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108TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 108–99
Part 1

NATIONAL SECURITY READINESS ACT OF 2003

MAY 14, 2003.—Ordered to be printed

Mr. POMBO, from the Committee on Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1835]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Security Readiness Act of 2003".

SEC. 2. MILITARY READINESS AND THE CONSERVATION OF PROTECTED SPECIES.

(a) DESIGNATION OF CRITICAL HABITAT.—Section 4(a)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(a)(3)) is amended by striking "prudent and determinable" and inserting "necessary".

(b) LIMITATION ON DESIGNATION OF CRITICAL HABITAT.—Section 4(a)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(a)(3)) is amended—

(1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(2) by inserting "(A)" after "(3)"; and

(3) by adding at the end the following:

"(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines that such plan addresses special management considerations or protection (as those terms are used in section 3(5)(A)(i)).

"(ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).

"(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.".

(c) CONSIDERATION OF EFFECTS OF DESIGNATION OF CRITICAL HABITAT.—Section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(2)) is amended by inserting "the impact on national security," after "the economic impact,".

SEC. 3. AMENDMENT TO DEFINITION OF HARASSMENT UNDER MARINE MAMMAL PROTECTION ACT OF 1972.

Section 3(18) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(18)) is amended by striking the matter preceding subparagraph (B) and inserting the following:

"(18)(A) The term 'harassment' means—

"(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or

"(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, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.".

SEC. 4. EXEMPTION OF ACTIONS NECESSARY FOR NATIONAL DEFENSE.

Section 101 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371) is amended by inserting after subsection (e) the following:

"(f) EXEMPTION OF ACTIONS NECESSARY FOR NATIONAL DEFENSE.—(1) The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this Act, if the Secretary determines that it is necessary for national defense.

"(2) An exemption granted under this subsection—

"(A) subject to subparagraph (B), shall be effective for a period specified by the Secretary of Defense; and

"(B) shall not be effective for more than 2 years.

"(3)(A) The Secretary of Defense may issue additional exemptions under this subsection for the same action or category of actions, after—

"(i) conferring with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate; and

"(ii) making a new determination that the additional exemption is necessary for national defense.

"(B) Each additional exemption under this paragraph shall be effective for a period specified by the Secretary of Defense, of not more than 2 years.".

SEC. 5. INCIDENTAL TAKINGS OF MARINE MAMMALS IN MILITARY READINESS ACTIVITY.

Section 101(a)(5) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(5)) is amended—

(1) in subparagraph (A)—

(A) by striking "within a specified geographical region";

(B) by striking "within that region of small numbers"; and

(C) by adding at the end the following:

"Notwithstanding the preceding sentence, the Secretary is not required to publish notice under this subparagraph with respect to incidental takings while engaged in military readiness activities authorized by the Secretary of Defense, except in the Federal Register.";

(2) in subparagraph (B)—

(A) by striking "within a specified geographical region"; and

(B) by striking "within one or more regions"; and

(3) in subparagraph (D)—

(A) in clause (i)—

(i) by striking "within a specific geographic region";

(ii) by striking "of small numbers"; and

(iii) by striking "within that region"; and

(B) by adding at the end the following:

"(vi) Notwithstanding clause (iii), the Secretary is not required to publish notice under this subparagraph with respect to an authorization under clause (i) of incidental takings while engaged in military readiness activities authorized by the Secretary of Defense, except in the Federal Register.".

SEC. 6. LIMITATION ON DEPARTMENT OF DEFENSE RESPONSIBILITY FOR CIVILIAN WATER CONSUMPTION IMPACTS ON CRITICAL HABITAT OR ENDANGERED SPECIES.

(a) RULE OF CONSTRUCTION.—For purposes of section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536), the terms "action" and "agency action", when applied to any action of the Department of Defense, shall not include water consumption of any kind unless—

(1) such water consumption occurs on a military installation, whether the source of the water consumed is located on or off the installation; or

(2) such water consumption occurs off of a military installation and the source of the water is under the direct control of the Department of Defense.

(b) VOLUNTARY EFFORTS.—Nothing in this section shall prohibit a military installation from voluntarily undertaking efforts to mitigate water use and consumption.

(c) DEFINITIONS.—In this section:

(1) The term "military installation" has the meaning given such term in section 2687(e) of title 10, United States Code.

(2) The term "water consumption" means the use of water, from any source, for human purposes of any kind, including household or industrial use, irrigation, or landscaping.

(d) EFFECTIVE DATE.—This section applies only to Department of Defense actions regarding which consultation or reconsultation under section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) is first required on or after the date of the enactment of this Act.

PURPOSE OF THE BILL

The purpose of H.R. 1835 is 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.

BACKGROUND AND NEED FOR LEGISLATION

Endangered Species Act provisions

Over the past decade, designation of critical habitat under the Endangered Species Act (ESA) has been a source of controversy. Due to the rigorous mandates required under the current ESA, specifically critical habitat designations, many think the program is unworkable. Judicial orders and court-approved settlement agreements have left the U.S. Fish and Wildlife Service (USFWS) with limited ability to prioritize its species recovery programs and little or no scientific discretion to focus on those species in greatest need of conservation. The Administration acknowledges that court orders and mandates often result in leaving the USFWS with almost no ability to confirm scientific data in its administrative record before making decisions on listing and critical habitat proposals. In the wake of the current circumstances, the Administration has recognized that critical habitat provides relatively little additional protection to listed species.

The Department of Defense (DOD) manages 25 million acres on more than 425 military installations in the United States, providing habitat for over 300 species listed as threatened or endangered. Under the Clinton Administration, recognizing the escalating challenge of balancing the ESA and that of DOD's primary mission of maintaining our Nation's military readiness, USFWS found a legitimate way to protect endangered species without invoking the critical habitat requirements of the ESA. Instead of new critical habitat designations, the Administration began using "Integrated Natural Resource Management Plans" (INRMPs), which are developed in close cooperation with USFWS and state wildlife agencies. INRMPs authorized in the Sikes Act (16 U.S.C. 670–670f)—ensure that readiness operation and natural resources con-

servation are both accommodated and consistent with stewardship and legal requirements. INRMPs provide for extensive public notice and comments. They are a comprehensive approach to ecosystem management that the USFWS has repeatedly determined to be sufficient to protect endangered species and their habitats.

The use of an INRMP as an alternative to a critical habitat designation has been threatened by legal challenge. H.R. 1835 will codify the use of INRMPs, thereby strengthening the legal defense of these plans before the court.

Marine Mammal Protection Act provisions

In 1981, the Marine Mammal Protection Act (MMPA) was amended to include authority for the Secretary of Commerce (or the Secretary of the Interior in certain circumstances) to issue incidental take authorizations for specified activities (other than commercial fishing operations) in specified geographic regions for periods of not more than five years if the activity has a negligible impact and takes small numbers of marine mammals of a species or takes from a population stock that is not depleted. The purpose of this new authority was to allow activities to occur around marine mammals, but to ensure that the activity did not have an adverse effect on the species.

The Secretary, when developing the implementing regulations, combined the negligible impact and small numbers requirements. The regulations, therefore, allowed the Secretary to make one finding. If an activity was determined to have a negligible impact on a marine mammal species, then the Secretary's determination also meant a small number of marine mammals would be affected and the activity could receive a small take authorization.

In 1994, the MMPA was again amended to include a definition of "harassment". In brief, the definition of "harassment" is any act of pursuit, torment, or annoyance of marine mammals which: [level A] has the potential to injure and [level B] has the potential to disturb by causing a disruption of behavioral patterns. This definition was included in the MMPA to clarify what activities constitute harassment and to assist the Secretary in enforcing actions that may adversely affect marine mammals. However, the definition has not led to better enforcement of the MMPA. The Secretary has been unable to prosecute certain activities (like jet skiing) that have been directed at specific animals due to the two-tiered requirement of the definition. The Secretary is required to determine if an action is an act of pursuit, torment, or annoyance and if that can be done, the Secretary then makes a determination if the action was level A or level B harassment.

The National Research Council (NRC) has issued three reports on the effects of sound on marine mammals: Low Frequency Sound and Marine Mammals: Current Knowledge and Research Needs, 1994; Marine Mammals and Low Frequency Sound: Progress Since 1994, 2000; and Ocean Noise and Marine Mammals, 2003.

In its 2000 report, the NRC concluded that regulating minor changes in behavior having no adverse impact did not make sense; instead, the regulations must focus on significant disruption of behaviors critical to survival and reproduction. The 2000 report recommended amending level B harassment to reflect these conclusions. The 2003 NRC report expanded further on the changes to

level B harassment and recommended that level B harassment should be modified to focus on biologically significant disruption of behaviors critical to survival and reproduction (i.e. adverse impacts), instead of any detectable change in behavior.

The 2000 report also recommended the removal of "small numbers" from the incidental take authorization, stating that it would be desirable to remove the phrase "small number" from the MMPA. The concern was that if the language was retained there would be a two test standard, small numbers first and if that were met, then negligible impact from the take of small numbers. The report stated, "The removal of 'small numbers' would prevent the denial of research permits that might insignificantly harass large numbers of animals and would leave the 'negligible impact' test intact."

The Administration, first under President Clinton and then under President George W. Bush, proposed amending the definition of harassment in the Administration's draft MMPA reauthorization bill. The language in the Administration's bill modifies the NRC language to allow for proper implementation and enforcement. The "harassment" definition in H.R. 1835 is taken from the Administration's draft MMPA bill.

DOD has requested amending the MMPA to provide relief for military readiness activities due to a recent court case, *Natural Resources Defense Council, et al.* v. *Donald Evans, et al.* The case focuses on the incidental take authorization issued to the Navy authorizing the testing and training of its Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) sonar.

The plaintiffs in the case called into question the Secretary's implementing regulations, specifically the combination of the "small numbers" and "negligible impact" findings in its application to the sonar permit. In addition, the plaintiffs argue that in the final rule the Secretary used an illegal definition of "harassment" and too broadly defined the "specified geographic region". The judge ruled that the combination of the "small number" and "negligible impact" findings was in violation of the statute. The judge agreed with the plaintiffs that the Secretary did use an illegal definition of "harassment" and ruled that the Secretary used the best scientific information available when determining the specific areas the sonar could be tested. As a result of the court's rulings, the Navy has been severely limited in its ability to test and train its SURTASS LFA sonar.

COMMITTEE ACTION

H.R. 1835 was introduced on April 29, 2003, by Congressmen Elton Gallegly (R–CA), Richard W. Pombo (R–CA), Jim Gibbons (R–NV), and Don Young (R–AK). The bill was referred to the Committee on Resources and additionally to the Committee on Armed Services. On May 6, 2003, the Full Resources Committee held a hearing on the bill. On May 7, 2003, the Full Resources Committee met to mark up the bill. Chairman Richard Pombo offered an amendment to strike: (1) the language in Section 2(a) of the bill which would allow federal agencies to protect listed species as is practicable and consistent with their primary purposes and; (2) the third paragraph in the harassment definition, in Section 3 of the bill, which referenced any act directed toward a specific individual, group, or stock of marine mammals. This amendment was adopted

by voice vote. Congressman Rick Renzi (R–AZ) offered an amendment to add a new section to the bill on "Limitation on Department of Defense Responsibility for Civilian Water Consumption Impacts on Critical Habitat or Endangered Species," by defining two terms in Section 7 of the ESA. The terms when applied to the Department of Defense shall not include water consumption of any kind unless the consumption occurs on the military installation or the consumption occurs off the installation, but the source of water is under the direct control of the Department. The amendment was adopted by a roll call vote of 22 to 16, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
108th Congress

Date: May 7, 2003

Convened: _____
Adjourned: _____

Meeting on: Mr. Renzi amendment to H.R. 1835 (Add at end of new section: SEC. Limitation Department of Defense Responsibility for Civilian Water Consumption Impacts on Critical Habitat or Endangered Species, **was NOT AGREED TO by a Record Vote of 22 Yeas and 16 Nays**

☐ Attendance ☒ Recorded Vote Vote Number 18 Total: Yeas 22 Nays 16

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman	✓			Mr. Peterson, PA			
Mr. Rahall, WV		✓		*Mr. Tom Udall, NM*		✓	
Mr. Young, AK				Mr. Gibbons, NV	✓		
Mr. Miller, CA				*Mr. Mark Udall, CO*		✓	
Mr. Tauzin, LA				Mr. Souder, IN	✓ UC		
Mr. Markey, MA		✓		*Mr. Acevedo-Vilá, PR*		✓	
Mr. Saxton, NJ				Mr. Walden, OR	✓		
Mr. Kildee, MI		✓		*Mr. Carson, OK*			
Mr. Gallegly, CA				Mr. Tancredo, CO	✓		
Mr. Faleomavaega, AS				*Mr. Grijalva, AZ*		✓	
Mr. Duncan, TN				Mr. Hayworth, AZ	✓		
Mr. Abercrombie, HI		✓		*Mr. Cardoza, CA*	✓		
Mr. Gilchrest, MD	✓			Mr. Osborne, NE	✓		
Mr. Ortiz, TX				*Ms. Bordallo, GU*	✓		
Mr. Calvert, CA				Mr. Flake, AZ	✓		
Mr. Pallone, NJ		✓		*Mr. Hinojosa, TX*			
Mr. McInnis, CO				Mr. Rehberg, MT	✓		
Mr. Dooley, CA				*Mr. Rodriguez, TX*		✓	
Mrs. Cubin, WY	✓			Mr. Renzi, AZ	✓		
Mrs. Christensen, VI		✓		*Mr. Baca, CA*		✓	
Mr. Radanovich, CA	✓			Mr. Cole, OK	✓		
Mr. Kind, WI		✓		*Ms. McCollum, MN*		✓ UC	
Mr. Jones, NC	✓			Mr. Pearce, NM	✓		
Mr. Inslee, WA		✓		Mr. Bishop, UT	✓		
Mr. Cannon, UT	✓			Mr. Nunes, CA	✓		
Mrs. Napolitano, CA		✓		Mr. Putnam, FL	✓		
				Total	22	16	

The bill as amended was then ordered favorably reported to the House of Representatives by a roll call vote of 25 to 13, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
108th Congress

Date: May 7, 2003

Convened: _____
Adjourned: _____

Meeting on: On favorably reporting H.R. 1835 to the House as amended

☐ Attendance ☒ Recorded Vote Vote Number 19 Total: Yeas 25 Nays 13

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman	✓			Mr. Peterson, PA	✓		
Mr. Rahall, WV		✓		*Mr. Tom Udall, NM*		✓	
Mr. Young, AK	✓			Mr. Gibbons, NV	✓		
Mr. Miller, CA				*Mr. Mark Udall, CO*		✓	
Mr. Tauzin, LA				Mr. Souder, IN	✓		
Mr. Markey, MA		✓		*Mr. Acevedo-Vilá, PR*			
Mr. Saxton, NJ				Mr. Walden, OR	✓		
Mr. Kildee, MI		✓		*Mr. Carson, OK*			
Mr. Gallegly, CA				Mr. Tancredo, CO	✓		
Mr. Faleomavaega, AS				*Mr. Grijalva, AZ*		✓	
Mr. Duncan, TN				Mr. Hayworth, AZ	✓		
Mr. Abercrombie, HI	✓			*Mr. Cardoza, CA*	✓		
Mr. Gilchrest, MD	✓			Mr. Osborne, NE	✓		
Mr. Ortiz, TX				*Ms. Bordallo, GU*	✓		
Mr. Calvert, CA				Mr. Flake, AZ	✓		
Mr. Pallone, NJ		✓		*Mr. Hinojosa, TX*			
Mr. McInnis, CO				Mr. Rehberg, MT	✓		
Mr. Dooley, CA				*Mr. Rodriguez, TX*		✓	
Mrs. Cubin, WY	✓			Mr. Renzi, AZ	✓		
Mrs. Christensen, VI		✓		*Mr. Baca, CA*	✓		
Mr. Radanovich, CA	✓			Mr. Cole, OK	✓		
Mr. Kind, WI		✓		*Ms. McCollum, MN*		✓	
Mr. Jones, NC	✓			Mr. Pearce, NM	✓		
Mr. Inslee, WA		✓		Mr. Bishop, UT			
Mr. Cannon, UT	✓			Mr. Nunes, CA	✓		
Mrs. Napolitano, CA		✓		Mr. Putnam, FL	✓		
				Total	25	13	

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The Act may be cited as the "National Security Readiness Act of 2003".

Section 2. Military readiness and the conservation of protected species

Subsection (a) amends section (4)(a)(3) of the Endangered Species Act by striking "prudent and determinable" and inserting "necessary".

Subsection (b) amends section (4)(A)(3) of the ESA by adding a new (B)(i) which requires the Secretary of the Interior to not designate critical habitat for lands or other geographic areas owned or controlled by the Department of Defense that are subject to INRMPs if the Secretary determines such plans address special management conditions or protections. Consultations under section 7(a) of the ESA are still required and the Department of Defense is still obligated to comply with section 9 of the ESA.

It is the intent of the Committee that an INRMP on a military installation shall be deemed a sufficient species management program so that a designation of critical habitat is not needed for that facility. H.R. 1835 will codify the policy brought forward by the Clinton and Bush Administrations that allowed the Department of Defense to cooperate with the USFWS in responsibly managing habitat.

Section 3. Amendment to definition of harassment under Marine Mammal Protection Act of 1972

Section 3(18) of the MMPA is amended by striking "any act of pursuit, torment, or annoyance which" after "harassment means." It also modifies [level A] harassment to include "injures or has the significant potential to injure" and [level B] harassment to include "disturbs or is likely to disturb." The amended definition clarifies "natural behavioral patterns" as migration, surfacing, nursing, breeding, feeding, or sheltering. An act is considered level B "harassment" if it effects a marine mammal to a point where the marine mammal's "natural behavioral patterns" are abandoned or significantly altered.

Section 4. Exemption of actions necessary for national defense

This section amends the MMPA to include an exemption for the Secretary of Defense after conferring with the Secretary of Commerce, or the Secretary of the Interior, or both, as appropriate, for military readiness activities necessary for national defense. The Secretary of Defense can apply for an exemption for a period of not more than two years and can ask for extensions for periods of not more than two years.

Section 5. Incidental takings of marine mammals in military readiness activity

This section amends section 101(a)(5) of the MMPA by striking any reference to "small numbers" and "specified geographic region."

The removal of these provisions would no longer require that activities authorized under this section be limited to a "specified geo-

graphic region" or restricted to effecting only "small numbers" of marine mammals. The scientifically-based "negligible impact" standard will be the guide for the Secretary of Commerce when determining the effect of activities on marine mammals. The underlying rulemaking process will still analyze the impacts and scope of military readiness and other activities.

It is the intent of the Committee that the deletion of "specified geographical regions" and "small numbers" requirements from the MMPA will require the Secretary of Commerce to amend the current regulatory definition of "specified activity", set forth in 50 Code of Federal Regulations 216.103, to ensure consistency with the MMPA as amended. "Specific activity" should be redefined to preclude mention of "small numbers" and "specified geographic region".

These proposed amendments do not change the applicant's requirement of having to show that his or her activities are having a negligible impact on the marine mammal species and populations. Additionally, the applicant will have to demonstrate that his or her 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 take authorizations under the MMPA.

It is also the intent of the Committee that nothing in this provision would preclude the National Marine Fisheries Service from issuing an incidental take authorization only for the area described in the permit application.

This section also strikes all notice requirements for an incidental take authorization for a military readiness activity, except the Federal Register publication. In referring to military readiness activities, the Committee means those activities defined in Section 315(f) of Public Law 107–314 (Bob Stump National Defense Authorization Action for Fiscal Year 2003). The section also clarifies that references to military readiness activities "authorized by the Secretary of Defense" do not require a specific authorization of each activity by the Secretary of Defense and that the Secretary of Defense is not prohibited from delegating such authority. Finally, none of these changes in any way requires the public disclosure of classified information.

Section 6. Limitation on Department of Defense responsibility for civilian water consumption impacts on critical habitat or endangered species

(a) Rule of Construction. The terms "action" and "agency action" in Section 7 of the ESA are clarified so as when applied to any action of the Department of Defense the terms shall not include water consumption of any kind unless the consumption occurs on the military installation or the consumption occurs off the installation, but the source of water is under the direct control of the Department.

(b) Voluntary Efforts. Nothing in the section shall prohibit a military installation from voluntarily mitigating water use and consumption.

(c) Definitions. The terms "military installation" and "water consumption" are defined.

(d) Effective date. The requirements regarding consultation or reconsultation under section 7 of the ESA is first required on or after the date of enactment of this Act.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. This bill does not authorize funding and therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 12, 2003.

Hon. RICHARD POMBO,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1835, the National Security Readiness Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

BARRY B. ANDERSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 1835—National Security Readiness Act of 2003

H.R. 1835 would exempt the Department of Defense (DoD) from complying with certain requirements of the Endangered Species Act of 1973 (ESA) and the Marine Mammal Protection Act of 1972. The bill also would amend the ESA to change the standard for determining when critical habitat for threatened or endangered species should be designated and would prohibit such designations from being made on land owned or controlled by DoD.

CBO estimates that implementing H.R. 1835 would have no significant impact on the federal budget. Based on information provided by the Department of the Interior, we do not expect the revisions made to the two conservation acts would cause any change in the workload of the agencies responsible for implementing and enforcing them (primarily the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration). The DoD expects that the changes would provide additional flexibility in carrying out military training and testing exercises. CBO expects that the department could experience some reduction in the costs of complying with the two acts, but realizing any such savings would depend on future appropriations actions. Enacting this bill would not affect direct spending or revenues.

H.R. 1835 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Deborah Reis. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 4 OF THE ENDANGERED SPECIES ACT OF 1973

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) * * *

* * * * * * *

(3)*(A)* The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent [prudent and determinable] *necessary*—

> [(A)] *(i)* shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

[(B)] *(ii)* may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines that such plan addresses special management considerations or protection (as those terms are used in section 3(5)(A)(i)).

(ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) BASIS FOR DETERMINATIONS.—(1) * * *

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, *the impact on national security,* and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweight the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * * * *

MARINE MAMMAL PROTECTION ACT OF 1972

* * * * * * *

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) * * *

* * * * * * *

[(18)(A) The term "harassment" means any act of pursuit, torment, or annoyance which—

[(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or

[(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.]

(18)(A) The term "harassment" means—

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or

(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, including, but

not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.

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TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

MORATORIUM AND EXCEPTIONS

SEC. 101. (a) There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) * * *

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(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) **[**within a specified geographical region**]**, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity **[**within that region of small numbers**]** of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment—

(i) * * *

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Notwithstanding the preceding sentence, the Secretary is not required to publish notice under this subparagraph with respect to incidental takings while engaged in military readiness activities authorized by the Secretary of Defense, except in the Federal Register.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity **[**within a specified geographical region**]** if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that—

(i) * * *

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities **[**within one or more regions**]** is having, or may have, more than a negligible impact on the species or stock concerned.

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(D)(i) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) **[**within a specific geographic region**]**, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not

intentional, taking by harassment [of small numbers] of marine mammals of a species or population stock by such citizens while engaging in that activity [within that region] if the Secretary finds that such harassment during each period concerned—

(I) * * *

* * * * * * *

(vi) Notwithstanding clause (iii), the Secretary is not required to publish notice under this subparagraph with respect to an authorization under clause (i) of incidental takings while engaged in military readiness activities authorized by the Secretary of Defense, except in the Federal Register.

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(f) EXEMPTION OF ACTIONS NECESSARY FOR NATIONAL DEFENSE.—(1) The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this Act, if the Secretary determines that it is necessary for national defense.

(2) An exemption granted under this subsection—

(A) subject to subparagraph (B), shall be effective for a period specified by the Secretary of Defense; and

(B) shall not be effective for more than 2 years.

(3)(A) The Secretary of Defense may issue additional exemptions under this subsection for the same action or category of actions, after—

(i) conferring with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate; and

(ii) making a new determination that the additional exemption is necessary for national defense.

(B) Each additional exemption under this paragraph shall be effective for a period specified by the Secretary of Defense, of not more than 2 years.

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DISSENTING VIEWS

H.R. 1835 purports to address concerns raised by the Department of Defense that the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) undermine national security and impede military readiness. Yet H.R. 1835 goes beyond the provisions the Administration requested in the Department of Defense Authorization Act of 2004 transmitted to Congress on April 10, 2003. The Administration has not asked for H.R. 1835 and failed to even take a position on the legislation at the May 6, 2003, hearing.

In our view, H.R. 1835 overreaches and is unnecessary. The Secretary of Defense has never used the exemptions available to him under Public Law 105–85 and Section 7(j) of the ESA. In addition, the General Accounting Office has found that training readiness remains high at military installations notwithstanding our environmental laws.

Under Section 4(b)(2) of the ESA, the Secretary of the Interior already has the discretion to substitute preparation of an adequate Integrated National Resources Management Plan (INRMP) prepared by the Secretary of Defense pursuant to the Sikes Act for critical habitat designation. In fact, it is the practice of the Fish and Wildlife Service to substitute an INRMP that provides for the conservation of the species, and includes assurances that the INRMP will be implemented and effective, for critical habitat designation, according to the Congressional Research Service. This discretion has never been challenged successfully in court. Unless the Fish and Wildlife Service continues this policy under H.R. 1835, the only time the conservation needs of the species will be examined will come during a Section 7 consultation when it is likely to be too late as the species and habitat may already have dwindled significantly.

The Majority complains that lawsuits are driving policy at the Fish and Wildlife Service, yet the Committee failed to adopt the one provision recommended in testimony given by Interior Assistant Secretary for Fish and Wildlife and Parks Craig Manson to avoid future litigation. He asked the Committee to strike the words "provides the 'special management considerations or protection' required under the Endangered Species Act (16 U.S.C. 1532(5)(A)) and" in Section 2(c)(3) of H.R. 1835 but this recommendation was ignored.

Section 2(b) of H.R. 1835 would require the Secretary of the Interior to designate critical habitat to the maximum extent "necessary" without defining "necessary." This change would give the Interior Secretary too much latitude at a time when the world is on the brink of the sixth mass extinction, according to testimony presented to the Committee. As critical habitat shrinks, endemic species die at a proportional rate. Once a species is lost, it is gone

forever and so too may be key sources of food and medicine. The Administration did not request the language in Section 2(b) and it should be dropped.

Similarly, Section 6 of H.R. 1835 would exempt the Department of Defense from Section 7 of the ESA for any of its off-base actions related to water consumption; here again, the Department of Defense is not seeking this amendment adopted in full Committee and it has nothing to do with national security. Section 6 of H.R. 1835 applies nationwide and should be deleted.

In regards to the MMPA, H.R. 1835 does nothing to address the concerns raised regarding the DoD proposed changes to weaken the Act. Rather, the bill compounds these problems by broadening the scope of these changes beyond that proposed by the Pentagon to further undermine protections for all marine mammals of which several species still remain listed after thirty years as endangered or threatened.

The Navy portrays its proposed changes to the MMPA's definition of harassment as "narrowly tailored to protect military readiness activities, not the whole scope of Defense Department activities", and asserts that the new definition would provide "greater clarity and notice regarding application of the MMPA to military readiness activities." Yet section 3 of H.R. 1835, which parallels the DoD proposal, can be considered neither narrow in scope, an improvement on suggested ambiguities in the present definition, nor science-based.

First, the definition proposed in section 3 does not reflect the recommendations of the National Research Council. The NRC did not recommend any change to Level A harassment, and the NRCs recommended change to the language of Level B harassment did not include the subjective and ambiguous phrase "to a point where such behavioral patterns are abandoned or significantly altered." That this proposed language no more clarifies the existing definition of harassment is succinctly stated in Dr. Peter Tyack's March 13, 2003 testimony before the Military Readiness Subcommittee of the House Armed Services Committee. Dr. Tyack is a renowned marine mammal biologist and the principal research scientist for the Navy's SURTASS/LFA scientific research program. Tyack clearly states that, "The proposed changes in the definition of harassment do not make sense from a biological perspective and do not fully clarify the problems with the earlier definition." Assertions made by the Navy that this new definition is science-based and a clarification are a sham.

Furthermore, this definition would reverse the essential protective mandate that is the operative premise of the MMPA. In a written response to questions contained in the Committee on Resources Report 107–65, the Chairman of the Marine Mammal Commission, Dr. John Reynolds, notes that "the proposed definition effectively reverses the precautionary burden of proof [on a permit applicant] that has been a hallmark of the [MMPA] since its inception in 1972." This critique is even more applicable considering the provisions in section 5 of H.R. 1835 that would strike from the MMPA key conservation terms specifying small numbers and specific geographic regions necessary to determine the nature and extent of incidental harm to a marine mammal or marine mammal population

caused by a proposed activity. That these terms were also key elements of the courts decision in *NRDC* v. *Evans,* 232 F. Supp.2d 1003 (n.D. Cal 2002) which enjoined the Navy from global deployment of its SURTASS/LFA sonar system is not a coincidence.

The Navy's rationale for seeking this new definition is to spare military readiness activities from a purported regulatory burden of seeking MMPA permits. We note again for the record that neither the Departments of Commerce nor Interior have ever denied a permit request made by the Navy. Even if we found the Navy's argument credible, we cannot ignore the fact that the definition in H.R. 1835 would apply to all activities, not just military readiness activities. Far from being a simple clarification, this new definition would provide a far broader and much higher legal threshold for regulators to determine an activity's potential and likely harm. Consequently, a significant loophole would be created to allow a great many more activities to be granted permits for incidental harassment, or worse, to evade any permit review at all.

Finally, section 4 of H.R. 1835 would grant to the Secretary of Defense an audacious and unwarranted discretionary authority to exempt any action, or any category of actions, undertaken by the Department of Defense from compliance with the MMPA. As stated earlier, the Secretary has never invoked exemption authorities currently available to him under other statutes. Accordingly, we question the necessity or practical benefit of authorizing an exemption authority under the MMPA. Yet, even if an exemption authority was found to be desirable, the exemption authority in H.R. 1835, which would obviate any meaningful environmental review by the Federal resource agencies, revoke any requirement for public comment, and allow exemptions to be endlessly renewed at two year intervals, is utterly remarkable in its contrast to other comparable exemption authorities which ensure at least some measure of administration or public accountability.

In closing, lacking any compelling data to conclusively demonstrate that military readiness and training have suffered as a result of compliance with the ESA and MMPA, we are not persuaded that the changes to these acts proposed by the military are justified. If anything, the recently completed Iraqi Freedom campaign verifies once again that our armed forces remain the best trained, best equipped force on the planet. The majority has opportunistically selected the present circumstances as a thin veneer behind which to move legislation to weaken key aspects of the ESA and MMPA that it could not achieve otherwise. Such overreaching should not be rewarded, and the House should reject this legislation.

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