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Exemptions from Environmental Law for the Department of Defense: Background and Issues for Congress

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Summary

Since FY2003, DOD has sought broader exemptions from environmental laws that it argues are needed to preserve training flexibility and ensure military readiness. There has been disagreement in Congress over the need for broader exemptions in the absence of data on the overall impact of environmental requirements on readiness. There also has been disagreement over the impacts that broader exemptions would have on environmental quality. Although Congress has enacted certain exemptions DOD requested, it has opposed others. After considerable debate, the 107th Congress enacted an exemption from the Migratory Bird Treaty Act, and the 108th Congress enacted exemptions from the Marine Mammal Protection Act and certain parts of the Endangered Species Act. These exemptions were contentious to some because of concerns about the weakening of protections for animals and plants. As in recent years since FY2003, DOD again has requested exemptions from the Clean Air Act, Solid Waste Disposal Act, and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These exemptions are included in the Administration's FY2008 defense authorization bill (S. 567), as introduced. Although DOD asserts that these exemptions are needed to maintain military readiness, concerns about potential impacts on human health and the environment have motivated opposition to them.

Introduction

Over time, Congress has included exemptions in several environmental statutes to ensure that requirements of those statutes would not restrict military training needs to the extent that national security would be compromised. These exemptions provide authority for suspending compliance requirements for actions at federal facilities, including military installations, on a case-by-case basis. Most of these exemptions may be granted for activities that would be in the "paramount interest of the United States," whereas others

are specifically for national security.[1] Most of these exemptions are limited to one year, but they can be renewed.[2] The extent to which broader exemptions from environmental requirements are needed for military readiness activities has become a prominent issue.

DOD argues that obtaining exemptions on a case-by-case basis is onerous and time-consuming because of the number of training exercises that it conducts on hundreds of military installations. DOD also argues that the time limits placed on most exemptions are not compatible with ongoing or recurring training activities. Instead, DOD has sought broader exemptions from certain environmental requirements that it argues could restrict or delay necessary training. As part of its FY2003 defense authorization proposal, DOD issued a Readiness and Range Preservation Initiative, requesting certain exemptions from six environmental laws: Migratory Bird Treaty Act, Endangered Species Act, Marine Mammal Protection Act, Clean Air Act, Solid Waste Disposal Act, and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

DOD's request for broader exemptions has been contentious in Congress. Some Members assert that such exemptions are necessary to provide greater flexibility for conducting combat training and other readiness activities without restriction or delay. However, other Members, states, environmental organizations, and communities oppose broader exemptions, pointing to the lack of data to demonstrate the extent to which environmental requirements have restricted training exercises and compromised readiness overall. They argue that expanding exemption authority without justification for its need would unnecessarily weaken environmental protection.

After considerable debate, the 107th Congress enacted an exemption from the Migratory Bird Treaty Act, and the 108th Congress enacted exemptions from the Marine Mammal Protection Act and certain parts of the Endangered Species Act. Although these exemptions were contentious among those concerned about the weakening of protections for animals and plants, there has been greater opposition to exemptions that DOD has requested from the Clean Air Act, Solid Waste Disposal Act, and CERCLA. Opponents to exemptions from these three latter statutes have expressed concern about human health risks from potential exposure to air pollution and hazardous substances. DOD has requested these exemptions again in its FY2008 defense authorization proposal, included in Sections 314 and 315 of the Administration's bill (S. 567), as introduced. DOD continues to assert that critical training could be restricted if these exemptions are not enacted. However, opposition to these exemptions has been motivated by the absence of data demonstrating how requirements of these statutes have restricted training and affected readiness overall, and concerns about human health and environmental risks.

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[1] The following environmental laws authorize the President to grant exemptions for federal facilities, including military installations, on a case-by-case basis. Exemptions for activities in the "paramount interest of the United States," including national security, are provided in the Clean Air Act (42 U.S.C. 7418(b)), Clean Water Act (33 U.S.C. 1323(a)), Noise Control Act (42 U.S.C. 4903), Solid Waste Disposal Act (42 U.S.C. 6961(a)), and Safe Drinking Water Act (42 U.S.C. 300(j)(6)). A "national security" exemption is provided in CERCLA (42 U.S.C. 9620(j)). The Endangered Species Act (16 U.S.C. 1536(j)) authorizes a special committee to grant an exemption if the Secretary of Defense finds it necessary for national security.

[2] The Safe Drinking Water Act does not impose time limits on exemptions. Although the Endangered Species Act allows time limits, the law does not require it.

The following sections discuss challenges in assessing the impact of environmental requirements on military readiness, broader exemptions for military activities that Congress has enacted, and DOD's continuing request for additional exemptions.

Impact of Environmental Requirements on Readiness

Whether existing exemption authorities are sufficient to preserve military readiness has been an ongoing issue. Assessing the need for broader exemptions is difficult because of the lack of data on the cumulative impact of environmental requirements on readiness overall. Although DOD has cited instances of training restrictions or delays at certain installations, the Department does not have a system in place to comprehensively track these cases and assess their impact on readiness. In 2002, the General Accounting Office (GAO, now renamed the Government Accountability Office) found that DOD's readiness reports did not indicate the extent to which environmental requirements restrict training activities, and that such reports indicate a high level of readiness overall.[3] However, GAO did note individual instances of environmental restrictions at some installations. A 2003 GAO report found that environmental restrictions are one of several factors, including urban growth, that can affect DOD's ability to carry out training activities, but that DOD continues to be unable to *broadly* measure the impact of encroachment on readiness.[4]

To better understand training capacity and needs, Section 366 of the National Defense Authorization Act for FY2003 (P.L. 107-314) required DOD to develop a comprehensive plan to address training constraints caused by limitations on the use of military lands, marine areas, and airspace. The following year, Section 320 of the National Defense Authorization Act for FY2004 (P.L. 108-136) required DOD to report to Congress on how civilian encroachment, including compliance with air quality and cleanup requirements, affects military operations. DOD released a report on these matters in February 2006.[5] The report included an inventory of training ranges but did not identify constraints on each, as DOD indicated that it does not have a mechanism in place to retrieve and centralize this information for each individual range. The report also described situations in which air quality and cleanup requirements *could* affect military readiness, but it concluded that these requirements have not affected readiness activities thus far, causing some to question the need for broader exemptions.

Exemptions Enacted in the 107th and 108th Congresses

At the Administration's request, the 107th Congress enacted an interim exemption for military readiness activities from the Migratory Bird Treaty Act, and the 108th Congress enacted a broad exemption from the Marine Mammal Protection Act and a narrower one from certain parts of the Endangered Species Act. Throughout the congressional debate over these exemptions, there was significant disagreement among

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[3] General Accounting Office, *Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges*, GAO-02-614, June 2002.

[4] General Accounting Office, *Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving*, GAO-03-621T, April 2003.

[5] Department of Defense. *Report to Congress on Sustainable Range*s. February 2006. See [https://www.denix.osd.mil/denix/Public/News/OSD/i366/i366.html].

Members of Congress regarding the military need for them in light of the lack of data on the effect of these statutes on readiness overall, and the potential impact of the exemptions on animal and plant species. A summary of each exemption is discussed below.[6]

Migratory Bird Treaty Act. Section 315 of the National Defense Authorization Act for FY2003 (P.L. 107-314) directed the Secretary of the Interior to develop regulations for issuing permits for the "incidental takings" of migratory birds during military training exercises, and provided an interim exemption from the Migratory Bird Treaty Act while these regulations were drafted. A U.S. district court had ruled that federal agencies, including DOD, are required to obtain permits for incidental takings.[7] DOD argued that an exemption was needed to prevent the delay of training activities until takings permits can be issued. In February 2007, the U.S. Fish and Wildlife Service finalized regulations for issuing incidental takings permits to DOD.[8] The interim exemption expires on the effective date of these regulations, March 30, 2007, after which DOD is required to obtain permits for activities that may result in incidental takings.

Endangered Species Act. Section 318(a) of the National Defense Authorization Act for FY2004 (P.L. 108-136) granted the Secretary of the Interior the authority to exempt military lands from designation as critical habitat under the Endangered Species Act, if the Secretary determines "in writing" that an Integrated Natural Resource Management Plan for such lands provides a "benefit" to the species for which critical habitat is proposed for designation. The U.S. Fish and Wildlife Service had allowed these plans to substitute for critical habitat designation. DOD argued that clarification of the authority for this practice was needed to avoid future designations that in its view could restrict the use of military lands for training. Section 318(b) also directed the Secretary of the Interior to consider impacts on national security when deciding whether to designate critical habitat. Although these provisions affect the applicability of critical habitat requirements on military lands, DOD continues to be subject to all other protections provided under the Endangered Species Act, including consultation requirements and prohibitions on the "taking"[9] of endangered and threatened species.

Marine Mammal Protection Act. Section 319 of P.L. 108-136 provided a broad exemption from the Marine Mammal Protection Act for "national defense." Section 319 also amended the definition of "harassment" of marine mammals, as it applies to military readiness activities, to require greater scientific evidence of harm, and required the consideration of impacts on military readiness in the issuance of permits for incidental takings. DOD argued that these amendments were needed to prevent restrictions on the

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[6] For further discussion of the Migratory Bird Treaty Act exemption, see CRS Report RL31456, *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2003*. For further discussion of the Endangered Species Act and Marine Mammal Protection Act exemptions, see CRS Report RL32183, *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004*. Also see CRS Report RL31415, *The Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Background and Current Law*.

[7] 191 F. Supp. 2d 161 (D. D.C. 2002).

[8] 72 *Federal Register* 8931.

[9] "Taking" as defined in the Endangered Species Act (16 U.S.C. 1532(19)).

use of the Navy's low-frequency "active" sonar system. Environmental advocates had legally challenged the use of the sonar system, arguing that it harmed marine mammals and thus violated the Marine Mammal Protection Act and other environmental statutes.[10] The impact of Navy sonar on marine mammals, particularly mid-frequency sonar, has continued to be an issue.[11] In January 2007, DOD used its authority in Section 319 of P.L. 108-136 to issue a two-year exemption from requirements of the Marine Mammal Protection Act for Naval training activities involving the use of mid-frequency sonar, and the use of a new sensor that utilizes small explosive charges under water.[12]

Administration FY2008 Proposal

The Administration submitted its FY2008 defense authorization request to Congress on February 6, 2007. Senator Carl Levin, Chairman, and Senator John McCain, Ranking Member, of the Senate Armed Services Committee, introduced the Administration's legislative proposal (S. 567) on February 13, 2007. In his statement introducing the measure, Senator Levin noted that the bill was offered before Congress at the Administration's request without expressing the views of the committee on its substance.[13] Similar to past Administration proposals since FY2003, S. 567 includes exemptions from certain requirements of the Clean Air Act, Solid Waste Disposal Act, and CERCLA. Exemption provisions in S. 567, and related issues, are discussed below.

Solid Waste Disposal Act and CERCLA. Section 314 of S. 567 would amend the definition of "solid waste" in the Solid Waste Disposal Act and "release" (or threatened release) in CERCLA, to exclude military munitions on an operational range. The proposed exemption uses the current definition of operational range,[14] under which DOD has the discretion to designate practically any lands under its jurisdiction as operational, regardless of whether the land is being used for training. Opponents have asserted that this exemption would place military munitions on operational ranges beyond the reach of these two statutes, and could allow munitions and resulting contamination to remain on any military lands designated as operational. As the exemption would no longer apply once a range ceased to be operational, it presumably would not apply to ranges on closed bases *after* the land is transferred out of military jurisdiction.[15]

DOD asserts its proposal would clarify existing regulations that the Environmental Protection Agency finalized in 1997.[16] Under these regulations, "used or fired" munitions on a range are considered a solid waste only when they are removed from their landing

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[10] NRDC v. Evans, 232 F.Supp. 2d. 1003, 1055 (N.D. Cal. 2002).

[11] See CRS Report RL33133, *Active Military Sonar and Marine Mammals: Events and References*, by Eugene H. Buck and Kori Calvert.

[12] See [http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10427].

[13] *Congressional Record*, February 13, 2007, pp. S1911-S1912.

[14] 10 U.S.C. 101(e)(3).

[15] For a discussion of cleanup requirements on closed bases, see CRS Report RS22065, *Military Base Closures: Role and Costs of Environmental Cleanup*.

[16] 40 C.F.R. Part 266, Subpart M, *Military Munitions Rule*.

spot.[17] Until DOD removes them and they "become" solid waste, they are not subject to disposal requirements. Munitions left to accumulate on a range can leach hazardous constituents into the soil and groundwater over time, possibly requiring cleanup. DOD states that it seeks to clarify existing regulations in order to eliminate the possibility of legal challenges, which might result in an active range being closed to require the removal of accumulating munitions and cleanup of related contamination. DOD cautions that such challenges could restrict training.

However, excluding military munitions from "solid waste" and "release" in federal statute could have broader implications. Opponents, including state attorneys general, state waste management officials, municipal water utilities, environmental advocates, and communities, have argued that DOD's proposal would narrow the waiver of federal sovereign immunity in states, resulting in the removal of state authority to monitor groundwater on operational ranges to determine whether a health hazard is present, or to file citizen suits under the Solid Waste Disposal Act or CERCLA to compel cleanup of that substance. They maintain that if this were the case, groundwater contamination could not be investigated until it migrated off-range, potentially resulting in greater contamination and higher cleanup costs than if the contamination were identified and responded to earlier. Opponents also have asserted that the potential *threat* of litigation is not sufficient basis for a broad change to existing law, noting that cleanup requirements have not resulted in widespread restrictions on the operation of military training ranges.

Clean Air Act. Section 315 of S. 567 would exempt emissions generated by military readiness activities from requirements to "conform" to State Implementation Plans (SIP) for achieving federal air quality standards. Under current law, sources of emissions, including activities of federal agencies, that would increase emissions above limits in a state's SIP are prohibited, unless offsetting reductions from other sources are made in the same area. DOD argues that its proposed exemption would provide greater flexibility for transferring training operations to areas with poor air quality, without restrictions on these operations due to the emissions they would generate.

DOD asserts that the activities in question have a small impact on air quality, many of which involve the reassignment of aircraft from one installation to another. In most areas, the threshold for imposition of the conformity requirement is a net increase of 100 tons of emissions annually, an amount that some municipal governments estimate would be equal to more than 72,000 military aircraft takeoffs and landings annually. Whether such an increase is, in fact, "small" is one issue raised by opponents, including state and local air pollution control program officials, state environmental commissioners, state attorneys general, county and municipal governments, and environmental advocates.

Section 315 also would alter Clean Air Act requirements for nonattainment areas in which nonconforming military readiness activities are conducted. These areas would be allowed to demonstrate that they would have met the standards except for emissions from readiness activities. The bill would remove the consequences of failure to attain the standards in such areas — that is, an area could not be forced to impose more stringent pollution control requirements if its failure to meet air quality standards were the result of emissions generated by military readiness activities.

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[17] 40 C.F.R. 266.202(c).