

Environmental Coalition Opposes the Pentagon's 'Readiness and Range Preservation Initiative'

*American Rivers * Center for Biological Diversity
Center for Public Environmental Oversight * Defenders of Wildlife
Earth Island Institute * Earthjustice * Endangered Species Coalition
The Humane Society of America * Military Toxics Project * National Audubon Society
National Environmental Trust * National Wildlife Federation *
Natural Resources Defense Council * Oceana
Public Employees for Environmental Responsibility * Seaflow
Sierra Club * US PIRG * World Wildlife Fund*

This year, Congress is being asked again to consider a proposal from the Pentagon that would provide the Department of Defense with sweeping new exemptions from the laws that protect our clean water, clean air and wildlife. While we understand the importance of our military's efforts to protect national security, additional exemptions being proposed in *The Readiness and Range Preservation Initiative* are not necessary to accomplish this goal and will only threaten our nation's public health and natural heritage.

No government agency should be above the law – especially the laws that protect the air and water in and around our military facilities and the health of the people who live nearby. Exempting military operations from fundamental public health and environmental laws will make the people who live near these exempted military operations and the states that host them second class citizens, stripping them of protections provided at private sector facilities, and shifting the burden of habitat protection entirely to other federal agencies and the private sector.

The statutes now under fire already provide the flexibility needed to balance environmental protection and military readiness by allowing exemptions on a case-by-case basis in the interest of national security. According to a briefing presented to the Deputy Secretary of Defense by the Department's "Senior Readiness Oversight Council" last December:

national security clauses exist in many of this Nation's environmental statutes that would allow senior officials...to exclude DoD from certain provisions...under certain conditions. To date DoD has not used such exemptions to any extent to address encroachment concerns...ⁱ

There is no evidence that the military has ever been refused an exemption from these laws when it has been sought, and abundant evidence that cooperative local efforts have produced effective solutions. The military has, time and time again, found reasonable solutions to pursue necessary training in compliance with environmental laws.

Independent and administration sources agree that protecting the environment has not compromised readiness. The General Accounting Office (GAO) said the DoD has failed to produce quantitative evidence that environmental laws or other "encroachments" have significantly affected military readiness.ⁱⁱ And Christine Whitman, head of the U.S.

Environmental Protection Agency, recently testified before the Senate that she has “been working very closely with the Department of Defense and I don’t believe that there is a training mission anywhere in the county that is being held up or not taking place because of environmental protection regulation.”ⁱⁱⁱ The National Park Service also recently warned that the changes being sought “would cause substantial degradation of natural resources.”^{iv}

DoD’s proposal ignores concerns expressed by states and local communities directly affected by base operations. The Pentagon’s proposal directly contradicts the principle of the Federal Facilities Compliance Act – passed nearly unanimously in 1992 – by unnecessarily exempting the DoD from federal laws at the expense of public health, public lands, air and water, and wildlife. Moreover, if the exemptions were granted, American taxpayers and state governments would bear the burden of cleanup costs and face public health risks from toxic contamination resulting from military operations. Last year, the Attorney General of Colorado wrote:

...we are concerned that providing the Department of Defense statutory exemptions from environmental laws will have adverse impacts on human health and the environment...substantially increased cost to “remedy” environmental contamination, and greater constraints on the use of training ranges...The Department...cannot afford to repeat the experience at the Massachusetts Military Reservation ... There, decades of military training activities have contaminated over 60 billion gallons of groundwater in the sole source aquifer for Cape Cod.^v

Under this proposal, the Defense Department will be exempted from laws that have long been supported by the American people, including laws that preserve the air and water around our military facilities, protect the health of people who live on or near military bases, and sustain America’s wildlife -- the Resource Conservation and Recovery Act, Superfund (CERCLA), the Clean Air Act, the Endangered Species Act, and the Marine Mammal Protection Act. Last year, with the exception of the Migratory Bird Treaty Act, Congress rejected these exemptions and we are requesting that they do the same this year.

What follows is a brief overview of the laws at risk from the Pentagon’s proposal.

Resource Conservation and Recovery Act: Exempting the military from hazardous waste regulation

The Defense Department’s proposal seeks to exempt explosives and munitions at “operational” military ranges (a vague term which includes dozens of ranges that have been inactive for years or decades), and the toxic contamination they cause, from regulation under the Resource Conservation and Recovery Act (RCRA). RCRA is the nation’s premier law for regulating “hazardous wastes” and is meant to prevent toxic pollution and ensure that the parties responsible for hazardous wastes pay to clean them up. Military munitions contain heavy metals and other toxic substances that escape into the air, soil, and water when the munitions are fired and if they do not explode or only partially explode, and when munitions and their components are produced or destroyed. This proposal would exempt munitions and their toxic components from virtually any regulation under RCRA by exempting “explosives, unexploded ordnance, munitions,

munition fragments, or constituents thereof” on operational military ranges from RCRA’s definition of “solid waste.” The proposed language would allow the Defense Department to simply leave munitions releasing toxic substances lying on or in the ground where they can leach into the environment, without any independent oversight or regulation. It would also seek to exempt from RCRA ordnance and toxic munitions contamination at sites other than training ranges. Army Ammunition Plants and facilities that have produced, tested, and demilitarized military rockets are some of the nation’s most contaminated public and private sites warranting inclusion on EPA’s Superfund list.

The Defense Department claims that this proposal would simply codify existing regulatory policy. This is not true. EPA currently has authority under RCRA to order investigation and cleanup of both off-range and on-range munitions contamination when there is an imminent and substantial endangerment to public health. DOD’s language – which is extremely broad and vague – would seemingly prevent EPA from exercising this authority, even in the face of an immediate danger to public health.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Exempting the military from cleaning up toxic substances

The Defense Department is already responsible for more Superfund sites than any other party -- at least 130. Yet this proposal seeks to exempt the agency from having to clean up the toxic substances that leach from military explosives and munitions on “operational ranges” (once again a vague term which includes dozens of ranges that have been inactive for years or decades). CERCLA (the Superfund law) is our nation’s premier law for cleaning up the worst toxic waste sites. The language would allow the military to wait to clean up such sites until after toxic contamination has increased for years, has spread off-site, and has driven cleanup costs much higher. How would it do this? CERCLA’s clean up provisions are triggered by a “release” of a toxic substance. The language exempts from the term “release” any “explosives, munitions, munitions fragments, or constituents thereof” unless the range is closed or the toxic substances migrate off the range. CERCLA would only apply to these substances after the contamination has spread for years or decades, threatening public health and environmental quality, and adding years and potentially billions of dollars to any final clean up.

What is most disturbing is that DOD appears to have made a conscious decision to exclude munitions constituents from oversight not because it interferes with readiness—there has never been a documented instance where this has happened—but because of the staggering liability it will bear for the characterization and remediation of Perchlorate and other energetic contaminants such as RDX and HMX. The current legal authority on munitions contamination is the Military Munitions Rule promulgated by EPA in 1997 as directed by Congress in the Federal Facilities Compliance Act of 1992. The Munitions Rule determines, among other things, when munitions become a hazardous waste. However, it does not cover munitions constituents. DOD, it appears, consciously chose to include these constituents in the items to be excluded from our nations’ hazardous waste laws despite the real risks they pose to human health.

The Defense Department claims that this proposal would simply codify existing regulatory policy. This is not true. The RCRA and CERCLA proposals, when taken together, would

force nearly all responses to munitions contamination to occur under CERCLA. Unless an active military range is listed on the Superfund National Priorities List (which is highly unlikely), DOD would itself be leading the response to both on- and off-range munitions contamination. Under DOD's proposal, EPA – and, by extension, states -- would likely have no independent authority under either RCRA or CERCLA to issue binding orders or go to court to address either off-range or on-range contamination, even in the case of an imminent and substantial endangerment to human health. EPA and states could be cut off from any effective oversight of contamination caused by military munitions.

Up to 25 million acres of land and untold acres of water at several thousand sites in the U.S. – including sites near populated areas - are currently contaminated nationwide with toxic munitions constituents and unexploded ordnance. At the Massachusetts Military Reservation on Cape Cod, on-site contamination impacted local wells and a sole source aquifer supplying drinking water for half a million people. Two separate communities adjacent to Aberdeen Proving Grounds, MD now know that their drinking water is contaminated from Perchlorate that is flowing off base. In many cases, it is unclear whether DOD's proposal would allow contamination that has migrated off site to be addressed at its source.

For more information on RCRA/CERCLA contact: Aimee Houghton, Center for Environmental Oversight, (202) 452 8039; Steve Taylor, Military Toxics Project, (207) 783-5091; Geoff Fettus, Natural Resources Defense Council, (202) 289-6868 Julie Wok, USPIRG, (202)546-9707

Clean Air Act: Permitting the military to pollute our air

The Readiness and Range Preservation Initiative's (RRPI) proposed revisions to the Clean Air Act seek to exempt the Department of Defense from having to comply with our national public health air quality standards, called national ambient air quality standards or NAAQS. This means that those living in areas near military bases could breathe dirtier air, which could result in more premature deaths, asthma attacks, cardiopulmonary problems, and other adverse health and environmental effects. The sweeping exemptions within this proposal are unnecessary as the Clean Air Act has ample provisions to reconcile clean air requirements with national security and military readiness concerns.

The Clean Air Act requires states to analyze their pollution, and then develop comprehensive plans that delineate how a state will attain the federal air quality standards and how it will verify such attainment. The federal government is required to do its share, ensuring that its activities do not impair air quality. This means that DOD activities cannot cause or contribute to a violation of any NAAQS, increase the frequency or severity of NAAQS violations, or delay attainment of a standard. To ensure this, certain proposed federal activities trigger an analysis of emissions to determine the activity's impact on air quality.

Because RRPI defines military readiness so broadly, it attempts to permanently exempt DOD from conforming to federal or state implementation plans for attaining the NAAQS for

a broad range of activities. RRPI attempts to give DOD a three-year extension on its conformity analysis and allow the federal government to proceed with its activities while analyzing those same activity's effects on air quality. Although the RRPI contains language requiring DOD to cooperate with a state to ensure conformity within three years of the date of new activities, it subsequently attempts to remove all the hammers for ensuring that they do so and to preempt a state from taking action to require reductions from the DOD. Thus, an area that violates the NAAQS because of these military activities could no longer have to take steps to meet them or take additional steps to reduce air pollution.

Moreover, RRPI actually *defines* dirty air to be clean air, even though air quality in reality is dirty and unhealthy. Section 2018 does this by allowing EPA to approve areas as if they had attained the Clean Air Act's health-based standards, *even though areas have not attained these health standards*, if the reason for the nonattainment is military air pollution. This is without precedent in the Clean Air Act and a direct attack on the protectiveness and truthfulness of what it means to attain the Clean Air Act's health-based air quality standards. This has led the bi-partisan association of state and local air pollution control officials to oppose DOD exemptions from the Clean Air Act, and to write Congress noting that "the significant adverse air quality impacts that could result from such exemptions could unnecessarily place the health of our nation's citizens at risk."

Relieving DOD from its obligation to control its own air pollution, however, will only shift that burden to private industry, small businesses and the public. Responsible state and local officials will not allow unhealthy air caused by military pollution to remain unaddressed, and they will turn to local businesses and members of the public (through measures aimed at cars and trucks) to make up the emissions reductions to which the military should have contributed. Nor should the public be fooled into thinking that air quality is healthy in areas where military air pollution causes it to be unhealthy but the RRPI allows it to be falsely defined as healthy. Allowing the military to do less than its fair share to clean up our air will force burdens upon industry and small businesses and the public and, worse, it will encroach upon the public's right to breathe clean and healthy air.

The Defense Department claims that there is insufficient flexibility in current law to accommodate its needs, but the Clean Air Act provides ample mechanisms for exempting agency activities from conformity requirements where there truly is a military or national security need.

For information on Clean Air contact: John Walke, Natural Resources Defense Council, (202) 289-2406; Nat Mund, Sierra Club, (202) 547-1141.

Endangered Species Act: Eliminating Protections for Endangered Species

DOD's proposal would eliminate the designation of critical habitat on all lands "owned or controlled" by the military – where some of the best habitat remains for more than 300 species on the brink of extinction. Specifically, the proposal would prevent the U.S. Fish and Wildlife Service or National Marine Fisheries Service (Services) from designating critical habitat on any lands owned or controlled by DOD if an Integrated Natural

Resources Management Plan (INRMP) has been developed pursuant to the Sikes Act that “addresses special management consideration or protection.” This would do nothing to ensure that training activities are designed in a manner that avoids unnecessary destruction of essential habitats. To safeguard this nation’s natural heritage – especially the hundreds of imperiled species residing on the 25 million acres of military lands – the DOD must continue to uphold its ESA responsibilities.

DOD has a long history of successful compliance with the ESA on its numerous installations. Although species conservation challenges have arisen in a handful of locations, local DOD and federal wildlife officials have consistently met those challenges and developed strategies for achieving training objectives while complying with the ESA. DOD has rightly taken pride in its species conservation efforts, many of which were spurred on by the ESA.

DOD can request that the Services exercise their authority under section 4(b)(2) of the ESA to exclude specific parcels from critical habitat designations altogether where such designations would conflict with training needs. When such exclusions have been requested, they have been freely given – even when the result was to remove from protection lands that had been deemed “essential to conservation.” For example, of Camp Pendleton’s 150,000 acres, less than 5% are designated as critical habitat for any species. After considering portions of Camp Pendleton as critical habitat for the gnatcatcher, the FWS exercised its discretion under current law and excluded all of Camp Pendleton and Marine Corps Air Base Miramar from the gnatcatcher’s critical habitat designation. Providing DOD with a blanket legislative exemption, which would apply in the many places where no unavoidable conflict between wildlife conservation and national security exists, is unjustified.

For parcels of DOD land that are part of a critical habitat designation, and not excluded in the section 4(b)(2) process, section 7(a)(2) of the ESA provides an opportunity for DOD to work with Service officials to develop a “win-win” solution that allows training exercises to go forward while avoiding unnecessary damage to endangered species and habitats. In the unlikely event that DOD and Service officials are unable to develop such a “win-win” solution, section 7(j) of the ESA allows the Secretary of Defense to unilaterally exempt DOD from the law simply by finding that the action must be carried out for reasons of national security. To this date, no exemption has ever been sought.

For information on Endangered Species contact: Daniel Patterson, Center for Biological Diversity, (520) 623-5252; Mary Beth Beetham, Defenders of Wildlife, (202) 682-9400; Susan Holmes, Earthjustice, (202) 667-4500; Beth Lowell, Endangered Species Coalition, (202) 772-3230; Bart Semcer, Sierra Club (202) 547-1141; John Kostyack, National Wildlife Federation (202) 797-6879, Shannon Ryan, USPIRG (202) 546-9707 Robert Irwin, World Wildlife Federation (202) 861-8382.

Marine Mammal Protection Act: Allowing the military to harm marine mammals without review

The heart of the Marine Mammal Protection Act (MMPA) – our nation’s leading instrument for the conservation of whales, dolphins, sea otters, manatees, and other marine mammals

– is its general moratorium on the “taking” of these species. Under the moratorium, wildlife agencies are required to review government activities that have the potential to harass or kill these animals in the wild.

The Pentagon’s proposal would exempt the military from the MMPA in three significant ways. First, it would introduce a major loophole into the statutory definition of “harassment,” allowing a range of Pentagon activities that potentially harm marine mammals by causing physical injury or impairing their ability to breed, nurse, feed, or migrate, to escape review. Secondly, it would eliminate the requirement that takes be limited to “small numbers” of animals in a “specified geographic region,” opening the door to activities that could take hundreds of thousands of marine mammals across the world’s oceans. And, finally, it would create broad exemptions that seek to allow the Pentagon to bypass the review process entirely. Unlike military exemptions written into other statutes, the ones proposed for the MMPA are not triggered by war or national emergency and are not conditioned on completion of an initial stage of environmental review, but can be applied to virtually any military activity or technology at any time.

The likely result of these dramatic changes would be far less protection for marine mammals, less mitigation and monitoring of impacts, less transparency, and even more public controversy and debate. The DoD has not made the case that any such steps are warranted. Under the MMPA, the Pentagon may receive authorization to “harass” marine mammals through a streamlined process that, by law, can take no longer than 120 days. Furthermore, under the Armed Forces Code, it can obtain special accommodations to meet the needs of military readiness and can appeal adverse decisions to the President. This last provision has never been invoked with regard to the MMPA, presumably because – as the director of the National Marine Fisheries Service testified last year – not one of the Pentagon’s requests for authorization under the Act has ever been denied.

One example of the importance of the MMPA’s review provisions is the use of Navy sonar, which over the past decade has been shown to have serious impacts on marine mammals, ranging from death to internal hemorrhaging to disruptions in breeding. In December 2001, the Navy admitted that its use of intense sonar in a training exercise caused a mass stranding of whales in the Bahamas.

For information on the Marine Mammal Protection Act Contact: Mark Palmer, Earth Island Institute (415) 788-3666; Michael Jasny, NRDC (202) 289-6869; Ted Morton, Oceana, (202) 833-3900.

NOTES

ⁱ From “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Service Chiefs. Subject: Senior Readiness Oversight Council Approval of 2003 Sustainable Ranges Action Agenda” at p. 9 (December 10, 2002).

ⁱⁱ See GAO, *Military Training: DOD Lacks a Comprehensive Plan To Manage Encroachment on Training Ranges*, GAO-02-614 (June 2, 2002). The GAO report further points out that each major branch of the armed forces – Army, Navy, Air Force, Marines – conducts training exercises separately and without collaboration, thereby unnecessarily duplicating costs and environmental impacts. In the case of Camp Pendleton in California, habitat conflicts could be minimized if the Marines would conduct their desert training at nearby Edwards Air Force Base.

ⁱⁱⁱ See Whitman’s testimony regarding DOD exemptions from environmental laws, U.S. Senate Environment & Public Works Committee Hearing, February 26, 2003.

^{iv} Suzanne Stuglinski, “DOD environmental exemption requests headed for review,” *Environment & Energy Daily*, March 10, 2003.

^v *See* letter from Ken Salazar, Attorney General of Colorado to Representative Joel Hefley, April 1, 2002