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Exemptions from Environmental Law for the Department of Defense: An Overview of Congressional Action

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Summary

Several environmental statutes contain national security exemptions, which the Department of Defense (DOD) can obtain on a case-by-case basis. Since FY2003, DOD has sought broader exemptions that it argues are needed to preserve training capabilities 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 training and readiness. There also has been disagreement over the potential impacts of broader exemptions on environmental quality. After considerable debate, the 107th Congress enacted an exemption that DOD requested 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, DOD has again requested exemptions from the Clean Air Act, the Solid Waste Disposal Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as part of its FY2007 defense authorization proposal. Concerns in Congress about human health and environmental risks have motivated opposition to these exemptions. To date, none of the FY2007 defense authorization (H.R. 5122 and S. 2766) or appropriations bills (H.R. 5385 and H.R. 5631) include these exemptions. This report will be updated as warranted.

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

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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,³ 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 the exemption DOD requested 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. Congress has not enacted these exemptions thus far, but DOD requested them again in its FY2007 defense authorization proposal, continuing to assert that critical training could be restricted otherwise. To date, none of the FY2007 defense authorization (H.R. 5122 and S. 2766) or appropriations bills (H.R. 5385 and H.R. 5631) include these exemptions.

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), Resource Conservation and Recovery 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.

³ The Solid Waste Disposal Act is popularly referred to as "RCRA," the Resource Conservation and Recovery Act of 1976, which amended the Solid Waste Disposal Act in that year.

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

There has been ongoing disagreement as to whether existing authorities for case-by-case exemptions from environmental requirements are sufficient to preserve military readiness. Assessing the need for broader exemptions is difficult because of the lack of data on the cumulative impact of environmental requirements on readiness. Although DOD has cited anecdotal 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 combat training activities, and that such reports indicate a high level of readiness overall.⁴ However, GAO noted individual instances of environmental restrictions at some military installations and recommended that DOD's reporting system be improved to more accurately identify problems for training that might be attributed to restrictions imposed by environmental requirements. A 2003 GAO report found that environmental restrictions are only one of several factors, including urban growth, that 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.⁵

To better assess encroachment on military lands, Section 120 of the National Defense Authorization Act for FY2004 (P.L. 108-136) required the Secretary of Defense to report to Congress on how civilian encroachment, including compliance with air quality and cleanup requirements, affects military operations. DOD released this report in February 2006.⁶ Although the report describes situations in which such requirements *could* affect military readiness, it concluded that air quality and cleanup requirements have not affected readiness activities thus far. Members opposing broader exemptions from environmental laws have expressed their reluctance to enact such exemptions if DOD cannot confirm that requirements of these laws have indeed affected readiness.

Exemptions Enacted in the 107th and 108th Congresses

As noted above, 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

⁴ General Accounting Office, *Military Training: DOD Needs a Comprehensive Plan to Manage Encroachment on Training Ranges*, GAO-02-727T, May 2002.

⁵ General Accounting Office, *Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving*, GAO-03-621T, April 2003.

⁶ Department of Defense. *Report to Congress on Sustainable Ranges*. February 2006. pp. 3-1 through 3-7. See [<https://www.denix.osd.mil/denix/Public/News/OSD/i366/i366.html>].

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. A summary of each exemption is discussed below.⁷

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 the issuance of 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 are being drafted. A U.S. district court had ruled that federal agencies, including DOD, are required to obtain permits for incidental takings,⁸ and DOD argued that an exemption was needed to prevent the delay of training activities while regulations are developed. In June 2004, the U.S. Fish and Wildlife Service proposed regulations for issuing incidental takings permits to DOD⁹; the draft of the final regulations is in interagency review.

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 been allowing these plans to substitute for critical habitat designation in recent years. 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 directs 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”¹⁰ 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

⁷ 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*.

⁸ 191 F. Supp. 2d 161 (D. D.C. 2002).

⁹ 69 *Federal Register* 31074.

¹⁰ As defined in federal statute, “taking” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)).

takings. DOD had argued that these amendments were necessary primarily to prevent restrictions on the testing of the Navy's low-frequency "active" sonar system. Environmental organizations had legally challenged the use of the sonar system, arguing that it harmed marine mammals and was therefore a violation of the Marine Mammal Protection Act, as well as other environmental statutes.¹¹

Action in the Second Session of the 109th Congress

DOD submitted its FY2007 defense authorization proposal in the second session on April 3, 2006. Similar to past proposals since FY2003, it included exemptions from certain requirements of the Clean Air Act, Solid Waste Disposal Act, and CERCLA. DOD and some Members argue that these exemptions are needed to preserve training capabilities critical to military readiness, and that they would have a minimal impact on environmental quality. Other Members, states, communities, and environmental organizations counter that the impacts reach beyond DOD's stated intent and that such exemptions could harm human health and the environment. To date, none of the FY2007 defense authorization (H.R. 5122 and S. 2766) or appropriations bills (H.R. 5385 and H.R. 5631) include these exemptions. DOD's proposal is discussed below.

Clean Air Act. Section 313 of DOD's legislative proposal 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 beyond limitations established 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 the possibility of restrictions on these operations due to the emissions that they would produce.

DOD has asserted that the activities in question (many of which involve the reassignment of aircraft from one installation to another) have a small impact on air quality. In most areas, the threshold for imposition of the conformity requirement is a net increase of 100 tons of emissions annually, a threshold that translates to a net increase of 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 organizations.

The proposal also would alter Clean Air Act requirements for nonattainment areas in which DOD conducts nonconforming readiness activities. These areas would be allowed to demonstrate that they would have met the standard except for emissions from readiness activities. In addition, the proposal 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 is the result of emissions from military readiness activities.

¹¹ NRDC v. Evans, 232 F.Supp. 2d. 1003, 1055 (N.D. Cal. 2002).

Solid Waste Disposal Act and CERCLA. Section 314 of DOD’s legislative proposal 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,¹² under which DOD has the discretion to designate practically any lands under its jurisdiction as operational, regardless of whether the land is currently being used for training. Opponents assert that, in effect, this exemption would place military munitions on operational ranges entirely beyond the reach of these two statutes, and could allow munitions and any resulting contamination to remain indefinitely on any military lands designated as operational. As the exemption would no longer apply once a range ceases to be operational, it presumably would not apply to ranges on closed bases after the land is transferred out of the jurisdiction of DOD.¹³

DOD claims that its proposal would clarify existing federal regulations under the Military Munitions Rule, promulgated by the Environmental Protection Agency in 1997.¹⁴ Under this rule, “used or fired” munitions on a range are considered a solid waste only when they are removed from their landing spot.¹⁵ 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 the munitions rule in order to eliminate the possibility of legal challenges to existing regulations, which might result in an active range being closed to require the removal of accumulating munitions and cleanup of related contamination. DOD asserts that such challenges could restrict training.

However, excluding military munitions from the definitions of “solid waste” and “release” in federal statute could have broader implications for cleanup than in existing regulation. Those opposed to these statutory changes include state attorneys general, state waste management officials, municipal water utilities, environmental organizations, and community groups. They argue that the proposed exemption would narrow the waiver of federal sovereign immunity in states, resulting in the removal of state authority to monitor groundwater on an operational range to determine if a substance presents a health hazard, or to file citizen suits under the Solid Waste Disposal Act or CERCLA to compel cleanup of that substance. If this were the case, they argue, groundwater contamination could not be investigated until it migrates off-range, potentially resulting in greater contamination and higher cleanup costs than if the contamination were identified and responded to earlier. Opponents also assert 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, as DOD fears.

¹² 10 U.S.C. 101(e)(3). Operational range is “a range that is under the jurisdiction, custody, or control of the Secretary of Defense and that is used for range activities, or although *not currently being used* [emphasis added] for range activities, is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.”

¹³ For a discussion of cleanup requirements on closed bases, see CRS Report RS22065, *Military Base Closures: Role and Costs of Environmental Cleanup*.

¹⁴ 40 C.F.R. Part 266, Subpart M.

¹⁵ 40 C.F.R. 266.202(c).