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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 cumulative impact of environmental requirements on readiness. There also has been disagreement over the impacts that broader exemptions would have on environmental quality. Although certain exemptions DOD has requested have been enacted into law, Congress has opposed others. After considerable debate, the 107th Congress enacted a temporary 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. As in each year 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), but Congress has not included them in the FY2008 defense authorization bills (H.R. 1585 and S. 1547), nor the FY2008 defense appropriations bills (H.R. 2642, H.R. 3222, and S. 1645), on which it has acted so far. Apart from these bills, stand-alone legislation (H.R. 3366) would seek to clarify the compliance of military activities with environmental laws.

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] Whether 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 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 requirements that it argues could restrict or delay training. In FY2003, 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 combat training and other readiness activities. 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 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 a temporary 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 again has requested exemptions from these three statutes as part of its FY2008 defense authorization proposal, included in Sections 314 and 315 of the Administration's bill (S. 567). DOD continues to assert that critical training could be restricted without these exemptions. However, the absence of data demonstrating how these statutes have restricted training and affected readiness overall, and continuing concerns about human health and environmental risks, have motivated opposition to these exemptions.

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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.

DOD's proposed exemptions are not included in any of the FY2008 defense authorization bills (H.R. 1585 and S. 1547), nor the FY2008 defense appropriations bills (H.R. 2642, H.R. 3222, and S. 1645), on which the 110th Congress has acted so far. In its report H.R. 1585 (H.Rept. 110-146), the House Armed Services Committee did note the "often competing requirements for maintaining military readiness and protecting the environment," and directed the Government Accountability Office (GAO) to study the extent to which environmental laws, regulations, and exemptions have affected military readiness and the environment. GAO has conducted similar studies in the past, and has acknowledged the difficulty in assessing such impacts, as discussed below.

Apart from the above defense bills, stand-alone legislation (the Military Environmental Responsibility Act, H.R. 3366) has been introduced that would seek to clarify the compliance of military activities with numerous environmental laws. Section 3 of the bill would specify the substantive and procedural requirements to which DOD and other defense-related agencies are subject. However, the effect of certain provisions is unclear. Although one provision would prohibit exemptions from environmental requirements, another provision would acknowledge the possibility of future exemptions and limit their duration to six months, unless extended by an act of Congress.

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 at certain installations, a system is not in place to comprehensively track these cases and assess their impact on readiness. In 2002, GAO 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. In 2003, GAO found in another report 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

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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.

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 had not affected readiness activities so far, causing some to continue questioning the need for broader exemptions.

Exemptions Enacted in the 107th and 108th Congresses

The 107th Congress enacted a temporary exemption for military readiness activities from the Migratory Bird Treaty Act, which has since expired. 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 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. Each of these exemptions, and relevant developments subsequent to their enactment, are discussed below.

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.[6] DOD had argued that an exemption was needed to prevent the delay of training activities until takings permits could be issued. In February 2007, the U.S. Fish and Wildlife Service finalized regulations for issuing incidental takings permits to DOD.[7] The interim exemption expired on the effective date of these regulations, March 30, 2007. DOD now 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 (INRMP) for such lands provides a "benefit" to the species for which critical habitat is proposed for designation. In many instances, 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. Since the enactment of these provisions,

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[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].

[6] 191 F. Supp. 2d 161 (D. D.C. 2002).

[7] 72 *Federal Register* 8931.

the U.S. Fish and Wildlife Service has routinely excluded military lands from critical habitat designations either because an INRMP was deemed to offer adequate protection, or because of potential impacts on national security. However, DOD remains subject to all other protections provided in the Endangered Species Act, such as the prohibition on "takings" in Section 9 of the act, and consultation requirements in Section 7.

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. At the time, DOD argued that these amendments were needed to allow the use of the Navy's low-frequency "active" sonar system. Environmental advocates had legally challenged the use of this sonar, arguing that it harmed marine mammals and thus violated the Marine Mammal Protection Act and other environmental statutes.[8]

The impacts of mid-frequency active sonar on marine mammals also has been an issue. In January 2007, DOD invoked its authority in P.L. 108-136 to issue a two-year exemption from the Marine Mammal Protection Act for Naval training activities involving the use of mid-frequency active sonar, and the use of a new sensor that utilizes small explosive charges under water. In its report on H.R. 1585, the House Armed Services Committee expressed its concern about the impacts of this exemption. The committee directed the Navy to assess the increase in military readiness, and the number and species of marine mammals injured and killed, resulting from activities conducted under the two-year exemption.

Although DOD has invoked the above exemption from the Marine Mammal Protection Act, other federal statutes have been used to challenge the Navy's sonar use. On August 6, 2007, a U.S. district court granted a preliminary injunction against the Navy to prevent the use of mid-frequency active sonar in training exercises planned off the coast of southern California.[9] The court based its decision on potential violations of the Coastal Zone Management Act, National Environmental Policy Act, and the Administrative Procedures Act. The preliminary injunction does not appear to prevent the Navy from carrying out other training activities it may have planned in that area of the ocean that do not involve the use of mid-frequency active sonar.

Administration FY2008 Proposal

Although Congress has enacted the above exemptions from the Migratory Bird Treaty Act, Endangered Species Act, and the Marine Mammal Protection Act, Congress has not acted on the exemptions from the Solid Waste Disposal Act, CERCLA, and the Clean Air Act, which DOD continues to seek. The following sections discuss these latter exemptions and the issues surrounding them.

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

[9] NRDC v. Winter, No. 8:07-cv-00335 (C.D. Cal. August 6, 2007).

Solid Waste Disposal Act and CERCLA. Section 314 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. Opponents have asserted that this exemption would place military munitions on such ranges beyond the reach of these two statutes, allowing munitions and resulting contamination to remain and present potential health risks. 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.

DOD asserts its proposal would clarify existing regulations that the Environmental Protection Agency finalized in 1997 with authorities under the Solid Waste Disposal Act.[10] Under these regulations, "used or fired" munitions on a range are considered a solid waste only when they are removed from their landing spot. Until DOD removes them and they "become" solid waste, they are not subject to disposal or cleanup requirements under the Solid Waste Disposal Act. DOD states that this clarification is needed in statute to eliminate the possibility of legal challenges that could require cleanup of a range each time a munition is deposited, which could make training impractical.

Some Members of Congress, states, and environmental organizations have expressed concern that the proposed amendments could have broader implications. First, amending the definition of release would exceed the scope of the above regulations and place military ranges beyond CERCLA's reach. Second, the exemption could result in removing state authority to monitor contaminated ranges to determine whether a health hazard is present. Further, the proposed amendments could circumvent the authority under CERCLA and the Solid Waste Disposal Act to file citizen suits to compel cleanup of munitions and related contamination on military ranges.

Clean Air Act. Section 315 would allow a three-year exemption from air quality "conformity" requirements for military readiness activities. Under current law, emissions must conform to limits in State Implementation Plans (SIPs) to achieve federal air quality standards, unless offsetting reductions from other sources are made in the same area where the violation would occur. DOD asserts that its proposed exemption would provide greater flexibility for transferring training operations to areas with poor air quality, as those operations would be given more time to conform to emissions limits in those areas. Although DOD states that these operations would have a small, short-term impact on air quality, some Members of Congress, states, and environmental organizations have questioned whether the emissions would be great enough to present a health risk.

Section 315 includes additional provisions that would alter Clean Air Act requirements for nonattainment areas in which emissions from military readiness activities would be exempt from conformity requirements. Under these provisions, individual areas would exclude emissions from readiness activities in determining whether they have met federal air quality standards. As a consequence, 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 readiness activities. Some have questioned whether these provisions would therefore weaken the public health protections that federal air quality standards are intended to provide.

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[10] 40 C.F.R. Part 266, Subpart M, *Military Munitions Rule*.