



# Exemptions from Environmental Law for the Department of Defense (DOD)

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## Summary

Whether broader exemptions from federal environmental laws are needed to preserve military readiness has been an issue. Questions have been raised as to whether environmental requirements have limited military training activities to the point that readiness would be compromised. The potential impacts of broader exemptions on environmental quality have raised additional questions. Although certain exemptions the Department of Defense (DOD) first requested in FY2003 have been enacted into law, Congress has opposed others. The 107<sup>th</sup> Congress enacted an exemption from the Migratory Bird Treaty Act, and the 108<sup>th</sup> Congress enacted exemptions from the Marine Mammal Protection Act and from designation of military lands as critical habitat under the Endangered Species Act, if certain conditions are satisfied. In Administration defense authorization proposals from FY2003 through FY2008, DOD also requested exemptions from the Clean Air Act, Solid Waste Disposal Act, and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). To date, Congress has not enacted these three latter exemptions. Some Members have noted their concern about the potential impacts of these exemptions on human health and the environment. The Administration's FY2009 defense authorization bill (H.R. 5658 and S. 2787, introduced by request) does not include these exemptions.

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## Introduction

Over time, Congress has included exemptions in many federal environmental laws to ensure that requirements of those statutes would not restrict military training to the point that national security would be compromised. These exemptions provide authority for suspending compliance requirements for actions at federal facilities on a case-by-case basis. Some exemptions are specific to military installations, rather than all federal facilities. Most of the exemptions only can be granted by the President, rather than by the head of the department or agency that administers the activity in question. Further, most of the exemptions are authorized for activities that are in the “paramount interest of the United States,” whereas some are specifically for national security or national defense. None of the statutory authorities for these exemptions provide criteria for determining whether an activity meets these thresholds. Depending on the statute, the President, or other authorized decision-maker, has the discretion to make this determination. Most of the exemptions are limited to one or two years, but can be renewed.<sup>1</sup>

Whether broader exemptions are needed to ensure military readiness has been subject to much debate. The Department of Defense (DOD) argues that obtaining exemptions on a case-by-case basis is onerous because of the vast number of training exercises it routinely 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 CERCLA.

DOD’s request for broader exemptions has been contentious in Congress. Some Members have asserted that such exemptions are necessary to provide greater flexibility for combat training and other readiness activities. Other Members, states, environmental organizations, and communities have opposed broader exemptions, raising questions about the degree to which environmental requirements have compromised readiness overall. They have argued that expanding exemption authority without a clear national security need could unnecessarily weaken environmental protection.

In response to DOD’s request, the 107<sup>th</sup> Congress enacted an exemption from the Migratory Bird Treaty Act, and the 108<sup>th</sup> Congress enacted exemptions from the Marine Mammal Protection Act and from designation of military lands as critical habitat under the Endangered Species Act, if certain conditions are satisfied. These exemptions were contentious among those concerned about protections for animal and plant species. There has been greater opposition to exemptions DOD requested from the Clean Air Act, Solid Waste Disposal Act, and CERCLA. Opponents to exemptions from these latter statutes have expressed concern about human health risks from

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<sup>1</sup> Authorities for the President to exempt activities of federal facilities in the paramount interest of the United States are provided in Coastal Zone Management Act (16 U.S.C. 1456(c)(1)(B)), 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(b)), Safe Drinking Water Act (42 U.S.C. 300j-6), and Solid Waste Disposal Act (42 U.S.C. 6961(a)). CERCLA authorizes the President to exempt Department of Defense (DOD) and Department of Energy (DOE) facilities for purposes of national security (42 U.S.C. 9620(j)). The Marine Mammal Protection Act authorizes the Secretary of Defense to exempt military actions if the Secretary determines that such actions are necessary for national defense (16 U.S.C. 1371(f)). 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.

potential exposure to air pollution and hazardous substances. Congress has not enacted these exemptions to date. DOD requested them in the Administration's defense authorization proposals from FY2003 through FY2008. The Administration's FY2009 defense authorization bill (H.R. 5658 and S. 2787, introduced by request) does not include these exemptions.

Apart from defense authorization legislation, at least one stand-alone bill has been introduced in the 110<sup>th</sup> Congress to clarify the degree to which military activities must comply with environmental requirements. Introduced in the first session, the Military Environmental Responsibility Act (H.R. 3366) 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 appear to prohibit exemptions from environmental requirements, another provision acknowledges the possibility of future exemptions and would limit their duration to six months, unless extended by an act of Congress.

The following sections discuss the impact of environmental requirements on military readiness, broader exemptions Congress has enacted in recent years, and Administration proposals for additional exemptions from air quality and cleanup requirements.

## **Impact of Environmental Requirements on Readiness**

Assessing the military need for broader exemptions has been challenging because of the lack of data confirming whether environmental requirements have impaired military readiness overall. In its report on the National Defense Authorization Act for FY2008 (H.R. 1585, H.Rept. 110-146), the House Armed Services Committee noted the "often competing requirements for maintaining military readiness and protecting the environment." The committee directed the Government Accountability Office (GAO) to study the extent to which environmental requirements have affected military readiness. GAO issued its findings in March 2008, stating that environmental requirements caused some training activities to be cancelled, delayed, or altered, but GAO noted that readiness data did not indicate those actions had hampered military readiness overall.<sup>2</sup> GAO issued similar findings in prior work on this issue in 2002<sup>3</sup> and 2003.<sup>4</sup>

The committee also directed GAO to examine the effect of military exemptions on the environment. Based on information from regulatory officials, GAO's March 2008 report did not identify any instances in which the use of recent exemptions from the Migratory Bird Treaty Act and Endangered Species had adversely affected the environment but stated that the effects of exemptions from the Marine Mammal Protection Act were yet to be determined. GAO also concluded DOD had not presented a "sound" case for the additional exemptions it has requested from the Clean Air Act, Solid Waste Disposal Act, and CERCLA. In a July 2007 report to

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<sup>2</sup> GAO, *Military Training: Compliance with Environmental Laws Affects Some Training Activities, but DOD Has Not Made a Sound Business Case for Additional Environmental Exemptions*, GAO-08-407, March 2008.

<sup>3</sup> GAO, *Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges*, GAO-02-614, June 2002.

<sup>4</sup> GAO, *Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving*, GAO-03-621T, April 2003.

Congress,<sup>5</sup> DOD had reiterated its position that additional exemptions from these statutes are needed but did not demonstrate how requirements of these statutes had affected readiness.

## **Exemptions Enacted in the 107<sup>th</sup> and 108<sup>th</sup> Congresses**

The 107<sup>th</sup> Congress enacted an exemption for military readiness activities from the Migratory Bird Treaty Act. The 108<sup>th</sup> Congress enacted a broad exemption from the Marine Mammal Protection Act for national defense, and a narrower exemption from designation of military lands as critical habitat under the Endangered Species Act if certain conditions are satisfied. In the debate over these exemptions, there was disagreement about 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. These exemptions and their use to date 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 to authorize “incidental takings” of migratory birds during military readiness activities, and authorized a blanket exemption from the Migratory Bird Treaty Act while these regulations were drafted. Prior to enactment, a U.S. district court had ruled in 2002 that federal agencies, including DOD, must obtain permits for incidental takings.<sup>6</sup> Subsequently, DOD requested an exemption from Congress, arguing that critical training could be delayed or constrained otherwise. With the authority provided in P.L. 107-314, the Fish and Wildlife Service finalized regulations on February 28, 2007, broadly authorizing incidental takings of migratory birds during military readiness activities.<sup>7</sup> These regulations allow incidental takings if DOD implements conservation measures to minimize or mitigate “significant adverse effects” on migratory bird species. The regulations allow the Secretary of the Interior to suspend or withdraw the takings authorization for individual activities, if these conditions are not satisfied.

### **Endangered Species Act**

Section 318(a) of the National Defense Authorization Act for FY2004 (P.L. 108-136) authorized the Secretary of the Interior 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 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

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<sup>5</sup> DOD, Office of the Secretary of Defense, Under Secretary of Defense for Personnel and Readiness, *Report to Congress on Sustainable Ranges*, July 2007.

<sup>6</sup> 191 F. Supp. 2d 161 (D. D.C. 2002).

<sup>7</sup> 72 *Federal Register* 8931.

Interior to consider impacts on national security when deciding whether to designate critical habitat. Since the enactment of these provisions, the 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. DOD remains subject to all other Endangered Species Act protections on its lands, such as the takings prohibition in Section 9, and consultation requirements in Section 7.

## **Marine Mammal Protection Act**

Section 319 of P.L. 108-136 authorized a broad exemption from the Marine Mammal Protection Act for “national defense” that the Secretary of Defense may invoke in consultation with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate. 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. Environmental advocates had challenged the use of this type of sonar, arguing that it harmed marine mammals and thus violated the Marine Mammal Protection Act and other environmental statutes.<sup>8</sup>

The Navy’s use of *mid-frequency* active sonar also has been an issue. Since 2006, the Secretary of Defense twice has invoked the authority in P.L. 108-136 to exempt the use of mid-frequency active sonar from the Marine Mammal Protection Act during certain training exercises and operations. The Secretary invoked the first exemption in June 2006 for six months, and the second one in January 2007 for two years. The Navy stated that the longer two-year exemption would allow it to continue critical training while preparing a comprehensive environmental compliance plan for its ranges and operating areas. In its report on the National Defense Authorization Act for FY2008 (H.R. 1585, H.Rept. 110-146), the House Armed Services Committee expressed concern about the exemption. The committee directed the Navy to assess the increase in military readiness over the two-year period as a result of the exemption, estimate the number and species of marine mammals injured and killed, and report on its efforts to comply fully with the Marine Mammal Protection Act upon the expiration of the exemption.

Although the Secretary of Defense has invoked exemptions from the Marine Mammal Protection Act, environmental organizations have challenged the Navy’s use of mid-frequency active sonar based on potential violations of other federal statutes, including the Endangered Species Act, Coastal Zone Management Act, and National Environmental Policy Act (NEPA). In January 2008, President Bush exempted the Navy’s training exercises from the Coastal Zone Management Act with authorities under that statute to exempt federal actions that are in the “paramount interest of the United States.” The Council on Environmental Quality (CEQ) also used its “emergency” regulatory authorities under NEPA to identify alternative arrangements that the Navy could pursue to allow its training exercises to continue. These actions have been subject to further legal review and challenge to determine under what conditions the Navy could continue its training exercises while ensuring adequate protections for marine mammals.

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<sup>8</sup> NRDC v. Evans, 232 F.Supp. 2d. 1003, 1055 (N.D. Cal. 2002).

## **Past Administration Proposals**

Although Congress has enacted the above statutory authorities for 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 that DOD has requested. DOD included these three latter exemptions in the Administration's defense authorization proposals from FY2003 through FY2008. The Administration's FY2009 defense authorization bill (H.R. 5658 and S. 2787, introduced by request) does not include these exemptions. The following sections discuss past Administration proposals and related issues.

### **Solid Waste Disposal Act and CERCLA**

DOD had proposed to 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 asserted that this exemption would have placed 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 have applied once a range ceased to be operational, it presumably would not have extended to ranges on closed bases *after* the land is transferred out of military jurisdiction.

DOD asserted its proposal would have clarified existing regulations that the Environmental Protection Agency finalized in 1997 with authorities under the Solid Waste Disposal Act.<sup>9</sup> For regulatory purposes, "used or fired" munitions on a range are considered 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 stated that this clarification was 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 expressed concern that the proposed amendments could have had 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, such an exemption could result in removing state authority under both statutes to monitor military ranges to determine whether contamination may migrate off-site and present a health risk to nearby populations. Further, the proposed language could have circumvented the authority under both statutes to file citizen suits to compel cleanup of military ranges.

### **Clean Air Act**

DOD also had proposed to exempt military readiness activities from air quality "conformity" requirements for three years. 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. DOD asserted that its proposed exemption was needed to allow more time for military operations transferred to areas with poor air quality to conform to

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<sup>9</sup> 40 C.F.R. Part 266, Subpart M, *Military Munitions Rule*.



emissions limits. Although DOD stated that these operations would have had a small, short-term impact on air quality, some Members of Congress, states, and environmental organizations questioned whether the emissions would be great enough to present a health risk.

Past proposals also included provisions that would have altered Clean Air Act requirements for “nonattainment” areas in violation of federal air quality standards. States would have been required to exclude emissions from military readiness activities in these areas when determining whether they are in compliance. In effect, states could not have imposed more stringent pollution control requirements in these areas if the failure to meet air quality standards would have been the result of emissions from military readiness activities. Some questioned whether these provisions consequently would have weakened public health protections that federal air quality standards are intended to provide.

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