authorized under the Marine Mammal Protection Act.

Our day-to-day operations in the marine environment place us in situations where we are often the first or best responders to deal with efforts to assist protected

species that may be in distress. In the specific instances when the Coast Guard is responding to a protected animal in distress, we either have received permits or have been added to NOAA Fisheries permits to ensure our compliance with the Acts.

However, the Coast Guard's pursuit of an incidental take authorization, at least with respect to its operations that could result in the lethal taking of northern right whales in the North Atlantic, has been unsuccessful. This is because the National Marine Fisheries Service has determined that any incidental mortality of this species cannot be considered to be negligible for purposes of the Marine Mammal Protection Act and likely would jeopardize the survival and recovery of the species in violation of section 7 of the Endangered Species Act. In addition, the permit process is geared for approval of specific activities that can be identified and assessed well in advance. Often Coast Guard operations require on the spot decisions—requesting individual incidental take permits is simply not feasible.

Since the Coast Guard is a multi-mission service, most Coast Guard activities would not fall under the military readiness exemption of the amendment. However, there are activities where the Coast Guard shares similar interests and military readiness concerns with the Department of Defense. National Defense and Homeland Security are two of our service's statutorily tasked missions. Coast Guard assets use Coast Guard and Department of Defense facilities and weapons ranges vital to our ability to maintain our readiness.

The Coast Guard understands the need for all Federal agencies to minimize their impact on marine mammals and protected species and notes that this proposed amendment does not exempt our military partners or us from this responsibility. Therefore, the Coast Guard supports the proposed amendments goals of maintaining military readiness while carefully balancing environmental needs. This critical balance will ensure that neither our environment nor the nation's military readiness will be compromised.

Thank you for the opportunity to testify before you today. I will be happy to answer any questions you may have.

The CHAIRMAN. Thank you. I thank all of the panel for their testimony.

I would like to start, if I may, with Major General Bowdon. We have had an opportunity over the past several years to look at some of the things that are going on right now at Camp Pendleton. Your testimony details how the proposed critical habitat designation for the 18 endangered species will affect training.

How much of the land area of Camp Pendleton was proposed as critical habitat? I understand you do have a visual presentation on that, is that correct?

General BOWDON. That is correct, Mr. Chairman.

The CHAIRMAN. If you could share that with the Committee. The question has arisen that there is no evidence that currently ESA or the Marine Mammal Protection Act has any impact in the failure of DOD to show that it has any impact. If you would share that with us.

General BOWDON. I would be happy to, Mr. Chairman.

[Slide presentation.]

The first slide that you see in front of you is Camp Pendleton's 125,000 acres, 200 square miles. We are bordered by San Clemente, Fallbrook and Oceanside. The red hatched area there is the impact area that we use for training. The black hatched area is a dud area behind some rifle ranges. It is wide open space. We occupy about 12,000 of the 125,000 acres in cantonment and family housing areas.

Next slide, please.

This is the way that we would like to use the base to train and to maneuver, to train our Marines, sons and daughters of America,

so that they are well-trained as they go forward into what is known as forward presence and combat operations.

Next slide, please.

The nonmilitary land use at Camp Pendleton is really not an issue. We have some areas that are a State park, which is depicted there by the yellow, the San Onofre State Park. There is also the San Onofre nuclear generating station there. We have I-5, we have gas lines, rail lines, power lines, and then the green areas are also some areas where there is some agricultural activity that goes on there.

All of those areas are, of course, man made and we can control those to some degree, in terms of diminishing them or letting them expand. We have control over those.

Next slide, please.

This depicts 28,000 acres that is basically the base-line that we have today of endangered species. We are the only activity in Southern California that knows where all of our endangered species are, and we are counting them and watching to make sure that they prosper on our reservation. They have been quantified and that is essentially what it looks like. What you start to see there, of course, is encroachment upon the areas that we would like to be maneuvering and training in.

Next slide.

This slide depicts what could happen if we do not clarify the law and if we do not give some primacy to the military mission on DOD lands. This would, of course, be worst case, worst case being that we lose 57 percent of the base, some 70,000 acres, to critical habitat, which is exactly what some special interest groups would like to see happen. If that happens, my training mission would be severely inhibited.

Thank you for that question, sir.

[End of slide presentation.]

The CHAIRMAN. What you have shared with the Committee are proposed critical habitat designations, in your term, a worst case scenario, for the base.

Are there recent court cases that make the worst case scenario more likely?

General BOWDON. Yes, sir. There is—The Mexican Spotted Owl case is one of those cases. There are cases in Federal court where we have lost the judgment to a special interest group.

The CHAIRMAN. Where you lost the case?

General BOWDON. Not the Marine Corps. The Forest Service.

The CHAIRMAN. Thank you.

Unfortunately, my time has expired. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

I'm just wondering if anybody on the panel can respond as far as the Administration's position goes on H.R. 1835, the bill introduced by Representative Gallegly.

Mr. COHEN. Sir, my name is Ben Cohen. I'm the Deputy General Counsel at DOD for Environment and Installations.

With respect to those elements of H.R. 1835 which deal with military readiness activities, we believe that the bill, with two relatively minor exceptions with respect to MMPA, provides the same

level of benefit to the Department of Defense as the Administration proposal.

With respect to those elements that don't deal with military readiness activities, we would defer to the Department of Interior.

Mr. RAHALL. So, if I heard that response correctly, in regard to those elements that go beyond and apply to all agencies, you are not necessarily endorsing it?

Mr. COHEN. Sir, as the Defense Department, we would need to defer to the Department of Interior on that issue, as it's within their jurisdiction.

Mr. RAHALL. The Administration had a draft of this bill before it was introduced. Did the members of this panel have a draft of it as well?

Mr. COHEN. Sir, yes, we did.

Mr. RAHALL. And you know it's scheduled for markup tomorrow?

Mr. COHEN. Yes, sir.

Mr. RAHALL. You know, it seems to me that what this panel—and I would appreciate any members comment on it—what this panel is requesting does not go as far as what the pending legislation would do, H.R. 1835. And while I am not endorsing what this panel is recommending, it would appear that it is more reasonable in comparison with—I stress in comparison with—H.R. 1835.

Would anybody wish to comment on that statement?

Mr. COHEN. Sir, it's correct that the Department of Defense did not propose some of the changes which are included in H.R. 1835, in that changes which we were proposing dealt only with military readiness activities, and the Committee has chosen to address other issues that are within the jurisdiction of this Committee and the Department of Interior.

Mr. RAHALL. Is it your understanding that, if H.R. 1835 were to pass, would it be effective retroactively or proactively?

Mr. COHEN. Sir, I think with respect to the military readiness provisions of the MMPA and ESA, it would be effective, principally, prospectively, on a going-forward basis.

Mr. RAHALL. From date of enactment?

Mr. COHEN. Yes, sir.

Mr. RAHALL. Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. I don't believe that our mikes are working right now.

[Proceedings suspended.]

The CHAIRMAN. It's working now.

I will recognize Mr. Gilchrest, the Chairman of the Subcommittee, for his questions.

Mr. GILCHREST. I thank the Chairman.

Gentlemen, I think there's no question that military facilities must train those soldiers and airmen and seamen to the best level absolutely possible. When I was in the Marine Corps almost 40 years ago, in the 1960's, we trained aggressively at LeJeune, at the infamous Vieques, Camp Pendleton, any one of a number of other places.

In those days, there was no ESA. In those days, there were no "smart bombs". When we got to Viet Nam, we knew what we were doing because of the training, and we were able to react under a

myriad of difficult circumstances. So, essentially, that needs to be done today.

Today we have "smart bombs", and we have ESA, and we've become a lot more sophisticated. I think what we must do is learn how to understand the relationship between living things and their environment and how we train young people to engage in combat and come home. I think we can do that.

I think the INRMP concept is one of those concepts that is essential, that can actually work, that you can set aside areas on these facilities where there will be habitat for the living resources, and you can set aside areas where there is going to be training, in the same way that we homes for humans, farms for humans, shopping plazas for humans, and we have areas around the country that we're losing that we need to expand that we have habitat for wildlife. So I think we're moving in a direction that we need to move in.

Mr. Chairman, I'm going to offer some amendments tomorrow that I think will refine some of the language in H.R. 1835 so that we can accommodate, in a much better fashion, all those things.

General Fil, you said we needed to balance ESA and military training. On page 2, lines 6 and 7 of 1835, it says by inserting after "threatened species" the following: "insofar as is practicable and consistent with their primary purposes". This deals with do we comply with ESA, or is it only complying with ESA when it's "practicable and consistent with their primary purpose."

Do you think that gives the right level of balance between military training and the Endangered Species Act, adding to the policies regarding the Federal departments and agencies section and so on of the Endangered Species Act by inserting, after "threatened species", the following, will preserve threatened and endangered species "insofar as is practicable and consistent with their primary purposes", which is training?

Is that a balance, in your judgment, to training and ESA?

General FIL. Sir, I must admit that I'm an Army officer and not an attorney, so I couldn't speak to whether that language is appropriate or not.

May I defer to Mr. Cohen, please.

Mr. GILCHREST. Yes.

Mr. COHEN. Thanks, General.

Sir, that was language that again was not actually requested by the Department of Defense. It goes to matters that are broader than national security issues and military readiness, so we defer on that to the Department of Interior.

Mr. GILCHREST. OK.

Admiral Moeller, a similar question—and maybe we're going to refer to DOD legal counsel here as well. In the bill, on page 4, lines 7 and 8, this generally is dealing with harassment of marine mammals. It is basically with level two harassment. It deals with "any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild..."

It goes on to say, "...surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered." That's the language in the bill.

The language from the Natural Research Council is "...to a point where such behavioral patterns are abandoned or a meaningful disruption of biological activities are significantly altered." Instead of just saying "significantly altered", the Natural Research Council has "a meaningful disruption of biological activities are significantly altered."

I know we're getting into some arcane language at this point, but I think those are two examples of what I would like to amend tomorrow, Mr. Chairman, which I think goes to the heart of what DOD needs to do and what we saw over here at Camp Pendleton. We can refine an understanding of the relationship between living things and their environment and how to protect that, with the concept of INRMP in mind, not that you're going to protect every square inch of this ocean or every square inch of this military base, but you set aside certain areas that you know you're going to preserve for critical habitat, but in those areas there's a more refined understanding of how to do that.

I realize my time is up. Thank you.

The CHAIRMAN. I thank the gentleman. He is a valued member of the Committee and I will work with him in terms of what his concerns are. As you are well aware, we have worked for several weeks struggling with these issues, so I will continue to work with him.

Mr. GILCHREST. Thank you.

The CHAIRMAN. Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman.

To the Deputy General Counsel, why is the national security exemption to environmental laws not sufficient to enable the military to carry out its mission? Has the Secretary of Defense ever sought an exemption under section 7(j) of the Endangered Species Act, or ever invoked his authority under Public Law 105-85, to suspend any administrative rule or regulation that would "have a significant adverse effect upon the military readiness of any of the armed forces?"

I know Donald Rumsfeld very well. He is not very bashful in using his authority. Has he ever used that authority to exempt the military from even ESA sections or the Marine Mammal Protection Act?

Mr. COHEN. Sir, the Defense Department has never invoked section 7(j) of the Endangered Species Act, and it has never used section 2014, the provision that you were referring to in title X, allowing for suspension for up to 5 days of administrative action.

To your broader question, why those exemptions or others in our environmental laws aren't sufficient to protect the national security, several of the relevant statutes, including the Migratory Bird Treaty Act, which Congress visited last year, and the Marine Mammal Protection Act, do not have any national security exemption, even for wartime.

The provision in section 2014, which is often cited as something that's cross-cutting and would enable us to effect the application of those statutes, would permit the Department of Defense to suspend for, at most, 5 days the action of another administrative agency. So, sir, a 5-day suspension of another agency's action would provide us with very little relief.

This is particularly the case since environmental regulators, Federal and State, have not been a principal source of problems for us. To take the SURTASS LFA case, for example, we received the administrative action that we requested from the Department of Commerce. They granted us a letter of authorization to take this critical system to sea. But we were then sued on that and enjoined. That section, 2014, doesn't apply to court action.

Finally, to answer your question about section 7(j) of the Endangered Species Act, and then, more broadly, the environmental laws more generally and our means of proceeding by exemption, section 7(j) comes as part of the process of the Endangered Species Committee. It is clearly designed to be site-specific and to deal with a particular set of activities.

The Department of Defense and successive administrations, historically have been extremely reluctant to invoke the Endangered Species Committee, for obvious reasons, and always sought to try to find ways to address these problems through regulation or by adjusting the statute, which is what we're doing now, rather than actually invoking the exemption.

This is a point that goes more broadly to the whole Defense Department package, sir. We don't want to be exempt from environmental laws. What we would like to do is adjust the environmental laws, the underlying statutory authorities themselves, in such a way that we can, at one and the same time, fulfill our national security mission and protect the environment, rather than invoking the hammer of section 7(j), which would sweep away all the protections of the Act.

Mr. KILDEE. Well, the hammer, you know, need not be brought down with full force with the exemption. The Secretary of Defense is given discretion within that exemption. We don't say you must use a sledge hammer. You're a lawyer and you know that, within an exemption, you can use it to a degree or use it fully. Mr. Rumsfeld is fully capable, intellectually, of seeing how much of that exemption might be required.

Mr. COHEN. Yes, sir. But in this instance, because we have an existing policy adopted during the last administration which enables us to actually protect the environment and manage our installations for national security, it hasn't been necessary for us to go that route, and we're hoping to shore up that policy.

Mr. KILDEE. I would hope, generally, we would try to use existing law rather than change the law. These laws have come up, hopefully, through the combined wisdom of many, many Congresses, and some of these laws were enacted before I came here 27 years ago. But I do think you should explore what authority and how much discretion the Secretary can use within that authority to achieve what is needed.

You know, we're not just "tree-huggers" up here. I have two sons who are captains in the Army. We're all very much concerned about the training of our military. But I do think that further exploration of what power already exists might be helpful.

Mr. ABERCROMBIE. Will the gentleman yield?

Mr. KILDEE. I would be happy to yield to the gentleman from Hawaii.

Mr. ABERCROMBIE. Mr. Cohen, are you familiar with the memorandum for Secretaries of the military departments from the Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense and Service Chiefs, on the subject of "senior readiness oversight counsel approval of the 2003 sustainable ranges action agenda"?

Mr. COHEN. Yes, sir, I believe so.

Mr. ABERCROMBIE. OK. Under the exemptions in ESA compliance, are you familiar with page 9, which discusses the failure of the Department of Defense to ever utilize the exemption capacity that it has, as Mr. Kildee discussed?

Mr. COHEN. Sir, I can't recall the specific passage you're referring to.

Mr. ABERCROMBIE. I'm not trying to trap you, believe me. The gist of it I can summarize from the passage itself.

What the previous paragraph simply says, Mr. Chairman, is, to date, the DOD has not used such exemptions to any extent to address encroachment concerns. Congress and many environmental organizations criticized the Department for not pursuing these avenues of relief already available to them, instead of pursuing new legislation. It goes on to say—and I'm quoting—"A draft memorandum has been developed and coordinated within the IPT that would provide guidance to the services on how to assess and process exemption requests in appropriate situations. This memo is attached, along with a briefing package, for review."

Wouldn't it make sense for the services to try to use existing law, and if it runs into difficulties in specific situations, then seek relief on that basis, rather than, before you even try what is readily available to you now, come in and ask for a complete change in the basis of the existing legislation?

Mr. COHEN. Sir, we actually believe that the proposals that we're bringing forward are consistent with the correct interpretation of the laws we're seeking to clarify. For example, most of the reforms that we're suggesting, many of the reforms we're suggesting to MMPA, simply would codify interpretations that the regulatory agency has already brought forward.

Mr. ABERCROMBIE. Excuse me—

The CHAIRMAN. The gentleman's time has expired.

Mr. ABERCROMBIE. OK. Thank you, Mr. Chairman. I'm going to pursue that later, then. Thank you.

The CHAIRMAN. Mr. Gibbons.

Mr. GIBBONS. Thank you very much, Mr. Chairman.

Gentlemen, to each of you, I want to thank you for your effort to work and defend our Nation. From a very proud constituent of all of yours, I want to thank you for your effort.

This is an issue which, of course, affects many of us on this Committee because many of us have districts which have large military installations. I, for one, have several which are affected by the Endangered Species Act, whether it's Nellis Air Force Base, Fallon Naval Air Station, or any of the others that have provided a great deal of training for our young men and women around this country.

I do know that during Operation Enduring Freedom there were opportunities to test, on a rather short notice basis, some of the new technologies and weapons systems that were used to successfully conclude those conflicts.

My question would be—and I guess I would go to Colonel DiGiovanni in asking this question—whether or not the designation of critical habitat versus an Integrated Natural Resource Management Plan area would have an impact, a serious impact, a negative impact, on training for any ongoing operation, if you could compare and contrast the designation of a critical habitat for an endangered species versus the Integrated Natural Resource Management Plan.

Colonel DIGIOVANNI. OK, sir. I'll briefly address some of the issues to the best of my knowledge.

When something is designated as critical habitat, the primacy for the use of that land becomes the survival of the species, we think, under an Integrated Natural Resource Management Plan, you can better balance military needs with the needs of the community and the environment.

We also think that when you designate critical habitat, you're focusing on a specific species, whereas if you use an Integrated Natural Resource Management Plan, then you can approach it in a more holistic manner and look at the entire ecosystem in which you're trying to balance the two competing needs.

Any other issues I would like to defer to Mr. Cohen for further clarification.

Mr. GIBBONS. If we're going to turn to Mr. Cohen, let me add to this question because, Mr. Cohen, you're the legal expert here. When you talk about flexibility and the difference between critical habitat versus an Integrated Natural Resource Management Plan, it seems to be one of process over restriction and inflexibility.

My concern here is there are going to be critics out there, well-meant, well-meaning critics, who are going to say that, unless there's some designation, clearly, of some abuse of discretion, whether it's an arbitrary or capricious decision, that no one is going to want to intercede in any of these current existing laws that establish critical habitat and designated Endangered Species Act, but that gives the military no flexibility when it comes to challenging these issues.

I would like to ask you if you think there is greater capability of both preserving the species as well as allowing for training of our men and women in the military when you have an Integrated Natural Resource Management Plan—I just throw that out there—versus something designated as a critical habitat. Could you address that issue?

Mr. COHEN. Yes, sir. Thanks very much.

In the first instance, we do believe that the INRMP is a superior tool because it does enable us to manage the entire ecosystem on a holistic basis. We think it's a more modern and more science-based tool than the critical habitat device that was developed decades ago. We think that this ecosystem management is what gives us the flexibility to, at one and the same time, promote our military mission and also protect species.

We don't think this is an instance of some sort of tragic tradeoff between national security and environment. We can do both those jobs, sir, if we're given the appropriate flexibility in the statute. We feel that critical habitat is not the appropriate regulatory framework because it doesn't enable us to do both jobs.

Mr. GIBBONS. So it would be true that it would require, if you were to take it to a judicial decision, it would require you, if it's critical habitat, to have an arbitrary, capricious decision, or an abuse of discretion would be the only way to unwind or to lessen the impact of critical habitat on the military operation?

Mr. COHEN. Well, actually, sir, because we're another Federal agency, we don't have the ability to challenge actions of the Interior Department in court, nor have we ever had the need to, in terms of working through critical habitat issues, because the Interior Department has tried to accommodate national security, wherever possible. In fact, their policy of using INRMPs in lieu of critical habitat designation is the policy that was developed in the last administration to accommodate these two interests.

The problem comes, sir, with outside litigants, private parties and nongovernmental organizations, who are trying to strike down the action taken by the Interior Department to accommodate national security.

The CHAIRMAN. Mr. Pallone. If you want me to skip you, I'll go to Mrs. Christensen.

Mrs. CHRISTENSEN. Thank you very much, Mr. Chairman.

Has the Navy ever been denied a request for incidental harassment authorization under the MMPA?

Admiral MOELLER. The issue for us has been one of, as we go forward for the kinds of things that we need to address in the future from a test and training standpoint, the detailed, very elaborate and complex process to be able to conduct training activities in a manner consistent when they are appropriate for us from a scheduling standpoint to do so. So as has been discussed here today, what we're trying to accomplish here is to put in place mechanisms that will allow us enhanced flexibility to be able to kind of do the things that are very, very important from a national security standpoint.

Mrs. CHRISTENSEN. This question I guess I would refer to anyone on the panel. I'm having difficulty reconciling this request with recent statements that I really support. I'm really proud of the performance of our troops in Iraq and Afghanistan, wherever they have been sent.

The General Accounting Office, for example, found that training readiness remains high at our military institutions, and even the Secretary was quoted as saying our troops were, as I agree they are, the best trained, best equipped and finest troops on the face of the Earth. So I'm trying to reconcile these kind of statements with the support of the military for this piece of legislation.

Can someone help me out with that? Haven't, in fact, the remedies and the flexibilities that are already in place been enough to allow our military to be properly trained and to receive the kind of accolades that I quoted?

General FIL. Yes, ma'am. Thank you, if I might attempt an answer to that.

Well, I think there is no doubt that our troops are, indeed, the best in the world. It's a tribute to hard work, dedication, and leadership from four stars all the way down to seamen and airmen and privates, in all the services, and also a tribute to Congress for funding us to make us the greatest armed force in the world.

But our recent fight against the Iraqis is not necessarily the same kind of fight that we're likely to have in the future. We need to prepare to defend the Nation against any possible potential threat, existing or emerging. That causes us to want to make sure that our training facilities are, indeed, the best as we can possibly make them.

I can speak for the National Training Center in regards to the second half of your question, ma'am. That is, because of critical habitat designation, we have lost a very large portion of our training area, cutting off one entire maneuver area. We have a portion of the facility that congressionally has been given to us, set aside, if you will, of 110,000 acres. Much of that is designated critical habitat. In fact, there are no tortoises living there and never will be. It 's not suitable for habitation for this particular species of Desert Tortoise.

So what we seek is the ability to continue to work very closely with our colleagues and the Fish and Wildlife Service to do both things—protect the species and yet make the best use of this land for training for the forces of today and the future.

Mrs. CHRISTENSEN. I guess, with somewhere in the vicinity of 25 million acres of land that the military has, it still becomes a concern?

General FIL. I can only speak to the 740-750,000 acres that we're training on at the National Training Center. But yes, ma'am, it is indeed a concern.

Mrs. CHRISTENSEN. I'm not on any of armed forces Committees, but it's my understanding that the type of training and the type of combat that might occur in the future will be different from what we're experiencing now.

Has that been taken into account, the type of training that will be needed for future conflicts? Has that been taken into account in your support of this legislation? Is this legislation still needed in light of the different kinds of combat that our troops will be facing?

General FIL. Yes, ma'am. If I could just answer that and then I'll pass it to my colleagues.

Ma'am, indeed, we look to the future. We are presently looking 25 to 30 years out and developing the requirements that we believe for the National Training Center, and the collaborative effort that we have with our other facilities from the other services in Southern California and Nevada, we believe that, in fact, these two initiatives are very much in parallel.

The CHAIRMAN. The gentlelady's time has expired.

Mr. Jones.

Mr. JONES. Mr. Chairman, thank you.

I want to first say that I appreciate you and this Committee, whether we agree on all the issues or not, for holding this hearing. I think last year we had a similar bill and also a hearing that was very important.

I have three bases in my district: Camp LeJeune, Cherry Point Marine Air Station, and Seymour Johnson Air Force Base. A multitude of the issues that have been discussed today by you gentlemen, as well as the Committee, we've been discussing for 9 years down in the 3rd District of North Carolina.

My question is really probably for Mr. Cohen. I want to go back to what the gentleman from Hawaii was asking you earlier, when he was saying that you had certain authority. I believe your response was that "we need clarification". My reason for bringing his question back up is this: you talk about how you and Fish and Wildlife are working together to see if you're following the law, the Endangered Species Act, and if you can train in this area, train in that area.

What has been the cost to the Department of Defense over the last few years as it relates to litigation, as to the area of training?

Mr. COHEN. Sir, I think I had better take that for the record, if I could. I don't know whether we have that number aggregated. It would clearly involve costs imposed on our regulators as well, because it is their decisions that are frequently challenged in court, and on the Department of Justice, which represents us in court. So it would be across a number of agencies. Certainly, a lot of the litigation has been very extensive and expensive.

Mr. JONES. Mr. Chairman, with your permission, I would like to have that information for the record, the best that could be provided, so that the Committee would have that.

The CHAIRMAN. Yes, if the gentleman will provide that for the record. I realize you probably have to work with DOJ to come up with an answer, but if you could provide that for the record.

[the information submitted for the record by Mr. Cohen follows:]

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 12 2000

The Honorable Thomas M. Davis, III
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter dated March 13 requesting information related to litigation filed against the Department of Defense or the Military Departments alleging violations of environmental laws. We also appreciate the willingness of the Committee staff to meet with Department of Justice personnel on April 8 in order to discuss the scope and purpose of the request. Based upon your letter and the meeting, the Environment and Natural Resources Division generated the summaries and tables attached to this letter.

First, enclosed are case summaries of legal actions brought against the Department of Defense under the federal statutes identified in your March 13 letter for the period 1995-present that are directly related to military training or readiness activities. The summaries, which are separated by the responsible Environment and Natural Resources section (Environmental Defense or Wildlife and Marine Resources), provide: case name; the judicial district in which the case was filed; the status of the case (ongoing, closed, or appeal pending); and an overview of the case. A number of these cases were discussed at the April 8 meeting with Committee staff, and we hope these written summaries are helpful.

Second, enclosed are a series of tables that list cases brought against the Department of Defense under federal statutes identified in your March 13 letter for the period 1995-present. The tables, which are broken down by Environment and Natural Resources section (Appellate, Environmental Defense, or Wildlife and Marine Resources), list: case name; the judicial district in which the case was filed; case number; client agency, statute under which the suit was brought; and, if attorneys fees were paid, the amount of attorneys fees. As discussed during the April 8 meeting, the Division has excluded from these tables cases brought against the Army Corps of Engineers in relation to the Corps' administration of section 404 of the Clean Water Act and cases brought under the Comprehensive Environmental Response, Compensation and Liability Act against the Department of Defense or the Military Departments. The cases referenced in these tables but for which summaries are not provided do not directly relate to military training or readiness activities.

As to the other information requested, the Environment and Natural Resources Division does not have legal policies or procedures governing environmental litigation involving military activities. Furthermore, Department of Justice regulations provide that the Office of the Solicitor General determines whether, and to what extent, appeals will be taken by the United States to appellate courts. *See* 28 C.F.R. § 0.20(b). The Solicitor General possesses the authority to make all decisions regarding appeals, including appeals to the United States Supreme Court. The Office of the Solicitor General generally provides the Division as well as affected agencies, including the Department of Defense, with the opportunity to provide input prior to making decisions as to whether an adverse decision should be appealed.

We trust that this information is responsive to your request. If we can be of further assistance on this or any other matter, please do not hesitate to contact this office.

Sincerely,

Jamie E. Brown

Jamie E. Brown
Acting Assistant Attorney General

Enclosures

cc: The Honorable Henry A. Waxman
Ranking Minority Member

Appellate Section

CASE NAME	DISTRICT	COURT NO.	AGENCY	STATUTE	STAGE	ATTNY'S FEES
ARTHUR WEST V. SECRETARY OF DEFENSE	Washington, West	98-35681	Dept of Defense	CWA	Closed	
CENTER FOR BIOLOGICAL DIVERSITY V. DANZIG, ET AL.	District of Columbia	00-3044	Dept of Navy	MBTA	Closed	
CHEMICAL WEAPONS WORKING GROUP V. DEPARTMENT OF THE ARMY	Utah	96-4166	Dept of Army	RCRA	Closed	
FAMILIES AGAINST NERVE GAS INCINERATION V. ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION	Alabama, Middle	2-000595	Dept of Army	CAA, RCRA	Closed	
FORT ORD TOXICS PROJECT, INC V. CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY	California, North	98-16160	Dept of Army	RCRA	Closed	
GROUND ZERO CENTER FOR NON-VIOLENT ACTION V. UNITED STATE DEPARTMENT OF THE NAVY, ET AL.	Washington, West	01-5339	Dept of Navy	ESA	On Appeal	
HELEN FROST, JOHN DOE I-VI V. WILLIAM PERRY, ET AL.	Nevada	96-16892	Dept of Defense	RCRA	Closed	
MISSOURI COALITION FOR THE ENVIRONMENT V HERMAN	Missouri, East	994-2266	Dept of Army	CWA	On Appeal	
NEW YORK STATE DEPT. OF ENVIRONMENTAL CONSERVATION ET AL. V. DEPT. OF AIR FORCE	New York, North	89-197	Dept ofAir Force	CWA	Closed	
OSI, INC V UNITED STATES	Alabama, Middle	98-920	Dept of Air Force	RCRA	Closed	
PEOPLE OF THE STATE OF CALIFORNIA V. U.S.	California, East	98-0437	Dept of Air Force	CAA	Closed	
PINE BLUFF FOR SAFE DISPOSAL; CHEMICAL WORKING GROUP, INC. V. ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION	Arkansas, East	2000-524-3	Dept of Army	RCRA	On Appeal	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. PERRY	Arizona	94-814	Dept of Defense	ESA	Closed	
U.S. V. TENNESSEE AIR POLLUTION CONTROL BOARD	Tennessee, Middle	3-96-0276	Dept of Army	CAA	Closed	
VIEQUES CONSERVATION AND HISTORICAL TRUST V U.S.	Puerto Rico	00-1578	Dept of Navy	CAA, CWA, RCRA, SDWA	Closed	
WATER KEEPER ALLIANCE V DEPARTMENT OF DEFENSE	Puerto Rico	3-00-02295	Dept of Defense	RCRA	Filed	

Environmental Defense Section

CASE NAME	DISTRICT	COURT NO.	AGENCY	STATUTE	STAGE	ATTNY'S FEES
AIRPORT WORKING GROUP OF ORANGE COUNTY, INC. V. U.S. DEPARTMENT OF DEFENSE	California, East	02-1110	Dept of Defense	CAA	Filed	
ALASKA COMMUNITY ACTION ON TOXICS V. THE ARMY	Alaska	02-083	Dept of Army	CWA, RCRA	Filed	
ALLIANCE OF PEACE LOVING PEOPLE OF VIEQUES V U.S.	Puerto Rico	00-1484	Dept of Defense	CWA, RCRA	Closed	
ARTHUR WEST V. SECRETARY OF DEFENSE	Washington, West	98-35681	Dept of Defense	CWA	Closed	
BARRY FARM RESIDENT COUNCIL V. NAVY	District of Columbia	96-1700	Dept of Navy	RCRA	Closed	
BARRY FARM RESIDENT COUNCIL, INC. V. NAVY	District of Columbia	96-1450	Dept of Navy	CWA	Closed	
CHEMICAL WEAPONS WORKING GROUP V. DEPARTMENT OF THE ARMY	Utah	96-4166	Dept of Army	RCRA	Closed	
CITIZENS ORGANIZED FOR RESPONSIBLE ENVIRONMENT V. DEPARTMENT OF DEFENSE	Washington, West	96-5186	Dept of Defense	CWA	Closed	
CITY OF JACKSONVILLE, FLORIDA V. NAVY	Florida, Middle	3-01-368-20	Dept of Navy	CAA	On Appeal	
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT V. U.S.	Colorado	97-1601	Dept of Defense	RCRA	Closed	
COMMONWEALTH OF MASSACHUSETTS V. DOD	Massachusetts	92-11040	Dept of Army	CWA	Originated	
CONCORD DISPOSAL SERVICE, INC. V. COHEN	California, North	97-0971	Dept of Defense	RCRA	Closed	
CONTRA COSTA WASTE SERVICE V. UNITED STATES	California, North	96-3147	Dept of Navy	RCRA	Closed	
COOSA RIVER BASIN INITIATIVE, INC V WARR	Alabama, Middle	98-2082	Dept of Army	RCRA	Closed	
COUNTY OF CAPE MAY V. U.S.	New Jersey	95-2857	Dept of Navy	RCRA	Closed	
DAVID BOSLEY, ET AL. V. ARMY	Oregon	00-1039	Dept of Army	RCRA	Closed	
DEPARTMENT OF TOXIC SUBSTANCES CONTROL V. U.S.	California, East	97-5016	Dept of Defense	RCRA	Closed	
DERMODY PROPERTIES, INC. V. U.S., ET AL	Nevada	94-494	Dept of Air Force	CWA, RCRA	Closed	
DLA V. COMMONWEALTH OF PENNSYLVANIA	Pennsylvania, East	02-0330	Dept of Defense	CWA	Filed	
ENVIRONMENTAL HEALTH COALITION V. DALTON	California, South	96-947	Dept of Navy	CWA	Closed	
FAMILIES AGAINST NERVE GAS INCINERATION V. ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION	Alabama, Middle	2-000595	Dept of Army	CAA, RCRA	Closed	
FAMILIES CONCERNED ABOUT NERVE GAS INCINERATION V. ARMY	Alabama, North	1-02-02822	Dept of Army	RCRA	Filed	
FORBES/FISHERIES ISLAND CONSERVANCY, INC. V. CORPS OF ENGINEERS	New York, East	95-3474	Dept of Navy	CWA	Closed	
FOREST GUARDIANS V ARMY	New Mexico	00-722	Dept of Army	CWA	Closed	
FORT ORD TOXICS PROJECT, INC V. CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY	California, North	98-16160	Dept of Army	RCRA	Closed	
HISTORIC AIRCRAFT PRESERVATION, INC. V. ONE F4F-4 AIRPLANE, ET AL.	Washington, West	95-795	Dept of Navy	RCRA	Closed	

IN RE: TOOELE COUNTY CHEMICAL AGENT DISPOSAL FACILITY PERMIT APPEAL	Utah		Dept of Army	RCRA	Filed	
IRBY V. NAVY	Maryland	00-3151	Dept of Navy	CWA, RCRA	Closed	
JEFFREY SHELTON, JR, ET AL. V. HERCULES INC	Arkansas, East	97-131	Dept of Air Force	RCRA	Closed	
JOHN THOMAS HAGLER V. FLORIDA DEPT. OF ENVIRONMENT V. FLORIDA DEPT. OF ENVIRONMENTAL PROTECTION, ETAL	Florida, North	95-30054	Dept of Navy	CWA	Closed	
LARRY MATLOCK V. DOD	Tennessee, East	4-00-80	Dept of Defense	RCRA	Closed	
MARINA BAY REALTY TRUST V U.S.	Massachusetts	1-00-11623	Dept of Navy	RCRA	Closed	
MISSOURI COALITION FOR THE ENVIRONMENT V HERMAN	Missouri, East	994-2266	Dept of Army	CWA	On Appeal	
MISSOURI COALITION FOR THE ENVIRONMENT V. HERMANN	Missouri, East	964-2279	Dept of Army	CWA	Closed	
MISSOURI COALITION FOR THE ENVIRONMENT V. HERRMAN	Missouri, East		Dept of Army	CWA	Closed	
MISSOURI COALITION FOR THE ENVIRONMENT, ET AL. V. HARRIET BEARD, ET AL.	Missouri, East	954-1339	Dept of Army	CAA	Closed	
MONTEREY BAY UNIFIED AIR POLLUTION CONTROL DISTRICT FOR THE PEOPLE OF CALIF V. U.S.	California, North	97-20946	Dept of Army	CAA, RCRA	Closed	
MONTEREY BAY UNIFIED AIR POLLUTION CONTROL DISTRICT V. U.S. DEPARTMENT OF THE ARMY	California, North	99-20485	Dept of Army	CAA, RCRA	Filed	
NATIONAL STEEL CORPORATION, GREAT LAKES DIVISION V. UNITED STATES COAST GUARD	Michigan, East	96-74087	Dept of Defense	CWA	Closed	
NATIONAL WILDLIFE FEDERATION V CALDERA	District of Columbia	1-00-1031	Dept of Army	CWA	Closed	
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION V. UNITED STATES	Nevada	98-34	Dept of Army	CWA, RCRA	Closed	
OSI, INC V UNITED STATES	Alabama, Middle	98-920	Dept of Air Force	RCRA	Closed	
PEOPLE OF THE STATE OF CALIFORNIA V. U.S.	California, East	98-0437	Dept of Air Force	CAA	Closed	
PEOPLE OF THE STATE OF ILLINOIS V. U.S. ARMY	Illinois, North	00-8121	Dept of Army	CWA	Filed	
PINE BLUFF FOR SAFE DISPOSAL; CHEMICAL WORKING GROUP, INC. V. ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION	Arkansas, East	2000-524-3	Dept of Army	RCRA	On Appeal	
PUGET SOUND CLEAN AIR AGENCY V. ARMY	Washington, West	3-02-05153	Dept of Army	CAA	Closed	
PUGET SOUND CLEAN AIR AGENCY V. ARMY	Washington, West	01-012138931	Dept of Army	CAA	Filed	
RABUN COUNTY COALITION TO SAVE THE FOREST AND EDMON NICHOLSON V. GEORGE G. MARTIN	Georgia, North	96-2696	Dept of Army	CWA	Closed	
RURAL ALLIANCE FOR MILITARY ACCOUNTABILITY V ARMY	California, East	2-00-804	Dept of Army	RCRA	Closed	$360,000.00
SAN DIEGO BAYKEEPER V. U.S. DEPARTMENTOF DEFENSE	California, South	02-0499	Dept of Navy	CWA	Filed	
SAN FRANCISCO BAYKEEPER, ET AL. V. DEPT. OF THE NAVY, ET AL.	California, North	94-3521	Dept of Navy	CWA	Closed	$113,000.00
SAN FRANCISCO BAYKEEPER INC V. U.S. DEPARTMENT OF THE NAVY	California, North	96-3370	Dept of Navy	CWA, RCRA	Closed	$221,315.70
SAN FRANCISCO BAYKEEPER V. DEPARTMENT OF THE NAVY	California, North	97-3656	Dept of Navy	CWA	Closed	
SAN FRANCISCO BAYKEEPER V. U.S. DEPARTMENT OF NAVY	California, North	95-3033	Dept of Navy	CWA, RCRA	Closed	$79,631.76
SIERRA CLUB, ET AL V. UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD	Utah		Dept of Army	RCRA	Closed	
STATE OF OHIO V AIR FORCE	Ohio, South	3-99-231	Dept of Air Force	CAA	Closed	
STATE OF TEXAS V. THE DEPARTMENT OF DEFENSE	Texas, South	98-190	Dept of Army	CAA	Closed	
STATE OF WISCONSIN V. OLIN CORPORATION	Wisconsin, West	01-504	Dept of Army	RCRA	Closed	
STATE OF WISCONSIN V. U.S. DEPARTMENT OF ARMY	Wisconsin, West	01-0577	Dept of Army	RCRA	Closed	
THE MARCH COALITION FUND, ET AL. V. UNITED STATES	California, South	97-56080	Dept of Navy	CAA	Closed	
THE PORT OF REDWOOD CITY V. GIBSON ENVIRONMENTAL, INC.	California, North	98-3501	Dept of Army	RCRA	Closed	
THE SOUTHLAND CORPORATION V UNITED STATES OF AMERICA	California, North	99-20096	Dept of Navy	RCRA	Closed	
U.S. V. TENNESSEE AIR POLLUTION CONTROL BOARD	Tennessee, Middle	3-96-0276	Dept of Army	CAA	Closed	
UNITED AMMUNITION CONTAINER, INC V UNITED STATES	Tennessee, West	10-100-1178	Dept of Defense	CWA, RCRA	Closed	
UNITED STATES V. ILLINOIS POLLUTION CONTROL BOARD	Illinois, North	97-7499	Dept of Navy	CWA	Closed	
VIEQUES CONSERVATION AND HISTORICAL TRUST V U.S.	Puerto Rico	00-1578	Dept of Navy	CAA, CWA, RCRA, SDWA	Closed	
WATER KEEPER ALLIANCE V DEPARTMENT OF DEFENSE	Puerto Rico	3-00-02295	Dept of Defense	RCRA	Filed	

Wildlife and Marine Resources Section

CASE NAME	DISTRICT	COURT NO.	AGENCY	STATUTE	STAGE	ATTNY'S FEES
AMERICAN RIVERS, ET AL. V. U.S. ARMY CORPS OF ENGINEERS, ET AL.	District of Columbia	03-241	Dept of Army	ESA	Filed	
ARC ECOLOGY, ET AL. V. UNITED STATES MARINE CORPS	California, North	99-1178	Dept of Navy	ESA	Closed	
B AND B PARTNERSHIP, ET AL. V. UNITED STATES OF AMERICA	Maryland		Dept of Navy	ESA	Closed	
CENTER FOR BIOLOGICAL DIVERSITY V. COHEN	Arizona	99-203	Dept of Army	ESA	Filed	$75,196.50
CENTER FOR BIOLOGICAL DIVERSITY V. DANZIG, ET AL.	District of Columbia	00-3044	Dept of Navy	MBTA	Closed	
CONCERNED CITIZENS OF EAST COLUMBUS, ET AL. V. PETERS	Georgia, Middle		Dept of Army	ESA	Closed	
DEFENDERS OF WILDLIFE V. BABBITT	District of Columbia	99-927 99-0927	Dept of Air Force	ESA	Filed	$237,484.60
DEFENDERS OF WILDLIFE, ET AL. V. SHEILA E. WIDNALL, SECRETARY OF THE AIR FORCE	District of Columbia		Dept of Air Force	ESA	Closed	$32,000.00
GROUND ZERO CENTER FOR NON-VIOLENT ACTION V. UNITED STATE DEPARTMENT OF THE NAVY, ET AL.	Washington, West	01-5339	Dept of Navy	ESA	On Appeal	
HARRY FERGERSTROM V. UNITED STATES DEPARTMENT OF NAVY	Hawaii	98-212	Dept of Navy	ESA	Closed	
HAWAI'I COUNTY GREEN PARTY v. CLINTON	Hawaii	98-232	Dept of Defense	MMPA	Closed	
HAWAII COUNTY GREEN PARTY, ET AL. V. CLINTON	Hawaii	00-166	Dept of Navy	ESA	Closed	
HUMANE SOCIETY OF THE UNITED STATES and SHIRLEY COBLE V. WILLIAM COHEN, ET AL.	District of Columbia	99-252	Dept of Defense	MBTA	Closed	
IN RE LFA SONAR	District of Columbia		Dept of Defense	ESA, MMPA	Closed	
IN RE NATURAL RESOURCES DEFENSE COUNCIL			Dept of Navy	ESA, MMPA	Closed	
KANOA, INC. DBA BODY GLOVE CRUISES V. CLINTON	Hawaii	98-00250 98-250	Dept of Defense	ESA, MMPA	Closed	
McCOY LAND AND CATTLE COMPANY, ET AL. V. GERMAN AIR FORCE, ET AL.	Texas, West	98-40	Dept of Air Force	ESA	Closed	
NATIONAL WILDLIFE FEDERATION, ET AL. V. U.S. DEPARTMENT OF THE ARMY	District of Columbia	00-1031	Dept of Army	ESA	Closed	
NATURAL RESOURCES DEFENSE COUNCIL V. DEPARTMENT OF THE NAVY	California, South		Dept of Navy	MMPA	Closed	
NATURAL RESOURCES DEFENSE COUNCIL, ET AL. V. EVANS, ET AL.	California, North	02-3805	Dept of Navy	MMPA	Filed	
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. V. UNITED STATES DEPARTMENT OF THE NAVY, ET AL.	California, Central	01-07781	Dept of Navy	ESA	Closed	
NAVY ARTILLERY EXERCISES (FLORIDA)	Florida, North		Dept of Navy	MMPA	Closed	
OCEAN MAMMAL INSTITUTE V. COHEN	Hawaii	98-7-160	Dept of Defense	MMPA	Closed	
RICHARD A. SCOTT V. UNITED STATES OF AMERICA	Alabama, Middle	00-743 00-742	Dept of Army	ESA	Filed	
RURAL ALLIANCE FOR MILITARY ACCOUNTABILITY, ET AL. V. UNITED STATES DEPARTMENT OF THE ARMY	California, East	00-804	Dept of Army	ESA	Closed	
SIERRA CLUB V. CITY OF SAN ANTONIO, ET AL.	Texas, West		Dept of Defense	ESA	Closed	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. PERRY	Arizona	94-814	Dept of Defense	ESA	Closed	
THE CETACEAN COMMUNITY V. GEORGE W. BUSH, ET AL.	Hawaii	02-599	Dept of Defense	ESA	Filed	
VIEQUES CONSERVATION AND HISTORICAL TRUST, ET AL. V. WILLIAM J. CLINTON	Puerto Rico	00-1578	Dept of Defense	ESA	Closed	
WATERKEEPER ALLIANCE, ET AL. V. UNITED STATES DEPARTMENT OF DEFENSE, ET AL.	Puerto Rico	00-2295	Dept of Defense	ESA	Filed	

Environmental Defense Section

Alaska Community Action on Toxics v. Army (D. Alaska)

Case No.: 02-083

Status: Ongoing

Summary: The case concerns the Army's Fort Richardson, which is located northeast of Anchorage. Fort Richardson is a 60,000 acre facility that has been used for training for many years, beginning in the 1940s. Plaintiffs filed a complaint on April 12, 2002 and an amended complaint on June 26, 2002. Plaintiffs allege that: (1) a Clean Water Act National Pollution Discharge Elimination System permit is required for certain training exercises; (2) the Army has violated an Alaska anti-pollution statute and therefore violated the Resource Conservation and Recovery Act; and (3) the Army has failed to do an Remedial Investigation/Feasibility Study required by the Comprehensive Environmental Response, Compensation, and Liability Act for the cleanup of unexploded ordinance. The United States filed an answer on July 11, 2002. In November 2002, the parties filed a Joint Request to Stay the litigation to allow the parties to pursue settlement. The stay expired April 4, 2003.

Alliance of Peace Loving People of Vieques v. United States (D.P.R.)

Case No.: 00-1484

Status: Closed

Summary: Plaintiff was a group of local residents who sought to halt the Navy's training at Vieques. The complaint alleged violations of the Clean Water Act, the Resource Conservation and Recovery Act, and the Commonwealth's nuisance laws. Although the complaint was filed with the court, it was never formally served on the United States. The district court dismissed the case in 2001 based on plaintiff's failure to timely serve the complaint. Plaintiff did not take any further action.

Forbes/Fishers Island Conservancy, Inc. v. Corps of Engineers (E.D.N.Y.)

Case No.: 95-3474

Status: Closed

Summary: This case was a citizen action to prevent Thames River dredging for the Seawolf Submarine homeporting project. Plaintiffs filed a complaint on

October 24, 1995 alleging violations of the Clean Water Act and the Ocean Dumping Act. Plaintiffs subsequently filed a motion for preliminary injunction that was denied. The Court eventually dismissed the case on jurisdictional grounds. Plaintiffs appealed, and the parties then settled based on commitments by the Corps of Engineers and EPA to make certain adjustments when issuing Ocean Dumping Act permits for disposal of dredged material in Long Island Sound.

Vieques Conservation and Historic Trust v. Bush (D.P.R.)

Case No.: 00-1578

Status: Closed

Summary: This case concerned Naval training exercises at Vieques. This action was filed in May 2000, by an organization of Vieques residents. The complaint included claims under the Endangered Species Act, Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, Safe Drinking Water Act, Migratory Bird Treaty Act, and the Ocean Dumping Act, as well as claims related to the 1983 Memorandum of Understanding between Puerto Rico and the Navy, the illegal use of the security zone, the illegal restriction on access to public beaches, and public nuisance.

Between May 2000 and April 2001, plaintiffs filed three separate motions for a temporary restraining order to halt planned training exercises. The court denied each motion and the training proceeded. The United States filed a motion to dismiss the case in July 2000. The case was dismissed in June 2001.

Waterkeeper v. Dept. of Defense (D.P.R.)

Case No.: 3-00-02295

Status: Ongoing

Summary This case concerns Naval training exercises at Vieques. The plaintiffs are two national environmental organizations, Waterkeeper Alliance and Natural Resources Defense Council; two organizations of Vieques residents; and sixteen individual residents of Vieques. The complaint, which was filed in October 2002, alleges that the Navy's training operations violated the civil rights of the residents of Puerto Rico; did not comply with the Endangered Species Act; and created an imminent and substantial endangerment under the Resource Conservation and Recovery Act.

Plaintiffs simultaneously moved for a temporary restraining order and preliminary injunction to halt training exercises scheduled for the following week. The district court denied the motion. Plaintiffs later renewed the motion for a preliminary injunction with respect to the Endangered Species Act claims. The district court again denied the motion. Plaintiffs appealed the district court's decision, and the decision was affirmed by the First Circuit.

The Endangered Species Act claims became moot when the Navy finished its consultation with the Fish and Wildlife Service and the National Marine Fisheries Service and a biological opinion was issued. Plaintiffs did not seek judicial review of the opinion.

The United States filed a motion to dismiss the civil rights claims and some (but not all) of the Resource Conservation and Recovery Act claims. The district court granted the motion for the Resource Conservation and Recovery Act claims and part of the civil rights claims. The civil rights claim was dismissed in part because the statute of limitations had expired for many elements of the claim, such as the decision to build the training facility in Puerto Rico, which was made during the 1940's. The court did not dismiss claims that the Navy's continued use of the facility violated plaintiffs' civil rights. Plaintiffs have not sought discovery or taken any further action at all with respect to the civil rights issues.

The parties filed cross-motions for summary judgment on the Resource Conservation and Recovery Act claim alleging that hazardous waste accumulated at the live impact area is causing an imminent and substantial endangerment to human health or the environment. After receiving the United States' motion, Plaintiffs moved for limited discovery. The motion was granted. The parties are still in the midst of discovery.

Wildlife and Marine Resources Section

Natural Resources Defense Council v. Evans, et al. (N.D. Cal)

Case No.: 02-3805

Status: Ongoing

Summary: This challenge brought by an environmental organization seeks to enjoin the peace-time use of the Navy's Surveillance Towed Array Sensor System Low Frequency Active Sonar (SURTASS LFA). Plaintiff claims that the National Marine Fisheries Service improperly approved operation of SURTASS LFA in violation of the Marine Mammal Protection Act, the Endangered Species Act, and the National Environmental Policy Act. Plaintiff asserts that operation of SURTASS LFA will irreparably injure marine mammals, including whales, dolphins, seals, and other species. On October 31, 2002, the district court enjoined the Navy's use of SURTASS LFA until the parties could agree on a more tailored preliminary injunction. The court recognized the importance of the technology but believed plaintiff's claims were likely to prevail and directed the parties to attempt to agree on restrictions that would further protect the species. The parties were able to do so, and the Navy was able to operate the system within the confines of the more limited preliminary injunction for the one-year duration of the MMPA letter of authorization. Briefing on summary judgment will be complete as of May 22, 2003. Oral argument on the parties' cross-motions for summary judgment is set for June 30, 2003.

The Cetacean Community v. President of the United States, et al. (D. Hawaii)

Case No.: 02-00599

Status: Ongoing

Summary: Plaintiff filed this suit on behalf of whales, dolphins, and porpoises seeking to enjoin the wartime use of SURTASS LFA. The United States filed a motion to dismiss on the grounds that marine mammals are not "persons" entitled to sue under the Endangered Species Act, the President is not an "agency" under the Administrative Procedure Act, and plaintiffs did not satisfy the 60-day notice of intent to sue prerequisite of the Endangered Species Act. The motion was granted by the court.

Center for Biological Diversity v. Pirie (D.D.C.)

Case No.: 00-3044

Status: Merits litigation is completed; attorney's fees litigation ongoing

Summary: Plaintiff is an environmental organization that challenged the Navy's use of an island, Farallon de Medinilla, in the Northern Marianas for live fire training exercises. The Navy utilized the island for various training activities. The island is uninhabited, but various species of migratory birds inhabit the island. Plaintiff claimed that the Navy's exercises resulted in the death of birds, and that the Navy was violating the Migratory Bird Treaty Act's prohibition against killing migratory birds. Plaintiff sought an injunction against the training exercises until the Navy obtained a Migratory Bird Treaty Act permit. The district court held for the plaintiff and enjoined the Navy's training activities for a short period, but the injunction was stayed by the Court of Appeals, pending appeal. During the appeal, Congress enacted legislation that mooted the appeal: on December 2, 2002, President Bush signed the Bob Stump National Defense Authorization Act for Fiscal Year 2003. Section 315 of the Act effectively exempts the type of military training at issue here from the prohibition of the Migratory Bird Treaty Act by providing that the prohibition against taking migratory birds "shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned." Subsequently, the Court of Appeals dismissed the case on mootness grounds, vacated the district court opinion, and remanded the matter to the district court for resolution of plaintiff's request for attorney's fees and costs.

Natural Resources Defense Council v. Navy (C.D. Cal.)

Case No.: 01-07781

Status: Closed

Summary: Plaintiff is an environmental organization that challenged the Navy's Littoral Warfare Advanced Development (LWAD) Program under the Endangered Species Act, the Marine Mammal Protection Act, the Magnuson Fishery Conservation and Management Act, and the National Environmental Policy Act. LWAD is an office of the Navy that oversees tests of anti-submarine technology, including sonar. Plaintiff asserted that such tests were harming marine mammals but failed to challenge specific tests or projects under LWAD's auspices that allegedly harmed particular species. The United States moved to dismiss on the ground that plaintiff had not challenged a final agency action, as required for judicial review under the Administrative Procedure Act. The court granted the motion to dismiss.

Defenders of Wildlife v. Babbitt (D.D.C.)

Case No.: 99-0927

Status: Ongoing

Summary: Plaintiff is an environmental organization that alleged violation of the Endangered Species Act by numerous federal agencies with respect to activities on or near the Barry Goldwater Air Force Base in southern Arizona that allegedly impacted the endangered Sonoran pronghorn. Claims were made against the Air Force, Marines, Bureau of Land Management, U.S. Border Patrol, and U.S. Fish and Wildlife Service. The plaintiffs claimed that the Fish and Wildlife Service did not adequately consider the impacts of other agencies' activities on the pronghorn when it issued a biological opinion for each single agency. The district court agreed, and remanded most of the challenged opinions, but it did not enjoin any federal agency activities. Recently, plaintiffs brought a motion to enforce the judgment, arguing that the agencies had not complied with the remand instructions and seeking: (1) further remands and (2) to enjoin some of the non-military agencies' activities. The court denied most of the requested relief, but remanded one biological opinion again to the Fish and Wildlife Service. None of the Department of Defense opinions were remanded by the court, but the Department of Defense and the Fish and Wildlife Service decided to revise the Department of Defense biological opinions to address the limited concerns the court voiced on the motion to enforce.

Ground Zero Center for Nonviolent Action v. Navy (W.D. Wash.)

Case No.: 01-5339

Status: Closed

Summary: Plaintiff is an advocacy organization that brought Endangered Species Act and National Environmental Policy Act claims against the Navy relating to the expansion of a submarine facility in Bangor, Washington. The district court granted the United States' motion to dismiss certain claims, which would require revealing classified information such as confirmation that certain weapons were or were not to be housed at the facility. The court granted the United States' motion for summary judgment with respect to the remainder of the claims.

Environment and Natural Resources Division Case Summaries
Select Department of Defense Litigation (1995-Present)

Natural Resources Defense Council v. U.S. Department of the Interior (C.D. Cal.)

Case No.: 01-7028 (related Case No. 01-8412)

Status: Closed

Summary: Plaintiffs are environmental organizations that filed suit against the U.S. Fish and Wildlife Service challenging the Endangered Species Act critical habitat designation for the Coastal California Gnatcatcher. One of the claims asserted by plaintiffs was that the Fish and Wildlife Service had improperly excluded Camp Pendleton from the designation. Because Fish and Wildlife Service concluded that it would not defend the designation on other grounds, including that it believed it was necessary to revise the economic analysis, the United States sought and was granted a voluntary remand of the designation to the Fish and Wildlife Service. Currently, the Fish and Wildlife Serviced is engaged in a rulemaking process to issue a new critical habitat designation for this species.

Mr. COHEN. Yes, sir.

Mr. JONES. Mr. Chairman, just a couple of other statements. I'm not going to ask any other questions.

I appreciate General Bowdon sharing with the Committee what you did. I wish Mr. Pallone and all of us who were not here could see that again.

Would you mind going through that screen one more time so that the members on that side, that just came in, could see them. The reason I do that is because there is going to be a major debate tomorrow or the next day, and I think the better informed we are, whether we agree or disagree, is extremely helpful. Would you please point that out again, because some members have just come in, your problems at Camp Pendleton?

[Slide Presentation.]

General BOWDON. Thank you, sir. I would be happy to.

This is Camp Pendleton, 125,000 acres, contains an impact area there in red. Of course, we are bordered by several different communities there in Southern California.

Next slide, please.

This is how we would like to train. Those big red arrows are essentially maneuver areas, places where we would like to maneuver our troops in order to train them to be the best they can be.

Next slide.

Those areas that just popped up, the yellow, the green, are, of course, areas that are man-made areas. It's Interstate 5, the San Onofre State Park. It's the San Onofre nuclear generating plant, and also some agricultural areas that predate the base's 60-year history. They are areas that we can control the future of, to make them larger or to diminish in some degree, if we had to, or to keep them as is.

Next slide.

This is the baseline. We are currently constrained and degraded to some small degree, 30 percent—that's really not a small degree—but to a 30 percent degree with our training. We know

where all of our endangered species are. We have a program that tracks them. They use about 28,000 acres on our base.

You can see how now those red arrows that we use to train in are starting to become incumbered. That is status quo. That is where we are today. We have quantified the degradation to our training through a quantification study, recently completed, that indicates that we are able to meet our training standard at the 68 percentile degree.

Next slide.

This is what could happen to us if we do not get clarification in the law and primacy of our mission. This would indicate 70,000 acres, 57 percent of the base, would come under critical habitat. You can see that we would be so constrained that we would be able to only do a very small part of our training activity.

We need to be able to train our Marines and sailors as they go off to do the bidding for our country. They are our sons and daughters of America and we owe them the best training that we can give them. So we need to be very careful that the training that we have today is preserved.

Thank you.

Mr. JONES. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Pallone.

Mr. PALLONE. Because you had Pendleton up there—and I'm glad that Mr. Jones showed me that—I just wanted to use as an example one of the concerns I have, General.

Rather than showing the systematic conflict between military readiness and the implementation ESA, evidence of problems presented thus far appears to be to be mostly a few anecdotes—in other words, some specific anecdotes. But when the full situation is examined at the specific bases, like Pendleton, it appears the DOD is telling only part of the story and the supposed conflict either does not exist or is not as bad as it would appear based on the DOD assertions.

Just as an example, the DOD stated that proposed critical habitat designations threaten to encumber—I guess it's 37 or 57 percent of Camp Pendleton. However, after the military consulted with the Fish and Wildlife Service, the total acres of designated critical habitat on Camp Pendleton is 3.7 percent of the base's total land area, of which only 1.5 percent is on the base and actively used by the military, and about 2.2 percent is on the lands leased to California State Parks. There are other examples.

But since we just had the map there about Camp Pendleton, in the interest of time, I just wanted to ask how can you explain those discrepancies in these numbers at Camp Pendleton, because that's the type of thing I'm concerned about.

General BOWDON. Yes, sir. Thank you for that question.

The statement you have made is, in fact, true. We do not have a large critical habitat designation on Camp Pendleton as it exists today. However, there are those who are—We are being sued in Southern California every time we turn around. There are those special interest groups, and there are many, who would like to sue us to ensure that that critical habitat designation is, in fact, enforced on Camp Pendleton.

What I need is for you, Congress, to clarify the law and to quantify the law and give us primacy of our mission, so that they can't come to the courts and say it is not clear what priority the Marine Corps or any other service has in their mission, as opposed to the Endangered Species Act.

So that's what I want to go home with, that clarity of the law, so that I am not regulated by litigation in the courts by special interest groups, who would try to force that 57 percent of the base to become a critical habitat designation.

Mr. PALLONE. Well, when we had a hearing the other day in our Fisheries Subcommittee on INRMPs, in the context of other legislation, we talked about INRMPs instead of the designation of critical habitat. From what I understand, there is nothing to prevent the Secretary from basically designating an INRMP instead of designating critical habitat.

So why is that a problem? The court cases don't preclude you from doing that in any way, do they?

General BOWDON. I would like to refer to Mr. Cohen.

Mr. COHEN. Sir, the question is whether those decisions by the Secretary will be struck down. The Secretary has already made that decision at Camp Pendleton and at Miramar, and is preparing to make it again. But that decision will be challenged. There is ongoing litigation, as General Bowdon said.

We are not asking for this decision to be placed beyond the reach of any sort of judicial review. What we are trying to say is let's vindicate the policy of the last administration that allows the Department of Interior, on a case-by-case basis, to decide whether our INRMP is good enough to serve in lieu of critical habitat. If we propose an INRMP that's insufficient, the Secretary has the authority to refuse and to go ahead and designate critical habitat. If the Secretary makes a mistaken decision and accepts an INRMP that's inadequate, that decision can be challenged on a case-by-case basis.

What the litigants in California are saying today, sir, is that no INRMP, no matter how good it is, can ever substitute for critical habitat. That would overturn the decision of the last administration and their policy and the policy of this administration as well. We would simply like to give the Department of Interior that degree of flexibility.

Mr. PALLONE. It is not my understanding—and I don't want to continue this forever, Mr. Chairman—but it's not my understanding that there's any challenge to the INRMPs as an option. You seem to feel that that could be challenged as well, but no one has so far challenged the INRMPs option.

Mr. COHEN. Sir, if I could, actually it's been—I believe one of the litigants, the Natural Resources Defense Council, has already argued in briefs in California, that the policy is illegal.

Mr. PALLONE. OK. Again, it doesn't apply—they haven't challenged section 4(b)(2) of the Endangered Species Act, though. They haven't challenged that aspect.

Mr. COHEN. Actually, sir, I believe they are challenging the decision made under 4(b)(2) as well, sir.

Mr. PALLONE. Could you provide me with that information, because I would like to know if, in fact, that is the case.

Mr. COHEN. Yes, sir. I would be happy to.

Mr. PALLONE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Osborne.

Mr. OSBORNE. Thank you, Mr. Chairman. Thank you, gentlemen, for being here today. I thank you for what you do.

I would like to address my comment to General Fil. It's my understanding that at Fort Irwin the Desert Tortoise has been an issue, and the Desert Tortoise is listed as threatened, not endangered. But as I understand it, when a soldier or a training exercise encounters a Desert Tortoise, you've had training cease in that area; is that correct, according to your testimony?

General FIL. Sir, thank you for the question.

Yes, indeed. When we encounter a Desert Tortoise anywhere in the maneuver area, or in the cantonment area, we stop, we guard it, and we call in one of our environmental experts, a biologist, and if it can be removed, to be removed to a safe place. Although that only happens occasionally, because we're avoiding the areas where the Desert Tortoise is normally found, when it does happen, it does stop training in that area.

Mr. OSBORNE. Also, your testimony indicates that whenever a Desert Tortoise urinates, that you have to provide shade and then call in some specialist; is that correct?

General FIL. Sir, yes. When frightened, they will void their bladder. That makes them vulnerable during their hibernation period because they're insufficiently hydrated. So we do bring in a biologist and they'll normally give them whatever is required to rehydrate them and then set them free.

Mr. OSBORNE. I also see that apparently at one time you created a tortoise reserve, is that right, where you restricted certain activities where the tortoise was to be found?

General FIL. Sir, yes that's true. We took a line that goes along the nine zero east-west grid line, if you will, and all that is south of that we made off limits to any maneuver. That has since been designated as critical habitat.

In part of that area we have also developed a hatchery for tortoises. We're having really a great deal of success down there.

Mr. OSBORNE. The reason for my questions was it's my understanding you had taken some pretty extreme, and maybe even heroic measures, to protect the tortoise. Apparently Fish and Wildlife still declared it critical habitat, even in spite of all your efforts.

I guess my question to you is, do you feel that you could have coexisted with the tortoise and done some training in the area and still preserve the species without the critical habitat designation?

General FIL. Sir, thank you. We do think that we can coexist with the tortoise. That's why we believe that our Integrated Natural Resources Management Plan is the right answer for this, because it addresses military training and also the needs of the Desert Tortoise.

Mr. OSBORNE. Again, referring to your testimony, I guess you lost 22,000 acres of training area with the designation critical habitat.

General FIL. Sir, yes, and in fact, it's much beyond that now. Much of the land that was recently withdrawn so that it could be added to the National Training Center's maneuver area is also designated critical habitat for the Desert Tortoise, even though much

of that, in fact, doesn't have any tortoises in it, and probably never will. It's unsuitable.

Mr. OSBORNE. I'm not totally familiar with the dialog that occurs in creating critical habitat, but did you feel Fish and Wildlife adequately counted the number of tortoises present, that there was an interface with them in which there was some possibility that critical habitat designation could have been averted?

General FIL. Sir, I would say that we worked very closely with Fish and Wildlife. They are commenting and working collaboratively with us on our Integrated Natural Resources Management Plan. We believe that that is the right answer.

I will also say that we're learning more and more about the Desert Tortoise every day, and we made the study of this species one of our priorities, to find out more and more about it.

Mr. OSBORNE. OK. Thank you very much.

General FIL. Thank you, sir.

Mr. OSBORNE. I yield back.

The CHAIRMAN. Mr. Faleomavaega, did you have questions?

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I apologize for not being here earlier and listening to the testimonies of our distinguished panel members. I do have a couple of questions I wanted to ask the panel with reference to the proposed bill, H.R. 1835.

As I was listening to the dialog here, it seems that my reading of the bill is that it provides a blanket exemption, giving the Secretary of Defense that exemption authority versus, if I hear what Mr. Cohen said earlier on a case-by-case basis, in determining what would really be a better option to consider and how we could establish a balance between the environment and the needs for our national defense.

I would want to hear from members of the panel, if I'm misreading the proposed bill here. By giving the Secretary of Defense a blank check, giving him discretionary authority to say, if it's in national defense and Desert turtles should go out the window, so be it. Or should we take each area of the region where we have Defense resources, where we need to provide the best training possible for our military men and women in uniform, or could the better option be on a case-by-case basis, as I understand Mr. Cohen may have suggested. I don't know if I'm hearing it wrong.

Mr. COHEN. Sir, maybe I should take the first crack at the answer.

If I understand your question correctly, about H.R. 1835 and endangered species, the language that the Committee has proposed that is in the bill is actually rather close to the language that the House passed last year. It does actually provide a case-by-case decision for the Secretary of Interior when she decides—the relevant language is at page 2, line 25, "...if the Secretary determines that such plan addresses special management considerations or protection. In other words, if the Secretary decides that it doesn't, that it isn't sufficiently protective, then she will go ahead and designate critical habitat. If she decides that it is, then she will not. And those decisions would be judicially reviewable.

But one thing that would be taken away from the plaintiffs is this across-the-board argument that no INRMP, no matter how good it is, can ever substitute for critical habitat.

Mr. FALEOMAVAEGA. And the same authority also is taken for the Secretary of Defense, on page 4 of the bill—Do I have the same bill as you? Is that the same understanding also, that the Secretary of Defense is also given similar authority to—

Mr. COHEN. Sir, on that one, the exemption authority for the Marine Mammal Protection Act—

Mr. FALEOMAVAEGA. Yes.

Mr. COHEN. —that is an authority vested in the Secretary of Defense, and that language, I believe, tracks what the Defense Department proposed.

Again, we believe that the Marine Mammal Protection Act, like all the environmental statutes, should have an emergency exemption for particularly drastic circumstances. But we don't think it should be the way in which we address everyday, widespread, ongoing military test and training activities. The analogy we like to use is to a car. Every car ought to have an emergency road repair kit, but if that's the only way you get to work every morning, there is something wrong with your car. So we do support an exemption for MMPA.

But, sir, please let me leave no doubt that the Department does not want to have to proceed with its military readiness activities by virtue of an endless succession of Presidential or Secretary of Defense exemptions.

Mr. FALEOMAVAEGA. One of the ironies, for example, is that I know all of our military aircraft are exempted from using noise kits. If that doesn't create a hazard as far as sounds and everything, the military doesn't have to use noise kits. I understand it's in the name of national defense and national security and they don't have to be subjected to that.

The situation we've had to deal with in Vieques, the situation we had to deal with in Koholami, the situation where, as you have suggested earlier, the military is now filled with lawsuits, does this seem to give an indication that the current law, as it states, is badly written? Would you offer better recommendations on how we can improve the law to lessen the number of lawsuits that you're constantly being subjected to?

Mr. COHEN. Sir, we think that the language that we brought forward, in fact, would clarify and confirm the existing interpretation of the law. To that extent, it would limit the lawsuits.

But I think it does raise a very significant point, which is, although the Defense Department is sometimes described in this proposal as being on the offensive, or trying to radically change the existing regulatory structure, actually each of the proposals that we put forward reaffirms and stabilizes existing regulatory policies, some of them dating from the previous administration, others dating back decades.

It's the litigants attacking those policies in court who seek to change the regulatory policy of those administrations, and to impose new and sweeping regulation on military readiness activity.

Mr. FALEOMAVAEGA. My time is up. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cole.

Mr. COLE. Thank you very much, Mr. Chairman.

Gentlemen, thank you very much, frankly, for your distinguished service to your country. It's a privilege to have you here.

Let me ask a few general questions, and if I have time, I have a couple of specific things I would like to inquire about. This may be a somewhat unusual observation, but I must tell you, in listening to all your testimony and knowing that you are not trained in dealing with endangered species, that your profession is obviously of a military nature, I am extraordinarily impressed by the degree of knowledge that you individually have about what goes on in the respective facilities that you're responsible for.

Would you compare the level of knowledge that you have in these areas with what you see in the private sector? Do you think you spend a lot of your time focused on these issues? Let's start with anybody who cares to answer.

General BOWDON. Sir, I will try to talk to that.

We do spend a lot of time focused on these encroachment issues because they're vital to our training. I would point out, though, that at Camp Pendleton, where we are compared to any other municipality, wastewater, clean air, any other regulation, we are treated the same way and we would expect to be treated the same way. However, military training in those types of activities is different from those other types of entities, and we are unique in that. We require special attention for that.

Mr. COLE. Would anybody else care to answer that or address that?

General FIL. Sir, thank you very much.

I do not know how much time my civilian colleagues are spending on environmental issues, but I will say that, at the National Training Center, we are absolutely serious about this. We want to be strictly within the provisions of all of the laws that apply. We, likewise, are held to the same standard in many ways, as far as the city of Fort Irwin goes, if you will, as anywhere else in the Nation, and likewise for air quality. We have a good record. We've had many awards given to us and we're very proud of that. But we also do believe very firmly that we must work out a way to accommodate both the military needs and to accommodate the environmental protection requirements.

Mr. COLE. General, is it fair to say that you're going to find yourself, obviously, on many occasions deployed into rugged, wild areas, to areas that are, if you will, relatively undisturbed by human beings, or you may find yourself deployed into such situations, and isn't it in your interest to maintain an environment for your training that is similar to ones you might find yourself in in combat?

General FIL. Sir, thank you. We do, indeed, sir, and we want it to be that way 25, 50, 75 years from now as well.

Mr. COLE. Are any of your gentlemen at all aware of any species, endangered species, that have been seriously impacted by military training to the point that it has really threatened their long-term survival, or the loss of a particular species? I ask you this because I asked on the Armed Services Committee, to be fair, the Fish and Wildlife people who testified before us that same question, and they couldn't come up with any, either. Actually, they gave you a high recommendation for the working relationship they had with each branch of the military, so you clearly have done a good job.

Let me ask you this question, if I may. Admiral Moeller, did you testify, if I recall correct, a little bit about the LFA sonar system and some of your needs in that regard?

Admiral MOELLER. Thank you very much, sir.

Did you say, did I testify to that?

Mr. COLE. Yeah. Wasn't there some testimony to that effect?

Admiral MOELLER. Yes, sir, I did.

Mr. COLE. If I remember correctly, during your testimony you mentioned that you were testing—it was not just the training, but how well the system actually works and what obstacles you might deal with. If that's the case, was some of your testing relating to how the system might impact marine and mammal life?

Admiral MOELLER. Sir, as we go through our testing process, clearly that is one of the considerations that we need to take careful stock of. The testing that we are in fact doing right now, of course, is cognizant of that kind of concern, such that we have a good appreciation for exactly what it is that we're doing. That testing is certainly very critical to understanding exactly then how we would operationally employ the system at that point in time.

Mr. COLE. So is it fair to say then that a great deal of what you do is actually—clearly, your objective is to fight and win and protect the people under your commend, but also to have some awareness of what the impact of your activity is on the world around you, and you need some freedom and flexibility to determine those kinds of questions.

Admiral MOELLER. Without question, sir, that's exactly the case, yes, sir.

Mr. COLE. Thank you very much.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Mr. Udall.

Mr. TOM UDALL. Thank you, Mr. Chairman. I thank the panel and thank you for your service to our country.

General Bowdon, on this issue of the Endangered Species Act in Camp Pendleton, we have been going around on this a little bit and I was trying to listen to your answers here. It seemed to me that we're talking only about 1 percent of Camp Pendleton, that a little more than 1 percent has been designated critical habitat. Is that a fair estimation?

I mean, I understand there are 186,659 acres, and of this amount, critical habitat has been designated on 4,622. Much of that has been leased to California for a State park. So that means a little more than 1 percent of critical habitat has been designated at Camp Pendleton.

Is that accurate?

General BOWDON. Thank you for that question.

That is, in fact, a true statement, sir. That's not really what my concern is. My concern is what's going to happen in the future.

Mr. TOM UDALL. I understand that. I understand that there's a lawsuit out there and you're worried that they're going to come down. But there is a long history here with the Department of the Interior, working very closely with these INRMPs with you. In fact, using the authority under section 4(b)(2) of the ESA, the Secretary of Interior used discretion and opted not to designate critical habitat because these lands are used by the military. So you've had

another Executive agency, with expertise in this area, choose not to designate habitat. So what we're worried about is some floating possibility out here that this may happen.

It seems to me like the agencies are doing their job working with each other, and as your counsel said earlier, you work with other agencies to try to resolve these problems. He said that a couple of times, you know, that we have our mission for training and readiness, but we also want to comply with environmental statutes. So I don't know why we're rushing here to, in my opinion, gut the Endangered Species Act for something that is just hanging over our head.

This leads me to really ask the key question here—and maybe this is a question in a way for the Chairman—is there anybody today with expertise from the Federal Government that is going to weigh in on this bill that's before us? None of the panel before us wants to tell us, from the Department of Defense or any of these other agencies, whether you're for this bill or against this bill. Is that correct, except for the legal answer from counsel? So nobody is going to weigh in and say what your official position is on this bill.

Am I correct in saying that? Is anybody going to dispute that?

Then I've read through the testimony here of Dr. Hogarth, and he says 1835 was recently introduced and is still under review by the Administration. So Dr. Hogarth and the Assistant Secretary, Mr. Manson, all of these agencies with the real expertise on this issue have had this bill for over a week, and all we're going to hear today in testimony is what your counsel said here. He's going to defer to Interior. Interior is not going to take a position. The folks at NOAA, they're not going to take a position. So we're basically having nobody that has real expertise weigh in on this bill.

I would say, Mr. Chairman, we've got to get somebody over here that is going to weigh in on this bill before we go to markup. We don't have the expertise here to look at this. The expertise is in the Department of Interior, it's in NOAA, it's in your departments. And if nobody is going to weigh in on this bill, it seems that we should delay the markup on this. I mean, it's really a precipitous action, an expedited, hurried up action to move at this point.

I can tell you from my experience in dealing with the Department of Interior, if an agency like that had a bill and it was there for a week, and this was a major action taken by the Congress in a bill to gut the Endangered Species Act, and nobody could come up with a position in a week, a lot of people ought to have their heads roll, if they can't come up with a position on this.

So, Mr. Chairman, I would just ask that we get somebody from the Administration with some expertise to come in here and talk specifically about the bill we have before us. Thank you. I know I have run out of my time.

The CHAIRMAN. I recognize myself.

I will tell the gentleman, first of all, no one has introduced a bill that would gut the Endangered Species Act. I know that that is always the fallback position of so many people, that any time a bill is introduced that amends the Endangered Species Act, in any way, all of a sudden we're gutting the Act. That is not what is going on here.

You guys are failing to even listen to any of the testimony that's before you. You've got your script down and you're going by it, and you're not even listening to any of the answers that are coming back to your questions.

There are specific problems that the military has. That is what they have testified to. There are two provisions in the bill that they don't feel they have jurisdiction on the military, and they did not comment on those two sections of the bill.

Judge Manson is going to testify later, and you can ask your questions about those two sections of the bill when Judge Manson is before us.

General Bowdon, if I could have you put up again the screen that shows where the endangered species are right now.

General BOWDON. That is it, Mr. Chairman.

The CHAIRMAN. OK. In those areas where the endangered species are identified, can you go into those areas right now and train without any restrictions?

General BOWDON. We avoid them, sir.

The CHAIRMAN. You avoid those areas.

General BOWDON. That is correct.

The CHAIRMAN. So you cannot go into those areas and train now? Even though critical habitat has not yet been designated, you are restricted in your ability to use those portions of the base?

General BOWDON. We are restricted by the terms and conditions that we are given by the regulator on the use of the lands that are adjacent to the habitat being occupied by the endangered species. Of course, we honor that and work around it as best we can.

The CHAIRMAN. So you tried to come up with an INRMP in order to be able to look at the entire base in its entirety, the entire biodiversity, the entire area, and come up with a way that you can continue to use that base and not in any way harass or harm the endangered species that are currently there?

General BOWDON. That is exactly right, Mr. Chairman.

The CHAIRMAN. This is your INRMP right here?

General BOWDON. That is correct, approved by the regulator.

The CHAIRMAN. Now, when they keep saying that only 1 percent has been designated as critical habitat, or a little over 1 percent of what you are using, that is an accurate statement. But that has nothing to do with all of the areas where you can't go into.

The problem is, you're being sued, and suits are being threatened, that would designate critical habitat on the rest of your base. Even though you can't use that area right now, and you're trying to use some of our modern technology, modern ways of looking at the Endangered Species Act, you still can't use that. But if they win and they file a lawsuit and go against you, and that's all designated as critical habitat, then it's all off limits to you.

General BOWDON. Fifty-seven percent, 70,000 acres, will be basically off limits, not available for me, as Commanding General, to use it for training, and it will basically become the property of the regulator and probably, by litigation, special interest groups.

The CHAIRMAN. So you'll end up with whoever files the lawsuit, whatever groups go into this, with some say over that, and probably most likely the Fish and Wildlife Service managing those areas for the recovery of those endangered species, regardless of

what the critical habitat map comes back like, because at this point we really don't know what the critical habitat map will look like, and you will be confined to a very small area of the base.

Let me ask you this. Where are you going to go to train?

General BOWDON. Well, sir, we do work-arounds at this point. If that were to happen, we would have to work with the regulators to find ways that we could do some training at Camp Pendleton. However, we would have to use other areas, such as we use—

The CHAIRMAN. You would be able to have some training at Camp Pendleton, but you would have to go somewhere else for the rest of your training.

General BOWDON. At present, sir, we are only able to accomplish our training to a 68 to 70 percent standard. If critical habitat were imposed, which is what that map now shows, we would be far more encumbered and would have to do more training in other places, which would affect our quality of life. That training perhaps would be at Twenty Nine Palms, and Twenty Nine Palms is not always available. And it would cost a lot of money.

I would also point out that the success in Iraqi Freedom was because of a major work-around, in that we were able to train for months in the deserts of Kuwait prior to that action.

Mr. ABERCROMBIE. Mr. Chairman, would you kindly yield?

The CHAIRMAN. Yes.

Mr. ABERCROMBIE. Thank you. I'm asking you to yield on—

The CHAIRMAN. Before I yield to the gentleman—and I'm going to recognize you for your full 5 minutes right now.

Mr. ABERCROMBIE. Oh. OK. I just wanted to follow up on—

The CHAIRMAN. I'll just recognize you, Neil, as soon as I finish.

Mr. ABERCROMBIE. OK.

The CHAIRMAN. In wrapping up this part, are there any of you on the bases that you have jurisdiction over right now that have not had some impact on your training because of endangered species?

Are there any of you that are asking for an exemption from the Endangered Species Act or are asking us to gut the Endangered Species Act so that you don't have to abide by it?

Let the record show they answered in the negative. Mr. Abercrombie.

Mr. ABERCROMBIE. Thanks very much, Mr. Chairman.

Mr. Chairman, for the record, I, for one, would like to say that I don't believe that it is either your intent or the intent of others in presenting any of this legislation to gut the Endangered Species Act. I have great respect for you and your sense of "Aloha" for the land and for the creatures on it and in the sea as well.

My question is a follow up on what the Chairman says. I want it understood that my question and observation don't come from the point of view that I believe any of this is what the object is. Now, it may be the object of other groups outside—and believe me, I'm dealing with it right now. I'm very, very familiar, thoroughly familiar, in the sea, in the Pacific, and on land in Hawaii. There are people who want to use the Endangered Species Act as a vehicle for their political agenda, and I think they want to go to court. That's why I'm asking this question.

I think Mr. Kildee said at one point, do we really want to use a sledge hammer—and law can be a sledge hammer—as opposed to trying to implement it perhaps with a stiletto and succeed here, particularly where defense is concerned.

Now, in that context, General, I notice you have critical habitat potential. Have you been talking with the Fish and Wildlife Service?

General BOWDON. Every day, sir.

Mr. ABERCROMBIE. OK. You are familiar with the way the law works. Now, I'm going to draw a parallel, not an analogy but a parallel to what's happening in Hawaii right now, where the potential for designating critical habitat could, in effect, be three-quarters of the State. On the Island of Kauai, it could have been 75 percent of the island.

That is done as a defensive measure, Mr. Chairman, by Fish and Wildlife because they are being sued. What they want to do—and if you disagree with this assessment, General, just say so; you're not going to hurt my feelings. In fact, it will help to clarify things. When they make the first cut at critical habitat—and I'm just going to go through this a little bit, Mr. Chairman, because not everybody may be familiar with how this works. They take the broadest possible definition of critical habitat that could be, by any stretch of reason in a court assessed by a judge, as having made the widest possible consideration as to what critical habitat might be. That's the first cut, right?

Then what the law says is Fish and Wildlife has to come to the respective parties who are affected by such a designation, including the Defense Department, and ask them how does this affect you—the social impacts, the environmental impacts, the economic impacts, right? At that point, then, they come with a recommendation. And the way it has worked out over and over again is considerably less, sometimes as much as 90, 95 percent, or even more, less than what was originally encompassed. But they're on sound legal ground then because they are taking into account the rest of the land—excuse me, the rest of the elements, like economic impacts, et cetera. That being the case, that's why the law exists as it is here with exemptions and ESA compliance, takings, for example, in the ocean.

The difficulty I have is not with what the Chairman says, that there are groups out there who want to obviate this whole thing. On the contrary, I not only agree with him, but I would like to preclude them being able to do that. But I want to do it in such a way that doesn't kill off all of the good parts about this.

What I mean about the good parts, Mr. Chairman, it has been stated already—I believe Mr. Cole made the point, or observed the same thing that I heard the other day, that if you ask Fish and Wildlife and Interior and NOAA and some of the other groups, they will tell you that the Department of Defense is, if not first rank, is among the first rank of agencies in compliance with environmental standards and are good stewards. So it means there's a good working relationship there.

So, if we want to zero in on those who have a political agenda that simply is anti-military, and at the same time trying to uphold the environmental standards as embodied in either the Marine

Mammal Protection Act or the Endangered Species Act, doesn't it make sense for you to follow up on the recommendation that I first questioned the counsel about under the memorandum from the Oversight Council on Sustainable Ranges Action Agenda, in that it recommends, Mr. Chairman, that the—and this is the Integrated Product Team—recommends that the Secretary of Defense provide guidance to the services on how to assess and process exemption requests, and provide guidance on Endangered Species Act compliance to assist the installations in assessing regulatory burdens and resolve disputes not rising to the level of the exemption candidates.

My only point here is—and here I have experience with the Navy out in the Pacific—is it not the case in the Pacific that Fish and Wildlife is trying to work with Barking Sands over on Kauai right now and has been rebuffed? They have stated in writing, have they not, over and over again, how they are willing to comply and bring the critical habitat down to that which is recommended by the Navy, and the Navy has said that they won't do it because you've got a memo from former Secretary England saying that you are not to cooperate with the Fish and Wildlife Service at this point pending the resolution of this language in Congress?

Admiral MOELLER. Sir, if I may, thanks for that particular question.

With regard to what has taken place at PMRF, it's my understanding that critical habitat has already been designated there on the strip along PMRF.

On the second issue you raise with regard to the former Secretary of the Navy's direction, that was in an effort to obtain overall consistency from activity to activity, as opposed to something more to necessarily foreclose the ability to comment.

Mr. ABERCROMBIE. Is there or is there not a memo—two things, a memo, a draft memo providing guidance to the services on how to assess and process exemption requests? Maybe the counsel can answer.

Mr. COHEN. Sir, yes, there is.

The CHAIRMAN. I'll let the gentleman answer the question, but his time has expired. You can answer the question.

Mr. COHEN. Thank you, sir.

Yes, sir. It was actually signed by the Deputy Secretary of Defense on March 7th of this year. It does direct the military departments to create a process and criteria for evaluating requests for exemption.

Mr. ABERCROMBIE. Thank you. That's my point, Mr. Chairman. I hope that we can have a discussion or a dialog in the Committee here that takes as a starting point your observation about there are those who want to—who have their own agenda in here. But I assure you that I, for one, do not have such an agenda. But I do think that we need to give an opportunity for the DOD to try to work an exemption process, and a regulatory burden relief process short of exemption, before we move to try and change the language itself. I think such an operation is just underway now, and perhaps we need a little bit more elucidation from the Department on that.

The CHAIRMAN. I appreciate the gentleman's comments. I will just respond by saying I think that what you are asking for is actually what we're trying to do in this bill.

Mr. ABERCROMBIE. I'm sorry?

The CHAIRMAN. I think what you are asking for is what we're trying to do in this bill. Now, there may be specific language in this bill that you question, but the overall effort of this bill is to accomplish what it is you're asking for.

Mr. ABERCROMBIE. I'm going to take that as a "given", Mr. Chairman. My only point is that perhaps the DOD itself has solved its own problem by the creation of this exemption request process.

The CHAIRMAN. We have to codify it; that's the problem.

Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman.

First of all, Mr. Chairman, thank you for asserting the jurisdiction of this Committee over this issue, because I think when ESA issues arise, our Resources Committee needs to be a full participant in the process. So I commend you for not yielding our jurisdiction or waiving it, but rather, having this hearing and for your efforts on this legislation.

I have a couple of questions, and probably a comment or two, and I will address them to Admiral Moeller. Included in your testimony you talk about the Least Tern and the Western Snowy Plover populations at the Naval Amphibious Base in Coronado. Specifically you state that Least Tern nests have increased from 187 to 825, and Western Snowy Plover nests have increased from 7 to 99. This has been done, I guess, over a 9-year period.

Is this under an INRMP?

Admiral MOELLER. Sir, I would say that, first of all, the fact that those two particular species at Coronado have increased over that period of time I think bears witness to our stewardship of the environment and the actions taken at Coronado, which as you know, sir, is the location where our Navy Special Warfare trains, our SEALS train. Of course, that training was very significant and critical to the success of those forces as along with all other forces.

Mr. WALDEN. But was that done under an INRMP, do you know, or just under your general management strategies?

Admiral MOELLER. It was done under full compliance with the Endangered Species Act, sir.

Mr. WALDEN. So it wasn't part of an INRMP?

Admiral MOELLER. No, sir.

[RADM Moeller's response submitted for the record follows:]

After reviewing the transcript of my written testimony, I need to clarify this response. Yes, Navy has an INRMP that provided the guidelines used for conservation and stewardship of these species. As accurately reflected in my written testimony, NAB Coronado provides an excellent example of the effectiveness of INRMPs in protecting threatened and endangered species. Navy stewardship programs at Naval Base Coronado have greatly increased the number of California Least Tern and Western Snowy Plover nests at Naval Base Coronado. Through the Navy's conservation and management programs, California Least Tern nests have increased from 187 to 825 (more than a four fold increase) and Western Snowy Plover nests have increased from 7 to 99 (nearly a 14 fold increase) in nine years. These increases have been accomplished through the use of our INRMPs and related Biological Opinions issued by USF&WS. I apologize for any confusion my oral answer may have created.

Mr. WALDEN. I commend you for the work you're doing. Don't take my line of questioning the wrong way. What are the recovery

goals set by U.S. Fish and Wildlife Service on this, on these species? Are there specific goals that are set?

Admiral MOELLER. There may well be, sir. I need to take that one for the record, sir, and get back to you on that.

[RADM Moeller's response submitted for the record follows:]

California Least Tern that is dated 27 September 1985. The USFWS plans to update the recovery plan for the California Least Tern. For the Western Snowy Plover the USFWS has a draft recovery plan dated 1 May 2001, and has not established final recovery goals. A summary of goals specific to Navy installations in the 1985 recovery plan is as follows: develop management plans for Navy sites, look at feasibility of establishing nesting site at Naval Radio Receiving Facility San Diego, and control predators. Navy has accomplished all these goals.

Mr. WALDEN. OK. You testified that military training areas were originally located in isolated areas, and now they're surrounded by development, leaving the military lands as the only relatively undisturbed habitat for many species. Does this mean your stewardship of these lands has actually come back to bite you now?

Admiral MOELLER. I would say, sir, that again, we take great pride in our ability to preserve the environment in those areas where we clearly have to work through those issues. I'm not sure that I—

Mr. WALDEN. Doesn't it add extra pressure to you if the other lands around you have suddenly been developed and paved and built on, and it's your lands that are the ones left open?

I represent a district that is 72,000 square miles, bigger than any State this side of the Mississippi. We face this problem all the time.

Admiral MOELLER. Yes, sir. I mean, that is clearly a challenge that we have to work our way through. One area where that affects us, of course, is at Fallon, an area that we're concerned about. Of course, clearly the contribution of Fallon is great from the standpoint of all of our carrier-based air wings who train there, and all did train there en route to OIF.

Mr. WALDEN. I don't know who could answer this best, but is the INRMP process one that's available to all agencies to use?

The CHAIRMAN. No, that is DOD military lands.

Mr. WALDEN. OK. I'm new to this particular segment, because it really hasn't—

The CHAIRMAN. If the gentleman would yield, it operates similar to a habitat conservation plan. That would be with what you're used to dealing with. That would be a more accurate way of looking at it.

Mr. WALDEN. And is the goal then of this legislation, Mr. Chairman, to basically we'll treat it the same way as a habitat conservation plan, for purposes of satisfying the requirements of the Endangered Species Act, in a way?

The CHAIRMAN. It goes somewhat beyond that. In my opinion, what it does, it locks them in to adopting an INRMP and having to follow it, in order to protect species on those lands.

What has been suggested earlier is that the go to the God squad or that they request a national security exemption. It gives them lot more leeway to operate than tying them into an INRMP.

Mr. WALDEN. As you know, Mr. Chairman, in the Klamath Basin, where we've been through these Endangered Species Act

rules and all, the God squad option is really not a viable one, that no one has ever been able to make work, and if you do, it's costs are incredible potentially on those trying to make it work.

I know my time has run out, but I just hope that as we move to take care of the problem you face—and I'm very sympathetic in support of resolving it—I have to be able to go home to my district, that has suffered for decades because of these issues, unrelated to military, on how we manage Federal lands, to be able to explain to those folks, and John Day and Prairie City and Baker City, why, when the military runs up against a problem with ESA, we carve out a way to get around it, but if it's timber related or water related, we just put people out of business and destroy the economy of rural communities. That's a real bone stuck in my throat, and those are the people I represent.

Do not take that, though, as anything hostile toward what you're doing. I'm sympathetic and will work with the Chairman and you all to try and help you in the process. The training and the ground is invaluable.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman.

I have a couple of questions and some observations on some of the material that has been provided to us in preparation for this hearing. I want to also thank the witnesses for their fine work and assuring that our men and women in uniform were prepared and ready, and the proof is evident to everyone.

I was very curious as to the quantification study—I think it was Camp Pendleton, if I may, General. That was a contract study commissioned by whom?

General BOWDON. By the base, sir.

Mr. GRIJALVA. Thank you. I think some of the information that you gave in your testimony, both oral and written, is very pertinent to the discussion today. I wanted to know, the data from that particular study, is that available to the public or to the Committee and their staff?

General BOWDON. We can submit the study for the record, and would certainly like to do so.

Mr. GRIJALVA. Thank you, sir.

Mr. GRIJALVA. On that point, let me maybe follow up with a couple of other questions, if I may, General.

In that study, as we talk about the encroachment issue, what factors besides critical habitat, wildlife protection, affect the military's ability to train? I think it was just brought up by my colleague just now, including encroachment issues dealing with housing development, transportation and highways. What other factors are included in encroachment issues and the inability or ability of the—

General BOWDON. Sir, in the last 10 to 15 years, the biggest encroachment factor has been urbanization around the base, and then the destruction of habitat around the base. The growth and endangered species and the regulations associated with them have been the largest encroachment factor for Camp Pendleton.

Mr. GRIJALVA. And the data that we will receive as a Committee quantifies that particular point?

General BOWDON. That is exactly right, sir.

Mr. GRIJALVA. One other point. In your written testimony, General, in speaking of the quantification effort, you revealed that regulatory restrictions to natural and cultural resources constitute 70 percent of the encroachment factors affecting Camp Pendleton and its capability to accommodate training.

What is the breakdown between environmental protections and cultural resource protections at that 70 percent point that you make?

General BOWDON. The biggest encroachment to our operation for the purposes of this Committee, sir, is the Endangered Species Act. Almost 30 percent of the encroachments that we are now having to work with have to do with the Endangered Species Act.

Mr. GRIJALVA. And the percentage for cultural resources, regulatory issues or restrictions?

General BOWDON. I'll take that for the record and get it back to you. I think all three of them amount to—the Endangered Species Act, the wetlands regulations and the cultural resources regulations—all amount to about 70 percent, with the largest being the Endangered Species Act.

Mr. GRIJALVA. I would appreciate that, General. Thank you.

The observations, Mr. Chairman, that is particular to one very vital training area in the district that I represent in Arizona, the Barry Goldwater Range. There was an assertion made by the Department of Defense, I think in an interview in 2002 by the Deputy Under Secretary of Defense for Readiness, saying that almost 40 percent of the live missions at the Goldwater Range were canceled. Upon further review, and with information provided by the Department of Defense, that figure is not correct.

What is on the range is the Sonoran pronghorn, which to the latest count is between 21 and 30 of that very critically endangered species continue to survive.

Let's just concentrate on the flight issues, the sorties. Forty-five were canceled, 474 were moved to another location to accommodate the pronghorn, and there's 33,000 of those that are conducted every year.

The other point was made about Fort Hood, TX at 17 percent. There's only 17 percent of the acreage that is usable. I find it ironic, though, or would want more information, on the fact that about 74 percent of that land acreage is leased out or designated and restricted for cattle operations—the point being, I'm still searching for the urgency, the severity, the threat to national security and defense that this legislation purports to address.

I have no other questions. Thank you, Mr. Chairman.

Mr. WALDEN. [Presiding.] Thank you.

The Chair now recognizes Mrs. Bordallo.

Mrs. BORDALLO. Thank you, Mr. Chairman.

After listening for quite some time here, I realize we have a very complex issue before us. I do appreciate the thorough explanation of our Chairman, the necessity for us to act on DOD's request for legislative relief from encroachment by litigation. Believe me, I'm fully aware of these issues, as we are facing on Guam critical habitat designation issues. I represent the Territory of Guam.

Let me begin my questioning by saying that over one-third of our land on Guam is occupied by military bases, over one-third. We do have a number of designated training areas on our bases, both the Air Force and the Navy. I guess my question would be to you, Admiral.

In the current situation on the U.S. Naval Base in Guam, one of the recommendations made by the Fish and Wildlife Service is that native birds be reintroduced in order to facilitate their recovery after decimation by the brown tree snake. I'm sure you've heard about our brown tree snake. I have been told that reintroduction of endangered species on military lands is against the Navy's policy.

My question is, why does the Navy take the position that it does? That is, why will the Department not allow for the reintroduction of threatened and endangered species on its lands? And should the legislation before us be enacted, would the Navy reconsider this position?

What I'm asking, I guess, is could we have alternative plans in place?

[RADM Moeller's response submitted for the record follows:]

It is Navy policy to ensure that proper budgeting and planning is conducted to support ongoing and new natural resource efforts consistent with the Endangered Species Act for the conservation of listed species on Navy lands, and to ensure that Navy lands will remain available to support the military mission for which they have been so designated. Review and approval by the chain of command, including both the major claimant and CNO N45, is required prior to committing to introduce or re-introducing such species on a Navy installation. The availability of funds, ongoing and planned stewardship efforts, and consistency with Navy mission are key considerations in evaluating any such request from a field command to introduce or re-introduce threatened or endangered species on Navy lands. This approval process in no way alters the Navy's commitment to use its authority to enhance the recovery of listed species and their habitats. Fundamentally, the decision to introduce a listed species onto Navy lands mandates a long-term, irretrievable commitment of resources (e.g., funding, manpower, real estate, NEPA documentation). It is also possible that this type of decision may negatively impact mission readiness by altering the primary focus of our designated land use from support of military readiness to that of management and conservation of listed species. Secretary of Navy letter of 25 November 2002 reinforced this policy by directing such actions be staffed through the chain of command to ensure that Navy meets the "Department's obligations under Title 10 of the U.S. Code to maintain ready forces." Enactment of the proposed legislation, which deals with the use of INRMPs in lieu of critical habitat designation, would have no impact on our decision making process as it would not impact the key decision factors discussed above.

Mrs. BORDALLO.My position is that many of the bases probably do not have proper training areas. Some do and some do not. Some are larger. Some are smaller, have more land area to designate for training. I think we should look at this legislation on a case-by-case basis. This is just my personal opinion.

So could you answer that for the Navy?

Admiral MOELLER. Yes, ma'am. Thank you very much for that question.

I am familiar with that issue, from the standpoint of the position that the Navy has taken on it, and I believe—it's my understanding that that position is based on the fact that reintroduction

would create the potential for the species to proliferate and expand to the training areas in such a way that would then create some significant challenges for us from being able to then operate in the future and use those vital training areas for such purposes. So that's the basis on which the Navy position has been taken.

Mrs. BORDALLO. I understand. Then let me ask a follow-up question.

How, then, does the Navy suggest recovery of threatened and endangered species that have disappeared from your lands? And if you do not support allowing for them to recover on your own lands, isn't this a clear difference between what may be accomplished through critical habitat designation and what would be accomplished through only your requested alternative?

I'm just wondering, is there a plan that you have in place to deal with it? Guam doesn't have a lot of property.

Admiral MOELLER. The position, ma'am, is that doing so as you describe would kind of change the focus and the purpose of the land and how that would be allowed to be used if we were to do it that way. I think that's where we are on it, ma'am.

Mrs. BORDALLO. So your position then would be that, if this species of birds are threatened entirely, you don't feel you could change your policy in any way? Is this what you're saying?

Admiral MOELLER. No, ma'am. I'm not saying that. I think what I need to do is to take that one for the record, if I might, so I can provide you a much clearer answer, ma'am.

Mrs. BORDALLO. All right. Thank you.

Thank you very much, Mr. Chairman.

[RADM Moeller's response submitted for the record follows:]

No. We have carefully considered all aspects of this issue in formulating our current policy. We believe that it is fully consistent with the goals of the Endangered Species Act and our legal mandate under Title 10. Our penultimate goal is to achieve the correct balance between the protection of threatened and endangered species and our national security mission.

Mr. WALDEN. Thank you.

I want to thank the panel for being here today, and for your testimony on this legislation. We will excuse this panel and then bring up our second panel.

Mr. TOM UDALL. Mr. Chairman, could we—I just wanted to make one more statement, or ask a question to clarify something I said earlier, if that's all right.

Mr. WALDEN. That will be fine, if the panel can hold then.

Mr. TOM UDALL. Earlier I made the statement—and the Chairman objected to it—and it had to do with the gutting of the Endangered Species Act. I wanted to make myself clear in the record so the Chairman understood what I was talking about.

Some of the language that has been included in this bill would amend the current Endangered Species Act. This is a crucial section of the Endangered Species Act, because it's declaring what the policy of the Congress is. It says—and I'm quoting from the statute—under the policy of the Congress. "It is further declared to be the policy of the Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species"—that's what it currently says, and here's what is inserted

in this bill: "...insofar as practical and consistent with their primary purposes."

So what we're talking about is, if a Federal agency has this primary purpose and they're focused on the primary purpose, no longer do you have to engage in a section 7 consultation with the key Federal agency. To me, that totally changes the landscape.

The interesting thing to me is that, in fact, in 1966, the Endangered Species Act contained this same language, "...insofar as practical and consistent with their primary purposes." So that wasn't working in 1966, and we replaced that language with the language that's in the law today. We moved forward and we basically had an equality between agencies and between the concern for a species and concern for the primary mission, and we were forcing agencies to work with each other and resolve these things, which I think the military should be applauded for, in the many cases I've heard about, as Mr. Abercrombie said, for working together with the other agencies that are concerned about endangered species and finding solutions.

But under this current bill, under this current bill, if you use that language "...insofar as practical and consistent with their primary purposes", what you would end up doing is the Bonneville Power Administration and the Corps of Engineers, they could ignore the endangered salmon because they would just say their primary mission is to generate and transmit power, so we don't have to think about salmon any more.

The Federal Highway Administration could ignore the impact of highway construction on endangered species habitat because their primary mission is to build and maintain highways. You can see the example going on and on and on.

So this change could eliminate the need for any Federal agency to ever consider the impact of its action on endangered species. That's what worries me. That's what I think is very dramatic about what is being done here. I used the term "gut", and I still stand by it. But I believe that this is a dramatic change when we start saying "primary mission" and you then don't have to deal with an endangered species issue. I think that's the way a court would look at it.

I appreciate very much Chairman Walden for just giving me a second to outline that. It's not a question to this panel. I wanted to make clear what I was saying to the Chairman. I once again want to thank the military officers here for their service to the country and for the remarkable job that they did in Operation Iraqi Freedom.

Thank you very much, Mr. Chairman.

Mr. WALDEN. The gentleman yields back his time.

I would just yield myself 5 minutes, as we go back and forth here, and I won't take the full five. But given that the gentleman raised the issue of Bonneville Power and all, as I read this proposed language, I don't read it the same way, because it says "insofar as is practicable and consistent with their primary purpose." In the case of Bonneville Power, it's primary purpose is to manage the river system to produce power. It is also practicable that they can manage it in a way that is not harmful to the fish in the river. I think that's practicable. They can do it.

What we're trying to get at here—and I'm not trying to speak for the Chairman; he does a quite adequate job of that himself—but we're trying to get back to an evolution and a balance here that some of us think it has gotten out of balance. So I would just say that the idea here is to get back to a more level playing field.

Obviously, the law evolved out of '66 to '73, and I think it's time, 30 years later, to say maybe things aren't working quite the way they need to work and maybe there's a better way to do it.

I would yield back and recognize my colleague.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

I think the bottom line of the question, at least in my mind, and the concerns we have from our friends here from the various branches of the armed services—I'm not on the Armed Services Committee, but I think the bottom line issue that we're looking at is to determine how we can go about in giving the best possible training for our military men and women in uniform, training to the effect that anything less asks the question of their lives in the field of combat. I think this is basically what we're looking at, at least that's my understanding. It's the bottom issue.

But there seems to be a mixed bag here, Mr. Chairman, in terms of my observation. There is a mixture here that I see that in some military installations things work very well between the communities and the enforcement of the Endangered Species Act, and in other military installations we have very serious problems, the situation at Camp Pendleton, as explicitly stated by General Bowdon, and the problems that he is confronted with. So we definitely have a problem there.

I, for one, would like to see, if I gather from the testimony of our friends here, that there is a consensus among the armed services that we are providing less effectiveness in terms of how we're training our men and women in combat. Am I wrong on this observation? Am I to agree that there's consensus that we are not providing first-class training opportunities for our men and women in uniform and that's the reason for your presence here?

General BOWDON. That is correct, sir. I have identified the problem as a degradation to training, and I have quantified that problem that, aboard Camp Pendleton, we are only able to meet a 68 percent standard of training because of our compliance with the Endangered Species Act.

Mr. FALEOMAVAEGA. And there is absolutely no way in your capacity, or even with those Federal agencies, that you can work something out with reference to the current law as it now stands. It's impossible for you in your capacity, as I understand it, from 68 percent efficiency that you're having now in training your men in combat; am I correct on this?

General BOWDON. That is correct. But I would caution to this, in that we have received no reward for the good job that we have done. We have been given a recovery standard on several of the species, and for the Least Bell's Vireo, for example, there was less, when we started studying them, less than 300. The recovery standard was set at 300. We now have 700. I still have to work around the 700. So that's why I am encumbered.

Mr. FALEOMAVAEGA. Please, I'm not faulting you in your situation. I'm just simply saying that this is the reality you're con-

fronted with right now, as far as training resources made available at Camp Pendleton; you simply do not have the land available to train the number of men that you now have under your command simply because of the restrictions placed by the Endangered Species Act; am I correct on this?

General BOWDON. That is correct. But what I really need is clarification of my mission and clarification of the law for my mission, and codification of the current regulator's, Fish and Wildlife Service practices, and their approval of the Integrated Natural Resource Management Plans that we have.

Mr. ABERCROMBIE. Will the gentleman yield?

Mr. FALEOMAVAEGA. Yes.

Mr. ABERCROMBIE. But, General, doesn't that go to my question back here? This is coming from the DOD. It's not something I'm making up. The DOD should develop guidance on ESA compliance to assist installations in assessing regulatory burdens, 300 to 700, and resolving disputes not rising to the level of exemption candidates.

What you just talked about probably doesn't rise to the level of an exemption. But you haven't even made an inquiry. You have no guideline. You know, I'm familiar with about what the potential is. I went through that with the court. Fish and Wildlife has its standard, being able to go back into court and be able to hold off these groups that come in and want to knock you out of the box. They're trying to take you out there.

Fish and Wildlife isn't trying to do that. They have to protect their right flank, too. At least my experience with Fish and Wildlife is that they are more than willing to try to accommodate what you need to have done, but you folks don't even have a fundamental guideline, a paper or procedure.

Mr. FALEOMAVAEGA. Reclaiming my time, Mr. Chairman, not only do I agree with my good friend from Hawaii's assessment and concerns, but the bottom line concern that I have—and I think this seems to be the consensus here on this side of the aisle—the Department of Defense should take an overall concern about the very thing that Mr. Abercrombie has stated earlier, rather than each branch of the armed services saying we've got a problem but with no plan put forward. I think this is the concern we have.

We're not against the military providing the best possible training. We're just trying to see if we can establish a balance in terms of what we're concerned about as far as the Endangered Species Act and the needs for giving our men and women good training. That's all I'm concerned about.

Thank you, Mr. Chairman.

The CHAIRMAN. [Presiding.] The gentleman's time has expired.

Before I dismiss this panel, I want to thank you for your testimony and for answering the questions. I think all of you now have the opportunity to see what some of the questions and concerns are of the Committee and how difficult it is to move legislation such as this through the Committee.

I think you can also see that there is a tendency for some of us to not fully grasp just how difficult it is for you to do your jobs. I look forward to continuing to work with you in hoping to move this legislation forward.

Mrs. CHRISTENSEN. Mr. Chairman?

The CHAIRMAN. Mrs. Christensen.

Mrs. CHRISTENSEN. Could I also ask one final question?

The CHAIRMAN. If you make it real quick.

Mrs. CHRISTENSEN. OK. Probably some testimony will come later, but this goes to Colonel DiGiovanni. Professor Kunich, who will testify later, was formerly the chief environmental Law attorney for the Air Force Space Command. In his testimony he states, "During my two decades of military legal service, which included the first Gulf War, our intervention in Kosovo, and several major operations other than war, I never became aware of even one instance in which the Endangered Species Act or the Marine Mammal Protection Act posed an impediment to the military mission."

Have things changed dramatically since he left in 1999 to bring us to the point which we're at today?

Colonel DIGIOVANNI. I'm not sure what experiences the Judge Advocate has as far as preparing warfighters for combat. But I can say that we in the Air Force have a very good working relationship with the U.S. Fish and Wildlife Service and State agencies that allow us to produce what I think are pretty good Integrated Natural Resource Management Plans.

Again, I think what we're trying to do with the RRPI is to codify that into law, so that we can look at each individual issue out on the range in a holistic manner, in a way that takes a look at the entire ecosystem that we're trying to train on and produce warfighters to do what is needed for national defense needs.

Mrs. CHRISTENSEN. We appreciate the need for the ability to train and the difficulty being in court has presented to many branches of the armed forces, but it just seems this goes a bit further than it should go and it really undermines an Act that I think is important, that we protect and preserve.

The CHAIRMAN. I would agree with the lady, that the Endangered Species Act is important and it needs to be preserved. Unfortunately, when we have a panel of witnesses that testify for two-and-a-half hours about all of the problems they're having, it makes it difficult to move forward and do what we really need to do in order to allow them to do their job.

I do appreciate your testimony. I'm going to dismiss this panel. Thank you very much for your testimony.

Mr. ABERCROMBIE. Mr. Chairman. They can go.

The CHAIRMAN. Yes. You guys can go. And I'm going to call up our next panel.

Mr. Abercrombie.

Mr. ABERCROMBIE. I just wanted to compliment you on the fact that the two-and-a-half hours shows the thoroughness with which you're trying to come to grips with the issue, and I, for one, appreciate it.

The CHAIRMAN. Thank you.

Mr. ABERCROMBIE. Even if nobody else does, Mr. Chairman.

[Laughter.]

The CHAIRMAN. Thank you very much. I want to welcome our second panel. Before you guys get too comfortable, I would ask you to stand and raise your right hand.

[Witnesses sworn.]

Let the record show they answered in the affirmative. I welcome you here today. I apologize for the delay. I know that both you gentlemen have been waiting for your opportunity to testify.

Judge Manson, we are going to start with you in just 1 second. If I could have order in the Committee. I would like to have that rear door shut, and if you're in, you're in, and if you're out, you're out. These gentlemen have been waiting for a long time to have their opportunity to testify and they deserve to be heard.

Judge Manson, if you're ready, you may proceed.

STATEMENT OF CRAIG MANSON, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

Mr. MANSON. Thank you, Mr. Chairman. I appreciate the opportunity to testify this afternoon on this subject on behalf of Secretary Norton, who understands the unique nature of the duties and missions of the military and the need to train effectively for military activities. On a personal note, I have seen these issues from both perspectives, having served nearly 30 years in the active duty Air Force, the Air Force Reserve, and the Air National Guard. Many times I was called upon to advise commanders about compliance with environmental laws, including the Endangered Species Act.

From that experience, and my experience as a State regulator in California, I can say that the Department of Defense has been an exemplary steward of the Nation's natural resources, and that opinion is shared by the Secretary and throughout the Department of the Interior.

The Fish and Wildlife Service, which I oversee, has actively sought to work with the Department of Defense to achieve a balance between meeting the requirements of various natural resources laws without impacting the military's ability to train.

My testimony today focuses on the proposal concerning the substitution of Integrated Natural Resource Management Plans, INRMPs, on military installations for critical habitat under the Endangered Species Act. At least 300 listed species occur on Department of Defense lands, and access limitations due to increased security, the necessity for buffer zones, and good military stewardship has resulted in some of the finest remaining habitat occurring on those military lands.

The ESA requires the Fish and Wildlife Service to designate critical habitat for listed species, if designation is prudent and determinable. Critical habitat designations on DOD lands can impact the ability of the military to prepare and train by imposing additional requirements for consultation under section 7 of the Act.

As you are aware, Mr. Chairman, I have offered testimony at a recent hearing which focused on the problems the Fish and Wildlife Service currently faces in implementing the ESA's requirements to designate critical habitat. If I may, I would like to offer some brief general comments on that issue, followed by a discussion of critical habitat issues on military lands.

For many years, the Fish and Wildlife Service has faced the difficult challenge of meeting all of the non-discretionary deadlines to list species and designate critical habitat imposed by the ESA.

There are an ever-increasing series of court orders, compliance with which now consumes nearly the entire listing budget. Moreover, the accelerated schedules that often result from litigation have left the Service with almost no ability to confirm the scientific data and its administrative record before making decisions on listing and critical habitat proposals, without risking noncompliance with judicially imposed deadlines.

Finally, it has fostered a second round of litigation in which those who fear adverse impacts challenge designations. The cycle of litigation is endless, it's expensive, and in the final analysis, provides almost no additional protection to listed species. The time spent on lawsuits could be better spent on focusing on those actions which benefit species, through the development and implementation of recovery plans, working to develop partnerships with States and land owners, including the military.

The Department of Interior's policy is to exclude military facilities from critical habitat designations, if the military has an improved INRMP which addresses the species in question. We support the codification of this policy, as it has allowed the Department of Interior to address a number of Department of Defense concerns over critical habitat designations. You heard some of those concerns.

If I may, Mr. Chairman, this is a moderate policy, begun in the last administration. It provides a superior way of dealing with the issues raised by critical habitat because it approaches it from an ecosystem perspective instead of the long-discredited, species-by-species approach. It provides real management instead of the lack of management provided by the critical habitat designation. For that reason, we support it.

A recent court decision, however, has clouded our ability to exclude military lands; that was referred to by one of the earlier witnesses, involving the Forest Service suit in the District of Arizona. For that reason, it would be important to codify this policy.

In closing, Mr. Chairman, I believe that both the Interior Department and the Department of Defense have operated cooperatively to implement natural resources conservation laws passed by Congress. We are aware of the challenges that have arisen during this endeavor.

This concludes my testimony. I will be glad to answer any questions at the appropriate time.

[The prepared statement of Mr. Manson follows:]

Statement of Hon. Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior

Mr. Chairman and members of the Committee, I am Craig Manson, Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior (Department). I am pleased to appear before you today to discuss the role of the Department of the Interior in implementing Federal natural resource laws and our continuing working relationship with the Department of Defense (DoD) on natural resource issues. My statement will address the Fish and Wildlife Service's responsibilities and authorities under the Endangered Species Act (ESA), the Sikes Act, and the Marine Mammal Protection Act (MMPA). These laws reflect our Nation's long-standing commitment to the conservation of our natural resources for the benefit of future generations.

The Department interacts with Department of Defense activities through its bureaus, including the U.S. Fish and Wildlife Service, the Bureau of Land Management, and the National Park Service. The Fish and Wildlife Service strives to insure

flexibility in meeting our joint responsibilities under the various natural resource laws without impacting the military's ability to train its personnel. I believe that the Fish and Wildlife Service and the military have done a commendable job at working together to strike a balance between our legal responsibilities and the Armed Forces' duty to be both protectors of our National Security and stewards of our natural heritage. I also acknowledge that more can be done. I will address both our successes and challenges as I discuss issues associated with the applicable laws.

Endangered Species Act

The ESA was passed in 1973 to conserve vulnerable plant and animal species that, despite other conservation laws, were in danger of extinction.

DoD has a critically important role to play in the conservation of many rare plants and animals. At least 300 species listed as threatened or endangered occur on DoD-managed lands. DoD manages approximately 25 million acres on more than 425 major military installations throughout the United States. Access limitations due to security considerations and the need for safety buffer zones have sheltered many military lands from development pressures and large-scale habitat loss. As a result, some of the finest remaining examples of rare wildlife habitats exist on military lands.

The Fish and Wildlife Service has strived to establish good relationships with DoD that enable the military to carry out its mission of protecting our country while also ensuring the conservation of ESA-listed species on land it manages.

Candidate Conservation

Conserving species before they need protection under the ESA is easier, more efficient, and poses fewer challenges to Federal agencies, including the military. In partnership with DoD and NatureServe, the Fish and Wildlife Service is developing a list of all at risk, non-federally listed species that may be found on or near military lands. This partnership project was developed by the military agencies, and demonstrates their interest in working with the Fish and Wildlife Service to benefit species.

The term "species at risk" is a term used by NatureServe for a native species that is either a candidate for listing or is considered by NatureServe and the Network of Natural Heritage Programs to be "imperiled" or "critically imperiled." In NatureServe's use of the term, "species at risk" refers to species that are presumed extinct, historical, critically imperiled, imperiled, and vulnerable (GX, GH, G1, G2, G3 ranks, respectively). Although the Fish and Wildlife Service generally means the same thing when we use the term "species at risk," we use the term as a descriptive, illustrative term for those species that may warrant conservation to prevent the need to list under the ESA. A ranking of G1, G2, or G3 indicates those kind of species. "Imperiled" and "critically imperiled" are defined by NatureServe as terms referring to G1 and G2 ranked species.

Once a species at risk is identified based on a mutual priority between the DoD installation and the Fish and Wildlife Service, the Fish and Wildlife Service works with DoD to develop and implement conservation recommendations for the relevant activity. DoD working on a particular "species at risk" is based on a mutual priority between the DoD installation and the Fish and Wildlife Service.

In addition to this local and regional cooperation, Fish and Wildlife Service and DoD personnel have been meeting quarterly for several years in an "Endangered Species Roundtable." This informal session allows for open discussion and can lead to the referral of particularly difficult issues to headquarters for guidance or resolution. The group also reviews the Sikes Act and Integrated Natural Resource Management Plan (INRMP) development and implementation as they pertain to endangered species management.

Challenges

Even with these successful partnerships, we acknowledge that there have been challenges in resolving endangered species conservation and the military mission at some DoD bases and facilities. For example, 18 threatened or endangered species occur on Camp Pendleton, a Marine Corps Base in California. For some of these species, like the tidewater goby, the base harbors the only known remaining populations. Preventing potential conflicts between endangered species conservation and Camp Pendleton's primary military mission continually challenges the creativity of both the Fish and Wildlife Service and the base leadership.

Section 7(j) of the ESA provides a national security exemption that DoD can invoke in cases where National Security would be unacceptably compromised by conservation responsibilities. This exemption has never been invoked by DoD, a fact that speaks very well to the creativity of our military and natural resource professionals. However, it is apparent that we must avoid penalizing the military for hav-

ing done positive things for conservation of species and we must not unfairly shift the burden of species protection to the military. Additionally, in some cases, issues arise because of differing perceptions between our respective agencies about the effects of the provisions of the ESA. Finally, I must note that many of the challenges presented to the military under the ESA are similarly faced by other Federal agencies and private landowners. We look forward to continuing to work with the DoD to clarify these issues and build upon the relationship we have established.

Critical Habitat Designation

As you are aware Mr. Chairman, I offered testimony at a recent hearing which focused on the problems the Department and the Fish and Wildlife Service currently faces in implementing the ESA's requirements to designate critical habitat. If I may, would like to offer some brief general comments on this issue, followed by a discussion of critical habitat issues as the relate to military lands.

Designation of critical habitat has been a source of controversy and challenge for many years. For well over a decade, encompassing four separate Administrations, the Fish and Wildlife Service has been embroiled in a relentless cycle of litigation over its implementation of Section 4 of the ESA. The underlying premise of those cases has been a dispute between the Fish and Wildlife Service and numerous private litigants over the proper allocation of the limited funds appropriated by Congress to carry out the numerous petition findings, listing rules, and critical habitat designations mandated under the rigorous deadlines in Section 4. The Fish and Wildlife Service now faces a Section 4 program in chaos—not due to agency inertia or neglect, but due to limited resources and a lack of scientific discretion to focus on those species in greatest need of conservation.

For many years the Fish and Wildlife Service has been unable to comply with all of the non-discretionary deadlines imposed by Section 4 of the ESA for completing mandatory listing and critical habitat (listing program) actions within available appropriations. The majority of private litigants have therefore repeatedly sued the Fish and Wildlife Service because it has failed to meet these non-discretionary deadlines. These lawsuits have subjected the Fish and Wildlife Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Fish and Wildlife Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions most urgently needed to conserve species.

Moreover, the accelerated schedules that often result have left the Fish and Wildlife Service with almost no ability to confirm the scientific data in its administrative record before making decisions on listing and critical habitat proposals, without risking noncompliance with judicially-imposed deadlines. Finally, it has fostered a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. This cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

In short, litigation over critical habitat has hijacked our priorities. The Fish and Wildlife Service's listing program's limited resources and staff time are being spent responding to an avalanche of lawsuits, and court orders focused on critical habitat designations. We believe that this time could be better spent focusing on those actions that benefit species through improving the consultation process, the development and implementation of recovery plans, and working to develop voluntary partnerships with States and other landowners. As discussed in more detail below, this includes the military agencies.

Issues Relating to Definitional Exclusions from Critical Habitat

Integrated Natural Resource Management Plans (INRMPs) are planning documents that allow the military to implement landscape-level management of its natural resources while coordinating with various stakeholders. The Department of the Interior initiated a policy in the previous Administration, which we have continued, to exclude military facilities from critical habitat if there was an approved INRMP for that facility which addressed the species in question. However, a recent court case has cast doubt on our ability to continue this practice.

The policy is based on the definition of critical habitat which states, in part:

> ...the specific areas within the geographical area occupied by the species...on which are found those physical or biological features—(I) essential to the conservation of the species and (II) which may require special management considerations or protection;

The exclusion policy was based on a decision that military lands with an approved INRMP, and other types of land with approved management policies, did not require

special management consideration because they already had adequate management and, thus, by definition would not be considered critical habitat.

However, the U.S. District Court in Arizona has ruled, in a case relating to Forest Service lands (Center for Biological Diversity v Norton), that this interpretation is wrong, and the fact that lands require special management necessitates their inclusion in, not exclusion from, critical habitat. The Court went on to say that the government's interpretation amounted to our inserting the word "additional" into the statute (between "require" and "management"), and that only Congress can so revise the definition.

While the implications of this decision go far beyond military lands, we felt it important to advise the Committee of it and the cloud it casts over our continued ability to exclude military lands with approved INRMPs from critical habitat. We believe this adds additional weight to the Administration's proposal, contained in the Readiness and Range Preservation Initiative, for a statutory exclusion.

To avoid possible confusion in light of the Court's ruling, we would suggest striking the words "provides the "special management considerations or protection" required under the Endangered Species Act (16 U.S.C. 1532(5)(A)) and" from the proposed new section 2017(a) of the Administration's Readiness and Range Preservation Initiative. While that phrase is consistent with our interpretation of the law, it could cause future litigation problems due to the Court's ruling that the necessity for "special management considerations or protection" requires that land to be included, not excluded, from critical habitat. This change would leave the section with an unambiguous statement that completion of an INRMP for the species in question precludes designation of critical habitat at that facility.

Other Recent Critical Habitat Actions

The ESA portion of the Administration's proposal addresses critical habitat designations. The Department has been able to address a number of DoD concerns over critical habitat designations.

Critical habitat proposed for the purple amole, a plant, in California included significant portions of Camp Roberts and Fort Hunter Liggett. Camp Roberts had a completed INRMP which addressed conservation of this plant, and we excluded it from the critical habitat designation on this basis.

While Fort Hunter Liggett was developing an INRMP to address the plant, it did not have the plan completed at the time we had to make the decision on the critical habitat designation. However, DoD had provided us with detailed comments on the adverse impacts to military readiness that would result from the proposed designation, and these justified removing the Fort from the critical habitat under section 4(b)(2) of the ESA. We determined that the benefits of excluding the area exceeded the benefits of inclusion, in that the adverse impacts to national defense exceeded the benefits that would result from designating the area as critical habitat.

Although not the basis for our decision, the fact that Fort Hunter Liggett had a statutory obligation to complete its INRMP, and to include the plant within that plan, provided us with an additional comfort level for that exclusion.

Sikes Act and Integrated Natural Resource Management Plans

In Fiscal Year 2002, the Fish and Wildlife Service and state fish and wildlife agencies assisted in development, review, and/or implementation of INRMPs for 225 military installations in the United States.

INRMPs serve as an effective vehicle through which DoD and the Military Services can comprehensively plan for conservation of fish and wildlife species. This planning has the potential to address important needs for resident endangered species, including the protection of habitat.

We are committed to improving and expanding our existing partnerships with DoD, the Army, the Navy, the Air Force, and the Marine Corps. We look forward to opportunities to increase the utility of INRMPs as tools to maximize the potential benefits of DoD lands to fish and wildlife conservation while ensuring effective training of our troops.

Marine Mammal Protection Act

The Marine Mammal Protection Act of 1972 established a Federal responsibility, shared by the Secretaries of the Interior and Commerce, for the management and conservation of marine mammals. The Department of the Interior is responsible for sea otters, walrus, polar bears, dugongs, and manatees, while the Department of Commerce is responsible for cetaceans and pinnipeds, other than walrus, including seals, whales and dolphins. In 1994, Congress enacted a number of amendments to the statute. One of the provisions, with broad applicability throughout the Act, added the definition of "harassment" as an element of the Act's take provisions.

Over the last several years, the Fish and Wildlife Service has worked diligently with the National Marine Fisheries Service (NMFS), the Marine Mammal Commission (MMC), the United States Navy, and Alaska Natives to develop proposals that enhance marine mammal conservation, and provide greater certainty to the regulated public regarding certain areas of the existing law. During this process, revisions to the definition of harassment were considered to address a number of concerns, including those expressed by the Navy. The text of this proposed amendment to the definition of harassment is contained in Administration's Range Readiness and Preservation initiative in a way that only applies to DoD military readiness activities.

We note that this same language applying to all entities, in addition to other important proposals related to the MMPA, are contained in the Administration's comprehensive legislative proposal to reauthorize and amend the Marine Mammal Protection Act. This MMPA reauthorization proposal was transmitted to Congress at the end of February. The Department strongly supports enacting this comprehensive legislative proposal, which will address the concerns of the Navy regarding harassment.

The Administration's Range Readiness and Preservation initiative contains two other provisions related to the MMPA—an incidental take provision related to military readiness activities, and a national defense exemption. Because the Department of Commerce has the most interaction with DoD regarding these particular MMPA issues, we will defer to their comments on these provisions.

Conclusion

In closing, Mr. Chairman, I believe both the Department of the Interior and DoD have acted cooperatively to implement natural resource conservation laws passed by Congress. We are aware of the challenges that have arisen during this endeavor. The Department is prepared to explore and craft creative solutions to balance our conservation mandates with military readiness. We look forward to continue work with the Department of Defense on this vitally important matter.

This concludes my testimony. I appreciate the opportunity to appear today before the Committee, and I would be pleased to answer any questions you have.

The CHAIRMAN. Thank you.

Dr. Hogarth.

STATEMENT OF WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Dr. HOGARTH. Thank you, Mr. Chairman, and members of the Committee. I am Bill Hogarth, the Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration. I appreciate the opportunity to testify before you today regarding H.R. 1835, which proposes amendments to the Endangered Species Act and to the Marine Mammal Protection Act.

H.R. 1835 is still under review by the Administration. However, I am prepared to give preliminary views today. As always, we are happy to work with the Committee to resolve any concerns.

Over the past several years, NOAA worked closely with the U.S. Fish and Wildlife Service, the Department of Defense, the Marine Mammal Commission and others to develop an administration proposal to reauthorize the MMPA. This administration MMPA bill was transmitted to Congress in February of this year.

Revising the MMPA's definition of harassment has been a major topic in reauthorization discussions. NOAA has experienced a number of difficulties with interpretation, implementation, and enforcement of the current MMPA harassment definition. The current definition impedes NOAA's ability to adequately enforce the MMPA's take provisions. As it is currently written, only those acts involving

"pursuit, torment, or annoyance" can be addressed. Additionally, the agency must provide that the act has the potential to either injure or disturb a marine mammal. Thus, it contains a two-tiered standard that the agency must meet before it can properly enforce the Act. H.R. 1835 helps eliminate these problems.

The current definition is also overly broad and fails to create a clear threshold for what activities do or do not constitute harassment. NOAA supports the manner in which H.R. 1835 clarifies the definition of harassment to focus the agency and the regulated community on the types of harassment that results in meaningful, biological disturbance to marine mammals.

The current definition also does not provide an adequate mechanism to address activities intentionally directed at an individual or groups of marine mammals that could have biologically significant impacts.

NOAA supports the third tier of the harassment definition in H.R. 1835, which makes it explicit that activities that are likely to disturb marine mammals that are directed at individual or groups of marine mammals are considered harassment.

Overall, NOAA strongly supports the proposed amendments to the harassment definition contained in H.R. 1835, which effectively are identical to the proposed harassment definition in the Administration's MMPA bill. H.R. 1835 will apply a clear standard of harassment to the entire regulatory community and will result in more meaningful protections for marine mammals and focus on activities that will result or could result in significant impacts on marine mammals.

In addition to the harassment language change, H.R. 1835 would also amend several parts of the current legislative requirements that authorize incidental take legislative language in section 101(a)(5) of the MMPA. Incidental takes are those that are unintentional and may occur during otherwise lawful activities.

Under the MMPA, NOAA fisheries will authorize the takes of small numbers of marine mammals if the takings will have no more than a negligible impact on those marine mammal species or stocks, and not have an unmitigable adverse impact on subsistence levels of these species.

H.R. 1835 would delete the "small numbers" standard in section 105(a)(5) of the MMPA and would no longer require that activities under this section be limited to a "specified geographic region." These proposed amendments do not change the applicant's requirement of having to show that their activities are having a negligible impact on the marine mammal species and populations. Additionally, applicants seeking small take authorizations for their activities will still have to abide by all requirements of the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act, where they apply.

These small take applications are currently evaluated based on the biological significance of the effect their actions would have on marine mammals. This will not change under the amendments proposed in H.R. 1835, and NOAA does not believe that the protection of marine mammals will be decreased under this bill.

In conclusion, I hope to have the opportunity to work with the Committee to resolve outstanding issues in this bill, and to work

to improve areas in need of attention in both the MMPA and the ESA. I look forward to working with the members of the Committee, your staff, and other interested members of the public to meet the challenges that we all face in conserving and protecting marine mammals and endangered and threatened species.

This concludes my testimony, Mr. Chairman. Thank you again for the opportunity to testify before your Committee today. I look forward to answering any questions you may have.

[The prepared statement of Dr. Hogarth follows:]

Statement of Dr. William T. Hogarth, Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on H.R. 1835. I am Dr. William T. Hogarth, Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration (NOAA). I appreciate the opportunity to testify today regarding the bill, which proposes amendments to the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). NOAA Fisheries shares jurisdiction over implementation of both of these statutes with the U.S. Fish and Wildlife Service (USFWS). NOAA Fisheries administers the MMPA for approximately 150 stocks of cetaceans, seals, and sea lions, while USFWS has responsibility for walruses, manatees, polar bears, dugongs, and sea otters.

H.R. 1835 was recently introduced and is still under review by the Administration. It includes some provisions that are similar to the Administration's Readiness and Range Preservation Initiative. NOAA Fisheries has not yet completed a thorough review of the bill but we are prepared to give preliminary views today. As always, we are happy to work with the Committee to resolve any concerns.

MARINE MAMMAL PROTECTION ACT

Definition of Harassment

Over the past several years, NOAA worked closely with the USFWS, Department of Defense, Marine Mammal Commission, and others to develop an Administration proposal to reauthorize the MMPA. This Administration MMPA reauthorization bill was transmitted to Congress in February 2003.

Revising the MMPA's current definition of harassment has been a major topic in reauthorization discussions. NOAA strongly supports the proposed amendments to the harassment definition contained in H.R. 1835. These amendments are effectively identical to the proposed harassment definition in the Administration's current proposed MMPA bill, as well as the MMPA reauthorization proposed by the Clinton Administration. We appreciate the work the Committee has already done to reauthorize the MMPA and look forward to working with you to achieve timely passage of a bill.

The definition of harassment, a critical component of the "take" prohibition, which is also defined in the Act, has broad applicability throughout the MMPA. The current definition in the MMPA separates harassment into two levels. Level A harassment is defined as, "any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild." Level B harassment is defined as, "any act of pursuit, torment, or annoyance which 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."

NOAA has experienced difficulties with interpretation, implementation, and enforcement of the current MMPA harassment definition. First, the definition is limited to acts involving "pursuit, torment, or annoyance." Second, the definition is overly broad and does not provide a clear enough threshold for what activities do or do not constitute harassment. Third, the definition does not provide an adequate mechanism to address activities intentionally directed at individual or groups of marine mammals that could have biologically significant impacts. H.R. 1835 and the Administration's MMPA reauthorization bill both propose very similar revisions to the current definition that would address each of these concerns.

Inappropriate Two–Tiered Standard: The current definition of harassment impedes NOAA's ability to adequately enforce the MMPA's take provisions. As the definition is currently written, only those acts involving "pursuit, torment, or annoyance," terms that are undefined in the MMPA, can be addressed. Second, the agency

must prove that the act has the potential either to injure or disturb a marine mammal. Thus, the current definition contains a difficult two-tiered standard that the agency must meet before it can prosecute anyone who takes a marine mammal by harassment. As a result, NOAA agrees with the need to eliminate the phrase "pursuit, torment, or annoyance" from the harassment definition.

Overly Broad: The current definition of harassment is both broad and ambiguous and, therefore, it fails to create a clear threshold for acts that do and do not constitute harassment. As a result, it is difficult for the agency to prioritize its resources to deal with the types of harassment that have the most negative effects on marine mammals. We are also concerned that the existing definition could result in unnecessary administrative burdens on the regulated community. One could argue, for instance, that any activity has the potential to disturb a marine mammal by causing disruption of behavioral patterns, from humans walking along a pier near a group of sea lions causing them to stop feeding and raise their heads, to driving a ship that causes a wake that dolphins choose to swim in. As interpreted by some courts, the current definition does not distinguish biologically significant, harmful events from activities that result in de minimis impacts on marine mammals.

The lack of a clear threshold for harassment in the definition blurs the distinction between those activities that cause insignificant impacts and those that cause truly harmful impacts to marine mammals. This has negative consequences on marine mammals, NOAA, and the regulated community. First, activities that result in meaningful biological disturbance to marine mammals do not receive the degree of attention that they warrant. Second, NOAA Fisheries must devote its already limited resources to addressing activities and issues that result in biologically insignificant impacts on marine mammals. Third, the lack of clarity in the definition imposes unnecessary regulatory burdens on the regulated community, who are forced to apply for permits for often harmless activities to prevent potential legal consequences. NOAA supports the manner in which H.R. 1835 clarifies the definition of harassment to focus the agency and the regulated community on types of harassment that result in meaningful biological disturbance to marine mammals, rather than those acts that are not likely to have biologically significant impacts on marine mammals.

Lack of Emphasis on Directed Impacts: NOAA supports the third tier of the harassment definition in H.R. 1835. This provision makes it explicit that activities that are likely to disturb marine mammals that are directed at individual or groups of marine mammals, such as closely approaching, touching, or swimming with dolphins in the wild, are considered harassment. Members of the public and commercial operators who intentionally interact with wild marine mammals either by boat, in the water, or on land disturb the natural behavior of the animals. They also do a great disservice to these animals over time by habituating them to humans and vessels. In addition, humans who attempt to closely approach, chase, swim with, or touch wild marine mammals place themselves at risk since wild animals are unpredictable and can inflict serious injury if threatened or afraid.

Overall, NOAA feels the proposed definition of harassment contained in H.R. 1835 will apply a clearer standard of harassment to the entire regulatory community and result in more meaningful protections for marine mammals. Additionally, the proposed definition conceptually mirrors recommendations by the National Research Council (NRC) for regulations that are based on the potential for a biologically significant impact on marine mammals. In 2000, NRC pointed out flaws in the current definition of harassment, contending that since science is improving in terms of its ability to distinguish between activities that have significant negative effects and those that have insignificant effects on marine mammals, the harassment definition should be amended to reflect this. The virtually identical harassment definitions contained in the Administration's MMPA bill and H.R. 1835 will both achieve this goal of focusing on activities that will result or could result in significant biological impacts on marine mammals.

Exemption of Actions Necessary for National Defense

H.R. 1835 would allow the Secretary of Defense, after consulting with the Secretaries of Commerce and the Interior, to exempt any action or category of actions undertaken by the Department of Defense (DOD) from compliance with any provision of the MMPA if it is determined to be necessary for national defense. These exemptions would be granted for up to two years, with additional two-year exemptions possible after further consultation between the Secretaries. While such a provision could result in reduced protections for marine mammals during times of heightened national security, such a change to the MMPA would be in line with exemptions to

protections for endangered and threatened species under the ESA for national security purposes.

Incidental Taking of Marine Mammals in Military Readiness Activity

H.R. 1835 would amend several parts of the current legislative requirements that authorize incidental take (section 101(a)(5) of the MMPA). Incidental takes are those that are unintentional and may occur during otherwise lawful activities.

The MMPA established a moratorium on the taking of marine mammals in U.S. waters by any person, and by those subject to U.S. jurisdiction on the high seas. In 1981, Congress amended the MMPA to allow "small take" authorizations for otherwise lawful activities. Under the present scheme, NOAA Fisheries will authorize the takes of small numbers of marine mammals if the takings will have no more than a negligible impact on those marine mammal species or stocks, and not have an unmitigable adverse impact on subsistence harvests of these species. Through regulation, NOAA Fisheries has defined "negligible impact" as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

In 1986, Congress amended both the MMPA, under the small take program, and the Endangered Species Act to authorize takings of depleted (and endangered or threatened) marine mammals, provided that the taking (lethal, injurious, or harassment) had a negligible impact on small numbers of marine mammals.

H.R. 1835 would delete the "small numbers" standard in Section 101(a)(5) of the MMPA and would no longer require that activities authorized under this section be limited to a "specified geographic region." These proposed amendments do not change the applicant's requirement of having to show that their activities are having a negligible impact on the marine mammal species and populations. Additionally, they will have to demonstrate that their activities will not have an unmitigable adverse impact on the availability of such species or stocks for subsistence uses pursuant to the MMPA. These analyses are the key elements to maintaining the health of marine mammal species and are the premise for small take authorizations under the MMPA. Applicants seeking small take authorizations for their activities will still have to abide by all requirements of the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act, where they apply.

Thus, to make the requisite negligible impact determination and to comply with other environmental laws, NOAA Fisheries would still have to know what activities would be taking place, as well as when and where they would occur under the language proposed by H.R. 1835. These small take applications are currently evaluated based on the biological significance of the effect that their actions would have on marine mammals. This will not change under the amendments proposed in H.R. 1835, and NOAA does not believe that protection of marine mammals will be decreased under this bill.

CONCLUSION

I hope to have the opportunity to work with the Committee to resolve outstanding issues in this bill and to work to improve areas in need of attention in both the MMPA and ESA. I look forward to working with Members of the Committee, your staffs, and other interested members of the public to meet the challenges that we all face in conserving and protecting marine mammals and endangered and threatened species.

This concludes my testimony. Thank you again for the opportunity to testify before your Subcommittee today. I would be happy to answer any questions you may have about my testimony or related issues.

The CHAIRMAN. Thank you.

Mr. Manson, you heard extensive testimony earlier on some of the problems that the military is currently having. The idea under this legislation is to codify a lot of the administrative things that you and your predecessor attempted to do to allow the military to work within the Endangered Species Act. But a question has come up during the previous testimony.

Is it your understanding that, under this legislation, would the military in any way be exempt from the Endangered Species Act? Would they be able to kill endangered species and destroy habitat under this bill?

Mr. MANSON. There is nothing in this legislation that would exempt the military from the Endangered Species Act.

The CHAIRMAN. So it is your understanding, from your years of experience, both at the State and Federal level, that one of the purposes of the military would continue to be to manage their lands in a way that protects endangered species?

Mr. MANSON. That would be my understanding.

The CHAIRMAN. Can you also help to clarify what exactly is going on right now—and we had extensive testimony dealing with Camp Pendleton, and I know you're familiar with Camp Pendleton—about the restrictions that are being placed on their ability to train now and the efforts that they're making to protect the species on that particular base?

Mr. MANSON. Well, I think that General Bowdon gave a far superior description of that than I could. There were a lot of numbers tossed around. I heard 1 percent in one case and some other numbers about the amount of critical habitat.

I think that it's important to note, as I think General Bowdon did, that he was talking about the 57 percent as potential critical habitat. There are a number of endangered species and overlapping potential critical habitat designations at Camp Pendleton, so there is more than one potential designation out there. In fact, there are at least two that are pending right now, in addition to the ones that have been previously made.

The CHAIRMAN. Let me ask you on a little bit different topic. A lot of questions keep coming up about invoking the God Squad and having them come in, as well as the military just asking for a national security exemption.

If a God squad request was made and they came in and exempted an activity that the military is carrying out, for a specific endangered species, does that not give them an exemption from the Endangered Species Act in that case?

Mr. MANSON. Well, for a particular species, and with respect to a particular activity, a particular project, it would.

I should note that, in the view of many, the Endangered Species Committee, also known as the "God Squad", is a very cumbersome procedure. It takes quite a bit of time and has only been invoked perhaps three times in the last 30 years because of the cumbersome nature of that procedure.

The CHAIRMAN. Well, to follow along with some of the line of questioning of my colleagues, in the case of Camp Pendleton, 18 separate endangered species, hundreds if not thousands of different activities, they would have to either request a national security exemption for each of those activities, or invoke the "God Squad" to come in on each and every one of those cases, instead of just going through what you termed a holistic approach of adopting an INRMP that manages endangered species on the entire property.

It would seem to me that, if you really do care about protecting endangered species, that that would be a better approach than going along some path of just asking for exemptions from the Endangered Species Act.

Mr. MANSON. Well, it certainly is my view that the INRMP process is a superior process, for a couple of reasons. One, it addresses multiple species instead of just individual species; two, it requires

active management of the species and the habitat; three, it's a process that involves not only the Fish and Wildlife Service but the relevant State wildlife agencies. So, to that extent, you get a lot of input and a lot of expertise about the management of the species and the habitat.

The bottom line about the INRMP process is that it does something for the conservation of the species. It's not an exemption. It keeps the military actively involved in the management of species. It keeps the Fish and Wildlife Service and the State actively involved in the management of species on a basis that is well-recognized in the conservation community.

The CHAIRMAN. I appreciate your testimony. Unfortunately, my time has expired.

Mrs. Christensen.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman. I appreciate both of you for your patience and the waiting throughout the previous panel and our questions.

I would like to ask a question that was asked of the previous panel, because I don't think it's ever been answered, and that is the Administration's position on H.r. 1835. Judge Manson, are you in a position to speak on behalf of the Administration? Are you representing the Administration on this bill?

Mr. MANSON. Well, I have testified in support of the INRMP process. I'm not aware that the Administration has a position on the overall bill.

Mrs. CHRISTENSEN. OK. The bill's provisions would be extended to other Federal agencies. This question would go to both you and Dr. Hogarth. Are both of you supportive of that?

Mr. MANSON. The INRMP process?

Mrs. CHRISTENSEN. No, the changes, that 2(a) would apply to all Federal agencies. Are you in support of that?

Mr. MANSON. As it's written, it appears that that would apply to all Federal agencies, yes.

Mrs. CHRISTENSEN. Is the Department of Interior in support of that?

Mr. MANSON. The Administration, as far as I know, doesn't have a position on that provision of the bill.

Mrs. CHRISTENSEN. We are having a bit of difficulty. Tomorrow, I believe, is the day we're going to be voting on this bill and we're apparently going to be doing so without a clear position from the Administration.

Dr. Hogarth, do you have any clarification on that?

Dr. HOGARTH. For the Marine Mammal Protection Act, as I testified, we are very supportive. We think it is very close to what the—you know, close to it. But the Administration itself has not come out point-blank, but I think if you look at what we have submitted as an administration bill, and the nature of H.R. 1835, you'll see they are very similar. Effectively, they seem to be the same.

As far as the Endangered Species Act, there is no administration position, and we also have concerns we have addressed that we would think need to be discussed with the Committee.

Mrs. CHRISTENSEN. Dr. Hogarth, on page 4 of your testimony you talked about H.R. 1835 deleting small numbers and that it would have—I think you're saying—I guess my question is, are you say-

ing there that the changes in H.R. 1835 will not undermine the Endangered Species Act?

Dr. HOGARTH. That's correct. We feel like we have to look at negligible impact—I mean the MMPA, not the Endangered Species Act. In the MMPA, we have to look at—

Mrs. CHRISTENSEN. For marine mammals.

Dr. HOGARTH. Right. We have to look at the negligible impact, and small numbers would be something you would look at. It depends. On California sea lions, a small number would be a large number. If you look at the Hawaii monk seals or right whales, small numbers would be extremely small. So the evaluation we have to do is the negligible impact to the population.

Mrs. CHRISTENSEN. I may have a follow up to that later on.

Mr. Manson, I have one other question. The military, in their responses, seemed to—what I gleaned from that was that the processes that were in place worked, except for the litigation that followed in many cases, and that's what their concern was about. In reading your testimony, I tried to get through it and really didn't read it through completely. It seemed that you were saying that the litigation arose largely over the lack of resources that the Fish and Wildlife Service had and their inability to complete their studies and their reports on a timely basis.

If that's the case, is that the cause of the litigation, rather than some unclarity in the law that this bill purports to try to clear up?

Mr. MANSON. That is certainly a major issue with the designation of critical habitat. I think you also heard from the military witnesses that there are challenges, there are so-called merits challenges to our critical habitat designations as well, where people don't like the nature or scope of our designations. That is also a significant issue in terms of litigation.

Mrs. CHRISTENSEN. I think, by and large, they all testified that they had a very good working relationship with Fish and Wildlife and—

Mr. MANSON. That's true.

Mrs. CHRISTENSEN. —and that they worked very collaboratively.

Just a follow up to Dr. Hogarth. You also said, to the extent that the Navy and other action agencies can plan sufficiently far in advance of the activities and provide us with adequate time to work them at the earliest possible stages, the implications of the permit process should be minor. You said this at last year's House Armed Services Committee hearing on environmental issues.

Again, is it an issue of the timeliness of their requests in the permitting process, rather than problems in how the law is worded that is creating the problem? That's what that seems to suggest to me, that it's the time to complete the processes.

Dr. HOGARTH. Thank you. I think there are a couple of things that we have. There is a resource issue within the agency. We have about two people to do all this work. But I think there are some problems that have arisen with lawsuits, such as small numbers and things like that, which we were trying to—that we've seen since then, which H.R. 1835 addresses. So I think there's a resource issue within the agency, but there is also some clarification that you made to the MMPA which I think will help alleviate some of the other problems.

Mrs. CHRISTENSEN. We haven't made it yet.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentlelady's time has expired.

Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

Judge Manson and Dr. Hogarth, welcome to the hearing room. You probably don't testify very often on Capital Hill, so this is a wonderful opportunity to meet all of us.

What we are trying to do here today—and Judge Manson, you have testified to INRMPs in the past. I think INRMPs are a positive and more comprehensive approach to understanding the living resources. To some extent, we want to make sure that the hearing we have today is appropriate to the problems that DOD faces and what researchers have difficulties with as well as far as marine mammals are concerned. We want to make sure that this bill, as attached to the DOD authorization, does not go beyond what is necessary. We can do that in other avenues. We certainly want to restore the vigorous capacity for the necessary training on military bases around the country, and we also, in so doing—we've heard the word "balance" here on a number of occasions—we certainly want to balance that with the ability to maintain and restore the prodigious bounty of God's creation without further degradation or disruption or the loss of habitat upon which we, as people, ultimately depend.

So I have three specific questions. I think the first will go to Dr. Hogarth, dealing with the language—I think we'll call it title or level—it used to be Level B harassment, and now I guess it's Level 2 harassment—the language that's in the legislation now and the language that was, I think, recommended by the NRC.

Dr. Hogarth, I would like some clarification why or if you prefer the language that's in the legislation now, why do you think that's more clear and more definitive as far as the broad protection to marine mammals is concerned?

We've heard from scientists on the number of definitions for harassment, and we understand the problems that are out there, and so the language in the legislation deals with the term "significant", abandoned or significant. The language that was recommended by NRC—and I'll read it— "...has the potential to disturb a marine mammal or marine mammal stock in the wild by causing meaningful disruption of biologically significant activities, including, but not limited to, migration, breeding, care of the young..." and so on. That was the language recommended by NRC.

The language that is in the bill, which I'm going to ask whether you prefer that and why, takes out "meaningful disruption of biologically significant activities" and just includes "abandoned or significant".

Could you comment on that, Dr. Hogarth?

Dr. HOGARTH. I think what we tried to look at was to make sure we—I'm sorry—that we looked at the NRC definition very clearly. It does not have a Level A. NRC goes strictly to a Level B for the potential to disturb.

We looked at it and added actions directed at a marine mammal, and that's not NRC. And we added actions that affect the marine mammal but at a significant level, but we didn't use the biological

because we were concerned about the term biological to avoid problems that were limited only to a strict definition of biology. You know, that does seem overly broad, and it may not include the ecological factors or other factors that may be determined, such as speed boats. Something that would continue to run up out of the rookery, things like that, would that be biological or would that be dislocation, would that be disturbance? So we felt like—

Mr. GILCHREST. You're saying that "meaningful disruption of biological activities" is more vague?

Dr. HOGARTH. We felt that the destruction of natural but not having the meaningful, that we took a term out that we would end up arguing in court. We said the disruption of natural, biological patterns, including but not limited to, so we had some of the same definitions but we just took out the word "meaningful" because, again, you get into court—like small numbers, what is small numbers, versus what is meaningful, you know, to the different populations. So we felt like it would be much easier for us in court than to have the "meaningful".

Mr. GILCHREST. My time is up. Maybe we'll have a second round. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Udall.

Mr. TOM UDALL. Thank you, Mr. Chairman.

First of all, Mr. Manson, it seemed to me you were taking a position that—Well, let me start here. First of all, why no position on the bill, Judge Manson?

Mr. MANSON. I'm not in charge of developing the entire administration's position. I can't answer that for you. The process is larger than me.

Mr. TOM UDALL. Don't you think it's important that the Administration have a position on something this sweeping?

Mr. MANSON. Well, certainly the Administration likes to have positions on important bills, but the process, as I said, is beyond me, so I don't have an answer to that particular question.

Mr. TOM UDALL. Have you alerted others in the Department that this is something significant and they know about it, or is everybody too busy to take a position, I guess?

Mr. MANSON. I don't know that that's the issue. I know that the bill has been with us only a short period of time, so...

Mr. TOM UDALL. So isn't it fair to say that when a significant issue comes up, if you've had something for a week, you would jump on it and you would take a position if you think it's important. Your agency is in the business of administering these laws. You have the expertise. If this is important—you know, a week is a significant amount of time for somebody to look at and be able to take a position.

Can you tell me how soon anybody is going to take a position on this?

Mr. MANSON. No, sir, I'm afraid I can't. In fact, the development of administration positions is even, as I understand the process, beyond the Department.

Mr. TOM UDALL. How about Dr. Hogarth. Why no position on this?

Dr. HOGARTH. This bill affects both the Secretary of Interior and Secretary of Commerce particularly, and there is some questions

that I think have to be addressed between the two of us, and then there were questions that I think we have for clarification in the bill. So a week in government, to me, is not a very long time for the time I've worked here. I think it's going to take a little while to do that, and then to go through the approval process that we have to go through.

We have discussed it. I don't think it's a matter of that—I don't know that we knew your timeframe was tomorrow. I didn't know that. I can't answer the question totally as to why, but I know it's a major bill and it's one that affects two agencies. They would have to both go through the process of getting the Administration position.

Mr. TOM UDALL. Both of you—Were you both here during the testimony of the military panel?

Mr. MANSON. I was.

Dr. HOGARTH. You were in the room the whole time?

Mr. MANSON. Yes.

Dr. HOGARTH. Yeah.

Mr. TOM UDALL. OK. Well, you heard me ask the question about the language "insofar as practical and consistent with their primary purposes", where I quoted the language that was being inserted into the Endangered Species Act, making it the policy of the Congress, that "insofar as practical and consistent with their primary purposes".

Don't you think that's a significant change in the policy of the Congress on the Endangered Species Act? Or do you disagree with the position I outlined there?

Mr. MANSON. Well, without ascribing a value one way or another to it, just on their face, the words are significant. Yes, I would agree with that.

Mr. TOM UDALL. Dr. Hogarth?

Dr. HOGARTH. Yes, sir, I think they are, because it gets into whether section 7 and our jeopardy still applies, whether it applies only to DOD but all Federal agencies. Because of all this, it's significant and there are some questions we have there, yes.

Mr. TOM UDALL. And that's the part your agency and the Department of Commerce isn't taking a position on?

Dr. HOGARTH. It doesn't mean we won't take a position. We just haven't had the opportunity yet to get that position clear, you know, cleared.

Mr. TOM UDALL. Let me just say that I think it would really help this Committee if your agencies, working through OMB and whatever other processes actually came out and spoke out before the markup as to what your position is on this bill, especially these crucial issues like section 2(a) and the consultation and other questions that have been raised here, I hope you will take that back to your respective agencies and try to urge them to move along a little more quickly.

Thank you very much, Mr. Chairman.

Mr. GIBBONS. [Presiding.] Thank you very much, Mr. Udall. I certainly hope Mr. Udall isn't implying that if the Administration supports this bill, he will, too.

[Laughter.]

Mr. TOM UDALL. No, not in any way. I want to know what the Administration's position is. I'm not going to give a blank check there, Mr. Gibbons. But I am happy to hear their position. They've got the expertise.

My real point was, don't you think, in something this significant, where these agencies have a huge amount of expertise, that they could weigh in on this kind of thing. I mean, they've got lawyers over there. This is a provision in the law that was in 1966. It was clearly litigated, there's legislative history. I mean, there's an enormous amount that has gone on here. I would just hope they would shed a little light with that great expertise you have at the Department of Commerce and Department of Interior.

Thank you very much, and thank you for the courtesy of letting me go a little longer here.

Mr. GIBBONS. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman.

I was somewhat tongue-in-cheek intrigued by my colleague's comment about 7 days being ample time for several agencies and the Administration to take a position on a bill this complicated, when last week I think they had 6 days to review our forest health bill and we heard nothing but how it was being rushed through with very little time to be able to be considered by members of this august committee. So I just put that out there to think about.

Judge Manson, what's the length of time for the military to receive a decision on applications seeking to use critical habitat for military exercises? How long does that take, in your experience?

Mr. MANSON. Well, for example, if they want to use critical habitat for an exercise, then they would have to—

Mr. WALDEN. From start to finish.

Mr. MANSON. They would have to undergo consultation with the Fish and Wildlife Service under section 7 of the Act. There are some statutory deadlines that run about 135 days in theory. In practice, depending upon the circumstances, it could be longer than that, and depending upon the circumstances, it could be significantly longer.

Mr. WALDEN. Do they have to go through a full NEPA process?

Mr. MANSON. No. Well, it depends. I'll put it that way. The section 7 process itself, does not require an additional NEPA process. It may be that something they are doing will require a NEPA process, independent of the section 7 process.

Mr. WALDEN. OK. So they go through the application process. How many days again does it take, 130 you said?

Mr. MANSON. A hundred-and-thirty-five in statutory theory.

Mr. WALDEN. OK. Now let's get to reality. Statutory theory. Then people have the right to appeal after that?

Mr. MANSON. Well, no. Certainly there is the possibility that someone could find a way to bring a suit about a particular activity that has gone on, but there is no direct appeal by a citizen.

Mr. WALDEN. But litigation could follow?

Mr. MANSON. There's a possibility that litigation could—

Mr. WALDEN. And does that happen very often?

Mr. MANSON. That happens occasionally, yes.

Mr. WALDEN. What kind of time line then does that entail?

Mr. MANSON. There is no way to estimate the average length of time that litigation over something that the military might do would take.

Mr. WALDEN. So a minimum of 135 days, plus the potential for litigation, which could go on for a very long time.

It has been stated that the proposed changes to the definition of "harassment" will help the agencies better enforce the MMPA. Can you give us some examples, either one of you, of how that might work?

Dr. HOGARTH. I think, from the standpoint—right now, first of all, you've got to prove that the act is one of pursuit, torment and annoyance. The problem we're having with the attorneys is that they're losing most of these cases, because you've got to prove the intent first.

Mr. WALDEN. Losing most of the cases of harassment—

Dr. HOGARTH. Right, because the vagueness of having to prove whether a person had the intent or not, so that's the first thing. You've got to prove that the act was one of pursuit, torment and annoyance, and then you have to have the intent of whoever did it.

Then you have to prove that the act had the potential to injure or disturb the marine mammal, which is somewhat easier to do. But first you have to go through whether the act is one of—you know. So we've been trying to—The MMPA does not identify or have any definitions or identify the terms "pursuit, torment or annoyance."

Mr. WALDEN. Are you doing research on the noise issue involving mammals?

Dr. HOGARTH. We are working on the noise issue.

Mr. WALDEN. Are there any findings yet?

Dr. HOGARTH. Well, we're in court on one, so I can't say much about the LFS sonar, yeah. But we continue to work on noise issues in marine mammals. There is work being funded, some at the University of Hawaii and other places, dealing with noise, yes, sir. Low level does not appear to be a problem.

Mr. WALDEN. In terms of the MMPA, is the intent the first threshold you have to meet in order to fall under the Act of actually harassing a mammal? Is it the intent, or is it the dislocation of their typical—

Dr. HOGARTH. That's why we agree with the definition, because now it says if you actually—you know, you don't have to prove the intent. If it's disturbing it, if you can actually show there's a difference in the behavior of the mammal, we feel like the new definition gets into this. It says disturbs or is likely to disturb the marine mammal by cause or disruption of their behavior.

Some of the old definitions, for example, if a dolphin came up in the wake of a boat, would that be disturbing the dolphin? That's one of the issues that came up.

Mr. WALDEN. I guess that's where I was headed with this. Does this definition strictly apply to the military's involvement—

Dr. HOGARTH. No.

Mr. WALDEN. —and if not, then why isn't commercial fishing, commercial transportation in and out of the harbors, tell me that's not having a tremendous effect on habitat.

Dr. HOGARTH. We have take reduction teams looking at marine mammals for fishing efforts. We have a team set up now to look at right whales, look at ship traffic. But there are many things we're doing under marine mammals.

You know, swimming with dolphins is a big issue, for example. That's a big issue in Florida. A lot of people call in. But if you go in the water and a dolphin swims by, is that harassment? That's the type of thing—Now we're saying to disturb the dolphin, the new definition. You have to show that it was disturbed and a potential for injury.

Mr. WALDEN. If I could just clarify briefly one other question that I had.

You made the statement, I believe, that there are two people within your agency to do all this work. Is that all the military work?

Dr. HOGARTH. That's correct.

Mr. WALDEN. And you have—How many people are in your agency?

Dr. HOGARTH. In our agency, overall, there is about 2,600. But in protected resources, looking at incidental take, and the military, yes.

Mr. WALDEN. Do you feel that's an adequate allocation of resources?

Dr. HOGARTH. No, sir. Well, it's what we have in our budget to deal with. There are two people for marine mammal, you know—

Mr. WALDEN. Have you requested others in your budget process? I'm sorry, I have run out of time. Thank you.

Dr. HOGARTH. Yeah, we continue to look at the amount of—the President's budget, you know, we support. But there are a lot of issues that you have to put priorities on, no doubt about it.

Mr. GIBBONS. Thank you, Mr. Walden.

Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman.

Let me follow up with Dr. Hogarth, if I may, on the point that was being made about the two staff, the full-time employees on staff to review Navy permitting requests under the Act. I think the question was, would increased staffing help expedite the process, and would that address some of the Navy's concerns that we heard about today?

Dr. HOGARTH. First of all, I think, you know, we have two people doing marine mammal assessments. That's what I was addressing. You know, it would speed up the timing. We are working with the military quite a bit, particularly the Navy, on looking at programmatic EISs and programmatic section 7's and all, because we think if we can get to this issue, that we could get them ahead of time and do a programmatic or help the process.

Additional manpower would definitely help us, and we are in the process now, working with the Navy, on an MOU to improve the processing and how we can get it done quicker. Sometimes it takes—I think the least we've had on some of the issues, it has been probably six to 9 months. It depends on the issue that's involved.

Mr. GRIJALVA. So the steps you indicated have been taken at this point, the planning—

Dr. HOGARTH. That's correct.

Mr. GRIJALVA. —the MOUs. And from your experience, those increased resources—let's say increased resources are available for additional staffing, which you earlier indicated would be important, that would initiate more advanced planning and it would foster a more efficient, if not more rapid permit application review process, would it not?

Dr. HOGARTH. It would, yeah. Yeah, it would, yes, sir.

Mr. GRIJALVA. Could you surmise for me or evaluate for me from the discussion today how much is a problem of process and how much is a problem of definition?

Dr. HOGARTH. Well, as you heard today, I don't think you heard—Most of the testimony I heard today was directed toward the encroachment issue, which is not the issue we addressed, the management plans dealing with the Department of Interior.

The issue that we have so far with the Navy has been the court case on small numbers and things like that, that we've been trying to work through. But I think most of our problems with the Navy, you know, marine mammals, has been the court system and the identification of some of the terms and how they were interpreted.

Mr. GRIJALVA. But process is still an issue?

Dr. HOGARTH. Process is still an issue, to make sure you get this done timely, yes, sir.

Mr. GRIJALVA. Two more for both the witnesses, if I may, either/or.

How many times has the Secretary of Defense used the provision that's already in there since 1998, for activities that fall under the scope of your agency, the provision that deals with the Executive branch and suspending administrative actions pending consultation between the Secretary of Defense and the head of the action agency, in this instance you two individuals?

Mr. MANSON. I believe Mr. Cohen testified earlier today that that had never been used. I concur with his testimony.

Mr. GRIJALVA. So if it's never been used, I would assume there has never been a denial, at least specifically with the Navy, correct?

Dr. HOGARTH. That's correct. Remember, the MMPA does not have the same exemption for national security that is the ESA. The MMPA does not—

Mr. GRIJALVA. So specifically for an issue of incidental harassment, the Navy would come to the Department of Interior and to your agency. That request has never been made, or has it ever been denied?

Dr. HOGARTH. It's never been made.

Mr. GRIJALVA. The Public Law does apply to all agencies, correct, P.L. 105-85?

Dr. HOGARTH. I will have to get back to you. I'm not sure of that.

Mr. GRIJALVA. Thank you.

Thank you, Mr. Chairman.

Mr. GIBBONS. Mr. Cole.

Mr. COLE. Thank you very much, Mr. Chairman, and thank you, gentlemen. You have been here a long time and thank you for your patience and your indulgence.

A couple of general questions, frankly, directed to both of you. And you addressed this, Judge Manson, in your initial testimony, but I think it's an important point. How would you rate the Department of Defense in terms of their efforts to comply with the Endangered Species Act and the various environmental regulations and obligations that they have?

Mr. MANSON. With respect to the Endangered Species Act, which we deal with, they have been very good. They have been outstanding stewards of habitat and species.

Dr. HOGARTH. I have been working with the Navy primarily, and I worked with them when I was in the Southeast Region, and dealt with them on Vieques, which they did everything possible that we could ask for. And since I've been here as Assistant Administrator for NOAA, we have had an excellent working relationship. Like I said, the MOUs, and we have regular meetings with them. So I think it's a pretty good working relationship.

Mr. COLE. Do either of you have any concern that, if this legislation were enacted, that that attitude would change or that they might be less cooperative or less diligent in fulfilling their obligations under the law?

Mr. MANSON. I have no way to accurately predict that, but I have no reason to believe that that would change. Their stewardship has remained at a high level over a number of years, through a lot of different regulatory schemes. So I would certainly expect they would continue to do a good job.

Dr. HOGARTH. I agree. I think the MMPA changes would only clarify things and get them to work with us maybe even more because of some of the ambiguities taken out. The ESA concerns we have to clarify that, whether they would have to work with us again or not is I think the issue we would have.

Mr. COLE. Again, to both of you, we have had a concern raised—and I think it's a legitimate question—that we regularly say, if the situation is so good, cooperation has been high, people have been doing their best on both sides of this divide to do the right thing, why—and again, you touched on this a little bit in your testimony—but why do you think these changes would be merited?

Mr. MANSON. Well, from my point of view, two reasons. One is, there is the threat of litigation over some of the things that have been done on the basis of mere policy between the Department of the Interior and the Department of Defense.

But the second, more fundamental and more compelling reason is that we believe these things that we've done on a policy basis, on an administrative basis, represent good public policy choices. And if they are good public policy choices for conservation, then they ought to be codified. They ought to be given the sanction of this Congress.

Mr. COLE. A couple more questions, if I may, Mr. Chairman. It will just take a second.

Mr. Udall raised a good point here about whether or not we have an administration position on such an important piece of legislation. Hopefully we will have one before the process is completed. First let me ask this:

To your knowledge, did the authors of the legislation work with people in the Executive branch and some of the experts that you

have there, obviously with the enormous experience you do have in dealing with these kind of issues, when they were drafting their legislation?

Mr. MANSON. I can't say that I know that. I came back from an out of town trip and found this legislation and was told I was going to testify, so that's what I know about it.

Mr. COLE. OK.

Dr. HOGARTH. I do think some of our people may have met with some of the staff members before it was completely drafted. I was not there.

Mr. COLE. Do either of you have any reason to believe that the Administration at this point is going to take a position against the legislation question?

Mr. MANSON. I can't say. I don't know.

Dr. HOGARTH. I can't say.

Mr. COLE. I yield back my time. Thank you, Mr. Chairman. Again, I very much appreciate you staying this late with us. Thank you.

Mr. GIBBONS. Thank you very much, Mr. Cole.

Gentlemen, I also appreciate the great amount of time you spent with this Committee, trying to help us better understand.

I have been advised by staff, in answer to Mr. Grijalva's question, that 105-85 only applies to DOD and DOI.

Let me ask just one question of both of you, sort of a generic question, and then we will allow you to exit. My question would be, looking at the language that's in this bill, is that language helpful to your departments with regard to activities, processes, litigation, et cetera? Would the bill be helpful to you?

Mr. MANSON. The language on INRMPs and critical habitat designation would certainly be helpful to the Department of the Interior.

Mr. GIBBONS. Dr. Hogarth?

Dr. HOGARTH. I think the language on the Marine Mammal Protection Act would be helpful. We support it. Like I said, I do have some clarifying questions on the ESA portion. If the understanding is just critical habitat there it would be one thing, but with section 7 and other things, there is a concern and we just don't know.

Mr. GIBBONS. Thank you, gentlemen.

In view of the late hour that you've spent here, I'm going to allow each member to have one follow-on question, because these gentlemen have been here now since 2 o'clock. While each of you are able to get up and leave at your will and go do other things, they've been very patient and very dedicated. So, in order to expedite them and the next panel, I'm going to limit it to one question.

Mr. Gilchrest.

Mr. GILCHREST. One question with three parts?

[Laughter.]

I'll do my best there.

We do need to codify some of the INRMPs, and I think that's the way we need to go. In pursuing the codification of that in statute, I certainly don't want to reduce the effectiveness of the consultation that brought us to INRMPs by a variety of different Federal agencies working together. So I don't want to begin separating that out with some of the language change.

The question, I guess to both, would be Level 3. If we can say Level 3 harassment now in the language of 1835, would that help or hinder scientific research that now to some extent seems to be hindered at this point? In the legislation, if I can sneak this in while the Chairman is preoccupied, dealing with—

Mr. GIBBONS. But I'm still listening, Mr. Gilchrest.

Mr. GILCHREST. In the legislation dealing with page 6, incidental takes, dealing with specific geographical regions and dealing with specific small numbers, the question is, would scientists be less effective in trying to apply for research activities as a result of Level 3 harassment, and in the letter of authorization or incidental harassment authorization, does that change at all that part dealing with geographical regions and dealing with small numbers?

Dr. HOGARTH. First off, let's take the second part about the small numbers and geographical range, we don't think that affects it at all because, to make the evaluation we have to make, we still have to know the geographical area you're working in. Small numbers take, when you look at the negligible impact, you would have to look at the population you're dealing with and what the numbers were anyway to do the negligible impact. So we don't think that affects it one way or the other.

We would have probably put this in our bill if we had the lawsuit we just had, knowing that—

Mr. GILCHREST. So, Dr. Hogarth, you feel that any act that is directed—this is the language under the text of the bill—"any act that is directed toward a specific individual, group, or stock of marine mammals in the wild and that is likely to disturb the individual, group or stock..." especially any act directed toward a specific individual, that's not going to hinder scientific research, the application for it?

Dr. HOGARTH. Not in my opinion, it won't.

Mr. GIBBONS. Thank you, Mr. Gilchrest, for that very succinct line of questioning. I appreciate that.

Mr. Udall.

Mr. TOM UDALL. I will strive for the same, Mr. Chairman. I will say for the record that I've been here the whole time, too, except for a couple of minutes to visit with some constituents.

Dr. Hogarth, I got from your answer about this definition of harassment and what the military was asking for, that you basically thought there wasn't much difference, that the current law, what the military is asking for, what's in this bill, H.R. 1835, there is not much difference.

First, I just wanted to ask, it seems to me that what the military was asking for was something very narrow, to deal specifically with their training and readiness, and what we're doing here is redefining harassment for all activities. Would you agree with that? So we're taking a pretty big step, rather than just limiting it to military, from what the military came in and said they wanted.

Dr. HOGARTH. I think this bill treats everyone the same, which we do not have a problem with.

Mr. TOM UDALL. So you agree that it's a redefinition that is very broad?

Dr. HOGARTH. Right.

Mr. TOM UDALL. Then the redefinition, when you redefine harassment, if you look at the current Act and the bill, H.R. 1835, it is talking about harassment to the point where "such behavior patterns are abandoned or significantly altered".

Now, it seems to me that that language is much different than what's in the current Endangered Species Act, that this is a global change. There are no definitions there. We don't define abandoned. We don't talk about what "significantly altered" means. These are really subject to a great deal of interpretation, wouldn't you say?

Dr. HOGARTH. First of all, the definition that's in H.R. 1835 is the same definition in the Administration's bill, so it's the same one. What you've got is—

Mr. TOM UDALL. I don't believe so.

Dr. HOGARTH. Except for Level 3. The Administration's MMPA bill, it's the same definition.

Mr. TOM UDALL. My question goes to, isn't the change from the current law under the Endangered Species Act—I mean, it 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, surfacing, nursing, breeding, feeding, or sheltering..."

This language here, it is any act that "disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including but not limited to migration, surfacing, nursing, breeding, feeding, or sheltering to the point where such behavioral patterns are abandoned or significantly altered." I mean, that is very significant language, wouldn't you say?

Dr. HOGARTH. Yeah, but if the current language says "has the potential", so first you have to determine—you know, this language is more direct and it's easier to determine, if it's likely to disturb a marine mammal, marine mammal stock in the wild, by causing natural behavioral patterns, including but not limited to. So if—

Mr. TOM UDALL. Current law is much broader and more protective; you would agree with me?

Dr. HOGARTH. Right, it's much broader.

Mr. TOM UDALL. The current law is much broader and more protective.

Dr. HOGARTH. It may be—you make it say it's broader and much more protective, but if you can't make the court cases on it, it is not. So far we have not been able to make court cases on the definitions we have. That's why we were trying to make them more specific and to take out some of what we considered potential, things like potential, and to add in significant and things like that, to try to make it easier for the attorneys and for the courts.

Mr. TOM UDALL. Have the courts said to us, have the courts said to the government or to the Congress "we don't like this definition and you should change it"?

Dr. HOGARTH. Well, we have lost, I think, the last three cases because of the—we have been unsuccessful due to not being able to really prove the point of what pursuit, torment and what the issues were.

Mr. TOM UDALL. I'm not interested in winning or losing cases. I'm interested if the court said they think this definition is not a good definition and the Congress should revisit it.

Dr. HOGARTH. But we are the ones trying to make—We are the ones taking action in court. We take a person to court based on the fact that we thought they were swimming with the dolphins or they had gone by with a jet ski or something too close to them and caused them or to alter.

These cases have been thrown out of court because we cannot prove the intent of the people of what they were doing.

Mr. TOM UDALL. Based on the definition alone?

Dr. HOGARTH. Based most on—what the attorneys are telling us is it's based on the definitions we have, the procedures.

Mr. TOM UDALL. Thank you. I see my time is out and I don't want to indulge Chairman Gibbons on his overindulge here. Can I submit additional questions to these witnesses for the record—

Mr. GIBBONS. Certainly.

Mr. TOM UDALL. —rather than having to ask you again to re-question. Is that all right, Mr. Chairman?

Mr. GIBBONS. Mr. Udall, you and any other member of this Committee are certainly welcome to submit written questions for the witnesses that could be answered and submitted for the record.

Mr. TOM UDALL. Thank you, Mr. Chairman, and thank you for allowing me to get in more than just one question. Thank you.

Mr. GIBBONS. Mr. Cole.

Mr. COLE. thank you, Mr. Chairman.

I would like to yield the balance of my time, and however many questions I have, to my good friend, Mr. Gilchrest.

Mr. GIBBONS. Well, it started out to be one. Mr. Gilchrest went to 2 minutes and forty-five seconds, and Mr. Udall went to 5 minutes. So, in the good gracious kindness to these gentlemen sitting out here, I would hope that we can limit the number of questions we have.

Mr. Gilchrest.

Mr. GILCHREST. I actually think, Dr. Hogarth, that the Level 3 definition of harassment in the language of the bill will be more protective, if I could say that to Mr. Udall, the Level 3 definition in the text, will be more protective than present law, because I think it gets at people that ride those alien species around, invasive species around, if I could refer to jet skis as invasive species. So I think that part, Dr. Hogarth, of the legislation goes to the heart of some of the problems in the more built-up areas. So I'm happy with that.

The last question I have deals with the issue of incidental takes based on the text of the language in the bill, which does change existing law, and how that would change or not change what NMPs or Interior would go through as far as letters of authorization or incidental harassment authorizations in those incidental takes.

Does anything change, based on this legislation, to what you do now as far as that process is concerned?

Dr. HOGARTH. No. No, not to the mitigation measures and being permits and all, it's still the same. I think I may have given you, in answer to you quickly awhile ago, from a scientific standpoint,

we use a different permit for scientific anyway. So that's why I say I don't expect any differences there.

Mr. GILCHREST. So there is no change in general harassment authorization—

Dr. HOGARTH. No.

Mr. GILCHREST. —based on the new legislation?

Dr. HOGARTH. Correct.

Mr. GILCHREST. And Level 3 harassment would not affect scientific research because it's a different permitting process?

Dr. HOGARTH. Yes, that's correct.

Mr. GILCHREST. How's that, Mr. Chairman?

Mr. GIBBONS. It was more succinct than your last effort, Mr. Gilchrest.

[Laughter.]

Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman. I have no questions for the witnesses, but just an insertion into the record regarding Public Law 105-85. If I could make that a part of the record.

This section deals with administrative actions adversely affecting military training or other readiness activities. I think it's 10 USCS, in particular section 2014. My request is to have that in its entirety so we can have a literal context as to the reference I made to that law.

Mr. GIBBONS. Without objection.

[The document follows:]

10 U.S.C. 2014

***CURRENT THROUGH P.L. 108–3, APPROVED 1/13/03 ***

TITLE 10. ARMED FORCES

SUBTITLE A. GENERAL MILITARY LAW

PART III. TRAINING AND EDUCATION

CHAPTER 101. TRAINING GENERALLY

Sec. 2014. Administrative actions adversely affecting military training or other readiness activities

(a) Congressional notification. Whenever an official of an Executive agency takes or proposes to take an administrative action that, as determined by the Secretary of Defense in consultation with the Chairman of the Joint Chiefs of Staff, affects training or any other readiness activity in a manner that has or would have a significant adverse effect on the military readiness of any of the armed forces or a critical component thereof, the Secretary shall submit a written notification of the action and each significant adverse effect to the head of the Executive agency taking or proposing to take the administrative action. At the same time, the Secretary shall transmit a copy of the notification to the President, the Committee on Armed Services of the Senate, and the Committee on Armed Services of the House of Representatives.

(b) Notification to be prompt.

(1) Subject to paragraph (2), the Secretary shall submit a written notification of an administrative action or proposed administrative action required by subsection (a) as soon as possible after the Secretary becomes aware of the action or proposed action.

(2) The Secretary shall prescribe policies and procedures to ensure that the Secretary receives information on an administrative action or proposed administrative action described in subsection (a) promptly after Department of Defense personnel receive notice of such an action or proposed action.

(c) Consultation between Secretary and head of Executive agency. Upon notification with respect to an administrative action or proposed administrative action under subsection (a), the head of the Executive agency concerned shall—

(1) respond promptly to the Secretary; and

(2) consistent with the urgency of the training or readiness activity involved and the provisions of law under which the administrative action or proposed administrative action is being taken, seek to reach an agreement with the Secretary on immediate actions to attain the objective of the administrative action or proposed administrative action in a manner which eliminates or mitigates the adverse effects of the administrative action or proposed administrative action upon the training or readiness activity.

(d) Moratorium.

(1) Subject to paragraph (2), upon notification with respect to an administrative action or proposed administrative action under subsection (a), the administrative action or proposed administrative action shall cease to be effective with respect to the Department of Defense until the earlier of—

(A) the end of the five-day period beginning on the date of the notification; or

(B) the date of an agreement between the head of the Executive agency concerned and the Secretary as a result of the consultations under subsection (c)

(2) Paragraph (1) shall not apply with respect to an administrative action or proposed administrative action if the head of the Executive agency concerned determines that the delay in enforcement of the administrative action or proposed administrative action will pose an actual threat of an imminent and substantial endangerment to public health or the environment.

(e) Effect of lack of agreement.

(1) If the head-of an Executive agency and the Secretary do not enter into an agreement under subsection (c)(2), the Secretary shall submit a written notification to the President who shall take final action on the matter.

(2) Not later than 30 days after the date on which the President takes final action on a matter under paragraph (1), the President shall submit to the committees referred to in subsection (a) a notification of the action.

(f) Limitation on delegation of authority. The head of an Executive agency may not delegate any responsibility under this section.

(g) Definition. In this section, the term "Executive agency" has the meaning given such term in section 105 of title 5, except that the term does not include the General Accounting Office.

HISTORY: (Added Nov. 18, 1997, P.L. 105–85, Div A, Title III, Subtitle B, Sec. 325(a), 111 Stat. 1678.) (As amended Oct. 5, 1999, P.L. 106–65, Div A, Title X, Subtitle G, Sec. 1067(1), 113 Stat. 774.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1999. Act Oct. 5, 1999, in subsection (a), substituted "Committee on Armed Services" for "Committee on National Security" preceding "of the House".

The CHAIRMAN. Gentlemen, your patience has been overwhelming. We thank you for that. We would like to excuse Panel 2 and call up Panel 3.

Panel 3 will consist of Dr. Paul Eugene Nachtigall—I hope I pronounced your name right—Director, Marine Mammal Research Program, Hawaii Institute of Marine Biology, University of Hawaii; Dr. Darlene R. Ketten, Senior Scientist, Biology Department, Woods Hole Oceanographic Institution; Mr. John C. Kunich, Associate Professor of Law, Roger Williams University School of Law; and Ms. Karen Steuer, Senior Policy Advisor, National Environmental Trust.

If I have mispronounced any of your names, I apologize. We will call the third panel up now.

Before you get seated comfortably there, we have a policy in this Committee, as you have already seen, to swear in our witnesses. So, when you are ready, we will begin that process.

[Witnesses sworn.]

Let me record show that each of the witnesses before us have responded in the affirmative.

To begin this panel, we will begin with Dr. Nachtigall, Director, Marine Mammal Research Program, Hawaii Institute of Marine Biology. Doctor, the floor is yours.

Again, to each of you, I apologize for the lateness of the hour and I am grateful for the patience you have demonstrated in waiting out the rest of the panels for your opportunity to testify.

Dr. Nachtigall.

STATEMENT OF PAUL EUGENE NACHTIGALL, DIRECTOR, MARINE MAMMAL RESEARCH PROGRAM, HAWAII INSTITUTE OF MARINE BIOLOGY, UNIVERSITY OF HAWAII

Dr. NACHTIGALL. Thank you very much.

Thank you for the invitation to appear before your Committee. I feel honored to be asked and appreciate your request to provide information. I will provide opinions concerning marine mammals with your understanding that I am primarily a scientist and not an advocate, a critic, or well-versed in legal matters. My comments are my own as a scientist and do not necessarily represent my institution or any professional society that I serve.

I primarily conduct research on the hearing and effects of sound on dolphins and whales. I am very concerned about both the ability to continue to conduct research and the effects of sound on populations of marine mammals. It is my opinion that one cannot know about the effects of sound on animals without conducting well-planned and executed basic research.

There appears to be a current trend among some marine mammal advocates to be very conservative when it comes to science. Some apparently advocate that no research involving sound should be done. I think it's unreasonable to do nothing. Basic research is essential to understand the animals and to assist in the preservation of their populations.

There have been two recent occurrences relating to research activities that have been enjoined by the courts. One of these research activities was specifically aimed at examining the effects of anthropogenic sound on the behavior of wild marine mammals. I believe that it is most unfortunate that this sort of research has been stopped. How will we know what the effects of sound are on marine mammals if, in fact, scientists are not allowed to study it?

In the other occurrence, a National Science Foundation-supported ship was enjoined from continuing seismic research off Mexico following the discovery of at least one beaked whale that stranded nearby the ship.

Scientists do have an obligation to be concerned about the effects of their scientific investigation on the environment. I believe that this case identifies a critical need for basic research on the effects of sound on whales. Beaked whales also stranded in the Bahamian incident and again in the Canary Islands within the last couple of years, both apparently involved naval exercises and sonar, but unfortunately we still know very little about beaked whales and what they hear.

One difficulty that I see is that it is becoming increasingly expensive and difficult to hold marine mammals for research. There are increasingly fewer opportunities to conduct hearing studies on marine mammals due to the expense of holding animals and the dif-

ficulty in acquiring new animals and new species of animals. It would be most helpful if the structure of the laws, and the implementation of the regulations governing the protection of marine mammals, created a climate of acceptance and support for bona fide scientists that care about marine mammals and have the training and skills to complete basic research and create the knowledge base necessary to solve practical applied problems.

H.R. 1835 would amend the definition of harassment of marine mammals under the Marine Mammal Protection Act. I will limit my comments to the effects of sound on marine mammals.

First of all, we have audiograms, indicating how well animals hear across frequencies, on only 10 or 11 of the 85 species of dolphins and whales. I am working on a panel organized by the National Marine Fisheries Service to establish tolerable sound levels for whales and dolphins based on the data we have to date. I am pleased with the idea of basing the levels on real scientific data, but concerned that we may not have sufficient data to cover many critical marine mammal species.

I am excited about the fact that we have developed new scientific tools to be able to learn which levels of sound may injure or harass marine mammals, but I do not believe that we currently have a broad enough data base to comprehensively know about sound levels and frequencies that might harass or injure a great variety of marine mammals.

The definitions of harassment are general, but seem tied to the current concern about sound in the oceans. If the harassing "act" were the production of some sort of sound, it would seem to be very difficult to determine what sort of "act" would be likely to disturb if, in fact, you did not know the basic parameters of the animal's ability to hear that sound.

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.

I therefore advocate that we accelerate the level of scientific inquiry to include new ways to test marine mammal hearing and to expand the number of species examined.

Thank you very much for this opportunity.

[The prepared statement of Dr. Nachtigall follows:]

Statement of Paul E. Nachtigall, Director, Marine Mammal Research Program, Hawaii Institute of Marine Biology, University of Hawaii

Thank you for the invitation to appear before your Committee. I feel honored to be asked and appreciate your request to provide information. I will provide opinions concerning marine mammals with your understanding that I am primarily a scientist and not an advocate, a critic or well versed in legal matters. My comments are my own as a scientist and do not necessarily represent my institution or any professional society that I serve.

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Some apparently advocate that no research involving sound be done. I think it is unreasonable to do nothing. Basic research is essential to understand the animals and to assist in the preservation of their populations.

There have been two recent occurrences relating to research activities that have been enjoined by the courts. One of those research activities was specifically aimed at examining the effects of anthropogenic sound on the behavior of wild marine mammals. I believe that it is most unfortunate that this sort of research has been stopped. How will we know what the effects of sound are on marine mammals if in fact scientists are not allowed to study it? In the other occurrence, a National Science Foundation supported ship was enjoined from continuing seismic research off Mexico following the discovery of at least one beaked whale that stranded nearby the ship. Scientists do have an obligation to be concerned about the effects of their scientific investigation on the environment. I believe that this case identifies a critical need for basic research on the effects of sound on whales. Beaked whales also stranded in the Bahamian incident and again in the Canary Islands within the last couple of years. Both apparently involved naval exercises and sonar, but unfortunately we still know very little about beaked whales and what they hear.

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Mr. GILCHREST. [Presiding.] Thank you, Dr. Nachtigall. I think we met in Hawaii at some point.

Dr. NACHTIGALL. We sure did.

Mr. GILCHREST. Back in 1942, just after—

[Laughter.]

Dr. NACHTIGALL. Four years before I was born, yeah.

Mr. GILCHREST. We both have been preserved well. But it's good to see you again, sir, and thank you for coming all this way to testify.

Dr. NACHTIGALL. Thank you very much.

Mr. GILCHREST. It seems like, when the smartest people testify, most of us leave the room.

Dr. Ketten, welcome from Cape Cod.

STATEMENT OF DARLENE R. KETTEN, SENIOR SCIENTIST, BIOLOGY DEPARTMENT, WOODS HOLE OCEANOGRAPHIC INSTITUTION, AND ASSISTANT PROFESSOR, DEPARTMENT OF OTOLOGY AND LARYNGOLOGY, HARVARD MEDICAL SCHOOL

Dr. KETTEN. Thank you, sir. It's a privilege to be here. I appreciate the opportunity to testify before this hearing.

My name is Darlene Ketten. I have an appointment as a senior scientist, as you've heard, at Woods Hole Oceanographic Institution, and I hold a joint appointment also at Harvard Medical School.

Aside from obviously having a letterhead that is way too long, I need to state, as Dr. Nachtigall did, that I am not here to represent officially the opinions of my institution but, rather, as an individual scientist. I will say, however, that the comments I am making are a consensus of opinions of my colleagues at both institutions with whom I have discussed this, as well as a great deal of e-mail traffic that has been going back and forth amongst oceanographic institutions and some organizations that represent oceanographic consortia.

My position is based primarily, in addition to those conversations, on nearly 20 years of experience in research in marine mammal sensory systems and on auditory trauma and disease. Obviously, I've had a fair amount of individual experience with research permitting under MMPA and ESA.

My opinions are also informed most recently by my experience as a panel member for the 2003 NRC Report on Ocean Noise as well as being on the advisory board for NOAA Fisheries for determining noise exposure standards, effectively trying to set up OSHA regulations for the ocean. We're not nearly there yet.

I was privileged to testify before the House Armed Services Committee and the Senate Armed Services Committee on the exemption question. Therefore, I have had fairly extensive opportunities to look at the components that have gone into this bill and to think about the implications of the amendments that are being proposed.

The first question that was posed to me in my letter of invitation was, "Are the issues that are addressed in H.R. 1835 of concern also for broader level endeavors, including the research community and the industry?" The answer is simple. Absolutely, for all of the issues that you have raised and considered. The Committee is to be applauded for the foresight to begin thinking about whether these have broader, important applications. Every endeavor by humans in the oceans, regulated or not regulated at the moment, has these concerns in common.

First of all, I want to say that I think conservation regulation is imperative. It is not something we can take lightly, nor that we should sweep away, not something that we should, the term has been used, "gut". No human activity in the oceans is without sound, and we do know, based on the last NRC report, noise from human efforts is going up three decibels per decade. That's a doubling per decade.

Because marine mammals, arguably, have as their most important sense hearing, additional noise can have horrendous impacts. Or it can have no impacts. The MMPA was implemented originally to conserve marine mammals and, therefore, to address the ques-

tion of such concerns as what will underwater noise do to marine mammals. Ideally, it was intended to judge and to regulate, to balance rationally, and, with appropriate information, responsibly human activities in the oceans and their potential impact.

Unfortunately, as Dr. Nachtigall has pointed out very clearly, we don't have enough knowledge to put numbers in front of the regulators and say this is safe or this is not safe. Consequently, we now find ourselves applying a precautionary principle that's to be lauded, but it is also changing our focus from the original intention of the MMPA of population level consequences to individual cases.

I would say that not only are we in a polarized and litigious climate at the moment, but in some cases, ironically, as in the most recent Pyrrhic victory in a court case in which the decision was to halt an experiment that was intended to test a sonar to detect and protect whales from ship strikes, we are beginning to enter a period of stagnation.

Permit processes are part of that. They are complex, costly, and they are fraught with delay and uncertainty. This is not news. You're all aware that there are three NRC reports in the last decade that have dealt with marine mammals and sound, and in every one of them there was a complete consensus that said the permitting process must be revised. They have all recommended the same revisions.

Within the last few months, there have been parallel position papers by every major oceanographic institution, being presented to this Committee and others, and organizations like CORE are similarly presenting position papers along the same lines.

To summarize that portion, I and many other scientists, as well as these position papers, are in agreement with the proposed amendment. They are to be applauded—but, there are a couple of short exceptions. I see I'm getting short of time.

The first and most important thing is that the inclusion of the word "significance" is important. It's a very good step forward, but "significance" is a fungible—

Mr. GILCHREST. Dr. Ketten, please don't rush. We'll listen.

Dr. KETTEN. OK. Thank you, sir. That's very generous.

Significance is a fungible term. It is not rigorous. There is, however, a term of art in science, "biological significance", and that means a population level effect. I would urge you to consider rewording the definition of harassment, in consistency with the 2000 and 2003 NRC reports, to simply add in that important modifier, "biologically significant." That restores the intent of the original MMPA and it provides relief for many of the problems that the NRC reports pointed out in the definition of harassment.

Therefore, subparagraphs (2) and (3), both for injury and for behavioral changes, with the addition of "biologically significant," come into line with the NRC recommendations. However—and here I must disagree with Dr. Hogarth—subparagraph (iii), any act directed at a specific individual, clearly the intention is not to decimate much less exterminate research, but it has that potential. This is an example of the law of unintended consequences. There is no hearing research, no bioacoustics research or behavioral work on marine mammals that does not involve testing, monitoring, or manipulating individual animals. That clause has the potential to

be used against marine mammal research permits very effectively. I urge you to reconsider, or at least to very carefully consider how that may be applied in the future.

The last comment I want to make is on the idea of the removal of small takes. This is a very important element with which I, at least, and many of the organizations, are in full agreement. Small takes has been used, interpreted, I should say, as meaning a very small number of individuals without the perspective of the percentage of population, and further, without the concept of individuals and their importance in life stages or their actions.

If small takes is not removed, then we have the possibility of it superseding the far more important issue of negligible impact. Therefore, I'm in complete agreement with the concept of small takes being removed and focusing on negligible impact as the truly appropriate variable.

In summary, for responsible stewardship, we really need to be able to go forward with an informed and balanced view. Hearings like this are allowing all of the significant, important parties that have a stake in this to have their views heard and, for that, I am extremely grateful.

If this amendment group is passed and applied more broadly, it actually has a very important potential to make the permitting process more effective and beneficial ultimately to marine mammals, particularly by broadening our facility for research.

Thank you for listening to me.

[The prepared statement of Dr. Ketten follows:]

Statement of Darlene R. Ketten, Ph.D., Senior Scientist, Assistant Professor, Biology Department, Department of Otology and Laryngology, Woods Hole Oceanographic Institution, Harvard Medical School

Credentials

This testimony is being submitted to the Committee to represent my views as an individual scientist. It does not represent those of either institution with which I am affiliated. I have arrived at my position as stated below based primarily upon my experience as a researcher with over 15 years experience in the combined fields of mammalian hearing, marine mammal sensory system modeling, ear disease, and head and neck trauma diagnostics. I received a B.A. from Washington University (Biology and French, 1971), an M.S. from M.I.T. (Biological Oceanography, 1979), and a Ph.D. from Johns Hopkins University (jointly awarded by neuroanatomy, behavioral ecology, and experimental radiology, 1984). I currently hold joint appointments as a senior scientist in Biology at Woods Hole Oceanographic Institution and as an assistant professor in Otolaryngology at Harvard Medical.

In addition to my basic research training, I have completed medical specialty accreditation courses in Otopathology, Neuroradiology, and Forensic Pathology, and I am a member of the Society of Marine Mammalogy, the Association for Research in Otolaryngology, the Radiological Society of North America, Sigma Xi, and the Acoustical Society of America. I am a Fellow of the Acoustical Society, an active member of the ASA Bioacoustics Technical and Membership Committees, and have served on Federal advisory boards and panels on hearing, bioacoustics, acoustic trauma, marine mammal acoustics, and ocean noise for the National Institutes of Health, National Institutes of Deafness and Communication Disorders, NIH Consensus Development Conferences, the National Academy of Sciences, the Marine Mammal Commission, Minerals Management Service, NATO, Office of Naval Research, and NOAA/NMFS. My current work focuses on understanding marine mammal hearing mechanisms and modeling the hearing of endangered species. My comments at this time are particularly related to my direct experience with permitting for the conduct of marine mammal research as well as discussions during my tenure as a member of the recent National Research Council panel on Ocean Noise and as a member of NOAA Fisheries advisory board on noise exposure.

Introductory Statement

The proposed amendments to the Endangered Species Act and the Marine Mammal Protection Act outlined in H.R. 1835 were prompted by exemptions requested for the purposes of improving and facilitating military readiness. I have had the privilege to testify before both the House and Senate Armed Services Committees with regard to that request. Therefore I have had the opportunity to consider the issues involved in both the exemption and the amendments being proposed and reviewed by this Committee. In my testimony before the House and Senate Armed Services Committees I stated that the exemptions were both timely and welcome as they had the potential to provide a spring board to both bring about public awareness of permitting issues and to promulgate changes that would benefit all communities whose work and research are regulated and impacted by to these same regulations. It is not surprising therefore that I applaud this Committee for its interest and foresight in considering whether the proposed changes are important and appropriate for a general level of application. These are indeed important issues for many scientific and industrial efforts, and it would be not only efficient but extremely beneficial for those efforts to consider extending the amendments to a more general case. In the following testimony, I will first outline broader level concerns related to sound in the oceans and the current regulatory effects and then discuss concerns with the current wording of H.R. 1835 under Section 3 for definition of harassment and Section 5 for incidental takes, both of which have particular implications for the oceanographic and marine mammal scientific research communities.

Current Acoustic and Legislative Issues

There is no denying the importance of anthropogenic sound impacts in our oceans and the appropriateness of regulating the deployment and use of sound sources. Concomitant with man's increasing use of the oceans is an increase in the ocean's acoustic budget. As indicated in the current NRC report on Ocean Noise (2003), noise from human related activity is increasing on average throughout the oceans at 3 dB per decade; i.e., potentially doubling every ten years. Given our ever increasing activity in all seas and at all depths, this figure is not surprising. Anthropogenic noise is an important component of virtually every human endeavor in the oceans, whether it be shipping, transport, exploration, research, military activities, construction, or recreation. For some activities, such as military exercises and oil exploration, impulsive and explosive devices are fundamental tools that are relatively short-term but locally intense; for others, such as shipping, the source levels may on average be lower, but the sounds are constant and cumulatively dominate the noise fields in high traffic areas of the oceans.

Because there is no human activity in the oceans that does not add noise and because our activities span the globe and produce sounds over the entire audible range of most animals, it is reasonable to assume that any man-made noise in the oceans may have a significant and adverse impact on marine animals. Because marine mammals are especially dependent upon hearing and in many cases are endangered, the concern over noise impacts on these animals is particularly acute. These concerns are both logical and appropriate, but it is also important to note that at this time, there is no data that gives us a firm answer on what will be the extent of impact from any one sound source. We simply do not have sufficient data to put accurate boundaries on our concerns.

This lack of discrete knowledge on impacts of underwater sound, coupled with the relatively open wording of the original MMPA and with recent dramatic stranding events, has led to a heated, highly polarized, litigious climate. In the last five years, there have repeated suits brought against both the military and research institutions, in part based on contentions that the permitting process was flawed and had allowed experiments or exercises to proceed without meeting the MMPA requirements. A recent example is the suit brought to halt LFA use based on the fact that beaked whale mass strandings were shown to correlate with naval exercises involving mid-range sonars. Whales that stranded in three such cases, the Bahamas, Madeira, and Canary Islands, have been found to have an unusual suite of traumas, the mechanisms for which are still under investigation. However, this is a case of inappropriate and overly broad extrapolation from one event to another. There are substantial differences between LFA and mid-range tactical sonars, and, to date, there is no evidence of physical harm from LFA. Nevertheless, this suit, which adduced as part of its concerns the Bahamian findings, was successful. Further, much of the suit's discussion centered on the potential for numbers of takes and the extent of posited impacts, both of which are issues directly related to the existing ESA and MMPA language.

Other cases have been brought within the last year, based on similar arguments, that halted physical oceanographic and behaviourial research as well. These cases

are addressed in additional testimony being submitted, and the details need not be repeated here. However, it is important to underscore that while the cases were motivated by very sincere concerns for the use of explicit sound sources, their impacts are potentially extraordinarily broad. Indeed, they have the potential to initiate a requirement for in-depth environmental impact statements for every marine mammal research project that is proposed. If that position obtains, it will at the very least substantially reduce and can quite literally shut down future research, for impact assessments of that magnitude are not sustainable by the general research community. Clearly, the issue of restrictions on sound sources is not simply a military concern. Issues, liabilities, and costs related to ESA and MMPA permitting are a common concern for every endeavor, whether currently regulated or not, that involves the use of sound in our seas.

As noted above, virtually every human activity in the oceans involves sound either intentionally or as a by-product. For responsible use of the seas, it is imperative to consider to the best of our ability the probable impact of each sound we add and to determine whether that impact is worth its inherent risk. At some level, some individuals may be impacted by any sound beyond the natural, average ambient. We must consider for any effort introducing sound use in the oceans whether and to what extent the projection and repetition of the signals employed will adversely impact significantly or negligibly any species within the "acoustic reach" of the source.

There are therefore two areas of concern that are irretrievably intertwined for all marine work. First, there is the need for responsible yet effective deployment of sound sources. To do that, we must balance potential impact against potential information. Second, there is the necessity to validate and regulate that balance through the permitting process. The major intent of the MMPA was to provide a process that would fairly and responsibly address those two concerns. Unfortunately, the knowledge base needed for informed regulation has not kept pace with the rapid growth of either the devices that are available or the increasing concerns about sound use. As the sources and uses increase, the permit process becomes progressively more encumbered. The regulatory agencies are overburdened and permitting procedures are complex, costly, and fraught with uncertainty.

The impact of the existing regulations and their implementation have been a common theme in three major National Research Council reports in the last decade:

- National Research Council (NRC). 1994. Low–Frequency Sound and Marine Mammals: Current Knowledge and Research Needs. National Academy Press, Washington, D.C.
- National Research Council (NRC). 2000. Marine Mammals and Low–Frequency Sound: Progress Since 1994. National Academy Press, Washington, D.C.
- National Research Council (NRC). 2003. Ocean Noise and Marine Mammals. National Academy Press, Washington, D.C.

There is complete consensus in the findings by these panels that the regulations must be revised to avoid the demise of valuable research programs, including those that would, ironically, be beneficial to marine mammal conservation. Further, major marine research institutions, independently and in concert, as well as broader based oceanographic organizations such as CORE (Consortium for Oceanographic Research and Education), have produced position papers advocating the same revisions as recommended by these panels

The proposed amendments within H.R. 1835 therefore have the potential to offer major and needed improvements in the permitting process if they address research as well as military needs. However, that also means that the bill before us must be carefully examined to avoid exacerbating current hazards or adding new ones that are specific to research. Two concerns are paramount: the definition of harassment and the issue of small takes.

Recommendations for revision of H.R. 1835

Section 3: Amendment to the definition of harassment

The definition of harassment is arguably the primary component requiring revision. The 1994 amendment to the MMPA included a definition of harassment as:

> "...any act of pursuit, torment, or annoyance which:
>
> Level A—has the potential to injure a marine mammal or marine mammal stock in the wild; or
>
> Level B—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."

This definition is sufficiently broad that it has been interpreted to mean any detectable change constitutes harassment. The first NRC report (1994) comments that as "researchers develop more sophisticated methods for measuring the behavior and

physiology of marine mammals".., it is likely that detectable reactions, however minor and brief, will be documented at lower and lower received levels of human-made sound". NRC (2000) concludes that it "does not make sense to regulate minor changes in behavior having no adverse impact; rather, regulations must focus on significant disruption of behaviors critical to survival and reproduction". The current NRC report (2003) clearly states that the previous recommendations are still relevant although unfulfilled and require attention. All three NRC committees are therefore in agreement that the definition of harassment should be modified to focus on the biologically significant injury and disruption of behaviors critical to survival and reproduction, i.e., on population level and therefore biologically significant impacts rather than individually detectable changes.

Of course sound operates at the individual level, but the repeatedly stated, fundamental concern is for the well-being of populations. All data to date have been gathered on individual or local populations. As the NRC report on Ocean Noise and Marine Mammals (2003) emphasized, our major concern should be for population level impacts. This is consistent with the intent but not all implementations of the MMPA.

The original MMPA noted a concern for impact on marine mammal populations. Yet, much of the debate and contention that we see today over the issues surrounding sound in the oceans derives from and focuses on relatively few impacted individuals. High profile events, like the dramatic strandings in the Bahamas and Canaries, are being construed as virtually global, both in terms of species effects and sound source types. Precaution is appropriate; however, currently, extraordinarily precautionary positions are holding sway in which very broad and scientifically unfounded extrapolations are being made. A Pyrrhic victory was recently won in a second case in which an experiment to test the audibility of sonars intended to detect and thereby protect whales from ship strikes was halted.

Realistically, because of the diversity of hearing characteristics among marine animals, it is virtually impossible to eliminate all acoustic impacts from any endeavor for all individuals, therefore the key issues that must be assessed are: 1) what combination of frequencies and sound pressure levels are proposed to fit each anthropogenic task; 2) what species are present in the area the device will ensonify at levels exceeding ambient; 3) what is the probable severity of any potential impacts to the exposed animals from the combined frequency-intensity-temporal characteristics of the source. Above all, the important point is to know whether these factors produce any biologically significant impact to a species. In the most recent NRC report, a major recommendation was to structure research on marine mammals to allow predictions of population-level consequences. Individual effects are inputs to our data base, but the true metric to apply is biological significance.

H.R. 1835 proposes a new definition of harassment that includes the concepts "...(i) significant potential to injure a marine mammal or marine mammal stock in the wild;" "...(ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, ...to a point where such behavioral patterns are abandoned or significantly altered", and "...(iii) any act that is directed toward a specific individual, group, or stock of marine mammals in the wild...". There are three chief concerns in this definition:

1. The appropriateness of the term "significant".
2. The appropriateness of the concept of abandonment and significant alteration of behaviours.
3. The appropriateness of the inclusion of acts directed towards individuals.

The new definition represents an important move by including the concept of significance but a further modification is critical to comply with the concerns noted above.

"Biological significance" is a term of art which implies a species or population level concern deriving from impacts that are capable of altering the viability of the population. "Significance" per se is not a sufficiently rigorous term to provide a litmus test for harassment; the phrase loses its technical relevance and potency if the biological modifier is removed. Therefore it is important, if the intent and concerns expressed in the NRC reports are to be addressed and, equally important, to avoid repeating the hazard of a non-explicit criterion, that the phrase "biological significance" be employed in this amendment in lieu of simply "significant".

Similarly, abandonment or alteration of behaviourial patterns is a phrase without explicit scientific meaning that could be interpreted to mean individual effects. Just as with injury, biologically significant alterations are the appropriate focus for setting behaviourial harassment criteria.

The addition of sub-paragraph (iii), under Section 3 poses a significant hazard for marine mammal research. For a number of practical reasons, research efforts on

marine mammal hearing, acoustics and behaviour depend upon the ability to observe, test, and manipulate individual animals. Therefore, although the intention of this paragraph may not have been explicitly directed at marine mammal research, it has, as written, the potential to substantially negatively impact this field. Sub-paragraph (ii) of Section 3 implies individual animal protection within the phrase, "likely to disturb a marine mammal or marine mammal stock", but has the additional criterion of significance. Therefore, sub-paragraph (iii) is redundant and potentially damaging, and I strongly recommended its deletion.

Section 5: Incidental Takings

The concept of incidental takes is important and should be preserved. However, the inclusion of small numbers in existing MMPA Section 1371 (a)(5)D)(I) represents a serious hazard to all permit processes. Small numbers has in some reviews and court cases been interpreted literally and not as a percentage of population, which is the more scientifically valid perspective. The proposed removal of small numbers in H.R. 1835 provides relief from this problem and obviates a potential hazard of there being two tests for determining takes by harassment; i.e., small numbers as well as negligible impact. Consequently, I strongly support the stated amendments to this section.

Summary

This Committee's interest and foresight in considering whether the changes to ESA and MMPA requested to enhance military readiness also have significance for research and industry are greatly appreciated. The proposed amendments have substantial potential to improve permitting processes for all marine endeavors. Currently, we are losing sight of the need for balance and for perspective. This is a potentially hazardous position since, ironically, this type of over-interpretation is actually preventing research that could provide precisely the answers that are needed to protect and conserve marine species. In a sense, precaution, in the extreme, may lead us to stagnation, and worse, because it is a position founded on assumed rather than known effects, it may prevent us from determining the true sources of greatest potential harm.

For responsible stewardship of our oceans, it is imperative that we understand our impacts and that we proceed with a balanced and informed view. Risk assessment must be a part of that debate. There is undeniably some risk to some individuals from any underwater sound, but individual risk must be balanced by potential gain to the species. The addition of significant to the proposed revisions is a conceptual step forward worthy of consideration. I urge that the step be carried further to one of "biological significance" in order to provide a scientifically valid criterion for determination of harassment. It implies that our focus be shifted from the impossible goal of avoiding any possible individual impact to biologically significant, population level concerns. Such a shift, implemented with caution and judicious oversight, will not only reduce litigation, but also provide opportunities for education and understanding by the public of the appropriate scope for our concerns and of the critical need for research that will provide data to finally allow us to place clear and valid limits on sound use in our seas.

Mr. GILCHREST. Thank you very much, Dr. Ketten.

Mr. Kunich, welcome.

STATEMENT OF JOHN C. KUNICH, ASSOCIATE PROFESSOR OF LAW, ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW

Mr. KUNICH. Thank you.

Mr. Chairman, members of the Committee, I thank you for this opportunity to testify. I am here speaking in my individual capacity and not as an official representative of my university.

As a professor of law at Roger Williams University School of Law, I have published several major law review articles dealing with the Endangered Species Act and the threats to biodiversity, and I wrote a book, "Ark of the Broken Covenant: Protecting the World's Biodiversity Hotspots", published this year by Praeger.

I served 20 years on active duty with the United States Air Force as a judge advocate prior to entering academia in 1999, and I specialized in these same areas in the Air Force as a JAG.

During the 1990's, I was the chief environmental law attorney for Air Force and the United States Space Command and NORAD, and I served as the chief of the environmental compliance and planning branch of the Headquarters Air force Environmental Law and Litigation Division.

During my two decades of military service, which included advising the warfighters during the first Gulf War, our intervention in Kosovo, and several major operations other than war, I never became aware of even one instance in which either the ESA or the MMPA posed an impediment to the military mission. The Air Force was able to comply with no harmful effect on military readiness, training, or, indeed, on the actual successful conduct of wartime operations. The military did not need to choose between environmental compliance and mission accomplishment.

I urge rejection of the proposal to substitute INRMPs for the critical habitat provisions under the ESA. The proposal would have the effect of rendering meaningless the most effective portion of the ESA. It would hollow out the core substantive protection of our most rigorous environmental statute and turn it into just one more procedural planning law.

The Supreme Court, in a series of cases, has recognized the intent of Congress to assign preeminent importance to preserving life under the ESA. And the reason is clear. There is no remedy for a species driven into extinction. Each of the 1.75 million species known to us today is one of a kind, the end product of millions of years of adaptations to specific environmental conditions. Extinction of any species is an irreversible, irremediable loss, different in kind from the losses sought to be prevented by all other environmental laws.

The world is now very likely in the midst of our sixth mass extinction. The five previous mass extinctions, during which up to 95 percent of all life quickly went out of existence, all took place before human beings came on the scene. We have an airtight alibi on the first five mass extinctions, but we are primarily responsible for this mass extinction. Through our destruction of enormous amounts of critical habitat, we have severely jeopardized at least 40 percent of all known species.

Species that are endemic to only a small geographical area tend to be narrowly adapted to conditions there, and there is a predictable mathematical relationship between habitat reduction and the numbers of species that can be sustainably supported.

My book, "Ark of the broken Covenant" focuses on the approximately 25 biodiversity hotspots, the 1.44 percent of Earth's landmass that contains all of the remaining habitats of over 133,000 identified higher plant species—that's 44 percent of the world's total—and 9,600 nonfish vertebrate species, 35 percent of the world's total. These species, and many others, are faced with imminent extinction on a scale the world has not seen since the extinction spasm that wiped out the dinosaurs. In fact, there may be millions of species we have never even identified, most of them crowded into these hot spots. Like the 40 percent plus of known

species, these millions of unknown species are largely endemic to the hot spots. They are found there and no where else on Earth. but their remaining habitat is shrinking at an alarming rate. They have already lost 88 percent of their primary vegetation and are likely, absent greatly increased conservation efforts, to lose much more soon.

Is there among these species a cure for AIDS or SARS or some other threats that will not arise for centuries? We will never know if we allow the critical habitats to be destroyed and, along with them, an immense share of all life on Earth. The prudent decision is to bet on life.

Now is the worst possible time for new and wide-open exemptions to the critical habitat protections. A mass extinction is not time for weakening the few effective legal protections of biodiversity. The United States should be exercising global leadership in crafting stronger, more effective legal safeguards for our dwindling biodiversity. Instead, the proposed exemptions would do exactly the opposite.

Thank you for this opportunity to testify. With your permission, at this point I would like to submit for the hearing record my Hastings Law Journal article and my Georgetown International Environmental Law Review piece, and I would be happy to answer any questions you may have.

Thank you.

[The prepared statement of Mr. Kunich follows:]

Statement of John Charles Kunich, Associate Professor of Law, Roger Williams University School of Law, Bristol, Rhode Island

Mr. Chairman, members of the Committee, thank you for this opportunity to testify. As a Professor of Law at Roger Williams University School of Law in Rhode Island, I specialize in Environmental, Natural Resources, and Biodiversity Law. I have published several major law review articles dealing with the Endangered Species Act and the threats to biodiversity, and I wrote a book "Ark of the Broken Covenant: Protecting the World's Biodiversity Hotspots" published in 2003 by Praeger Publishers.

Prior to entering academia in 1999, I served 20 years on active duty with the United States Air Force as a judge advocate, and I specialized in these same areas for the second half of my Air Force career. I was well suited to this specialty by virtue of my Bachelor of Science and Master of Science degrees in Biological Sciences, as well as my Juris Doctor degree from Harvard Law School and my Master of Laws degree in environmental law from George Washington University School of Law.

During the 1990's, I was the chief environmental law attorney for Air Force Space Command, United States Space Command, and the North American Aerospace Defense Command, and I served as the Chief of the Environmental Compliance and Planning Branch of the Headquarters Air Force Environmental Law and Litigation Division. I had the responsibilities of balancing the Air Force's mission requirements with our legal duties under all applicable Federal, state, and international environmental and natural resources laws.

During my two decades of military legal service, which included the first Gulf War, our intervention in Kosovo, and several major operations other than war, I never became aware of even one instance in which either the Endangered Species Act or the Marine Mammal Protection Act posed an impediment to the military mission. The Air Force was able to comply with the consultation requirements under Section 7 of the Endangered Species Act, as well as the takings provisions under Section 9, with no harmful effect on military readiness, training, or, indeed, on the actual successful conduct of wartime operations. The Air Force found a way to comply with all the mandates arising out of designated critical habitat for listed threatened and endangered species, as well as those responsibilities directly related to the listed species themselves. The military did not need to choose between environ-

mental compliance and mission accomplishment. The two were not mutually exclusive in any respect.

I urge rejection of the proposal to substitute completion of an Integrated Natural Resources Management Plan in lieu of the critical habitat provisions under the Endangered Species Act. The proposal would have the effect of rendering meaningless the most effective portion of the Endangered Species Act. It would hollow out the core substantive protection of our most rigorous environmental statute and turn it into just one more procedural planning law.

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.

The United States already has enough procedural environmental laws to give us a very good idea of their advantages and limitations. We have the National Environmental Policy Act, the Federal Land Policy Management Act, the National Forest Management Act, and the Emergency Planning and Community Right to Know Act, to name a few. These statutes serve the useful functions of requiring Federal agencies to jump through specified procedural hoops, to receive comments from concerned citizens as part of their planning, and to take environmental considerations into account in their decision making. But the United States Supreme Court has consistently held that these procedural statutes do not mandate correct decisions, or the most environmentally favorable plans—only that the correct procedures be followed. Plans made under these acts are, to a very great extent, entrusted to the discretion of the planners. As the Court has said, only uninformed, not unwise, decisions are prohibited. The planners are not required to accept the advice they receive from other agencies or concerned citizens, only to collect it and report it, perhaps with some comment for the record of decision. And the plans and decisions made under these procedural statutes are subjected only to the most deferential standard of judicial review when challenged in court. As the Chevron case and its many progeny have held, so long as the Federal agency plan or decision is not "arbitrary and capricious, or an abuse of discretion," it will not be overturned by a court.

In stark contrast to these planning statutes, the Endangered Species Act has been held to mean exactly what its exacting substantive language says it means. The Supreme Court, in a series of cases beginning with TVA v. Hill, 437 U.S. 153 (1978), has recognized the intent of Congress to assign preeminent importance to preserving life under the Endangered Species Act. Even when it costs hundreds of millions of dollars, or halts a massive Federal project, the value of preserving threatened and endangered species is greater. And one reason why is that there is no remedy for a species driven into extinction. No amount of money, no mitigation measures, can ever restore a species once it becomes extinct. Each of the 1.75 million species on Earth known to us today is one of a kind, the end product of millions of years of adaptations to specific environmental conditions. Each species is absolutely unique, and absolutely irreplaceable. Extinction of any species is an irreversible, irremediable loss, different in kind and not merely in degree from the kind of losses sought to be prevented by all other environmental laws, from the Clean Air Act to the Resource Conservation and Recovery Act.

The Endangered Species Act defines critical habitat in part as "the specific areas within the geographical area occupied by the species, at the time it is listed...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection...." The proposal seeks to codify Integrated Natural Resources Management Plans as, by definition, satisfying the "special management considerations or protection" clause of this provision. But this confuses the threshold definition of critical habitat with the legal effect of critical habitat designation. The Endangered Species Act requires substantive steps to be taken with regard to critical habitat once it is designated, including the avoidance of any harmful alteration of that habitat. It does not merely require "special management considerations or protection," to be left to the discretion of any departmental secretary in his or her management plans. This is a fundamental flaw in the proposed exemption. It is, in part, the need for "special management considerations or protection" that is a prerequisite for an area to be designated as critical habitat. This is very different from the legal effects of such designation once it takes place.

The world is now on the brink of, and very likely in the midst of, our sixth mass extinction. The five previous mass extinctions, during which huge numbers of species—up to 95 percent of all life on Earth—went out of existence in a short span of time, all took place before human beings came on the scene. We have an air-tight alibi on the first five mass extinctions, but we are primarily responsible for the mass extinction now just beginning. Through our deliberate or inadvertent alteration or destruction of enormous amounts of critical habitat, we have severely jeopardized at least 40 percent of all known species now in existence on the planet.

For each species, there is a point at which the number of reproductively capable individuals is so low, or the gene pool is so depleted, or the amount of suitable habitat is so small, that the species becomes doomed to extinction. This tipping point varies from species to species. We know so little about so many of the 1.75 million so-called known species in existence today that it would be more accurate to say that we know these species by name alone. For many of them, we have virtually no knowledge of their life cycle, ecological significance, physiological needs, genetic characteristics, or behavioral patterns. But we do know that species that are endemic to only a small geographical area tend to be narrowly adapted to conditions there, and that there is a predictable mathematical relationship between habitat reduction and the numbers of species that can be sustainably supported. Simply put, as the critical habitat shrinks, the endemic species die out at a proportional rate. A 90 percent reduction of critical habitat will cause the eventual extinction of roughly 50 percent of the species that live there. They will not disappear all at once, but at some point they will become irreversibly "committed to extinction." Scientists refer to such death-row species as the "living dead."

My book, "Ark of the Broken Covenant," focuses on the approximately 25 biodiversity "hotspots," the 1.44 percent of Earth's landmass that contains all of the remaining habitats of 133,149 identified higher plant species (44 percent of the world's total) and 9,645 non-fish vertebrate species (35 percent of the world's total). There is powerful evidence that these species, and many others, are faced with imminent extinction on a scale the world has not seen since the extinction spasm that wiped out the dinosaurs. In fact, the best scientific evidence indicates that there may be millions of species on Earth that we have never even identified, most of them crowded into these biodiversity hotspots. Like the 40 percent-plus of known species, these millions of unknown species are largely endemic to the hotspots. They are found there, and only there, and nowhere else on Earth. But their remaining habitat is shrinking at an alarming rate. They have already lost 88 percent of their primary vegetation and are likely, absent greatly increased conservation efforts, to lose much more in the foreseeable future.

If the question is, "What's in it for us?" to justify the effort necessary to stop the sixth mass extinction, the answer is a great unknown. Just as no one knows with certainty how many species are near extinction, and how many species remain to be discovered—1 million, 7 million, 15 million—no one can predict which species will hold the key to solving crises in the near future or beyond. Is there another penicillin out there waiting to be found? Are there portions of DNA in some yet-to-be-identified species that could revolutionize medicine or food production? Is there among these nameless species a cure for AIDS, or SARS, or some other dreadful threat to human life that will not arise until centuries from now? We will never know if we allow the critical habitats of the world to be destroyed, and along with them, an immense share of all life on Earth.

How do we rationally deal with so much uncertainty in our decision making? In "Ark of the Broken Covenant" I suggest a method similar to the famous Pascal's Wager, which I call the Hotspots Wager. 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? I do not have time here today to work through the entire decision matrix, but suffice it to say that the prudent decision is to bet on life. The potential rewards from preserving as much biodiversity as possible are enormous, and the potential loss we could face by failing to safeguard key sources of medicine, food, and ecosystem services is unfathomably devastating.

Now is the worst possible time to be contemplating new and wide-open exemptions to the critical habitat protections, in the United States or anywhere else. A mass extinction is no time for weakening the few effective legal protections now in place in defense of biodiversity. All or part of 3 of the 25 biodiversity hotspots are within the United States, and these hotspots would be further imperiled by the proposed exemptions. The United States should be exercising global leadership in crafting stronger, more effective legal safeguards for our dwindling biodiversity. Instead, the proposed exemptions would do exactly the opposite.

In nation after nation, all over the world, key habitats are either left completely unprotected, or assigned to nothing more than "paper parks," areas that are in theory protected on paper but in reality are without effective, actively enforced safeguards. Species-specific laws like the Convention on International Trade in Endangered Species (CITES) and the Endangered Species Act are, at best, of only limited utility in preventing widespread extinction, because they focus primarily on one species at a time, and only on species that are already on or near their deathbed. What the world needs is an enforceable, priority-based, proactive, comprehensive legal regime aimed at halting the decimation of the planet's most vital centers of species endemism—the biodiversity hotspots.

The only part of the Endangered Species Act that constitutes a major contribution to this goal is the critical habitat section. Critical habitat is the only means by which individual species-specific protections can simultaneously shield the places where many more species also cling to life. When keystone or indicator species are listed, their critical habitat will largely coincide with the habitat necessary to sustain numerous other species as well. It is the heart of the Endangered Species Act, the most beneficial aspect of this much-criticized statute. It is the last place we should look for opportunities to weaken the Act.

The Supreme Court has held that the Endangered Species Act Section 9 prohibitions on takings include habitat alteration that harms listed species. In the case of Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) the Court recognized that indirect harm to listed species through impacts on their critical habitat is forbidden. Part of the Court's reasoning was derived from one of the "central purposes" of the Endangered Species Act, as stated in Section 2 of the Act, specifically, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...." As the hotspots concept makes clear, it does no good to enact an Endangered Species Act and then leave the endangered species legally homeless.

When critical habitat is designated in the first place, the Secretary of the Interior or the Secretary of Commerce is given latitude to consider impacts of such designation on military readiness. As Section 4(b)(2) of the Endangered Species Act now provides, the Secretary "shall designate critical habitat, and make revisions thereto...on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." This language is sufficiently expansive to allow considerations of military readiness to exclude certain areas from critical habitat designation at the outset. And even after critical habitat is designated, the Act currently satisfies all realistic concerns related to national security.

The Endangered Species Act already has an "exemption for national security reasons" in Section 7(j) that directs the Endangered Species Committee to grant such an exemption when and if it truly becomes necessary, in the opinion of the Secretary of Defense, to provide relief for the military. Unlike the proposal now under consideration, this provision is properly reserved for a case by case determination with involvement from a high-level, largely independent group. The broader Endangered Species Committee option has rarely been invoked for any reason whatsoever during the decades since it was added to the Act, and the Committee has even more rarely actually granted an exemption. More specifically, I am not aware of any instance in which the Secretary of Defense has exercised the Section 7(j) option for a national security exemption. This is evidence that national security exemptions from the Endangered Species Act have never been needed and have never been justified, even in the opinion of the Secretary of Defense. There is certainly no need for a new, sweeping, permanent exemption for the Department of Defense.

Thank you for the opportunity to testify at today's hearing. With your permission, at this point I would like to submit, for the hearing record, my 2001 Hastings Law Journal article entitled "Preserving the Womb of the Unknown Species With Hotspots Legislation," and my 2001 Georgetown International Environmental Law Review piece entitled, "Fiddling Around While the Hotspots Burn Out." I would be happy to answer any questions you may have.

Mr. GILCHREST. Without objection, that will be submitted for the record. Thank you very much.

Miss Steuer, thank you for coming.

STATEMENT OF KAREN STEUER, SENIOR POLICY ADVISOR, NATIONAL ENVIRONMENTAL TRUST

Ms. STEUER. Thank you, Mr. Gilchrest.

Mr. Chairman and members of the Committee, my name is Karen Steuer. I am a senior policy advisor for the National Environmental Trust.

Unlike members of the Administration who couldn't speak to the bill, or for anybody besides their own departments, I can tell you that I am testifying today on behalf of organizations who represent millions of Americans, from Maine to California, and we do have a position on the bill. I'm afraid we're opposed to it. But we do appreciate the Committee's assertion of its jurisdiction over the DOD proposals and the opportunity to testify today.

Because the Committee's bill would now apply DOD's proposals to activities undertaken by any citizen or corporation of the United States, we believe it's critical that they now be considered and addressed as part of a comprehensive MMPA reauthorization. The DOD bill is not the place for this kind of legislation.

When the MMPA was last reauthorized in 1994, I was the legislative staff responsible on behalf of Congressman Gerry Studds, who Mr. Gilchrest will remember, and who was at that time the Chairman of the former Merchant Marine and Fisheries Committee which had jurisdiction over both the MMPA and the ESA.

I have to plead guilty on the harassment definition, because it was during the 1994 reauthorization that the current definition of "harassment" was added to the Act. I want to point out that it was added at the request of the scientific community. The language was worked out with many members of the scientific community, in a process that involved all stakeholders, not only scientists but Alaskan Inuit communities, the oil and gas industry, and fishermen.

The harassment definition is one of the core provisions of the MMPA. It is the threshold for applying for a permit under the MMPA in many cases, as we've heard today. We would strongly urge Congress not to amend this language without a thorough review of all the possible options and the consequences of those options.

It is our view that the characterizations presented today regarding the harassment definition, and some of the other problems with the MMPA, do not arise from ambiguities in the statutory language but instead reflect process problems residing within the wildlife agencies and between those agencies and DOD in particular. These problems include inconsistency in reviewing permit applications, conflicts in the process that dovetails the MMPA with NEPA, and lack of cooperation among the agencies.

One of the best examples of these ambiguities lies in efforts to protect North Atlantic right whales, the most endangered of all the large whales and a species which occurs almost exclusively in U.S. waters from Maine to Florida. While NMFS regulates fishermen, whose gear causes approximately half of the human-induced mortalities of this species, the agency has to date made no attempts to regulate shipping traffic, even though ship strikes have been documented to cause just as many right whale deaths. And while the Navy has conducted bombing exercises using live ordnance in right whale habitat, with right whales and other endangered

species present, without preparing an environmental impact statement, a permit application by the leading institution conducting right whale research is undergoing a full EIS review regarding the impacts of their research.

These are not problems that will be corrected by changing the harassment definition, but by clarifying and standardizing the process for permit reviews. If anything, the highly ambiguous language of the proposed definition, and in particular the terms "significantly altered and abandoned" will result in even more confusion and even more legal action, since their meaning varies from species to species and from behavior to behavior, and even from season to season. Nothing will be gained, and marine mammal conservation will undoubtedly suffer as a result.

We also agree with Dr. Ketten regarding the potential impacts of the last paragraph of the proposed definition, which would hold marine mammal scientists to a tougher standard than that used for review of other potentially far more damaging activities. In fact, Mr. Gilchrest, that paragraph would not impact jet ski operators because the language is about activities that are directed toward a marine mammal stock and marine mammal population. It would therefore impact marine mammal scientists far more than jet ski operators.

Finally, we want to bring to the Committee's attention, as has been mentioned previously, that the proposed harassment definition is very different from the definition suggested by the National Research Council. We do agree that the term "biological" in terms of "biologically significant activities" should be included in consideration of permit applications, but I'm afraid we don't agree that just adding that term to the existing definition as proposed by NMFS will resolve anything, because it would retain some of the very ambiguous terms "significantly altered and abandoned."

The Committee's bill also expands to all constituencies DOD's proposal to create a separate authorization process for military readiness activities, but as noted earlier, eliminates key conservation elements by deleting existing limitations regarding small numbers and impacts within a specified geographic region.

Retention of these limitations, we believe, is a vital component of the conservation principles embodied in the MMPA. In particular, geographic regions serve different biological purposes for different species, and actions that have little or no consequence on one species within a specified region may have grave consequences for another, and those consequences may vary within that region from spring to summer and summer to fall, depending on which species are present and what activities are underway.

These limitations were intended, when added to the Act in 1994 to provide us with a means of assessing impacts in the ocean environment in a realistic way, and in a limited way. We believe these terms should be retained, but they need to be defined, and NMFS has not defined them. That's part of the problem.

In conclusion, 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 certainly result if the original DOD amendments are enacted. But to use these problems or NMFS inconsistencies in

the review process as an excuse to propose sweeping changes to the MMPA, outside of a reauthorization process, is irresponsible and would greatly weaken an important conservation law, and a successful one, that has been in place since 1972.

We urge the Committee to strip these provisions from the DOD authorization bill and consider them in the context of the general MMPA reauthorization debate. We would like to continue to work with you and the agencies in continuing the Act's long and very successful history of marine mammal conservation.

Thank you very much.

[The prepared statement of Ms. Steuer follows:]

Statement of Karen Steuer, Senior Policy Advisor, National Environmental Trust, on behalf of the National Environmental Trust, Greenpeace, Humane Society of the United States, International Wildlife Coalition, Natural Resources Defense Council, Oceana, Sierra Club, The Ocean Conservancy, and World Wildlife Fund

Mr. Chairman, Congressman Rahall, and Members of the Resources Committee:

My name is Karen Steuer. I am a Senior Policy Advisor to the National Environmental Trust, and I am testifying today on behalf of organizations who represent millions of Americans from Maine to California. My testimony will focus on those provisions of the National Security Readiness Act that would amend the Marine Mammal Protection Act (MMPA). It is our hope that this testimony will also serve to address the Committee's questions regarding whether the proposed changes would benefit the scientific community and help to clarify the effect of permitted activities, while still maintaining protection for marine mammal populations It is our hope that this testimony will also serve to address questions regarding whether the proposed changes would benefit the scientific community, and help to clarify issues surrounding the current permitting process as they relate to both permit applicants and affected marine mammal populations.

The groups on whose behalf I am testifying today appreciate the Committee's assertion of its jurisdiction over the Department of Defense (DOD) proposals and the opportunity to testify. Although the changes to the MMPA proposed for the National Defense Authorization Act for Fiscal Year 2004 were restricted to activities undertaken by the Department of Defense, the Committee's bill would apply the proposed amendments to the definition of harassment and the incidental take authorization process to activities undertaken by any citizen of the United States. Now that it is apparent that these changes are intended to apply broadly, we believe that it is even more important that they be considered and addressed as part of a comprehensive MMPA reauthorization bill, as opposed to the National Security Readiness Act of 2003. In that context, we stand ready to work with you, other members of your Committee, relevant Federal agencies, and representatives of other affected constituencies, on this and other issues that have arisen since the Act was last reauthorized in 1994. not in the DOD authorization legislation.

Reauthorizations of successful and popular environmental laws should not be undertaken lightly. When the MMPA was last reauthorized in 1994, I worked for Congressman Gerry Studds, who was at that time the Chairman of the former Merchant Marine and Fisheries Committee, with jurisdiction over both the MMPA and the Endangered Species Act. It was during the 1994 reauthorization that the current definition of "harassment" was added to the Act—largely to address concerns raised by the scientific community. The process leading up to that reauthorization was bipartisan, extensive, and involved stakeholders from the ocean resource extraction industries, Alaskan Inuit communities, commercial fishermen, environmental organizations, and scientists. The result was a bill introduced by Congressman Studds and Congressman Young with strong bipartisan support. Some of the more senior Members of this Committee were members of the Merchant Marine and Fisheries Committee at that time, and will recall the effort that went into the current statutory language.

This history is particularly relevant to our discussion today because it has direct bearing on the appropriateness of the proposed changes to the definition of harassment, one of the core provisions of the Act and the one that establishes the threshold for applying for a permit under the MMPA. Congress should not amend this definition without a thorough review of all possible options and the consequences of those options. It is our view that the arguments and characterizations raised by

DOD in relation to harassment have been misleading. They do not arise from the language of the statute, but instead reflect process problems residing within the wildlife agencies and a lack of willingness on DOD's part to work with the agencies to resolve those problems.

The Harassment Definition

In 1994, representatives of the marine mammal research community approached the Committee regarding what they felt was unjustified scrutiny by the National Marine Fisheries Service in relation to permits for scientific research on marine mammals. The Committee was sympathetic to their concerns, and following consultations with NMFS, the Marine Mammal Commission and the scientific community, Congress created a two-tiered harassment definition, as follows:

"The term 'harassment' means any act of pursuit, torment, or annoyance which—

(Level A) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(Level B) 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.

Now the Congress is confronted by an attempt to change the definition on the part of DOD and some segments of the scientific community whose research incidentally takes marine mammals. The Administration claims that the current definition of harassment is overly broad and ambiguous, and has proposed the following alternative:

"The term harassment means any act which—

(Level A) injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or

(Level B) disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered; or

is directed toward a specific individual, group, or stock of marine mammals in the wild that is likely to disturb the specific individual, group, or stock of marine mammals by disrupting behavior, including, but not limited to migration, surfacing, nursing, breeding, feeding, or sheltering.

The critical issue now is the need to evaluate what changes—if any—are needed to the definition versus what action must be undertaken to improve implementation of the permit and regulatory process. It is our view that any problems that do exist are not due to ambiguities in the statutory language, but to fundamental process problems, including: inconsistency in reviews of permit applications, conflicts in the process that dovetails the MMPA with the National Environmental Policy Act, and a lack of cooperation among Federal agencies. If the problem lies in process issues that go uncorrected, changing the definition is likely to result only in more confusion, more delays in granting permits, and more lawsuits. Nothing will be gained, and marine mammal conservation will undoubtedly suffer as a result.

Unfortunately, regulation and permit processing under the MMPA appears to vary from one stakeholder group to another, which may have led to some of the concerns raised by the scientific community regarding the harassment definition. This concern was noted in a report produced by the National Research Council (NRC) in 2000, whose recommendations have often been used—and misused—in the context of the current effort to change the definition. In that report (Marine Mammals and Low–Frequency Sound: Progress Since 1994) the NRC stated that "Although Congress intended to provide less stringent means for marine scientists to obtain permission to unintentionally harass marine mammals to an insignificant degree, NMFS has applied its regulations most stringently to science.

One of the best examples of this inconsistent approach to processing permits lies in efforts to protect North Atlantic right whales, the most endangered of all the large whales and a species which occurs almost exclusively in U.S. and nearby Canadian waters. While NMFS regulates fishermen, whose gear causes approximately 50% of the human-induced mortalities of this species, the agency has to date made no attempts to regulate shipping traffic, even though ship strikes have been documented to cause just as many right whale deaths. At the same time, the Navy continues to conduct bombing exercises using live ordnance in known habitat for right, humpback, fin, and minke whales in the Gulf of Maine without informing NMFS, while a permit application by the leading institution conducting right whale research is undergoing a full environmental impact statement.

These are not problems that will be corrected by changing the harassment definition, but only by clarifying and standardizing the process for permit reviews. If anything, the highly ambiguous language of the proposed definition, adding such terms as "significantly altered" and "abandoned," will result in even more confusion and even more legal action, since their meaning varies from species to species and from behavior to behavior.

We would also like to point out that the harassment definition proposed by the Administration would reinforce the practice of holding scientists to a much higher and tougher standard than that used for review of other activities with potentially far more serious consequences for marine mammals. The definition proposed here would create a two-tiered standard: one that applies to marine mammal researchers (harassment "directed toward a specific individual, group or stock of marine mammals"), and one that applies to other scientists and activities such as oil and gas exploration, vessel traffic, and DOD exercises. Paradoxically, the result would be that research which stands to benefit marine mammals would be held to the tougher standard. We find it incomprehensible that, in light of the concerns raised to date by some members of the scientific community, the Administration would propose this change in the definition. We suspect that those scientists who have supported this language are not aware of the consequences for their own permit reviews.

Because the Committee has converted DOD's proposed changes into broad MMPA amendments, we think it is crucial that the Committee consider whether those changes were ever actually warranted. Attached to our testimony is a chart clarifying that since the current definition was adopted in 1994, DOD has never been denied a permit or incidental take authorization by NMFS. In Congressional testimony the Navy has frequently referred to fictitious situations that have no bearing on the actual language or the agency's interpretation of the law. The often-used scenario in which a naval vessel is prevented from leaving the harbor because a sea lion on the neighboring beach will turn its head to watch the boat simply bears no resemblance to the type of activity that NMFS actually regulates. Typical of these activities are missile firings, which cause pinnipeds hauled out on nearby rocks and beaches to stampede, killing their pups; and ship-shock tests, which involve detonations of thousands of pounds of high explosives. NMFS has never required a permit of an activity that merely caused a sea lion to turn its head. This is a spurious issue.

Amending the Authorization Process

The MMPA currently provides several avenues for exemptions from the moratorium on taking of marine mammals "

- The broadest, found in section 118 of the law, was written in 1994 and applies specifically to commercial fishing operations that incidentally catch marine mammals in fishing gear.
- "Small take permits" are authorized for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock. The Act specifies some of the conditions under which such permits can be granted; process and additional conditions have been addressed by regulation.
- In 1994, Congress also added exemption provisions for taking "small numbers" of marine mammals and for incidental harassment authorizations. These provisions were added due to initial concerns raised by groups such as the oil and gas industry. They were intended to provide a streamlined mechanism by which proponents such as the industry, institutions conducting oceanographic or seismic research, or the Department of Defense could obtain year-long authorizations for projects in which any takings would be by incidental harassment only. The responsible agency—usually NMFS—is required to publish a notice in the Federal Register of any authorization request within 45 days of its receipt. After a 30-day public comment period, the agency has 45 days to issue the authorization or deny. By law, the entire process can take no longer than 120 days.

DOD proposed to amend this last provision by creating separate incidental take authorization processes for military readiness activities. Although the DOD language and the Committee's bill partially tracks the existing provisions, it eliminates key conservation elements from the process by striking the limitations regarding "small numbers" of marine mammals and impacts within a "specified geographic region." The only conceivable reason for DOD to want these provisions eliminated would be if the Department intends to seek global exemptions to disturb, injure, or kill unlimited numbers of marine mammals, or to extricate itself from current lawsuits by seeking a legislative remedy. The Committee has now expanded this ill-conceived amendment to apply to all activities and all proponents, drastically weakening the MMPA in the process.

Retention of these limitations is a vital component of the conservation principles embodied in the MMPA. Under the current language, regions of operation and numbers of animals impacted are drawn as narrowly as possible to accomplish the proposed activity; environmental review then takes place on that basis. The status of marine mammal conservation varies from species to species and from ocean to ocean, and requires that activities be considered on a case-by-case basis. Geographic regions serve different biological purposes for different species, and actions that have little or no impact on one species within a specified region may have grave consequences for another. Similarly, given that many marine mammal species are migratory, action judged to have serious conservation implications during one season may be of no consequence if undertaken within the same geographic region during a different time of the year. If the current limitations on "specified geographic regions" and "small numbers" are eliminated, it will prove almost impossible to conduct an adequate assessment of impacts.

Proposal for Categorical Exemption

Finally, the Committee's bill proposes language allowing the Department to grant itself a categorical exemption to the MMPA for any "category of actions" necessary for national defense. Exemptions would run for two years, but be endlessly renewable for additional two-year periods. Additionally, while exemptions in other environmental statues such as the Clean Air Act give discretion directly to the President of the United States, the language contained in the Committee's bill vests authority directly in the Secretary of Defense, and lacks the Congressional reporting provision found in other statutes.

Moreover, the exemption proposed for the MMPA is not conditioned on any initial stage of environmental review. Even activities that are conducted in peacetime and whose mitigation would not have a significant adverse effect on readiness could fall outside of the process and be authorized under the MMPA, receiving no mitigation, monitoring, or even basic review. The effect of this phrasing is to remove any meaningful accountability or oversight on the granting and renewal of exemptions—a serious problem that is only compounded by the lack of a Congressional reporting provision.

Furthermore, the exemption may apply not only to any single action "undertaken by the Department of Defense or its components," but to any "category of actions" as well. Its scope is therefore much broader than that of exemptions available under the Endangered Species Act (16 U.S.C. sec. 1536(j)) and other statutes, which are limited to individual activities, technologies, or exercises. Through this language, the provision allows for sweeping application, even to potentially harmful activities that in themselves would not necessitate an exemption but are nonetheless contained within a broader category.

In supporting such an exemption, DOD has nowhere addressed the fact that considerable flexibility is already available under the Armed Forces Code. Under 10 U.S.C. sec. 2014, DOD may seek special accommodation and relief from any agency decision that, in its determination, would have a "significant adverse effect on the military readiness of any of the armed forces or a critical component thereof." This provision has never been invoked with regard to the MMPA, presumably because DOD's requests for authorization under the Act have never been denied and because any mitigation prescribed by the wildlife agencies has not been judged to have a significant adverse effect on readiness.

DOD has yet to demonstrate any real need for relief from the current process, and to extend the Department's weakening provisions to all constituencies appears to be nothing more than a general attempt to weaken an important environmental law in place since 1972. The Department's record of environmental review under the MMPA is one of general success, allowing for public participation, scientific analysis, and the prescription of mitigation and monitoring while protecting the military's need for readiness. No application submitted to the wildlife agencies by the Defense Department has been denied and most have been approved within the expected timeframe which, in the case of incidental harassment authorizations, is approximately four months.

Although DOD continues to reiterate its intention to fully comply with the intent and spirit of the MMPA, a closer examination of recent events indicates otherwise. As noted earlier, on several occasions, the Navy has either: conducted potentially dangerous exercises without informing NMFS, thus denying the agency the opportunity to evaluate "no-take" findings in associated Navy environmental assessments; given minimal notice of impending activities, resulting in inadequate opportunity for agency review; or consulted with NMFS but refused to implement even basic measures for mitigation and monitoring of activities that are potentially lethal or injurious to marine mammals.

Conclusion

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.

We urge the Committee to strip these provisions from the DOD Authorization bill and consider them in the context of the general MMPA reauthorization debate. Our combined organizations would be happy to continue to work constructively with the wildlife agencies and other constituencies on alternative approaches to improving MMPA processes and to continuing the Act's long and successful history of marine mammal conservation.

[An attachment to Ms. Steuer's statement follows:]

THE DEFENSE DEPARTMENT AND THE MMPA :
THE RECORD SINCE 1994

The Department's record of environmental review under the MMPA is one of general success, allowing for public participation, scientific analysis, and the prescription of mitigation and monitoring while protecting the military's need for readiness. None of the applications submitted to the wildlife agencies by the Defense Department has ever been denied and most have been approved within the expected timeframe, which, for "incidental harassment authorizations," is approximately four months.

Incidental Harassment Authorizations (16 U.S.C. § 1371(a)(5)(D))

ACTIVITY	APPLICATION DATE	PROPOSED AUTH. PUBLISHED	EFFECTIVE DATE OF AUTHORIZATION	NOTES
Demolition & removal of buildings at Point Mugu Naval Testing Grounds	April 10, 2002	July 30, 2002 (67 Fed. Reg. 49289)	Sept. 26, 2002 (67 Fed. Reg. 59824 (Sept. 24, 2002))	USN requested Sept. 26 starting date
Missile launches by USN at Point Mugu Naval Testing Grounds	April 9, 2002	July 1, 2002 (67 Fed. Reg. 44180)	Aug. 26, 2002 (67 Fed. Reg. 56271 (Sept. 3, 2002))	
Harbor activities at Vandenburg Air Force Base	Jan. 28, 2002	March 4, 2002 (67 Fed. Reg. 9702)	May 20, 2002 (67 Fed. Reg. 36151 (May 23, 2002))	Issued to Boeing, but activities conducted for USAF benefit
Demolition & removal of buildings at Point Mugu Naval Testing Grounds	May 23, 2001	June 29, 2001 (66 Fed. Reg. 34618)	Sept. 26, 2001 (66 Fed. Reg. 50416 (Oct. 3, 2001))	
Missile launches by USN at Point Mugu Naval Testing Grounds	Feb. 5, 2001	April 23, 2001 (66 Fed. Reg. 20435)	July 31, 2001 (66 Fed. Reg. 41834 (Aug. 9, 2001))	
Explosives testing of obstacle and mine clearing systems at Eglin AFB	July 20, 1998	Oct. 13, 1998 (63 Fed. Reg. 54676)	Dec. 1, 1998 (63 Fed. Reg. 67669 (Dec. 8, 1998))	USAF applied on USN's behalf
Athena rocket launches at Vandenburg AFB	March 10, 1998	April 8, 1998 (63 Fed. Reg. 17154)	July 18, 1998 (63 Fed. Reg. 30726 (June 5, 1998))	
Delta II, Titan II, Titan IV, and Taurus rocket launches at Vandenburg AFB	Oct. 7, 1997	Nov. 14, 1997 (62 Fed. Reg. 61092)	Dec. 19, 1997 (62 Fed. Reg. 67618 (Dec. 29, 1997))	
Lockheed Martin rocket launches at Vandenburg AFB	March 21, 1997	May 15, 1997 (62 Fed. Reg. 26779)	July 18, 1997 (62 Fed. Reg. 40335 (July 28, 1997))	
Taurus rocket launches at Vandenburg AFB	Aug. 14, 1996	Sept. 25, 1996 (61 Fed. Reg. 50276)	Jan. 1, 1997 (62 Fed. Reg. 734 (Jan. 8, 1997))	
Titan II and IV rocket launches at Vandenburg AFB	Jan. 24, 1996	March 15, 1996 (61 Fed. Reg. 10727)	Nov. 27, 1996 (61 Fed. Reg. 64337 (Dec. 4, 1996))	
Delta II rocket launches at Vandenburg AFB	July 17, 1996	Aug. 29, 1996 (61 Fed. Reg. 45404)	Nov. 13, 1996 (61 Fed. Reg. 59218 (Nov. 21, 1996))	
Lockheed Martin rocket launches at Vandenburg AFB	April 1, 1996	May 2, 1996 (61 Fed. Reg. 19609)	July 17, 1996 (61 Fed. Reg. 38437 (July 24, 1996))	Modification effective May 1, 1997
Delta II rocket launches at Vandenburg AFB	July 12, 1995	Aug. 18, 1995 (60 Fed. Reg. 43120)	Sept. 19, 1995 (60 Fed. Reg. 52653 (Oct. 10, 1995))	Modification requested 1/24/96 and issued 2/15/96
Lockheed rocket launches at Vandenburg AFB	Mar. 13, 1995	May 10, 1995 (60 Fed. Reg. 24840)	July 18, 1995 (60 Fed. Reg. 38308 (July 26, 1995))	

Small Take Permits (16 U.S.C. § 1371(a)(5))

Routine testing and training with SURTASS LFA sonar	Aug. 12, 1999	Mar. 19, 2001 (66 Fed. Reg. 15375)	Aug. 16, 2002 (67 Fed. Reg. 46712 (July 16, 2002))	Process awaited USN's preparation of EIS, released Jan. 2001
Operation of long-term sound source off Kauai by the North Pacific Acoustic Laboratory	May 21, 2000	Dec. 22, 2000 (65 Fed. Reg. 80815)	Sept. 17, 2001 (66 Fed. Reg. 43458 (Aug. 17, 2002))	Principal funder of project is Office of Naval Research
Use of underwater high explosives for shock-testing of USS Winston Churchill	Jan. 12, 2000	Dec. 12, 2000 (65 Fed. Reg. 77546)	May 1, 2001 (66 Fed. Reg. 22450 (May 4, 2001))	USN requested May to September 2001 operations window
Use of underwater high explosives for shock-testing of USS SEAWOLF	June 7, 1996	Aug. 2, 1996 (61 Fed. Reg. 40377)	May 1, 2000 (63 Fed. Reg. 66076 (Dec. 1, 1998))	Process suspended from 1997 to 1999 at request of USN "for reasons unrelated to the environment"
Space vehicle and test flight activities at Vandenburg AFB	Sept. 30, 1997	July 21, 1998 (63 Fed. Reg. 39055)	March 1, 1999 (64 Fed. Reg. 9925 (March 1, 1999))	Operations received authorization pending approval of permit
Use of underwater high explosives at Point Mugu	May 3, 1993	Oct. 15, 1993 (58 Fed. Reg. 53491)	March 3, 1994 (59 Fed. Reg. 5126 (Feb. 3, 1994))	Application modified on 9/2/1993 to take two additional species

Mr. GILCHREST. Thank you very much, Miss Steuer.

I guess anybody can answer this question, I suppose, but Dr. Ketten was the one, and then Miss Steuer just raised it again. Could you tell us, in real world terms, the impact of the change of

the definition of harassment where the word "significant" is used and, Dr. Ketten, where you said "biologically significant". Dr. Hogarth seemed to try to relay to us that the term "significant" was defined, it was a clearer definition, and marine mammals could be better protected and have less few lawsuits. The difference between just using the word "significant" and using the word "biologically significant". The NRC term was actually "meaningful disruption of biologically significant activities." Why would that be better than just the word "significant"?

Dr. NACHTIGALL. I believe that's directed to you, Doctor.

Dr. KETTEN. Gee, thanks Paul.

In the NRC Panel 2003, we deliberated this statement for a long period of time, not because there was not consensus amongst the panel but rather to try to get the wording to be explicit.

The difficulty that we had with just the term "significant" is that one then has to weigh what form of significance. Gregory Bateson once said that "a difference is a difference that makes a difference." Now, I don't know if that irritates you nearly as much as it irritates me, but he was trying to say that it is the thing that causes you to notice a difference. However, what the source of that difference is is what can be debated by just the term "significance."

Within research on ecology and behavior, and certainly in population biology, we talk about biological significance explicitly, as I said, as a term of art, not to mean an individual that is impacted but, rather, at what point do the number of individuals—whether you're dealing with breeders or mating behavior and individuals involved in that—at what point does an alteration have a biologically significant impact at the species or the population level. So it is a conventional scientific term, and by adding the term "biological" to it, we are adding a criterion that we think is important and was the original intention of the MMPA.

Mr. GILCHREST. Thank you. Does anyone else want to comment on that?

Ms. STEUER. If I may, Mr. Chairman, I think the other point that should be raised here is that where the currently proposed definition, the Administration's definition and the one that's used in H.R. 1835, use the term "significant", it is to describe an alteration of the behavioral pattern, not to describe the behavior itself. I believe what Dr. Ketten was trying to get at is that where that term is important is when you're looking at the behavior. As currently proposed, the Administration would use the term "significantly altered". What does that mean? Does significantly mean a little bit altered, does it mean a lot altered, does it mean abandoned for 20 minutes, does it mean abandoned for 3 hours, does it mean permanently abandoned? It's a very ambiguous approach to try to define an activity.

Mr. GILCHREST. Thank you.

One other quick question. On the Level 3 harassment, Dr. Ketten, you seemed to indicate that the language would make it very difficult and make it more difficult now for researchers to get permits. Can you explain that and maybe suggest a language change?

I thought the purpose of some of this is to have a better permitting process to do more, if I can use the word, significant research,

and a broader language of harassment so we can get at some of the other harassment problems that we don't get out now, and that was my understanding of Level 3 harassment but you're disagreeing with that.

Dr. KETTEN. I understand, sir, and I agree with your concept of adding the third paragraph. But as Ms. Steuer has said, and I had said, the difficulty that I see in it is how it will be interpreted by the public, and I see it as fostering lawsuits or preventing permits entirely. Consider that virtually every single experiment done is directed at an individual animal, whether it's a field experiment or a captive experiment, but as Ms. Steuer pointed out, jet skis do not direct their activity, typically, toward a dolphin. They provide a harassment, but not necessarily a directed one.

I see paragraph (ii) as including these clauses, since it says "a marine mammal or marine mammal stock", that is, an impact on an individual can be seen to be covered under (ii), but it doesn't explicitly say an activity directed at. I would leave that to the regulatory agencies in reviewing an application to determine if an activity is harmful or not. I see it as being covered under (ii). Therefore, I frankly have not at the moment, up to the moment, given any thought to revising (iii), but rather removing it.

Mr. GILCHREST. I see.

Dr. KETTEN. I will consider that and see if I can come up with better concerns, or better statements for these concerns.

Mr. GILCHREST. Thank you very much.

Mr. Udall.

Mr. TOM UDALL. Thank you, Chairman Gilchrest.

To Professor Kunich, in your testimony you say, "the world is now on the brink of and very likely in the midst of our sixth mass extinction". Could you please elaborate on this and why is it important to protect habitat on DOD lands and all Federal lands?

Mr. KUNICH. Yes, sir. There is evidence from studies on islands, primarily the study of islands biogeography, that shows there's a predictable relationship between habitat reduction and eventual extinction of species. Roughly speaking, a 90 percent habitat reduction will cause an eventual extinction of 50 percent of the species that are found there.

That doesn't mean they go extinct right away. They become committed to extinction. Scientists have a term, "the living dead", which sounds like it comes from a bad horror film, but it refers to species that are doomed to extinction because their numbers have been so depleted, their genetic diversity has been so reduced, that eventually they are going to die out, no matter what.

As the habitat for these endemic species is reduced, a similar thing happens. For species that are ubiquitous, this doesn't occur, but for species that are narrowly adapted to a specific small area, as that habitat shrinks, predictable numbers of species go extinct as well.

Now, why is this a concern for us? It's a concern, even on DOD lands, because the species that are found there could very well hold the key to medicinal advances, genetic engineering, techniques that could be the answer to SARS or some dread disease in the future, or to health or medicinal or agricultural concerns, and we can't afford to lose any of these raw materials.

By the way, the only complaint I really heard from the military people during the previous four-and-a-half hours is that they are being subjected to too many lawsuits. But I respectfully suggest there is nothing in the proposed change here that will reduce lawsuits. It will transform the substantive section of the ESA into a procedural one, but it won't exempt it from judicial review. NEPA, the Federal Land Policy Management Act, the National Forest Management Act and all the other planning and procedural statutes are fully subject to endless litigation. There are many hundreds of cases on all of them, and they are just as burdensome to defend against as cases under the ESA as it now exists.

Mr. TOM UDALL. The hot spots that you identified and talked about in your book, are some of those contained within the Continental United States, and Alaska and Hawaii?

Mr. KUNICH. Yes, sir, Congressman Udall, three of them are, at least in part. There's the Hawaiian Islands hot spot, the California floristic province, which is a portion of California—

Mr. TOM UDALL. Neil, you've got to listen to this. This is about Hawaii.

Mr. KUNICH. Hawaii is one of the hot spots.

Mr. TOM UDALL. You are a rich biological hot spot. I know you're more interested in those brownies, but listen here.

[Laughter.]

OK. Go ahead.

Mr. KUNICH. There's the Hawaiian Islands, which are part of a larger Polynesia/Micronesia hot spot. There's the California floristic province, which extends down to Baja, and then there's the Caribbean hot spot, which includes Puerto Rico and the southern tip of Florida. Those three are at least partially in the United States.

Mr. TOM UDALL. I wanted to ask you about critical habitat designations versus INRMPs. What additional protections do critical habitat designations offer that an Integrated Natural Resources Management Plan does not?

Mr. KUNICH. The primary additional protection they offer is that they are substantive provisions with real enforcement teeth under the ESA. If we substitute INRMPs, no matter how good the intentions are of the people who are writing them, implementing and drafting these plans, they remain just that. They're plans and there are hundreds of cases under all the other planning statutes that show that there's a very deferential standard of judicial review that's applied to such decisions. NEPA cases, famously, have held in the Supreme Court that NEPA does not prohibit unwise decisionmaking but only uninformed decisionmaking. It doesn't mandate a particularly good result, just that you go through the right procedural hoops. And you need more than that to adequately protect critical habitat.

Mr. TOM UDALL. On the issues of species protection and agency mission, is species conservation consistent with the "primary purposes" of agencies like the Forest Service, the BLM, the Bureau of Reclamation? Wouldn't there be massive litigation over primary purposes?

Mr. KUNICH. There certainly would be, in the Organic Act that establishes the forests, the national forest system, for example. The primary purpose of the forest system is silviculture, logging. It's

not conservation. That's in the Act. Of course, now we've become accustomed to treating national forests as if they were enclaves for recreation and preservation, but that's not what's in the Organic Act. There would be a tremendous amount of litigation over whether something is either the primary purpose or is consistent with it, and that in no way will be something that will minimize litigation. Instead, it will invite much more.

Mr. TOM UDALL. I also would like to thank the entire panel for your patience, and I thank the Chairman, both Chairmen that are here.

Mr. GILCHREST. Thank you, Mr. Udall.

Mr. Pombo.

The CHAIRMAN. Thank you.

Mr. Kunich, just to start with you, I guess this is a follow up on that last question. You got me to thinking. Do you think that the Endangered Species Act should be the primary function of these agencies, whether it's the Forest Service or DOD or the Department of Interior? Do you believe that, in carrying out the implementation of the Act, should that be the primary function of those agencies?

Mr. KUNICH. No, sir. But a string of Supreme Court cases, beginning with Tennessee Valley Authority versus Hill, have held that no matter how onerous the burden might be on an action agency of complying with the Endangered Species Act, the Act means what it says, and if it means stopping the Teleco Dam project on the eve of throwing the switch, so be it. The Court has famously said, if Congress didn't intend that, they're free to amend it. But as it's written, that is exactly what it requires. There is nothing in the mission statement or the Organic Act of any of these agencies that makes endangered species preservation their primary purpose.

The CHAIRMAN. No, there's nothing in their generic acts that does, but court decisions, as you have pointed out, have made it the primary function of these agencies, that in carrying out their job, whatever that may be, they have to abide by the Act, regardless of what happens.

Mr. KUNICH. They have to abide by the Act, but they have to abide by RCRA, CERCLA, NEPA and all the other Acts, too. That doesn't mean those Acts become their primary purpose. It's just that they have to comply with them.

The CHAIRMAN. Yeah, they do. I think you accurately pointed out that, because of a number of court cases, meeting the Endangered Species Act becomes their primary function.

Mr. KUNICH. It's an important part of their mission. They do have to invest a lot of resources into complying with it, that's true.

The CHAIRMAN. Specifically, in dealing with DOD, do you see that as a problem in carrying out their primary mission, if in carrying out the Endangered Species Act and meeting the requirements of the Endangered Species Act, if that limits their ability to carry out their primary function? Do you see that as a problem?

Mr. KUNICH. I don't think that has ever happened, sir. As the General testified earlier, he testified that their training was at about 68 percent effectiveness, but they never went for a 7(j) exemption, they never in any way even tried to go down that road, even though that's been in the ESA for many years. They don't

even have a procedure for asking for it. Apparently it didn't get to the point where it was really a serious problem.

If that's the case—

The CHAIRMAN. If I could back you up a little bit, I think it has become a serious problem. But personally, I've got a problem with them asking for a 7(j) exemption, because if you do care about protecting species, that is the worst possible scenario that you could lay out, is them getting an exemption.

Mr. KUNICH. The Endangered Species Committee provisions under the ESA don't give you a blank check to violate the Act. If you get an exemption from the "God Squad", there still have to be mitigation measures, measures to minimize the harm. It's just that it allows an exemption from a particular penalty provision. But there still are protections in place even with a "God Squad" exemption.

The CHAIRMAN. Not to the extent that there are, under every other provision that we've talked about—

Mr. KUNICH. That's true.

The CHAIRMAN. —including the INRMPs.

Mr. KUNICH. That's true.

The CHAIRMAN. Miss Steuer, before I run out of time, you talked about in your testimony there being other alternatives, other language that we could go forward with on the harassment definition.

Have you given the Committee or any of the agencies with jurisdiction what some of that alternative language is? Because I haven't seen it. I'm just wondering if you have.

Ms. STEUER. I'm sorry, Mr. Chairman, that's actually not what I said. What I said was what we need to do is look at eliminating the ambiguities in the permit process and in reviews, and in the regulatory issues we need to define terms that are causing some of the problems that have come up today, terms like "small numbers", terms like "specified geographic region". We need to better dovetail NEPA processes, with MMPA processes, with ESA processes, that clearly are not working well.

We should be looking at options for programmatic reviews of activities, which would greatly eliminate some of the review burdens both on the part of DOD or other constituencies and NMFS. Most of that is not being done. What I was suggesting is that we need to look at alternatives that would, in my view, resolve the problems far more than just changing the definition.

I am firmly convinced, having gone through this in 1994, that if we change the definition to anything that's been proposed—the Administration's definition, some of the other options on the table, the NRC definition—if we do any of that, without correcting the process problems, we will be back here again in a few years having this very same conversation. Obviously, we would all prefer not to do that.

The CHAIRMAN. I happen to agree with you on that point. As you know, that has been one of the battles that we've gone through over the years on this Committee, is changing that process. But I have faith in my Subcommittee Chairman, that he's going to take care of that.

[Laughter.]

Mr. GILCHREST. We're going to work on it, Mr. Chairman, as we go through the process of reauthorizing the Marine Mammal Protection Act, to solve all those definition and process problems.

I yield now to the gentleman from Hawaii.

Mr. ABERCROMBIE. Thank you, Mr. Chairman.

Mr. Chairman, I believe we're going to have to get to probably a vote situation fairly quickly, so this may not be able to go on too long. But I wanted to say for the record that I don't have a conflict of interest, as such, I don't believe, but I certainly want to acknowledge the fact that Dr. Nachtigall, I believe, is one that I am very pleased to have in front of the Committee because I believe he has an enormous amount of not only information but perspective to give in the context of scientific inquiry. It is in that vein, Paul, that I would like to ask you for the record—and we've talked about it beforehand, not specifically what you were going to say but talked about this issue on more than one occasion.

Do you recall my conversation with you, that I was concerned that sound science was going to get whipsawed or caught between ideology, if you will, and the motivation of certain interests, regardless of how well motivated they are, that the science actually involved would get lost in the process. My hope was that we could discover some way perhaps in between taking a sledgehammer, I think as Mr. Kildee put it earlier in the day, to existing legislation and perhaps finding a way to—I think I used the word stiletto. That was probably a bit unfortunate. But some way to zero in on what could profitably be done in a scientific way that wouldn't undermine the essential features of either the Marine Mammal Protection Act or the Endangered Species Act.

Could you comment on that a little further than your testimony does?

Dr. NACHTIGALL. Yes, I believe I could, if I understand you correctly.

I believe there is much more that can be done as far as science and understanding the issues that we're dealing with. I do get concerned about the whipsaw that you're talking about, the fact that on one side you have people who don't want to do anything, that essentially science wouldn't be allowed, and we're working on the intricacies of how that might happen. On the other side, we do have to make sure that we do protect the species, particularly the marine mammal species that we have, and unfortunately, we know very little about those species we're trying to protect.

Mr. ABERCROMBIE. Do you think it would be possible—You've heard some of my questions earlier in the day, and my observations. Do you think it would be possible if the Department of Defense worked up—and I'm trying to get a hold of this memo, by the way, that I referred to, because I could not find it, the memo regarding how we could access the question of exemption or regulation before you reach the level of exemption, which I think might apply to marine mammal research here, especially where the hearing is concerned.

Do you think it would be helpful if we tried to find and put into place a methodology for that kind of implementation of scientific research that would be short of either seeking exemptions or short of trying to change the law completely?

Dr. NACHTIGALL. Yes. I—

Mr. ABERCROMBIE. You don't really have a process available to you right now to be able to appeal to either side, right?

Dr. NACHTIGALL. That's true, I don't really have that process available. But I have been able to work very successfully with a number of people in regard to assuring that good science does get done. I think that's probably the essence of what I'm talking about here.

Mr. ABERCROMBIE. If we don't have such a process, if we're not able to implement what the Department of Defense now admits that it does not have, even though it has the possibility of doing it as already exists in the law, isn't the only thing that's going to be left then, especially if I understand Dr. Kunich's testimony correctly, we're just going to end up in court all the time.

Mr. KUNICH. Absolutely.

Mr. ABERCROMBIE. And that there is, in effect, a void right now of a process available to try to resolve these issues, not because we didn't anticipate it but because the DOD, to this point, actually hasn't implemented it.

I'm talking about something short of the "God Squad" thing. It is quite clear that, in the memo that I read a portion of to you, that they haven't even begun a guidance yet. If we at least put that into effect, wouldn't you have more of a fighting chance then to be able to come forward and avoid having a court dictate to you, because you would be able to say to the court, "Look, we've got protocols in place here that are quite adequate under the ESA and can meet any reasonable standard of addressing the question of whether we're going to harm, injure, et cetera any of the marine mammals."

Dr. NACHTIGALL. Anything that will be able to lead to the process that continues—be able to continue the work—I cited that one instance where there was an experiment that was actually stopped because of the fact that somebody was enjoined by the courts to stop the very research that really needs to be done. Anything that can be done to facilitate that research being done would, in fact, be beneficial.

Mr. ABERCROMBIE. Let me close, Mr. Chairman, because I know the vote will come up, by saying that anybody who has seen Dr. Nachtigall's lab, you will realize what has been done. He will testify to that, that even my wife, who did not want to go out there because she was afraid she couldn't stand seeing the dolphins captive, if you will, right?

Dr. NACHTIGALL. Yes.

Mr. ABERCROMBIE. Had her mind completely changed by actually going out there and seeing what was actually taking place, and understanding the value of scientific research that you're undertaking.

Dr. NACHTIGALL. Yes. That was a very good opportunity for us.

Mr. ABERCROMBIE. And I think that's probably indicative, Mr. Chairman, of what we can do if we can find a way—And I, too, want to echo the Chairman's remarks, that I have great confidence in you and your understanding of this and being able to come up with something. If you are able to come up with something, I would like to share in the credit with you—

[Laughter.]

—and if you are unable to do it, I reserve the right to blame you entirely.

Mr. GILCHREST. We will pull that rabbit out of the hat.

I want to thank all of the witnesses for coming and traveling so far today. We will continue to work on this issue throughout the coming weeks, and certainly when we reauthorize MMPA, go further in depth on many of these issues. Thank you all for your input.

We would like for each of you, over the next week or so, to give you a call at wherever you may be for some of the follow-up questions that we didn't get to today. Thank you all very much.

The hearing is adjourned.

[Whereupon, at 6:40 p.m., the Committee adjourned.]

[Responses to questions submitted for the record by Major General Bowdon follow:]

Response to questions submitted for the record by Major General William G. Bowdon, III, Commanding General, Marine Corps Base Camp Pendleton, California, U.S. Marine Corps

QUESTION 1: Mr. Pombo: You have heard in the past few weeks and you will probably hear today that the military is looking for exemptions from the ESA and MMPA so that you can get out of your environmental responsibilities under these acts. How do you respond?

Major General Bowdon: Marine Corps installations are essentially "a tale of two cities" in that some of the things we do mirror those actions taken by cities, counties, and private companies. For example, we operate utility systems, we repair equipment, and we provide your Marines and Sailors housing and health care. We intend to maintain high standards of compliance for these activities, and we do not seek any changes in the application of laws that govern them. Some of things we do, though, are uniquely military. For example, we train your Marines for combat over much of our lands. We simply are looking for clarification from Congress on how environmental laws are to be applied for military unique activities.

We hold all our land in the public trust and our record of stewardship of the natural resources entrusted to us by the American people is exemplary. The status of endangered species populations on our installations attests to this. The proposed legislation seeks to balance our environmental responsibilities with our national defense mission. We strongly believe that military training and the protection of endangered species can be mutually achieved—provided flexibility is provided for achieving a balanced approach. We need the help of Congress to provide that balance.

QUESTION 2: Rep. Pombo: When INRMPS are developed, who sets the recovery goals for the species in question?

Major General Bowdon: Recovery goals for species listed under the Endangered Species Act (ESA) are established by a process specified by that Act and U.S. Fish and Wildlife Service (FWS) regulations. This process is separate from the development of Integrated Natural Resource Management Plan (INRMP's). For example, during development and coordination of Marine Corps Base (MCB) Camp Pendleton's INRMP with the FWS, species recovery goals were not raised by the FWS and specific population targets were not established as INRMP objectives. Instead, Camp Pendleton's INRMP established ecosystem management practices to enhance habitat value.

QUESTION 3: Rep. Pombo: How does NEPA fit into the process of INRMPs?

Major General Bowdon: All Integrated Natural Resource Management Plan (INRMP's) undergo National Environmental Policy Act (NEPA) analysis and documentation before they become final. In the case of Camp Pendleton's INRMP, an Environmental Assessment was conducted.

QUESTION 4: Rep. Pombo: Why has DOD not exercised Section 7(j) of the "God Squad" under Environmental Species Act (ESA)?

Major General Bowdon: We do not believe invoking the use of an exemption for day-to-day activities is prudent. Exemptions are a bit like an emergency toolkit. Everyone should have an emergency toolkit in their car in case of breakdown on the side of the road. However, if you need to use the toolkit everyday to get to work,

it is time to replace the car. Thus far, we have not needed to exercise the use of Section 7(j). However, as the U.S. Fish and Wildlife Service is forced to designate critical habitat on military installations via the courts, it is clear that we may need to invoke this section of law. Unfortunately, critical habitat designation on military lands appears to be possible across the nation. Invoking Section 7(j) for every instance would argue that its time to ":replace the car."

QUESTION 5: Rep. Pombo: What is the life span of your INRMP? Is this typical for most INRMPS?

Major General Bowdon: The Sikes Act requires Integrated Natural Resource Management Plan (INRMPs) be reviewed and updated every five years unless conditions or military mission requires a more frequent update. We intend to update the MCB Camp Pendleton INRMP every 5 years.

QUESTION 6: Rep. Pombo: Is current or possible development in the immediate vicinity of your installation a factor in some of the training difficulties you have experienced or may experience in the future?

Major General Bowdon: Development and urbanization is the underlying factor of most training difficulties. The destruction and fragmentation of habitat is listed as the number one reason for most species requiring protection under the Environmental Species Act (ESA). As open space off Base is converted to homes and businesses, the remaining habitat on Base becomes more important to the continued survival of listed species. In the case of Camp Pendleton, the base now supports regionally significant populations for the tidewater goby, Pacific pocket mouse, and least Bell's vireo (100%, 85%, and 45%, respectively, of the remaining populations). This importance results in increased regulation and limitation of training activities on military lands.

QUESTION 7: Rep. Pombo: Are you aware of the new authority Congress provided the Department last year to enter into arrangement with local governments and conservation groups to create "buffers" of protected land around military bases? Do you think that use of the authority at Pendleton could help avoid future additional encroachment or perhaps even reduce the current level of restrictions you face?

Major General Bowdon: Use of this authority will help slow the rate of additional encroachment especially those created by development adjacent to the Base (noise complaints, edge effects on species and habitat management programs, stormwater run-off and erosion). However, this "buffer defense" is not an encroachment cure, as avoidance of future additional encroachment or reduction to the current level of restrictions will require a more regional solution that prevents the loss of habitat for species with declining populations and recovers already listed species. Funding in sufficient amounts to acquire, restore, and manage habitat throughout a listed species range will be required.

QUESTION 8: Rep. Pombo: Have you or your staff done any work with local governments and conservation groups to explore the potential use of this new authority?

Major General Bowdon: Camp Pendleton has been working with San Diego County, Orange County, Riverside County, San Diego State University, Trust for Public Land, The Nature Conservancy, Sierra Club, Wildlife Habitats League, and a host of other conservation groups since July 2002 to establish a coordinated cooperative process for the identification and acquisition of critical properties that support the conservation of species of regional importance. This process is integrating data from several ongoing Habitat Conservation Programs to prioritize areas that are essential for conservation and for which cooperative partners will be able to achieve the greatest value for their investment. While Camp Pendleton has not yet been a participant in any of these acquisitions, two of the participating organizations that were brought together by this effort have teamed to acquire a key property to help preserve an essential corridor for large mammals that supports regional biodiversity goals and helps MCB Camp Pendleton by avoiding development proximate to critical ranges and maneuver areas. We anticipate Camp Pendleton will participate with one or more partners for acquisition of lands adjacent/proximate to the base later this year.

QUESTION 9: Rep. Pombo: If the Congress were to pass the Readiness and Range Preservation proposals, do you think the "buffering authority" would still be a valuable tool for addressing encroachment?

Major General Bowdon: The ultimate solution to restrictions on military readiness from endangered species is to ensure sufficient viable populations and habitat exist to allow delisting and long term sustainability of species. Use of the "buffering authority" is key towards ensuring suitable habitat for sensitive biological resources is available without adversely affecting military training requirements. While some environmental advocacy organizations disagree with the Readiness and Range Pres-

ervation proposals, all agree that the buffering authority granted by Congress is a valuable tool to prevent future degradation of military training capabilities. Many of these environmental advocacy groups are partnering with us to acquire undeveloped lands adjacent/proximate to Marine Corps bases and stations.

[Responses to questions submitted for the record by Colonel DiGiovanni follow:]

Response to questions submitted for the record by Colonel Frank C. DiGiovanni, Chief, Ranges, Airfields and Airspace, Operation and Requirements Division, Air Combat Command, U.S. Department of the Air Force

ENDANGERED SPECIES ACT & MARINE MAMMAL PROTECTION ACT

Question 1: Congressman Pombo—You have heard in the past few weeks, and you will probably hear today, that the military is looking for exemptions from the ESA and MMPA so that you can get out of your environmental responsibilities under these acts. How do you respond?

Answer: Col DiGiovanni—We are not seeking exemptions for the ESA or the MMPA. The Readiness Range Preservation Initiative (RRPI) seeks to clarify elements of certain specific environmental statutes.

For the ESA, what is proposed through the RRPI is to codify an existing policy of the U.S. Fish and Wildlife Service (USFWS). That policy accepts Integrated Natural Resource Management Plans (INRMP) that provide "special management considerations or protection" for listed species as being sufficient to preclude designation of critical habitat. RRPI would formalize this policy, and would also continue to protect listed species since all provisions in the ESA remain unchanged.

We already consult extensively with the USFWS. We consult when a species is listed, then again when developing our INRMPs, and yet again when we have proposed actions that may affect the listed species or its habitat. If the USFWS reviews our INRMP and concludes it does not adequately protect the habitat of a listed species, they can either ask us to amend the plan or they may designate our land as critical habitat.

By working together with the USFWS, we can achieve a balance between military readiness and stewardship of the land entrusted to our care.

For the MMPA, we are not seeking exemptions but a definitional clarification of the term "harassment" for purposes of military readiness.

Question 2: Congressman Pombo—When Integrated Natural Resource Management Plans (INRMPs) are developed, who sets the recovery goals for the species in question?

Answer: Col DiGiovanni—The goals and objectives for recovery of endangered species are developed by the U.S. Fish and Wildlife Service (USFWS). The content of the INRMPs is developed by the Air Force in cooperation with the USFWS and the State Fish and Game Agency, along with public participation through the National Environmental Policy Act (NEPA).

The USFWS frequently recognizes the expertise of Air Force wildlife biologists, inviting them to be members of the endangered species recovery team. For example, biologists at Luke AFB in Arizona are members of the recovery team for the Sonoran Pronghorn, and they participated in the development of the recovery plan.

Development of the INRMP for the Barry M. Goldwater Range in Arizona was a multi-agency effort. Participants included the Air Force, Marine Corps, Bureau of Land Management, USFWS representatives from the Cabeza Prieta National Wildlife Refuge, the USFWS Ecological Services office in Phoenix, the Arizona Game and Fish Department, and the Organ Pipe Cactus National Monument (National Park Service).

Question 3: Congressman Pombo—How does the National Environmental Policy Act (NEPA) fit into the process of the Integrated Natural Resource Management Plans (INRMPs)?

Answer: Col DiGiovanni—In almost every instance, an INRMP will direct at least one "major federal action" subject to NEPA. The Air Force attempts to provide a level of consistency in the way it applies its National Environmental Policy Act's (NEPA) responsibilities in the INRMP preparation process. Yet, each INRMP is unique and Air Force program managers retain flexibility to meet their specific planning and management challenges as needed.

Since development of INRMPs is usually considered a Federal action, compliance with NEPA is required. Air Force program managers complete assessments to determine whether the action(s) proposed in development of their INRMP may signifi-

cantly affect the quality of the environment in accordance with NEPA guidelines. Throughout this process, formal NEPA documentation will be developed to inform decision-makers of the potential environmental effects of the proposed actions.

Question 4: Congressman Pombo—Why has DoD not exercised Section 7 (j) of the "God Squad" under the Endangered Species Act (ESA)?

Answer: Col DiGiovanni—The exemption process is only available after a lengthy process and when there is a total impasse between the ESA and the federal agency actions. Once granted, the action is exempted from the prohibitions of the ESA. The Air Force has never needed such a broad exemption to accomplish our training objectives. An Integrated Natural Resource Management Plan (INRMP) gives us flexibility to balance military training with conservation of natural resources, including threatened and endangered species. Section 7(j) provides relief under a worst-case scenario when national security is at stake.

It is far better to work with our partners at the U.S. Fish and Wildlife Service (USFWS) and the State Fish and Game Agencies to balance our responsible use and care of these training landscapes. The ESA provision in the Readiness and Range Preservation Initiative simply codifies the existing USFWS policy of allowing acceptance of our INRMPs as "special management considerations" in lieu of designating critical habitat. By complying with these considerations, the same protection is afforded the species and the AF's needs are also met.

Question 5: Congressman Pombo—We have heard a lot about "train the way you fight." Why is this important?

Answer: Col DiGiovanni—An analysis by the Defense Science Board Task Force (Training Superiority and Training Surprise, Jan 2001) revealed the highest losses among fighter pilots occur within the first ten combat missions. If we replicate these first ten missions in a realistic training scenario, our aircrews stand a much better chance of coming home from combat both victorious and alive.

We also need to develop and practice new techniques to ensure combat effectiveness. For example, we developed new tactics where ground parties directed attacks on time-sensitive targets, specifically Scud launchers. This technique was put to the test recently in Iraq when Saddam Hussein was reportedly in a Baghdad restaurant. Within only minutes of first notification, there were bombs on target. We can accomplish these missions in the real world because we practice these techniques in training.

In combat situations, aircrews may have only moments to make a life or death decision. The outcome of the decision is directly related to the pilot's training. Workaround or modified training, due to encroachment concerns, can instill pilots with inappropriate flying, threat evasion, or munitions delivery behaviors. These inappropriate behaviors may lead to ineffective performance in combat and loss of pilot and aircraft.

Question 6: Congressman Pombo—"Tell us from your aviator experience why you need the flexibility to react quickly to new mission requirements."

Answer: Col DiGiovanni—In recent years, each operation or conflict has been significantly different from those that preceded it. Rather than plan to fight the last war, we train across a broad spectrum of scenarios, with a focus on developing new tactics.

Immediately after the September 11 attacks, we began planning for operations in Afghanistan, but it soon became apparent that there were few conventional targets. The Mujahideen fought the Soviets from caves, so we quickly developed new tactics, built simulated caves and terrorist training camps at our Nevada and Utah Test and Training Ranges, and then sent in the aircrews to practice. Within four weeks of 9/11, those aircrews were engaging Al-Qaida terrorists and Taliban forces.

Flexibility was the key for preparing for this mission, and you know the results. Our Integrated Natural Resource Management Plans also give us flexibility while providing necessary protections to listed species. If the land were designated critical habitat, we would have spent weeks in consultation, and there is little doubt that we would not have completed the training in such a short time.

War is a dynamic process; battle plans, methods of engagement, and targets are situational specific. Although our training covers a multitude of scenarios, unforeseen new mission requirements often emerge during campaigns that are novel and unique. Without the ability to rapidly respond to new emerging threats or targets in a timely manner (days or weeks), the warfighter is at a disadvantage and at greater risk

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[Responses to questions submitted for the record by Brigadier General Fil follow:]

Response to Questions submitted for the record by Brigadier General Joseph F. Fil, Jr., Commanding General, National Training Center and Fort Irwin, California, U.S. Department of the Army

GENERAL QUESTION

RESPONSE TO EXEMPTION CONCERN

Question 1: You have heard in the past few weeks and you will probably hear today that the military is looking for exemptions from the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) so that you can get out of your environmental responsibilities under these acts. How do you respond?

Answer: The proposed legislation is not an exemption from the Endangered Species Act. Most of the Act will still apply as written. The legislation only provides an alternative to the designation of critical habitat on military lands. The legislation will only clarify and confirm existing regulatory policies concerning future designations of critical habitat that recognize the unique nature of our activities. It would confirm the prior Administration's decision that an Integrated Natural Resources Management Plan (INRMP) may, in appropriate circumstances, obviate the need to designate critical habitat on military installations. These plans for conserving natural resources on military property, required by the Sikes Act, are developed in cooperation with state wildlife agencies, the U.S. Fish and Wildlife Service (FWS), and the public. In most cases they offer comparable or better protection for the species because they consider the base's environment holistically, rather than using a species-by-species analysis.

Environmental groups are challenging the Administration's decision that INRMPs may adequately provide for appropriate endangered species habitat management. They cite Ninth Circuit Court case law suggesting that other habitat management programs provided an insufficient basis for the FWS to avoid designating Critical Habitat. These groups claim that no INRMP, no matter how protective, can ever substitute for critical habitat designation. This legislation would confirm and insulate the FWS policy from such challenges.

I would also note that this legislation does not automatically eliminate future critical habitat designations, precisely because under the Sikes Act, the statute giving rise to INRMPs, the FWS is given approval authority over those elements of the INRMP under its jurisdiction. This authority guarantees the FWS the authority to make a case-by-case determination concerning the adequacy of our INRMP as a substitute for critical habitat designation within Department of Defense lands. If the FWS does not approve our INRMP, the legislation will not protect the base from critical habitat designation

SETTING RECOVERY GOALS

Question 2: When Integrated Natural Resources Management Plans (INRMPs) are developed, who sets the recovery goals for the species in question?

Answer: The proposed legislation would not change the existing process for developing Recovery Plans and setting recovery goals. The regulator (in our case the U.S. Fish and Wildlife Service (FWS)) sets "recovery goals" through the development of a Recovery Plan, which is also required by the Endangered Species Act (ESA). When INRMPs are developed, FWS maintains authority over the species through the ESA Section 7 consultation process. The Department of Defense, including the component Armed Services, has a duty under Section 7 of the ESA to provide for the conservation and recovery of listed species. We meet this duty by consulting with the U.S. Fish and Wildlife Service to determine what effect our actions will have on listed species and what affirmative steps we can take to provide for their conservation. Specific conservation measures (related to established recovery goals) will be incorporated into INRMPs for implementation.

NATIONAL ENVIRONMENTAL POLICY ACT ROLE

Question 3: How does National Environmental Policy Act (NEPA) fit into the process of Integrated Natural Resources Management Plans (INRMPs)?

Answer: The NEPA requires systematic examination of possible and probable environmental consequences of implementing a proposed action along with reasonable alternatives to the proposed action to ensure decision-making reflects our environmental values.

The Army policy is that the creation and implementation of an INRMP requires the appropriate level of NEPA analysis. The NEPA analysis and documentation must be completed prior to approval and implementation of the INRMP. The Army uses the NEPA process to achieve public comments prior to a final decision. This

allows public stakeholder comments concerning the INRMP, in addition to any specific public comments generated in the early stages of the INRMP process.

DEPARTMENT OF DEFENSE ENDANGERED SPECIES ACT EXEMPTION

Question 4: Why has Department of Defense (DOD) not exercised Section 7(j) of the "God Squad" under Endangered Species Act (ESA)?

Answer: Although resource intensive and not without impacts on training realism, the National Training Center (NTC) has so far been able to balance its mission requirements with the conservation of the desert tortoise and Lane Mountain milk-vetch. We have not yet reached an irreconcilable conflict between national security and conservation warranting the use of Section 7(j). As clearly intended by Congress, an exemption under Section 7(j) must be reserved for those rare situations when all other options are exhausted and national security warrants it. Rather than take the drastic step of seeking an exemption, the NTC, as well as other DOD installations, continues to seek ways to maintain an effective balance between mission and conservation. The Range and Readiness Preservation Initiative ESA provision will assist us in maintaining the flexibility that we need to preserve this delicate balance.

LANE MOUNTAIN MILK-VETCH

Question 5: You testify that the U.S. Fish and Wildlife Service (FWS) originally estimated that there were 1,200 Lane Mountain milk-vetch plants. Subsequent surveys indicated that there were between 30,000 and 70,000. What was the recovery goal? Do we have any idea how large the numbers have ever been at their highest point? At what point do we consider this plant not really endangered?

Answer: The FWS has not yet published a Recovery Plan for the Lane Mountain milk-vetch (LMMV), therefore there is no recovery goal. A draft Recovery Plan was published prior to the 2001 field survey conducted by Fort Irwin. In that plan, the recovery goal was to conserve and protect all known occurrences of the species. This goal was based on an estimated total population of 1,200 plants in three locations.

We do not have sufficient scientific information to give a reliable idea of how large the numbers have ever been at their highest point. There is no evidence that this plant has become endangered due to a decline in numbers or that there were ever any more of them than there are now. This plant grows in a remote area that is composed of predominantly federal lands and is largely uninhabited. The few activities that occur in the area appear to have had little impact on the plant or its habitat. There is some ground disturbance due to old mining claims and recreational off-road activity, but in general the area remains untouched. It has been theorized that this plant may be a relic species, i.e. it is a leftover from a wetter time and is naturally diminishing in range and numbers due to climatic change in the desert. Astragalus in general, including LMMV, is known for having small geographic ranges and low numbers.

The numbers of this desert plant, like other desert plants of the same type, can vary widely from year to year. The number of plants seen in any given year appears to be solely dependent on rainfall and weather patterns. It is thought that the plants basically die back each summer and then grow again with the onset of enough rainfall. It is also believed that individuals may live ten years or more. The 2001 Fort Irwin-sponsored survey was conducted in a year of average rainfall that was preceded by two years of extreme drought; however, the pattern of rainfall made the season a particularly robust one with plenty of growth and seed production. If there were several years in a row of good rainfall the numbers may increase to hundreds of thousands of plants—and then in a drought year, as in 2002, the visible plants may be only a few hundred.

The LMMV is considered endangered as long as the FWS lists it as such. In cases where a species recovers, becomes extinct, or the original listing decision is determined erroneous (e.g. new populations have since been discovered), the FWS has a delisting process. This formal process requires the FWS to review five listing factors as they pertain to the species, except where the species has become extinct: (1) whether there is a present or threatened destruction, modification or curtailment of the species habitat or range; (2) whether the species is subject to over utilization for commercial, recreational, scientific, or educational purposes; (3) whether disease or predation are factors; (4) whether there are inadequate existing regulatory mechanisms in place; and, (5) whether there are other natural or manmade factors affecting the species continued existence. Delisting may be initiated by the FWS or it may be petitioned by other entities.

CHANGES IF ENDANGERED SPECIES ACT PROPOSAL IS PASSED

Question 6: If these changes to the Endangered Species Act are passed, what are the on the ground changes to the Army's actions or management?

Answer: The National Training Center could gain immediate flexibility in conserving Lane Mountain milk-vetch (LMMV). Critical habitat designation can impose rigid limitations on military uses of bases, denying commanders the flexibility to manage their lands for the benefit of both readiness and endangered species. In the case of LMMV, my staff can make informed, site-specific decisions on the right habitat to protect without unnecessarily impacting our mission. Critical habitat designation removes that flexibility by designating areas in a broad-brush fashion, requiring protection of a fixed area instead of actual habitat that biologists at the National Training Center are capable of determining more accurately in the process of conserving the species.

These changes would also affect us if additional critical habitat were proposed for designation on the installation. If that occurs in the future, we could use our Integrated Natural Resources Management Plan to prevent an additional designation of critical habitat while still providing a conservation benefit to the listed species.

REDUNDANCIES OR DUPLICATIONS THAT MAY BE REDUCED/ELIMINATED

Question 7: If these changes to the Endangered Species Act (ESA) are passed, what redundancies or duplications will be reduced/eliminated?

Answer: At Fort Irwin we could avoid multiple consultations for actions in areas that might have been designated as critical habitat, but are, instead, managed under the Integrated Natural Resources Management Plan. The legislation change DOD is seeking would reduce the regulatory burden under ESA Section 7, allowing both Army and administrators (US Fish and Wildlife Service and National Oceanic & Atmospheric Administration - Fisheries) to focus limited resources on conservation activities. Conservation of endangered species under both Sikes Act and ESA critical habitat constraints is largely redundant. In most cases, re-initiation of consultation due to the designation of critical habitat is unnecessarily duplicative.

QUESTIONS SUBMITTED BY THE HON. NICK J. RAHALL, II

PERFORMANCE IN IRAQ

Question 1: The military has received accolades for its purpose in Iraq. Just last week Secretary Rumsfeld praised U.S. troops as "the best trained, best equipped and finest troops in the world." How was the ESA a hindrance to the military?

Answer: I echo Secretary Rumsfeld's conclusions. The U.S. Military is indeed the finest in the world. That is not in question. Our uncompromising objective is decisive victory every time our troops engage an enemy in combat. We will accept nothing less.

The ESA constrains military training when management requirements associated with the protection of species and their habitat restrict access to doctrinally required amounts of training land, restrict the tires training lands are available to units, or restrict the numbers and types of training activities and equipment that can take place or be used on certain training lands. These constraints reduce the realism of training events, limit training to less than doctrinal distances, and often require units to deploy to other less constrained training facilities. Given the flexibility to work with State and federal regulatory agencies to develop and implement a quality Integrated Natural Resource Management Plans (INRMPs), most commanders can balance the competing requirements to protect species with the need for doctrinally sound military training. When rigid requirements such as those associated with the designation of Critical Habitat are implemented in lieu of quality management tools like the INRMP, flexibility is lost, resources (both conservation and training) are wasted, and training realism is reduced.

SITES AVAILABLE FOR THE MILITARY

Question 2: It seems that there are many sites available for weapons testing or military training activities not just one installation. In contrast, endemic species rely on unique locations and cannot be transported just anywhere. Is it possible for the U.S. military to make arrangements with other countries if we do not have the perfect location to conduct a specific military exercise or test a weapon?

Answer: The question implies that Army training events are easily relocated or that all that is necessary to conduct training is an open piece of ground. This is not the case. Modernized Army ranges provide instrumentation such as targetry, observation and control capabilities, and communications systems. They are designed to

meet very specific doctrinal requirements. Access to contiguous plots of open maneuver land in the sizes necessary to approximate realistic combat is extremely rare. Nearly every major Army training installation has a shortage of usable maneuver land. Firing ranges are often scheduled to maximum capacity. Army units take advantage of deployed training opportunities when they are available, are fiscally responsible, and make sense from the perspective of operational tempo and personnel tempo. However, overseas training opportunities are limited by the expense of training deployments, the availability and adequacy of training and support facilities in other countries. Relying on other countries to provide the facilities necessary to defend the United States is certainly not along-term solution.

In the case of my installation, the National Training Center, Fort Irwin, CA, there is no other facility in the world that provides this type of military training experience. At the NTC, we employ four key elements, not available at other training facilities, to train brigade combat teams. We have a full-time, dedicated Opposing Force Regiment (OPFOR); professional full-time trainers to observe and provide feedback to the training units; a sophisticated instrumentation system to track the battles, and a realistic battlefield that replicates the stress and conditions of actual combat. We are constantly examining our training, equipment, and training area, to ensure they support potential future joint and combined combat environments and they provide the realistic geographic battle space to train Brigade Combat Teams.

CURRENT FWS POLICY

Question 3: Both Major Bowdon and Brigadier General Fil's testimony indicated that a recent Federal court ruling p1aces the discretion given to the Interior Secretary in Section (4)(b)(2) in jeopardy. But I do not believe this is the correct reading of the decision in Center for Biological Diversity v. Gale Norton. The court said that the ESA requires the Secretary to designate critical habitat essential to the conservation of species and may also require special management considerations or protection. Assistant Secretary Manson also alluded to this in his testimony when he recommended a change in the bill in light of the court decision. Given that the court did not question Interior's discretion not to designate critical habitat under Section 4(b)(2), please explain how your current practice to exclude a military installation from critical habitat designation if an adequate INRMP is in place is threatened?

Answer: The court's opinion in Center for Biological Diversity v. Gale Norton calls into serious question the U.S. Fish and Wildlife Service's policy of not designating critical habitat on land covered by an adequate management plan affording the "special management consideration or protection" that critical habitat is intended to provide. This is the policy that the U.S. Fish and Wildlife Service has relied on to allow Integrated Natural Resources Management Plans (INRMP) to stand in place of designation of critical habitat on military installations. This policy is beneficial in ensuring that Department of Defense (DOD) installations will have the flexibility to effectively balance their mission and conservation responsibilities through INRMPs, without the rigid constraints currently imposed by critical habitat designation. This, however, does not mean that INRMPs are now entirely irrelevant to the U.S. Fish and Wildlife Service when they weigh the costs and benefits of critical habitat designation under Section 4(b)(2). The court granted deference to the Department of Interior's interpretation of "relevant impact" under Section 4(b)(2), recognizing that the U.S. Fish and Wildlife Service has broad discretion to determine what factors it will consider in deciding whether or not to exclude lands from designation. We believe that the existence of an effective INRMP should still be considered by the U.S. Fish and Wildlife Service in determining whether designation of critical habitat would add any additional conservation benefit to the species. While the court's decision may not preclude the U.S. Fish and Wildlife Service from considering an INRMP as a factor in making critical habitat designations under Section 4(b)(2), there is inherent uncertainty and litigation risk in this process that would be eliminated under DOD's Readiness and Range Preservation Initiative provision.

EXISTING AND FUTURE CRITICAL HABITAT DESIGNATION PROBLEMS

Question 4a: In your written testimony, you mention the critical habitat that is designated on 22,000 acres of the military base. I was under the impression that with the authorization of the NTC expansion, the 22,000 acres of critical habitat would be mitigated and could be used for training purposes. Indeed, Public Law 106-554 specifica1ly authorizes to be appropriated $75 million for "the implementation of conservation measures necessary for the final expansion plan for the National Training Center to

comply with the Endangered Species Act." Why, when Congress has enacted legislation specific to the National Training Center at Fort Irwin mandating the conservation of the desert tortoise AND authorizing $75 M to do it, is this still a problem?

Answer: While Public Law 106-554 authorizes $75M for new opportunities for conservation of desert tortoise, it does not specifically change the critical habitat designation for the Fort Irwin lands that are proposed to be opened for training use. The problem for the National Training Center and Fort Irwin is that 22,000 acres of former training land on Fort Irwin, and over 70,000 acres of the new expansion lands, are currently designated as desert tortoise critical habitat. Under the Endangered Species Act, the designation of critical habitat requires federal agencies that may affect endangered species or adversely modify such lands to consult with the U.S. Fish and Wildlife Service to consider the impacts of its activities on endangered species. In addition, the federal agency must determine whether its proposed action would "adversely modify" any designated critical habitat. The authorization for funding will allow Fort Irwin the potential ability to mitigate and compensate for impacts to endangered species and critical habitat present in the project area. We believe the desert tortoise conservation measures that are incorporated into the expansion plan will provide adequate mitigation and compensation to avoid jeopardy, but the Endangered Species Act consultation process must be followed to a final conclusion before the use of the land is approved.

EXISTING AND FUTURE CRITICAL HABITAT DESIGNATION PROBLEMS

Question 4b: In your written testimony you state that "the potential designation of critical habitat may...make this area totally unusable for Brigade Combat Team training by the NTC." I am fairly certain tat training restrictions on critical habitat are made by the FWS in consultation with the DOD after critical habitat is designated. Based on this sequence of events, your testimony would appear to be pure speculation. In fact, historically the FWS has tried not to place restrictions on critical habitat where it adversely impacts training. Is this statement simply your prediction about events that will transpire in consultation?

Answer: My statement is an assessment of what could and has happened based on the experiences of past consultations. The National Training Center and Fort Irwin has engaged in two formal consultations with U.S. Fish and Wildlife Service concerning our military training requirements. Each consultation resulted in some additional training restrictions. It is true that the U.S. Fish and Wildlife Service may exclude designation of critical habitat when it determines that benefits to the species would be outweighed by the adverse consequences to military readiness under Section 4(b)(2) of the Endangered Species Act. However, once the U.S. Fish and Wildlife Service designates critical habitat for a species, it must continually consider actions that may adversely impact the habitat.

Our current biological opinion requires that there can be no ground disturbing activities on the 22,000 acres of former training land in desert tortoise critical habitat. This means no off-road tactical vehicle use and no digging. We are limited to dismounted patrols in these 22,000 acres which makes the area mostly unusable for the type of training we are required to accomplish. Additionally, 70,000 acres of the new expansion lands are designated desert tortoise critical habitat; it is possible that the same restrictions could be put in place for this area.

Critical habitat for Lane Mountain Milk-vetch has not been designated, but the critical habitat designation is court ordered to be final by September 15, 2004. The designation could include the whole western expansion area using a broad-brush approach. We are concerned that severe restrictions, similar to those for actions in desert tortoise critical habitat, will result from future Lane Mountain Milk-vetch consultations even if we are successful in mitigating for our impacts to desert tortoise in the same area. Passing the Readiness and Range Preservation Initiative could provide some needed flexibility to our situation, but would not affect our responsibility to conserve species and to consult with the Service.

[Responses to questions submitted for the record by Rear Admiral Hathaway follow:]

Response to a question submitted for the record by RADM Jeffrey J. Hathaway, Department of Homeland Security, United States Coast Guard

MARINE MAMMAL PROTECTION ACT /ENDANGERED SPECIES ACT

QUESTION: I know the Coast Guard may have restructured your training or operations due to the Marine Mammal Protection Act (MMPA) or Endangered Species Act (ESA). Has any operation of the Coast Guard been prevented or prohibited from taking any action taken by the NOAA or the DOI? Has a seal on a buoy ever prevented the Coast Guard from doing maintenance for aids to navigation?

ANSWER: No, the Coast Guard has not been prevented or prohibited from taking any action by the National Oceanic and Atmospheric Administration (NOAA) or the Department of Interior (DOI) due to the Marine Mammal Protection Act (MMPA) or Endangered Species Act (ESA). Although no operations or training have been prevented or prohibited, including aids to navigation, the Coast Guard has issued guidelines to field units to schedule or delay activities to minimize or eliminate the negative impact to the protected species. For instance, Aids to Navigation (ATON) units schedule routine service of lighted aids for periods when specific species of birds are not nesting. The Coast Guard works closely with NOAA and DOI (Fish and Wildlife Service) to ensure Coast Guard operations can be conducted while complying with the MMPA and ESA.

[Responses to questions submitted for the record by Dr. Hogarth follow:]

Response to questions submitted for the record by Dr. William T. Hogarth, Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

Questions Submitted by Chairman Richard Pombo

Question 1: Is your agency conducting any research on the effects of various sounds on marine mammals? How much research is being funded by the Navy and/or NMFS? If not for this type of research, how much would we know about the acoustic ranges of various marine mammals?

Answer: The National Marine Fisheries Service (NOAA Fisheries) supports a scientific program related to acoustics and the effects of noise on marine animals (mammals and turtles) at a level of $200,000 per year (for each of the last three fiscal years). Because this program is a new one and receives only modest support, most of the funds have been used to convene scientific workshops to compile and interpret the existing scientific information and to recommend specific areas and priorities for future research. Specifically, these funds have been used to support workshops (Acoustic Resonance, Auditory Brainstem Response, Temporary Threshold Shift), an NRC panel on ocean noise, the development of acoustic criteria (noise standards) for the agency, research on whale calls, and the creation of a computer program for calculating safety zones around sound sources (for issuance of Marine Mammal Protection Act (MMPA) authorizations).

The Office of Naval Research (ONR) funds most of the research being done on marine noise. NOAA conducts some research alone and some in cooperation with ONR. The NOAA Fisheries budget for noise research is $200K per year. The ONR budget for noise research is $7 million per year. NOAA's Office of Oceanic and Atmospheric Research spends approximately $1 million per year on passive acoustic monitoring of the oceans, including whale calls. All NOAA Fisheries regions use passive acoustic detection to locate whales during marine mammal surveys. This monitoring effort differs from noise research, and is not described in detail here.

Before the current ONR research effort began 7 years ago, hearing ranges were known for only 5 or 6 of the 130 species of marine mammals, and nothing was known about the effects of noise on marine mammal ears. ONR has provided much needed information since then. Increased research has helped us gain a better understanding of the hearing ranges of between 12 and 15 marine mammal species. Other than the Navy and NOAA Fisheries efforts, the National Science Foundation and the oil and gas and seismic industries may soon contribute to the understanding of acoustics and marine mammals through donations to the National Ocean Partnership Program. Minerals Management Service (MMS) has contributed through monitoring programs as a part of authorizations (through regulations or Incidental Harassment Authorizations) to take marine mammals incidental to their activities. MMS has also produced a needed model of underwater explosions related

to rig removals. All these efforts provide data on behavioral responses of marine mammals and turtles to anthropogenic sound. No federal agency has yet conducted research on the effects of noise and explosions on fish, although some research has been conducted.

Question 2: We have heard from a number of scientists, groups and individuals that the proposed changes to the definition of "harassment" are problematic due to the inclusion of "significant" in paragraph (i) and the use of "natural behavioral patterns" in paragraph (ii). Why did the agency propose this language instead of the language recommended in the National Research Council's report?

Answer: The Administration used the NRC recommendations as a starting point for revising the current harassment definition to clarify that the definition should focus on those activities that are likely to result in significant negative impacts on marine mammals. The Administration's bill achieves this goal. Certain additional agency concerns affected some of the specific language choices in the Administration's proposed amendments to the definition.

Specifically, the definition of harassment proposed by the Administration would:

1) Make the definition more enforceable by eliminating the need to prove first that activities involve "pursuit, torment, or annoyance," terms that are currently undefined in the MMPA, before they can qualify as Level A or B harassment;

2) Make more explicit that certain activities directed at marine mammals may constitute harassment; and

3) Focus the harassment standard on those activities that are likely to result in significant negative impacts on marine mammals, rather than those that potentially result in de minimus effects, which could unnecessarily tax the agency's resources and overburden the regulated community. The Administration's definition of harassment differs from the NRC definition on this point in two ways:

- The Administration's definition includes Level A harassment (not addressed by the NRC) and differs from the current MMPA primarily by adding the word "significant" before the term "potential."
- The NRC recommended the term "meaningful disruption of biologically significant activities." While the Administration definition differs, it captures the same concept of focusing on those activities that exceed a de minimus threshold. The NRC term may be too constraining if the term "biologically" is interpreted too narrowly. In either case, regulations or guidance could provide a clearer definition of terms.

Question 3: The new paragraph (iii) in the proposed change to the definition of "harassment" has also been an issue of concern. This paragraph appears redundant to paragraph (ii) in the definition, but contains "any act that is directed toward a specific marine mammal...", but does not contain the "by causing disruption of natural behavioral patterns" qualifier. Why did the agency propose including this language in the definition?

Answer: The Administration believed it was necessary to make more explicit in the definition of harassment that activities directed at marine mammals in the wild may constitute harassment because they are potentially injurious to the animals. This language is intended to clarify that activities such as closely approaching, swimming with, or touching marine mammals may, in certain circumstances, constitute harassment. Thus, the second tier of the Level B harassment definition would help NOAA Fisheries and/or the USFWS better regulate, and where appropriate prosecute, activities that may not lead to abandonment or significant alteration of the marine mammal's natural behavioral pattern at the time, but are likely to cause disruption of natural behavioral patterns that are associated with cumulative, long-term harm to marine mammals.

Question 4: Scientists are concerned this will cause more restrictions on their research. Is this true?

Answer: This language will not impose increased restrictions on the scientific research community. The scientific research community already obtains scientific research permits or general authorizations for Level B harassment under MMPA section 104 for scientific research activities directed toward an individual, group, or stock of marine mammals in the wild, and section 104 would not be affected by this second tier of the definition. Under the new definition of harassment, research activities involving Level B harassment would still be covered under the General Authorization (GA) for scientific research, which provides a simplified process for authorizing research involving Level B harassment. This requires submission of "Letters of Intent" (LOIs) to notify NOAA Fisheries of intended activities. NOAA Fisheries reviews the LOIs within 30 days and issues "Letters of Confirmation." This process has worked well to date. Additionally, this process helps NOAA Fish-

eries track the types of research being conducted on marine mammals and the potential cumulative impacts they may have.

The GA does not apply to research activities involving Level A harassment or endangered or threatened species listed under the ESA. It also does not apply when harassment is incidental (not directed). As with current MMPA language, scientists who want to conduct Level A harassment activities, or work with ESA-listed marine mammals, need to apply for a scientific research permit. More scientific research is likely to fall under Level B harassment, and be subject to the streamlined procedures of the General Authorization, under the administration's proposed definition since the proposed Level A definition would focus on those activities that injure or have the "significant" potential to injure a marine mammal in the wild.

Question 5: How will the agency implement this language?

Answer: NOAA Fisheries intends to implement the new language in several ways. First, the agency will likely conduct a rulemaking to clarify the definition of harassment, and specifically, the intent behind this new language. Second, the agency will continue its long-term outreach efforts to educate the public and commercial operators about safe and responsible marine mammal viewing practices by continuing to produce outreach materials (e.g., brochures, posters, signs, public service announcements, etc.), holding community workshops, and continuing its partnership with the Watchable Wildlife program. Third, the agency intends to develop regulations in follow-up to the Advance Notice of Proposed Rulemaking published in January 2002 (67 FR 4379) that would further clarify specific activities that can cause harassment of marine mammals. Fourth, NOAA Fisheries Office of Protected Resources will continue to work with the NOAA Office of General Counsel and the NOAA Fisheries Office for Law Enforcement to develop strategies for addressing violations.

With regard to the scientific research community, the General Authorization for Scientific Research has been in place since 1994 and NOAA Fisheries has already developed a streamlined and expedited program to issue "Letters of Confirmation" for bona fide scientific research projects within 30 days of receipt of a "Letter of Intent" submitted by a qualified researcher. This authorization process has been successful and would not change.

Question 6: Could you explain the intent of the changes proposed to the MMPA definition of harassment in section 3, paragraph (iii)—"any act that is directed toward a specific individual"?

Answer: As discussed in our response to Question 3, clause (iii) of the proposed harassment definition will help NOAA Fisheries and/or USFWS to enforce the taking prohibition of the Act against those that directly harass marine mammals. It will make it more explicit that activities directed at marine mammals in the wild may constitute harassment because they are associated with negative long-term cumulative effects on the animals. This language is intended to clarify that activities such as closely approaching, swimming with, touching, or feeding marine mammals in the wild that are likely to disrupt the behavior of the animals are considered harassment. Thus, the second tier of the Level B harassment definition would help NOAA Fisheries and/or USFWS better regulate and enforce actions that may not lead to abandonment or significant alteration of the marine mammal's behavioral patterns at the time, but that are likely to cause disruption of such behaviors that are associated with cumulative, long-term harm to marine mammals (e.g., reduced fecundity, low calf weaning rate, increased energy expenditure).

Question 7: Could the goal of paragraph iii be accomplished under the language of paragraphs (i) and/or (ii)?

Answer: No. Paragraphs (i) (Level A harassment) and (ii) (Level B harassment) can apply to both direct and indirect harassment. However, paragraph (iii) is intended to address problems that the agencies have encountered in applying the Level B harassment definition to actions directed toward marine mammals, while paragraph (ii) is intended to address problems that the agencies have encountered in applying the Level B harassment definition to actions that cause incidental harassment. The language in paragraph (iii) recognizes that activities directed at marine mammals are more likely to disturb the animals; therefore, there is a different threshold for these directed activities. It also recognizes that those who engage in activities directed at marine mammals that are likely to disturb them should be treated differently from those who affect marine mammals incidentally. The new language would help NOAA Fisheries and USFWS better regulate, and where appropriate prosecute, activities specifically directed toward marine mammals which, if unchecked, can have negative long-term effects on marine mammals.

Question 8: Is there a reason why paragraph (iii) does not contain the "significance" threshold of paragraphs (i) and (ii)?

Answer: The main intent behind this language is to make it easier to regulate, and where appropriate prosecute, unlawful activities aimed at marine mammals in

the wild. This part of the Administration's proposed definition does not contain a "significance" threshold because activities directed at marine mammals in the wild by members of the general public that disturb the animals should not be allowed and because these activities often are more likely to cause adverse effects that may not be immediately recognized through significant changes in behavior.

Question 9: Will the removal of "specified geographic region" change how the agency determines if an activity has a "negligible impact" on marine mammal species?

Answer: While most activities take place within a relatively small area, some activities might apply for authorizations in the future, such as commercial or military transoceanic shipping or air transport, that would travel across more than a single biogeographic region. For example, a noisy, large container ship traveling the Great Circle Route from Los Angeles to Tokyo would transit 4-5 of the biogeographic regions, established under the LFA sonar rule, during that transit.

Sections 101(a)(5)(A) and 101(a)(5)(D) of the MMPA contain the requirement that the activity take place within a "specified geographic region." Negligible impact determinations are made under both sections on a species or stock basis and, for section 101(a)(5)(A), the determination must be made that the "total of such taking" by the activity will be negligible. If the negligible impact determination is based on a marine mammal species or stock basis, it does not matter if the activity is confined within a single specified geographic region, over several regions, or ocean-basin wide. Based on our current knowledge of marine mammals, it is difficult to draw specific geographic regions such that they encompass the entire suite of marine mammal stocks that might be affected by wide-ranging activities. Therefore, there would not be any modification in how NOAA Fisheries makes the necessary determinations, including negligible impact, under the small take program if the phrase "within a specified geographic region" is modified or removed.

Question 10: Could you explain how you envision take authorizations being implemented if the language within a "specified geographic region" is deleted from 101(a)(5) of the MMPA?

Answer: There would not be a significant change. The current regulations implementing the incidental take program under Section 101(a)(5)(A) instituted a process that requires those whose activities may result in a taking of one or more marine mammals to obtain a Letter of Authorization (LOA) under regulations implemented to govern that specific activity. The activity regulations do not authorize the taking; the LOA authorizes the taking. Because NOAA Fisheries must determine that the total taking by the activity is having a negligible impact on affected marine mammals stocks, the determinations necessary to support LOAs would not change and would continue to cover the area in which marine mammal stocks are affected.

Question 11: If an incidental take authorization for an activity is done on a worldwide basis, how would variations in the types and numbers of species and the types of potential harassment among different regions of the world be dealt with in one take authorization? For example, if there is only a few numbers of species under consideration in New England, but huge numbers of the same species in California, how would that be reflected in the mitigation measures for a single take authorization? Will NOAA have the resources to review the scientific literature, research and data on a global basis? Will this slow down the take authorization process?

Answer: NOAA Fisheries does not intend to issue blanket world-wide authorizations since all applicants will need to notify NOAA Fisheries of the location of their operations. If such locations are classified for military or commercial (e.g., oil and gas deposit locations) reasons, NOAA Fisheries has staff who are authorized to view that material and make the necessary determinations.

Regarding mitigation measures, NOAA Fisheries is required to ensure, through regulations, that the authorized taking is at the lowest level practicable. In making its determinations that the taking will have no more than a negligible impact on affected stocks and will not have an unmitigable adverse impact on subsistence uses, NOAA Fisheries considers all mitigation measures that can be practically implemented during rulemaking. If the mitigation measures are universal, they will be contained in the regulations and apply to all LOAs issued under that set of regulations. If the mitigation measures would vary by location, either because the affected stocks (especially in regard to endangered marine mammals) and impacts on them vary, because the characteristics of the action areas vary, or because an area needs additional protection during certain seasons, the regulations may contain a general framework for mitigation that allows for more tailored mitigation measures at the LOA level. In either case, NOAA Fisheries would not issue blanket worldwide authorizations, only regulations under section 101(a)(5)(A) that would form the framework for authorizations under LOAs.

In implementing the incidental take program, the applicant must provide to NOAA Fisheries and the U.S. Fish and Wildlife Service the best available information that the applicant's activity will have no more than a negligible impact on affected marine mammal species and stocks. That information is then reviewed by NOAA scientists to determine whether it supports the preliminary finding of negligible impact. NOAA's marine mammal scientists are among the most qualified to determine the accuracy of this information. If the information is insufficient to support even a preliminary finding, the applicant may be required to conduct scientific research on the impact. This is what the U.S. Navy was required to do before NOAA Fisheries would accept an incidental take application for SURTASS LFA sonar. However, when issuing incidental take authorizations for waters distant from the United States, delays may result because the marine mammal information on status and trends may not be available. Therefore, potential applicants should begin discussions with NOAA Fisheries early in the planning process for the activity to ensure that the necessary information is identified and can be obtained.

Question 12: Will incidental take authorizations be effective on a worldwide basis given the language in section 102(1) of the MMPA that it is illegal to take a marine mammal on the high seas?

Answer: Incidental take authorizations may be issued for activities of United States citizens on the high seas based on the language of MMPA sections 102(a)(1) and 101(a)(5). However, NOAA Fisheries does not intend to issue blanket worldwide authorizations, because all applicants will need to notify NOAA Fisheries of the location of their operations in order for NOAA Fisheries to carry out its responsibilities (see response to previous questions) and because the required determinations must be made on a stock-by-stock basis.

Question 13: Although it is not addressed by this bill, as you may be aware, the National Oceanic and Atmospheric Administration is considering expanding the Channel Islands National Marine Sanctuary to now include waters that are part of the Point Mugu Naval Air Station's sea test range. Do you believe that allowing marine sanctuaries to expand into waters used for military readiness activities is counterproductive to Point Mugu's mission and to our nation's military preparedness? If so, why? If not, why not?

Answer: National Marine Sanctuaries and Department of Defense (DOD) have coexisted since 1980, when the Channel Islands National Marine Sanctuary (CINMS) was designated in an area that significantly overlaps the Point Mugu Naval Air Station's Sea Test Range. Since that time, CINMS has never obstructed or intruded upon military activities within the Sea Test Range.

CINMS maintains a good working relationship with the Navy and Air Force and both have representatives on the Sanctuary Advisory Council, which advises NOAA on management of the Sanctuary.

Every relevant National Marine Sanctuary, including CINMS, provides an exemption for DOD activities. This exemption grandfathers in existing (as of the date of sanctuary designation) DOD activities and allows for the exemption of new DOD activities after consultation with NOAA. To date, such consultations have usually resulted in the requested exemption being granted to DOD. NOAA has not denied any request to extend exemptions to new activities. In the only case that we are aware of, it was not necessary to grant an exemption because after consultations, DOD agreed to other alternatives which met their needs.

NOAA is deferring selection of a preferred boundary alternative for the CINMS until additional biogeographic assessments are completed and a supplemental environmental impact statement is prepared sometime next year.

NOAA, having a positive working relationship with the DOD (including the Point Mugu Naval Air Station) to date, intends to continue these efforts if there is any future decision to expand CINMS boundaries farther into waters used for military readiness activities. NOAA believes that using existing DOD exemption mechanisms and fostering this working relationship will prevent any concerns or actions that might be counterproductive to the Point Magu's mission or to our Nation's military preparedness.

Question 14: Would giving the Department of Defense the authority, in certain circumstances, to keep off-limits active military waters from future marine sanctuary boundary expansions or new sanctuary designations alleviate hindrances to military readiness activities?

Answer: In passing the National Marine Sanctuaries Act (NMSA), Congress recognized the importance of special places in the marine environment that are of significance to the Nation. This protection can be achieved without compromising our Nation's military readiness.

The NMSA requires that, as part of every sanctuary designation (and potential boundary expansion, which would trigger the same process), the Secretary of Commerce consult with the Secretary of Defense on the sanctuary proposal. Historically, this has been the time that the details of how a sanctuary will interact with any military activities in the area has been determined, including specifics of regulations and boundary. To date, this has resulted in the inclusion of military operating areas in several sites (Channel Islands, Olympic Coast, Florida Keys, and Hawaiian Islands Humpback Whale National Marine Sanctuaries). It is clear from these examples that sanctuaries and military activities can co-exist without any hindrance to military readiness.

NOAA believes that this case-by-case consultation is the most effective way to determine how sanctuary and military activities can coexist, as sanctuary resources vary from site to site and military operating areas vary in their use.

Questions Submitted by Congressman Nick Rahall

Permit Process

Question 1: There are complaints that the permit process can be expensive and slow, and is not always applied equally to academic research, industry and the military. At last year's House Armed Services Committee hearing on environmental issues, you testified that "to the extent the Navy and other action agencies can plan sufficiently far in advance of activities and provide us with adequate time to work them at the earliest possible stages, the implications of the permit process should be minor."

- **How many dedicated full time employees are on staff to review Navy permitting requests under the Marine Mammal Protection Act?**
- **Would increased staffing help expedite this process thus addressing some of the Navy's concerns?**
- **What steps have been taken in the past twelve months to increase your resources and initiate more advanced planning to foster a more efficient permit application and review process?**

Answer: NOAA Fisheries has two positions and one contract person to review and process all small take applications from all applicants including the Navy, Air Force, Interior, FAA, the oil industry, and others.

Based on current and projected requests from the Navy, NOAA Fisheries anticipates that one position would be necessary to process all Navy small take applications within the time period required by the MMPA. However, there are significantly more Navy requests for consultation on the full range of Navy actions under section 7 of the ESA than there are small take applications. Therefore, to avoid delays in completing Navy MMPA small take authorizations, one additional position would also be needed to address Navy ESA consultation activities.

We have reached our authorized staffing levels with the recent hiring of a new employee to work on MMPA "small take" authorizations. In addition, we have reprogrammed funding to contract for a person to prioritize work on DOD small take applications. We are also reprogramming funds to bring on additional marine acoustic scientific expertise. Finally, we are discussing with the Navy options for acquiring additional resources.

The Navy and NOAA Fisheries have established several means to work on Navy projects months or years prior to their initiation so that MMPA and ESA authorizations are completed as soon as possible upon completion of other necessary environmental documents. These discussions often are initiated at our regional offices. For example, we will begin meetings in July 2003 for a Navy activity scheduled for 2006 that will need a small take authorization. On this and other Navy activities, NOAA Fisheries expects to be a cooperating agency in preparation of NEPA documents.

The FY 2003 President's request included $1.5 million to provide for thorough, complete, and timely environmental and economic analyses for NOAA's recovery programs. These funds would also support assessments of environmental and socioeconomic impacts of implementing protected species conservation programs. This request was not funded in the FY 2003 appropriation; however, it is also included in the FY 2004 request.

Existing Exemption

Question 2: In 1998, Congress amended the U.S. Armed Forces Code to give the military an opportunity to raise readiness issues to the political level of the Executive Branch and suspend administrative actions pending consultation between the Secretary of Defense and the head of the action agency involved.

How many times has the Secretary of Defense used this provision for activities that fall under the scope of your agency?

Answer: It is our understanding that the DOD has not used this provision to address activities that have fallen under the scope of NOAA programs.

Definition of Terms

Question 3: Section 3 of H.R. 1835 proposes changing the definition of harassment to purportedly clarify it. Can you please elaborate on how NOAA would interpret, define, and enforce the terms "significant potential to injure" and "significantly altered?"

Answer: Amendments to the harassment definition changed in H.R. 1835 from the hearing on May 6, 2003, to when the bill was reported out of the House Resources Committee. The below response notes which version of the amendments we refer to.

NOAA Fisheries worked closely with the Department of the Interior, Department of Defense, and Marine Mammal Commission to develop a package of amendments to improve implementation and enforcement of the MMPA. Clarifying the definition of harassment was part of these efforts in order to better regulate, and where appropriate prosecute, activities that unlawfully harass marine mammals. Our intention was to clarify statutory language while maintaining flexibility in case new scientific information were to become available that would shed light on the most important negative impacts of harassment on marine mammals. Further refinement of terms such as "significant potential to injure" and "significantly altered," contained in both the version of H.R. 1835 that was reported out of the House Resources Committee as well as the administration's MMPA reauthorization bill, would occur through rulemaking, which would provide for public input.

The proposed harassment language in the version of H.R. 1835 that was considered by the House Resources Committee at the hearing on May 6, 2003, and contained in the Administration's MMPA reauthorization bill would improve the Act by a) removing confusion and enforcement difficulties associated with the phrase "pursuit, torment, and annoyance," which provides terms that are not defined in the MMPA and create a second element that the agencies must prove in cases alleging harassment; b) providing greater notice and predictability to the regulated community; c) sparing the public the regulatory burdens associated with obtaining authorizations for relatively benign activities; d) clarifying that acts directed at marine mammals such as chasing, closely approaching, or feeding wild marine mammals that disturb or are likely to disturb the animals would constitute harassment; and e) providing marine mammals with protection from activities that are likely to be harmful and from the cumulative effects of activities that take marine mammals both directly and incidentally.

With regard to the term "significant potential to injure" in the proposed Level A definition in both versions of H.R. 1835 and the Administration's bill, the existing phrase "potential to injure" could be interpreted to mean that any activity, no matter how remote the possibility, is subject to the Level A standard because one could interpret that almost every activity, no matter how benign or seemingly inconsequential, has the potential to fall within the Level A standard. This does not make sense. The agencies therefore tried to find terms that would focus attention on those activities that exceed a theoretical possibility of injury, without moving the standard so far toward actual injury that the language would be meaningless. The agencies felt that "significant potential" was a more appropriate threshold that would enable staff to focus on those activities that pose important biological and ecological impacts to marine mammals. Any greater specificity in the statutory language is not necessary and would limit agency discretion and flexibility. As stated above, NOAA intends to further define these terms through regulations.

The term "significantly altered," contained in both H.R. 1835's and the Administration bill's amendments to Level B harassment, was developed by the agencies in an attempt to focus on those activities which are likely to cause biologically significant disruptions in behavior important to survival and reproduction. In our deliberations the agencies interpreted "abandoned" and "significant alteration" of behavioral patterns to mean a temporary or permanent departure from a natural behavior pattern when such departure is biologically or ecologically significant.

Litigation

Question 4: In your responses to questions at the hearing, you stated that enforcement cases brought by NOAA for harassment under the MMPA have been "thrown out of court" based on the definition of that term added to the Act in 1994. Can you please elaborate by providing the names of those cases and briefly summarizing the facts and the rulings?

Answer: NOAA Fisheries would like to clarify any testimony provided at the hearing that expressed or implied that certain cases were "thrown out of court" based upon the definition of harassment added in 1994. NOAA Fisheries is unaware of any instance in which a court has dismissed an enforcement action because the existing definition of "harassment" is overly vague. However, NOAA has declined to prosecute several cases because it determined that it would be unable to prove that the activity in question constituted an act of "pursuit, torment, or annoyance."

Question 5: What is NOAA's position on H.R. 1835?

Answer: These comments refer to the version of H.R. 1835 that was reported out of the House Resources Committee on May 7, 2003, and not the version that the Resources Committee considered during their hearing on May 6, 2003.

MMPA Concerns

With regard to the MMPA, NOAA Fisheries supports some of the key amendments in H.R. 1835 including those pertaining to the incidental take permit program. With regard to the harassment definition, however, NOAA Fisheries believes that the harassment definition contained in the administration's MMPA reauthorization bill would enable the agency to better uphold its responsibilities under the MMPA. Specifically, the Administration believed it was necessary to make more explicit in the definition of harassment that activities directed at marine mammals in the wild may constitute harassment because they are potentially injurious to the animals. This language, contained in the proposed amendment to section 3(18)(B)(ii) that would be made under Sec. 515 of the administration's MMPA reauthorization proposal is intended to clarify that activities such as closely approaching, swimming with, touching, or feeding marine mammals may result in harassment. This second tier of the Level B harassment definition would help NOAA Fisheries and/or the USFWS better regulate, and where appropriate enforce, actions that may not lead to abandonment or significant alteration of the marine mammal's natural behavioral pattern at the time, but that are likely to disrupt natural behaviors where such disruptions are associated with cumulative, long-term harm to marine mammals.

ESA Concerns

NOAA Fisheries has concerns about qualifying language and potential redundancies proposed by the ESA amendments in H.R. 1835.

With regard to critical habitat, section 2(a) of the bill leaves questions as to how to interpret the language in practical application. This section proposes to change the requirement to promulgate critical habitat to the maximum extent prudent and determinable by striking the words "prudent and determinable" and inserting the word "necessary." We are unclear as to how we would be expected to determine when critical habitat is necessary. The terms "prudent and determinable" are both clearly defined in regulation. Further, the courts have made clear that critical habitat has benefit to species and thus would be necessary in many, if not most, circumstances.

Question 6: What effect would Section 2(a) of H.R. 1835 have on the Endangered Species Act?

Answer: It is our understanding that the portion of the bill to which this question refers is no longer contained in the bill.

Nonetheless, the policy statement contained in section 2(c)(1) of the ESA that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act" is a cornerstone of the ESA. Given the often dire condition of endangered and threatened species, NOAA Fisheries and USFWS rely on the cooperation of all federal entities in furthering this policy of the Act to ensure that these species are being considered in all major management actions. Section 2(a) of the version of H.R. 1835 that the Resources Committee considered at the hearing on May 6, 2003 would have inserted the phrase "in so far as practicable and consistent with their primary purposes" after the words "threatened species," in the current policy statement quoted above. Few federal agencies have as their primary purpose the conservation of listed species. Thus, this could be interpreted as giving nearly all Federal agencies the opportunity to limit their commitment to the conservation of endangered or threatened species. Further, this amendment could apply to all sections of the ESA, including those governing section 7 consultations and recovery actions. This could have potentially serious repercussions on species already at risk of extinction by limiting agencies' commitment to minimizing impacts of federal actions and the recovery of species on federal lands. We must have the commitment of other agencies to realize our goal of conserving these species.

[Responses to questions submitted for the record by Judge Manson follow:]

Response to questions submitted for the record by The Honorable Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior

Question 1: What is the length of time for the military to receive a decision on applications seeking to use critical habitat for military exercises?

Response: When the effects to critical habitat are insignificant, we are often able to respond within 30 days. However, response times for consultations on military actions that affect designated critical habitat vary depending on the complexity of the action and its effects on the critical habitat. The U.S. Fish and Wildlife Service (Service) makes every effort to complete these consultations within the 135 days provided by the Interagency Cooperation regulations established at 50 CFR Part 402.

Question 2: It has been stated that the proposed changes to the definition of "harassment" will help the agencies better enforce the MMPA? Can you give us some examples?

Response: We support the Administration's proposed revision to the definition of harassment. The Service jointly administers the Marine Mammal Protection Act (MMPA) with the National Marine Fisheries Service. The MMPA gives each agency jurisdiction over different species that pose different management and enforcement issues. Under the proposed revised definition contained in the Administration's legislative proposal to reauthorize the MMPA, the Service does not anticipate changes in the way we currently enforce the MMPA, or in the types of harassment cases we would pursue. However, we believe that the proposed revised definition provides greater certainty to the regulated public regarding what actions constitute harassment.

Question 3: Has the Secretary of the Interior issued any incidental take authorizations? If so, for what activities and for what species of marine mammals? What type of mitigation measures does the Secretary require when issuing these authorizations?

Response: Yes, the Secretary of the Interior has issued incidental take authorization under Section 101(a)(5)(A) of the MMPA. To date, all such authorizations have been for oil and gas industry activities in Alaska, and involve polar bear and Pacific walrus. In November 2002, the Service proposed regulations to authorize incidental take of manatees during the course of government activities related to watercraft and watercraft access facilities in Florida. However, in May 2003, the Service published a notice in the Federal Register that effectively withdrew that proposed rule due to substantive comments and concerns raised during the rulemaking process regarding the information and analysis used to develop the proposed rule. The Service may propose such regulations again for manatees in the future.

The Service finalized incidental take regulations for industry activities on the following dates:

- June 14, 1991 for a period of 5 years in the Chukchi Sea;
- November 16, 1993 for a period of 18 months;
- August 17, 1995 for the period through December 15, 1998;
- January 28, 1999 for a period of 12 months; and
- March 30, 2000 for a period of 3 years.

These regulations authorized the incidental, unintentional take of small numbers of polar bears and Pacific walrus during oil and gas exploration, development, and production activities in the Beaufort Sea and the adjacent northern coast of Alaska (with the exception of the 1991 polar bear/walrus regulations, which, as noted above, were for industry activities in the Chukchi Sea). These rulemakings addressed primarily passive forms of take resulting from unanticipated interactions with polar bears, not lethal takes.

The regulations required mitigating measures that include:

- Approved plans for monitoring and reporting the effect of authorized industry activities on polar bear and walrus;
- A "Plan of Cooperation" that provides procedures on how industry will work with affected Alaska native communities to avoid interference with subsistence hunting of polar bears and Pacific walrus and to ensure the availability of the species for subsistence use;
- Site specific strategies to avoid conducting activities in areas that may contain denning bears, such as seasonal or location limitations on activities in impor-

tant denning habitat, or avoidance of known polar bear den sites by one mile; and

- Timing restrictions to minimize activities during peak den emergence.

In addition, on July 25, 2003, the Service issued a proposed rule to authorize taking of polar bear and Pacific walrus in Alaska incidental to oil and gas industry activities for a period of 16 months. This proposed rule contains the regulatory scheme described above.

Question 4: Although it is not addressed by this bill, as you may be aware, a study is underway to study the suitability and feasibility of designating a majority of Vandenberg Air Force Base lands as a unit of the National Park System. Do you believe including lands on an active military installation for possible inclusion with a National Park is counter productive to the mission of Vandenburg Air Force Base and our national preparedness? If so, why; If not, why not?

Response: Vandenburg Air Force Base lies within an area of the Gaviota Coast of California that Congress directed the National Park Service to study as a potential addition to the National Park System. Although the study has not been finalized, the draft report finds that the study area, including Vandenburg Air Force Base, is not feasible for addition to the National Park System.

We do not believe that such a study by the National Park Service, which is mandated by Congress, has any adverse impact on the military mission of Vandenburg or any other military installation. Studies by the National Park Service inform Congress whether certain lands might be eligible for addition to the National Park System and assess alternatives for their protection. In the case of active military bases, a study by the National Park Service normally discusses what alternatives might be considered by Congress if the land is no longer needed for military use. Any decision to follow up on such a study rests with Congress and not the National Park Service.

Question 5: Would giving the Department of Defense the authority, in certain circumstances, to remove certain active military lands from future park studies alleviate hindrances to military readiness activities?

Response: In addition to the information provided in the preceding answer, these park studies occur only as and when directed by Congress through the enactment of authorizing legislation. This Congressional direction includes the area to be studied. Therefore, Congress can now ensure that future park study legislation will not include military lands.

Question 6: I understand that a landowner who has received ESA section 10 permit coverage for certain activities through a habitat conservation plan (or "HCP") approved by the Fish and Wildlife Service may later have those activities reviewed under another regulatory process pursuant to section 7 of the ESA. The section 7 consultation process is triggered if the landowner requires permits or some other involvement of another federal agency. I also understood that this additional regulatory review often has the effect of delaying the implementation of activities already in compliance with the ESA and adding to their cost.

Secretary Manson, could you explain to me why a landowner holding a valid section 10 permit would be subjected to this additional regulatory scrutiny and if the Administration has considered approaches to eliminating this extra step under section 7?

Response: Because this is a statutory requirement, the Administration does not have the authority to eliminate this requirement. The Service is developing additional guidance that will expedite the section 7 review process for situations like the one you describe. We anticipate that the guidance will point to the biological opinion issued by the Service for the section 10 permit and Habitat Conservation Plan as also fulfilling the consultation responsibilities of any federal agencies that must subsequently approve activities that are covered by the Habitat Conservation Plan. As a result, there should be no additional regulatory delays associated with ESA compliance for activities that were covered in the HCP and the associated internal section 7 consultation the Service conducts when we issue the permit.

Question 7: I am aware that the Fish and Wildlife Service has, on occasion, agreed to exclude areas covered by existing HCPs from critical habitat designations. However, I am also aware that the Service has been unwilling to apply this approach to HCPs that are approved after the initial designation of critical habitat. It seems to me that the Service should be equally willing to exclude an area from critical habitat regardless of whether the HCP was approved before or after the initial designation.

Secretary Manson, could you explain why the Service would treat these two scenarios differently, and if the Administration had considered adopt-

ing a policy that clearly stated that areas covered by HCPs would not be subject to critical habitat designation, irrespective of when the HCP was approved, and that also directed the Service to use the public review process for the critical habitat designation as the basis for exempting existing and future HCPs?

Response: The Service normally would exclude from critical habitat designation for a particular species those areas included in approved HCPs that provide coverage for the species. We have made a commitment to go back and revise critical habitat for future HCPs when they are completed, if resources allow. As you know, litigation over critical habitat has limited the resources available for this purpose. The Fish and Wildlife Service's listing program's limited resources and staff time are being spent responding to an avalanche of lawsuits, and court orders focused on critical habitat designations. We believe that our staff time could be better utilized focusing on those actions that benefit species through improving the consultation process, the development and implementation of recovery plans, and working to develop voluntary partnerships with States and other landowners.

Revisions to critical habitat made in the year or so following a designation, while existing biological and economic information is still current, may be relatively short and inexpensive. Revisions that are made at times more distant from the original designation do, however, become more costly. As a result, revisions of critical habitat to exclude later HCPs may have to be postponed.

Questions Submitted by the Minority

Question 1: What is the Administration's position on H.R. 1835?

Response: While the Administration has not developed an official position on H.R. 1835, we do note that a number of the provisions contained in this legislation are similar to provisions in the Administration's Readiness and Range Preservation Initiative, which the Department supports.

Question 2: Is it the position of the Administration that Congress should eliminate the ESA's critical habitat protection? If Congress were to take this step, what mechanisms would remain in place to ensure that habitats needed for species recovery are protected?

Response: It is not the position of the Administration that Congress should eliminate the ESA's critical habitat protection. The Administration looks forward to working with Congress to develop a workable solution to the current breakdown. For example, one option that has been proposed would move the requirement to designate critical habitat from the time of listing to the time of recovery planning and make it non-regulatory, as in the Chafee-Kempthorne bill, S. 1100, which was introduced in the 105th Congress. With that change, the determination of which areas are important for a species' recovery would become a part of the recovery planning process, enabling the Service to determine a species' habitat needs at a time when there is a greater knowledge base about the species than at the time of listing. However, there are undoubtedly other alternatives which would also productively address this situation, and we welcome a chance to work with you to explore these.

We acknowledge that protecting habitat is essential to achieving recovery for many listed species. But both this Administration and the previous Administration have found that critical habitat designations add little, if any, benefits to the species. For example, the ESA requires consultation for activities that may affect listed species, including habitat alterations, regardless of whether critical habitat has been designated. We have also learned over time that, in almost all cases, active management of the habitat is far better than the "do no harm" requirement accompanying a critical habitat designation. However, because many landowners and land managing agencies strongly oppose critical habitat designations, the current critical habitat process has proven counterproductive to meeting the real needs of the species in many instances.

A significant problem is that the original ESA mechanism designed to address this, critical habitat designation, cannot produce the management needed. Active cooperation cannot be compelled by this regulatory scheme. Instead, we believe far better results can be achieved by developing and promoting cooperative conservation efforts between landowners and land managers.

Question 3: Does the Administration intend to issue a new regulation defining adverse modification of critical habitat as called for by the Fifth Circuit decision in Sierra Club v. U.S. Fish and Wildlife Service? If so, when will this regulation be proposed and finalized? In the meantime, what standard of protection of critical habitat is being used by the Administration in the Fifth Circuit?

Response: The Administration is developing a proposed rule that would address the Fifth Circuit's decision. Presently in the Fifth Circuit, in evaluating whether the

effects of a proposed action constitute destruction or adverse modification of critical habitat, we analyze whether the effects of the proposed action appreciably diminish the value of the critical habitat for the recovery of the species.

Question 4: Does ESA § 4(b)(2) give the U.S. Fish and Wildlife Service (FWS) the flexibility to exclude Defense Department lands from a critical habitat designation based on the existence of an adequate Integrated Natural Resource Management Plan (INRMP)? If so, what factors does FWS consider in determining whether an INRMP conserves listed species adequately enough to justify a ESA § 4(b)(2) exclusion?

Response: Section 4(b)(2) allows the Service to exclude DoD lands based on the existence of an adequate INRMP, or their importance to national security, or other relevant reasons under which the benefit of excluding the lands from critical habitat might exceed the benefit of including them. However, this is an action which is discretionary. The Department of Defense is seeking certainty, and we agree that this is warranted.

Question 5: Have the courts interpreting ESA § 4(b)(2) placed any limits on the U.S. Fish and Wildlife Service's ability to exclude habitats from critical habitat designations pursuant to this provision of the ESA? If so, please describe those limits. If not, please explain why ESA § 4(b)(2) is an inadequate tool for substituting an INRMP for a critical habitat designation when FWS deems it appropriate.

Response: The courts have ruled that the Secretary's ability to exclude areas under section 4(b)(2) is discretionary. Under the applicable standards, as long as proper procedures are followed and there is a rational basis on the record for the decision, we would not expect a court to overturn a 4(b)(2) exclusion, whether related to INRMPs or other factors. However, as noted above, this is an action which is discretionary, while the Department of Defense is seeking certainty.

Question 6: Please estimate the cost of cleaning up the backlog of critical habitat designations and provide a timeline and a detailed breakdown of how this estimate was derived. If Congress were willing to fund the clean-up of this backlog, would there be any remaining obstacle?

Response: For the reasons described in this answer, we do not have adequate information for providing an accurate response to this question. We do know, however, that Section 4 of the ESA requires critical habitat be designated for every species listed as threatened or endangered. Currently only 306 species or 25% of the 1,211 listed in the United States under the jurisdiction of the Service have designated critical habitat. Additionally, there are currently 257 candidate species for which listing proposals are believed to be warranted but which are precluded by higher priority actions. If these species are ultimately listed, critical habitat would need to be designated for most of them as well. Based on actual costs to complete recent critical habitat designations (between $200,000 - $600,000 per designation including economic analysis, NEPA compliance, and drafting and publication costs), it would cost hundreds of millions of dollars to designate critical habitat for all of these species as the Act requires. It would also take many years and substantial resources to completely address the backlog of critical habitat designations. Even if the resource issues related to the critical habitat backlog are addressed, the real issue is whether or not statutory critical habitats are effective in helping to conserve listed species. In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. As Judge Manson testified, we believe that the service's resources and time could be better spent focusing on those actions that benefit species through improving the consultation process, the development and implementation of recovery plans, and voluntary partnerships with States and other landowners. The present system for designating critical habitat is broken and, as Judge Manson testified, we are prepared to work with Congress to identify ways of providing necessary legislative relief.

Question 7: Please provide a list of any contractors that have been retained by the Administration to perform economic impact analyses under ESA § 4(b)(2), the terms of those contractual arrangements, and copies of any instructions that have been provided to these contractors regarding how economic impact analyses should be performed.

Response: The Service contracts with Industrial Economics (IEC) in Cambridge, Massachusetts, for completion of its economic analyses. In turn, IEC subcontracts out some of the analyses to other firms. Copies of the contracts and instructions are attached.

Question 8: How much money would the Administration save if it were not to follow the Tenth Circuit's New Mexico Cattle Growers ruling and to instead estimate only the impacts of critical habitat designation that are

not redundant with the impacts of other ESA provisions? Please provide a timeline and a detailed breakdown of how this estimate was derived.

Response: We made a policy decision to apply the 10th Circuit ruling nationwide because we believe it to be an accurate statement of the law. It has since been endorsed by courts in other circuits, including the 9th Circuit and here in the District of Columbia, and has not been rejected in any other circuit. Accordingly, it is not at all clear that we could legally pursue the course of action raised in this question.

In addition, it is difficult to estimate precisely how much the Service might save by this approach. Much of the Service's increased economic analysis costs result from doing a more robust analysis of the actual costs of critical habitat designations. Because we would still take the time to do these more robust analyses, we would likely still incur those associated costs.

Question 9: When the Administration characterizes the critical habitat protection as essentially valueless, does it take into account the value that critical habitat designation plays in protecting habitats not occupied by the listed species? If so, what other ESA provision protects unoccupied habitats? What impact on listed species would result from removing critical habitat protections for unoccupied habitats? Approximately how many listed species will need to be restored to unoccupied habitat in order to recover?

Response: The last element of the question highlights what we believe to be the most important aspect of the unoccupied habitat issue—that its value under the ESA is for reintroduction of the species in order to assist in recovery. However, a critical habitat designation cannot compel a private landowner, or a state or federal agency, to allow reintroduction on their land, or to manage their land to benefit the species. This can only result from the voluntary cooperation of the landowner or land manager.

As noted in my answer to Question 2 above, it is our experience that many landowners—public and private—oppose critical habitat designations. Inasmuch as most listed species are found, in whole or part, on state and private lands, critical habitat designations have become significant obstacles to obtaining landowner cooperation in species conservation, and a critical habitat designation for unoccupied habitat thus often harms rather than assists recovery for the species for which it is designated.

On the question in general, we do not track the overall amount of occupied and unoccupied designated critical habitat. However, because the ESA sets a higher standard for designation of unoccupied habitat than for occupied, and the legislative history instructs us to be "highly circumspect" in designating unoccupied habitat, it is reasonable to presume that most currently designated critical habitat is occupied habitat.

For these reasons, we do not believe that a lack of regulatory coverage under the ESA of unoccupied habitat is a significant aspect of the critical habitat issue, or would have significant consequences for the recovery of listed species.

Lastly, we note that there are a wide variety of other aspects of the ESA which can be used to help develop the cooperation of landowners and land managers. These include HCPs, Candidate Conservation and Safe Harbor Agreements, and the various ESA grant programs. Many other programs can be and are also used to benefit species' habitat, including Private Stewardship Grants and the Partners for Fish and Wildlife program.

Additional Questions Submitted by Congressman Nick Rahall

Question 1: Does the Department of the Interior support Section 2(a) of H.R. 1835.

Response: While the Administration has not developed an official position on H.R. 1835, we do note that a number of the provisions contained in this legislation are similar to provisions in the Administration's Readiness and Range Preservation Initiative (RRPI). For example, Section 2(a) of H.R. 1835 would provide, among other things, statutory authority for the Department to exclude military facilities from critical habitat if there was an approved INRMP for that facility which addressed the species in question. This is similar to provisions of the RRPI, which the Department supports.

Question 2: H.R. 1835 would make it the policy of the Congress that all Federal agencies must seek to conserve endangered and threatened species "insofar as is practical and consistent with their primary purposes." How would this affect other Federal agencies' requirement to comply with reasonable and prudent alternatives developed by FWS?

Response: Because this provision was removed from the bill during the Committee mark-up, we did not analyze its possible effect.

Question 3: Current FWS Policy I understand that, in general, the policy of the Secretary of the Interior has been to waive critical habitat designation when an adequately prepared Integrated Natural Resources Management Plan exists.

If H.R. 1835 is enacted, how, if at all, would this policy change? Is my understanding correct? If yes, what factors does FWS consider in determining whether an INRMP conserves listed species adequately?

Response: It has been our policy to continue the prior Administration's practice of determining that a military base with an adequate INRMP generally does not meet the definition of critical habitat as set forth in section 3(5)(A) of the Act, in that no special management or protection would be needed. This policy also applies to non-military lands with adequate management plans. The Service has considered three factors in evaluating INRMPs and non-military management plans that the plan provides a conservation benefit to the species, that it provides assurances that the plan will be implemented, and that it provide assurances, usually through monitoring and evaluation, that the conservation effort will be effective.

If H.R. 1835 were enacted in the version reported by the Committee, we would still evaluate the INRMP to make such a determination.

Question 4: Consideration of Relevant Impacts - Section 4(b)(2) of the ESA reads, in part, "the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat."

Have the courts interpreting ESA § 4(b)(2) placed any limits on the U.S. Fish and Wildlife Service's ability to exclude habitats from critical habitat designations pursuant to this provision of the ESA? If so, please describe those limits. If not, please explain why ESA § 4(b)(2) is an inadequate tool for substituting an INRMP for a critical habitat designation when FWS deems it appropriate.

Response: The courts have ruled that the Secretary's ability to exclude areas under section 4(b)(2) is discretionary. Under the applicable standards, as long as proper procedures are followed and there is a rational basis on the record for the decision, we would not expect a court to overturn a 4(b)(2) exclusion, whether related to INRMPs or other factors. However, this is an action which is discretionary, while DoD is seeking certainty.

Question 5: Litigation - Several pages of your written testimony talk about the effects of litigation on the U.S. Fish and Wildlife Service. Can you tell me how many of these lawsuits have been brought against the FWS for critical habitat designation, or lack thereof, on military land?

Response: The Service has been sued many times for failure to designate critical habitat, and many of these suits have been about critical habitat for species that occupy DoD lands. However the Service has never been sued specifically for designating critical habitat on military lands, or for failing to designate critical habitat specifically on military lands. The concerns expressed in the DoD statements relate to lawsuits over designation of critical habitat for species that occupy military lands, and the concern in my statement over lawsuits, insofar as it relates to DoD, is that a decision in a case not related to that Department could be interpreted as precluding our current practice of exempting DoD lands with INRMPs under section 3(5)(A).

Has this case been settled? When do you expect a final decision?

Response: As noted above, there is no specific lawsuit applicable here.

What effect would the RRPI have on your litigation load given the small percentage of lawsuits that regard military lands?

Response: It is not clear what affect the Range and Readiness Preservation Initiative (RRPI) would have on our litigation workload. It is always possible that the implementation of new statutory authority will be subject to litigation.

Question 6: You mention in your written testimony voluntary partnerships with States that include the military agencies. But many of the partnerships that include military lands are mandated by the Sikes Act.

To what extent do these mandated partnerships depend on voluntary cooperation between the DoD and the FWS?

Are there instances where the cooperation has not been volunteered to an extent to make the partnership successful?

Response: We have provided a sample of the many examples where military installations have undertaken voluntary cooperative actions that go well beyond the scope of Sikes Act requirements. We are not aware of instances where cooperation has not been volunteered to an extent to make the partnership successful.

Camp Shelby

The Service; the Mississippi Army National Guard; Mississippi Department of Wildlife, Fisheries, and Parks; and the U.S. Forest Service are in the final stages of developing a Candidate Conservation Agreement for the Camp Shelby burrowing crayfish. The goal of the Agreement is to conserve the species and its associated wetland bog habitat through habitat management, habitat protection, habitat and species monitoring, and education and information transfer. Implementation elements include collaborative actions among the parties on coordinating conservation activities, conservation schedule implementation, funding conservation actions, and assessing conservation progress. A multi-agency implementation team will ensure that the Agreement's expected goals and objectives are being realized, or will adjust efforts accordingly.

The parties to the Agreement believe that, with proper management, protection of this species and its habitat are compatible with the primary military training and other activities conducted by the Mississippi Army National Guard and the U.S. Forest Service. On-going and future management actions as outlined in the Agreement should ensure conservation of the species and preclude the need for its protection under the ESA.

Eglin AFB

Eglin AFB participates in the Gulf Coastal Plains Ecosystem Partnership (GCPEP). This partnership between The Nature Conservancy, state, federal, and private landowners was originally in response to the dramatic loss of longleaf pine habitat in the southeastern U.S. GCPEP promotes connectivity of managed lands in Alabama and the Florida panhandle with a mission that includes sustainability of native plants and animals (including over 160 rare and imperiled species), and the conservation and restoration of the integrity of ecosystems. The partnership, which covers 845,800 acres (and is growing), contains more than 20 percent of the remaining longleaf ecosystem and comprises the largest remaining nearly contiguous block of longleaf pine in the United States.

Other examples of voluntary cooperation between the Service and Eglin AFB include:

- Eglin AFB provides "donor" red-cockaded woodpeckers (RCWs) to be translocated as part of the "Southeastern Translocation Cooperative" to other recipient lands whose populations are in danger of extirpation;
- Eglin AFB funds two Service aquatic biologists that work on the reservation doing stream surveys and identifying aquatic ecosystem restoration needs;
- Eglin AFB has purchased sonic tags for Gulf sturgeon marine habitat studies;
- Eglin AFB in Florida hosted a large Earth Day event in 2002. Twenty thousand students participated with over 200 exhibitors, including the Service.

Fort Polk

In Louisiana, Fort Polk, home of the Joint Readiness Training Command (the most intensive force-level training in the country), has long funded two Service wildlife biologists who conduct a variety of habitat management and endangered species enhancement and recovery activities (such as habitat improvements in support of the western Louisiana recovery population of the RCW which includes adjacent lands on the Kisatchie National Forest (KNF)). Fort Polk has also entered into cooperative agreements with the Forest Service to use those adjoining KNF lands to meet their training needs, and has actively supported land stewardship and enhanced RCW management on those lands. An active participant in the "West Gulf Coastal Plain RCW Translocation Cooperative," Fort Polk has also played a key role in the partnership that developed the soon-to-be-signed Louisiana Pine Snake Candidate Conservation Agreement covering Texas and Louisiana.

Fort Bragg

Fort Bragg in North Carolina is a leader in voluntary cooperation that extends far beyond the measures required by the Sikes Act. Their former base commander Col. Davis received a conservation award last year from the Regional Director (of the Southeast Service Region).

Fort Bragg has consistently provided funding and support to the North Carolina Sandhills Conservation Partnership. In addition, Fort Bragg has voluntarily entered into a cooperative agreement with the Nature Conservancy to purchase conservation lands under the Private Lands Initiative. Fort Bragg also entered into an Interagency Agreement with the Service for support of the North Carolina Sandhills Safe Harbor Program. Under this program the Service works with private landowners to restore their lands to benefit the recovery of the RCW.

Fort Bragg has also sponsored a workshop for the Sustainable Sandhills Initiative. Under this initiative, Fort Bragg will work cooperatively with the surrounding counties to achieve Smart Regional Land Use Planning and to write a 25 year sustainability study.

McChord AFB and Fort Lewis

A study on phenology, nesting, success, habitat selection, and census methods for the streaked horned lark was conducted by the Washington Department of Natural Resources with partial funding by the Service on McChord Air Force Base and Fort Lewis. Other partners were Washington Department of Transportation and the Nature Conservancy. This study vastly improved our knowledge about the streaked horned lark, a candidate species. It also resulted in Fort Lewis voluntarily modifying their mowing schedules at their airfield to minimize nest destruction, not renewing a permit for a model airplane club that was conducting activities where horned larks were nesting, and posting of signs limiting entry at the nesting site.

Naval Air Station on Whidbey Island

A University of Washington project to study experimental restoration techniques for the golden paintbrush was partially funded with Service Coastal Program dollars through the Nature Conservancy with the Naval Air Station on Whidbey Island. The Service botanist in the Western Washington Office also provided technical assistance. The project consisted of experimental outplantings of the golden paintbrush under different treatments to develop improved restoration techniques.

Species-at-Risk Project

The Department of Defense, NatureServe, and local Natural Heritage Programs are working with the Service to develop management plans for selected species-at-risk occurring on military lands. The Department of Defense has committed $130,000 to the effort, which means devoting about $32,500 for each of four species, ideally from each branch of the military service. For each of the four species selected, the Service and the local Natural Heritage Program will help DoD identify the threats to the species and develop management guidelines to prevent further declines in the species on or near the installation where it occurs. If any of these species are subsequently listed, conservation efforts identified in the management plans could facilitate recovery and section 7 consultations.

Question 7: Effectiveness of INRMPs - In your written testimony you say that INRMPs are an "effective vehicle" through which DoD can plan for the conservation of fish and wildlife species. Do you have any data on which to judge the effectiveness of INRMPs at actually conserving fish and wildlife species?

Response: Integrated Natural Resources Management Plans are a relatively recent requirement—completed plans were required for relevant installations by November 2001. Prior to the use of INRMPs, Cooperative Plans to manage natural resources were developed by installations in coordination with the Service and states. The continued success of the military's recreational hunting and fishing programs, in addition to the diverse populations of wildlife present on installations, attest to the successful management provided by those plans. We anticipate that INRMPs will build on the success of the Cooperative Plans. With the Sikes Act's requirement for INRMPs, management plans now require an ecosystem management approach and more intense coordination and cooperation among military installations, the Service, and states. As the plans are implemented in years to come, this will ensure an "effective vehicle" for healthy and balanced management practices beneficial to all plant and animal species on lands managed by DoD.

Question 8: Camp Pendleton numbers

What is the current percentage of total acreage at Camp Pendleton designated as critical habitat?

Response: A total of 4,622 acres have been designated critical habitat on Marine Corps Base Camp Pendleton, most of which (about 2,767.82 acres) is leased to California State Parks. This acreage total takes into account overlapping areas designated for the individual species and does not include areas designated, but now vacated, by the courts. Thus, about 3.69 percent of the Base's total land area (125,118 acres) is designated critical habitat: 1.49 percent is on Marine Corps Base Camp Pendleton actively used by the military and 2.2 percent is on lands leased to California State Parks by Camp Pendleton.

Is there proposed acreage under active consideration? Why or why not?

Response: In 2000, the Service proposed approximately half of Camp Pendleton as critical habitat for the gnatcatcher. Other proposals for other species raised that to approximately 57% of the base. The Service's final critical habitat designations for the gnatcatcher and other species exempted both Camp Pendleton and MCAS

Miramar from critical habitat in the initial use of the 3(5)(A) exemption for an INRMP. Both areas were also excluded under section 4(b)(2), and the same approach was used for the other species. The final designations for the gnatcatcher and some of the other species were subsequently challenged in court. The Service then withdrew the proposals for revision.

On April 22, 2003, the Service published a revised proposed rule to designate critical habitat for the gnatcatcher and on April 24, 2003, we published a revised proposed rule to designate critical habitat for the San Diego fairy shrimp, the two main species at Camp Pendleton. The comment period for both of these rules closed on June 23, 2003. The acreage proposed at Camp Pendleton for each species is provided in the table below. The areas proposed are primarily non-training areas based on the Service's understanding of the base's training activities and include lands leased to State Parks and for agriculture use, lands between and adjacent to housing areas, and the Cocklebur Sensitive Area that was "set aside" (designated as a non-training area) to offset impacts from construction of a Navy Hovercraft facility.

However, the chart does not tell the entire story, as we may alter our proposal in the final rule, and whatever final designation we make for these species could well be challenged again in court. There is of course no way to predict the outcome of such a challenge, or how it might impact Camp Pendleton.

Proposed Critical Habitat on MCB Camp Pendleton

	California gnatcatcher	San Diego fairy shrimp	Total overlapping CH
Agriculture lease	2262.33	--	2262.33
State Park lease	1271.27	38.25	1271.47
Wire Mountain Housing Area	1027.75	538.32	1131.76
De Luz Housing Area	3167.24	--	3167.24
Cocklebur Sensitive Area	--	259.43	259.43
TOTAL	7728.59	576.57	7832.8

[Responses to questions submitted for the record by Rear Admiral Moeller follow:]

Responses to questions submitted for the record by RADM Robert T. Moeller, Deputy Chief of Staff for Operations/Plans and Policy, U.S. Pacific Fleet, U.S. Navy

Question 1: You have heard in the past few weeks and you will probably hear today that the military is looking for exemptions from the ESA and MMPA so that you can get out of your environmental responsibilities under these acts. How do you respond?

Answer: DOD is not seeking exemptions from the ESA and MMPA, nor any other environmental statute. Allegations to the contrary are erroneous and misleading. DOD will continue to comply with the same environmental laws as private organizations when engaged in the same activities, and as such DOD is subject to all federal environmental laws. The military also has a unique responsibility to prepare for and win armed conflicts—unlike any private organization, state, or local government—and has land specially set aside to test and train for that purpose. The changes being studied are narrowly focused on that testing and training, i.e., "military readiness activities." The changes would not affect DOD compliance with environmental laws in the management of its infrastructure or industrial operations that are similar to those of private companies. For example, DOD will continue to comply with all applicable environmental laws in the way that it runs its sewage treatment plants, paint booths, management of industrial hazardous wastes, etc. and DOD will continue all environmental cleanup programs. With respect to DOD's unique military readiness activities, the proposals simply provide greater flexibility to protect both our environment and military readiness. In this regard, DOD is seeking legislative clarification where the ESA and MMPA are being applied beyond their original legislative intent. We are looking at a combination of narrowly focused measures to enhance readiness while maintaining our commitment to environmental stewardship.

Question 2: When INRMPS are developed who sets the recovery goals for the species in question?

Answer: The U.S. Fish and Wildlife Service (USFWS) has the responsibility under the Endangered Species Act to develop species recovery plans and goals.

Question 3: How does NEPA fit into the process of INRMPs?

Answer: Navy policy and guidelines require completion of NEPA documentation for INRMPs. Navy completed separate NEPA documentation for each INRMP and required that a Finding of No Significant Impact be signed before the INRMP development process was considered to be complete.

Question 4: Why has DoD not exercised Section 7(j) of the "God Squad" under ESA?

Answer: The Department of Defense has not used the national security exemption in section 7(j) of the Endangered Species Act (ESA) because, to date, no DoD action has placed the continued existence of any threatened or endangered species in jeopardy. Under section 7(j), the Secretary of Defense may direct the Endangered Species Committee (a committee composed of various Cabinet and sub-Cabinet level officials) to exempt a DoD action from the prohibitions in the ESA when such an exemption is necessary for national security. Very few proposed DoD actions, however, have even the potential to threaten the continued existence of any species; generally DoD actions are confined to a discrete area for a limited time, while most species listed under the ESA are somewhat more widely dispersed. Hence, DoD would have to utilize the section 7(j) exemption only in the rare instance in which a particularly destructive, critical, national security activity was required to take place in an area that represented the full range of a particular species. Notwithstanding the rarity of such an occurrence, the ability to use the exemption is a valuable hedge against future emergencies.

A more common scenario for DoD under the ESA is that a proposed action will result in the take of a small number of individual listed species members or result in the destruction or adverse modification of critical habitat—but not in a manner that threatens the continued existence of the entire species. The ESA provides a means, through consultation, for a federal agency to obtain an incidental take statement from the appropriate agency (U.S. Fish and Wildlife Service or National Marine Fisheries Service) that covers these situations. Although such consultation, is time-consuming and, on occasion, results in requirements for mitigation that adversely impacts the value of a particular test or training exercise, DoD takes its responsibility to conserve species seriously and has not suggested that the requirement to consult on military readiness actions that could take threatened or endangered species be eliminated altogether. DoD has limited its legislative request on the ESA; it asks Congress only to allow the Secretary of the Interior not to designate critical habitat on a military installation when the Interior Secretary finds that an integrated natural resources management plan (INRMP) for that installation provides the special management considerations necessary to protect the species for which critical habitat would otherwise be designated.

DoD's suggested approach is more practical than its use of the section 7(j) exemption under the ESA. Although the existing exemption could be used to exempt use of designated critical habitat on an action by action basis, DoD believes it is unacceptable, as a matter of public policy, for indispensable readiness activities to require repeated invocation of emergency authority—particularly when narrow clarifications of the underlying regulatory statutes would enable the continuation of both essential readiness activities and environmental protection. Use of the INRMP, instead of designating critical habitat, would allow DoD to plan, in coordination with the U.S. Fish and Wildlife Service and the appropriate State wildlife agency, its use of a range (for example) over time without having to engage in multiple consultations with USFWS over what activities are, or are not, appropriate in an area that might also be used for species conservation. This would preserve efficiencies in both DoD and Interior. The narrowness of this proposed exception to critical habitat, however, is such that it would principally affect consultation on unoccupied habitat. Because listed species are present on occupied habitat, DoD would remain obligated, under section 7(a)(2) of the ESA, to consult with USFWS and NMFS on its actions in such areas to ensure that they do not jeopardize the continued existence of any threatened or endangered species.

Question 5a: Included in your testimony, you talk about the Least Tern and the Western Snowy Plover populations at the Naval Amphibious Base Coronado. Specifically you state that Least Tern nests have increased from 187 to 825 and Western Snowy Plover nests have increased from 7 to 99. This has been over a 9 year period. Is this under an INRMP?

Answer: The Least Tern and Western Snowy Plover have been successfully managed under an INRMP at Naval Amphibious base Coronado since 1998.

Question 5b: What are the recovery goals set by the USFWS on this?

Answer: There are presently no such goals in place.

Question 6a: You testify that military training areas were originally located in isolated areas and now they are surrounded by development, leaving the military lands as the only relatively undisturbed habitat for many

species. Does this mean that your stewardship of these lands has actually come back to bite you?

Answer: Multiple encroachment issues continue to constrain DOD's ability to maintain the combat readiness of America's military forces and many issues, such as development around our ranges. Many military facilities have become wonderful environmentally protected areas, largely due to DOD management processes and the exclusion of other high intensity land uses, which typically cause much more habitat damage than testing or training. The land, sea, air, and space we use to test our weapons and train our people are essential national assets, but environmental and other restrictions can have unintended consequences that increasingly limit the military's ability to effectively train for combat.

Question 6b: If you cannot use these lands for training any more, what options do you have other than not training?

Answer: When one considers that our forces must train as they fight and will fight as they train, there are no viable options providing a long-term solution. Some individuals allege that models and simulators and additional "work-arounds" are possible options. However, models and simulators can teach only so much. Military training involves integrating unit maneuvers with employment of munitions under conditions of stress. This can be done safely only on training ranges set aside for that purpose. Similarly, "work-arounds" will seriously degrade training and readiness when they go beyond being an inconvenience to fundamentally undercutting the realism and quality of training. The bottom line is that some "work-arounds" may satisfy regulatory rules designed for non-military activities but do not meet military training requirements. DOD is increasingly forced to restrict or relocate training and testing when encroachment affects our ranges. Both alternatives degrade the readiness of U.S. military forces.

Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar

Question 7a: If you were to receive an incidental take permit for the use of the SURTASS LFA sonar system and your subsequent monitoring on its effects on marine mammals showed that the sonar caused serious injury or death to a number of marine mammals, what would the result be?

Answer: In accordance with the incidental take permit, any observed effects on marine mammals would be promptly reported to the National Marine Fisheries Service (NMFS). In parallel, the Navy would reevaluate SURTASS LFA operations.

Question 7b: Would your permit be revoked or new mitigation requirements be written into the permit?

Answer: NMFS would evaluate the situation and determine the required action with regards to the permit.

Question 8: Although the stranding incidents in the Bahamas were not related to low frequency sonar, what was the Navy's response to using similar sonar systems in similar bottom types? Has the Navy changed their testing and training operations as a result of the lessons learned in the Bahamas?

Answer: After the Bahamas stranding, the Navy and NMFS launched a joint investigation into the potential causes of the stranding and issued the Joint Interim Report, Bahamas Marine Mammal Stranding Event of 15-16 March 2000, in December 2001. The joint interim report included the following mitigation recommendations:

a. Forego multi-ship, peacetime active sonar transmissions from mid-range tactical sonars in the Northeast and Northwest Providence Channels unless required for National Security reasons.

b. The Navy will carefully assess and closely scrutinize future training and training areas with an eye toward avoiding those situations where the combination of factors presented in this report (oceanography, bathymetry, sonar usage, etc.*) would be likely to occur.

c. If factors cited in the report exist at another location and relocation of the action is not feasible, and the action must proceed, Navy will adhere to the following procedures in the absence of a Letter of Authorization (LOA) or an Incidental Harassment Authorization (IHA):

(1) Immediately before the operation, use every facility or asset available to visually and acoustically survey for marine mammals;

(2) Establish a zone of influence appropriate to the existing oceanographic conditions and sonar source level settings;

(3) Employ properly trained lookouts;

(4) Implement shutdown procedures if marine mammals are detected within the zones of influence established for those species; and

(5) Immediately upon conclusion of the operation (where feasible, usually in near shore waters), survey for injured, disabled, or dead marine mammals using every facility or asset available. Notify NMFS if animals are found so an appropriate stranding response can be implemented.

d. NMFS will continue to conduct broad area surveys of marine mammal locations, migratory pathways, and habitats that can be used by Navy planners in selecting exercise sites.

The Navy reviews all major exercises for compliance with the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA), and when appropriate, pursues IHAs or LOAs under the MMPA. Consideration of the factors in the Bahamas report is included in each of these reviews, and applicable mitigation guidelines are promulgated by message. No multi-ship ASW training has been conducted in the Providence Channel since March 2000. To the extent possible and consistent with operational requirements, the Navy selects exercise locations to minimize potential adverse effects to marine species of concern (e.g., exercises scheduled near shore have been moved into deeper water towards areas of less favorable habitat and historically lower presence of marine mammals). In addition, the Navy, under its At Sea Policy, is reviewing each level of activity—major exercises and routing training events—for environmental compliance and mitigation concerns.

**Note: The report lists the full range of factors such as sound propagation characteristics (e.g., surface duct), unusual underwater bathymetry, intensive use of multiple sonar units, a constricted channel with limited egress avenues, and the presence of beaked whales.*

Question 9: How much testing of marine mammal hearing is being done by the Navy and/or NMFS? If not for this type of research, how much would we know about the acoustic ranges of various marine mammals?

Answer: The Navy supports almost all marine mammal hearing testing/research in the U.S. and internationally. Since 1991, the Navy has invested nearly $10 million to studies of marine mammal low frequency hearing sensitivity, critical ratios, critical bandwidths, masking, effects of diving on hearing and temporary threshold shift thresholds for seven species of marine mammals, plus fish and sea turtles. In addition the Navy has supported studies of marine mammal, sea turtle and fish hearing anatomy and the derivation of general predictive models of hearing function for fish and marine mammals. NMFS does not conduct hearing research, and currently provides small amounts of funding (less than $200,000 per year) in support of ancillary activities to hearing studies, such as providing stranded animal specimens to researchers working on anatomical studies.

Without Navy support almost nothing would be known of marine mammal hearing. Navy efforts began in the early 1960's with the discovery of dolphin sonar, related studies of seal and sea lion hearing, and development of the animal care and training procedures that are used worldwide today. A recent external independent review of the most recent progress in the ONR Temporary Threshold Shift program is posted on the ONR website (www.onr.navy.mil, keyword: mammal). That report assesses the current status of research in the field, and provides detailed recommendations for potential new areas of study, such as using evoked potential audiometric techniques to obtain rapid hearing assessments from new species not readily tested with existing methods (e.g. large baleen whales and beaked whales). Although other agencies, including the Minerals Management Service, are sponsoring an increasing amount of marine mammal behavioral research, practically all work on hearing thresholds is and has been supported by the U.S. Navy.

Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar

Question 10a: You testify that the LFA sonar system needs to be tested and evaluated to be effective. This implies that the permits you were requesting were to see how well the system works and were not just for routine training. Is that correct?

Answer: The permit was requested, and granted, for training, testing, and routine military operations. National Marine Fishery Service (NMFS) regulation Part 216, Subpart Q—Taking of Marine Mammals Incidental to Navy Operations of SURTASS LFA—50 CFR 216.180 states, "The authorized activities...include the transmission of low frequency sounds from the SURTASS LFA sonar and the transmissions of high frequency sounds from the mitigation sonar...during training, testing, and routine military operations of SURTASS LFA sonar."

Question 10b: Would part of that testing be to see how the sonar system affects marine mammals?

Answer: Yes. As part of the required monitoring mitigation set forth in the Regulation and Letter of Authorization (LOA), any effects of LFA on marine mammals

noted during operations will be recorded and reported to NMFS in quarterly and annual reports.

Under the Regulation and LOA, NMFS stated that while it believes that the research conducted to date is sufficient to assess the impacts of LFA on marine mammals, it would be prudent to continue research over the course of the period of effectiveness of the regulation. Research on the effects of low frequency sound and LFA on marine mammals may or may not involve the use of the LFA array depending on the nature of the research.

Question 10c: What types of mitigation and monitoring requirements did the agency put into your permit?

Answer: There are geographic restrictions as well as monitoring requirements associated with the permit.

Geographic Restrictions: NMFS adopted the Navy proposed action in the Final environmental impact statement (EIS): SURTASS LFA sonar operations would be conducted to ensure that the sound field does not exceed 180 dB (i.e., the zone of potential for injury to marine mammals) at a distance of 12-nm (22-km) from any coastline, including islands, nor in designated offshore biologically important areas, those portions of the world's oceans that are outside the 12-nm (22-km) coastline where marine mammals of concern congregate in high densities to carry out biologically important behaviors, during the biologically important season(s) for that particular area. The 12-nm (22-km) restriction includes almost all marine-related critical habitats and National Marine Sanctuaries (NMSs). However, some parts of NMSs, that are recognized to be important for marine mammals and are outside 12 nm (22 km), were added to the restricted areas by NMFS during rule making.

In addition to at the geographic limitation set forth by the 180 dB sound field, designed to protect marine mammals and other noise sensitive marine animals, the Navy will establish a similar, overlapping geographic limitation for human divers at 145 dB re 1 μPa (rms) around all known human commercial and recreational diving sites. Although this geographic restriction is intended to protect human divers, it will also reduce the LF sound levels received by marine mammals that are located in the vicinity of known dive sites.

Monitoring requirements: NMFS adopted, with modification, the Navy proposal in the Final EIS to use visual, passive acoustic, and active acoustic monitoring of the area surrounding the SURTASS LFA sonar array to prevent the incidental injury of marine mammals that might enter the 180-dB SURTASS LFA mitigation zone. In order to minimize risks to potentially affected marine mammals that may be present in waters surrounding SURTASS LFA sonar, the Navy will: (1) conduct visual monitoring for marine mammals and sea turtles from the vessel during daylight hours; (2) use passive SURTASS LFA sonar to listen for vocalizing marine mammals; and (3) use high frequency active sonar (i.e., High Frequency Marine Mammal Monitoring [HF/M3] sonar similar to a commercial fish finder) to monitor/locate/track marine mammals than may pass close enough to the SURTASS LFA sonar's transit array to enter the 180 dB sound field (LFA mitigation zone).

NMFS decided in the Final Rule to augment the 180-dB LFA mitigation zone to ensure to the greatest extent practicable that marine mammals are not subject to potential injury. In that regard, as an added mitigation measure, NMFS established an interim "buffer zone" extending an additional 1 km (0.54 nm) beyond the 180-dB LFA mitigation zone.

Question 10d: Would these mitigation measures have minimized the harm to marine mammals?

Answer: Yes. The conclusion of the SURTASS LFA Final EIS was that under the preferred alternative (with geographic restrictions and monitoring mitigation as noted above) the potential impact on any stock of marine mammals from injury is considered negligible, and the effect on the stock on any marine mammal from significant change in a biologically important behavior is considered minimal. NMFS, as a cooperating agency on the Final EIS, concurred with this conclusion.

Question 10e: What would happen if the mitigation measures were not effective?

Answer: If the mitigation measures were ineffective, LFA transmissions would be suspended until corrective actions were completed. For example, if the High Frequency Marine Mammal Monitoring (HF/M3) sonar were to become inoperative, LFA transmissions would be suspended until it was able to perform adequately.

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