

# ELR

## NEWS & ANALYSIS

### The Endangered Species Act Is Still Strong on Department of Defense Lands

by Jonathan W. Hitesman

#### I. Military Training Versus Endangered Species Protection

The U.S. Congress recently amended the Endangered Species Act (ESA) to exempt the U.S. Department of Defense (DOD) installations from critical habitat designation when qualified resource management plans are established.<sup>1</sup> Despite an apparently sweeping exemption from a key part of the ESA, endangered and threatened species are still effectively protected on DOD installations without adversely affecting military training and national security. In fact, the recent amendments surprisingly require heightened scrutiny of DOD integrated natural resource management plans (INRMPs) while essentially codifying existing U.S. Fish and Wildlife Service (FWS) regulations. Although amending the ESA was unnecessary and unjustified, endangered and threatened species occupying DOD installations will continue to be protected because INRMPs provide protection for listed species at least as effective as the designation of critical habitat.

Recent military successes in the Global War on Terror have led some commentators to conclude that U.S. military training is “good enough.” Regardless of how successful the U.S. Armed Forces have been in Iraq and Afghanistan, if better training can prevent the death of even one U.S. soldier, sailor, airman, or Marine, then the country as a whole has the obligation to ensure that better training is available. Success on the battlefield is no reason to restrict training at home, even in favor of the nation’s treasured resources including endangered species. This is not to suggest that the balance between military training and endangered species protection should be skewed in favor of the DOD. Rather, balancing becomes more difficult when the lives of American servicemembers are at stake. Military readiness and endangered species protection are not mutually exclusive and must continue to be balanced.<sup>2</sup>

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1. National Defense Authorization Act for Fiscal Year 2004, §318, Pub. L. No. 108-136, 117 Stat. 1392, 1432-1433 (to be codified at 16 U.S.C. §1533).
2. STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 2, 185-86 (1996) (citing former Secretary of Defense Dick Cheney, Address to the Defense and Environmental Initiative Forum, Washington, D.C. (Sept. 3, 1990) (“Defense and the environment is not an either/or proposition. To choose between them is impos-

One maxim that has been reinforced by Operation Enduring Freedom (Afghanistan) and Operation Iraqi Freedom is that our armed forces “need to train [like they] fight.”<sup>3</sup> Training exercises must be realistic and challenging to mirror combat operations as closely as possible. As legendary National Football League coach Vince Lombardi once said: “Practice does not make perfect. Only perfect practice makes perfect.”<sup>4</sup> Some have blamed environmental laws in general, and the ESA in particular, for the loss of realistic combat training. It is true that repeating the same old canned scenarios will do our forces little good in combat. Likewise, merely simulating the basic task of “digging-in” a fighting position will be of minimal value when actually required to do it during combat operations.<sup>5</sup> Whether training is basic or complex, the requirement for realistic and flexible training ranges increases the pressure put on the military installations to develop challenging training opportunities while still protecting and preserving endangered and threatened species.<sup>6</sup> INRMPs are used by installation commanders to find and maintain the balance between military readiness and protection of endangered species.

This Article defends INRMPs and DOD’s use of them to protect endangered and threatened species. Sections II and III will provide necessary background information on INRMPs and how they work to achieve the purposes of the ESA. Section IV analyzes the competing arguments for amending the ESA highlighting the reasons why the amendments were unnecessary and unjustified by the situation. Next, Section V argues that endangered and threatened species are still well protected on DOD installations. Finally,

ble in this real world of serious defense threats and genuine environmental concerns.”)).

3. *Military Environmental Legislative Proposals: Hearings Before the Subcomm. on Military Readiness, House Armed Services Comm.*, 108th Cong. (Mar. 13, 2003) (statement of Raymond F. DuBois Jr., Deputy Undersecretary of Defense, Installations, and Environment, discussing the importance of realistic training). See *Endangered Species Programs on Defense Department Lands, Hearings Before the House Resources Comm.*, 108th Cong. (May 6, 2003) (statement of Major Gen. William G. Bowdon III, U.S. Marine Corps (USMC), Commanding General, Marine Corps Base, Camp Pendleton, recounting that during Operation Enduring Freedom, Afghanistan, was the first time Marines of the 15th Marine Expeditionary Unit could actually dig and construct protective fighting positions because environmental restrictions at Camp Pendleton prohibit this vitally important, but basic, skill) [hereinafter Major Gen. Bowdon Statement].
4. *Military Environmental Legislative Proposals*, *supra* note 3 (statement of Raymond J. Fatz, Deputy Assistant Secretary of the Army, Environmental, Safety, and Occupational Health, discussing the importance of realistic training).
5. See Major Gen. Bowdon Statement, *supra* note 3.
6. See generally DYCUS, *supra* note 2, at 33 (“while realistic training has become more difficult and costly, there have been no reductions in unit readiness”).

Section VI offers several regulatory and policy changes required to ensure that INRMPs protect endangered and threatened species to the maximum extent possible without adversely affecting required military training.

## II. INRMPs

INRMPs are at the center of the current controversy. These planning documents are developed and implemented by each DOD installation as required by the Sikes Act Improvement Act (Sikes Act) of 1997.<sup>7</sup> The Sikes Act requires the DOD to use INRMPs to maximize the conservation and protection of its natural resources, including endangered and threatened species and their habitat, without compromising its primary mission of national defense. This comprehensive regime began as a mere authorization to allow hunting and fishing on one Florida military reservation.<sup>8</sup> It has since grown into a behemoth requiring a comprehensive ecosystem-based approach to natural resource management on all DOD-controlled lands. As the natural resource management purpose grew, so did the list of requirements. While it was once only encouraged to achieve a “mutual agreement” between the FWS<sup>9</sup> and the applicable state wildlife agency, now such concurrence is required.<sup>10</sup> Likewise the object of the management plan itself was once aspirational but is now strictly required in accordance with statutory deadlines for completion and revision.<sup>11</sup> Similarly, implementation of plans was once discretionary, but action provisions of adopted INRMPs are now mandatory.<sup>12</sup> As a positive side effect, this progression has resulted in increasingly better funding of INRMP projects. The recent amendments to the ESA make INRMPs even more important to DOD installations and endangered and threatened species because the adequacy of some INRMPs will bar the FWS from designating critical habitat on those DOD installations.

## III. Critical Habitat and INRMPs

“As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for

the preservation of endangered species ever enacted by any nation.”<sup>13</sup>

The ESA has been called the “pitbull” of environmental law because of its clear mandates and strong prohibitions for the protection of endangered and threatened species.<sup>14</sup> “Although the creatures may not care, it is the listing process under the ESA that triggers the important protections of the law—the designation of critical habitat, consultation to avoid jeopardy, prohibitions against taking, and planning for habitat conservation and recovery.”<sup>15</sup> Of these, critical habitat and its designation are the most controversial because this process is pivotal in the balance between: (1) survival of the species dependant upon the habitat and; (2) the effects of prohibitive burdens immediately attached to land when designated as critical habitat.<sup>16</sup> Likewise, critical habitat is pivotal in the balance between military readiness and species protection. Designation of critical habitat on DOD lands could tip the balance too far in favor of species protection while devastating training; however, the ESA still mandates conservation of listed species.<sup>17</sup> INRMPs are used by DOD installations to provide the required protection to listed species without the need for designated critical habitat that would adversely affect military training.

On November 24, 2003, Congress passed the National Defense Authorization Act for Fiscal Year 2004 (2004 Authorization Act). The 2004 Authorization Act amended the ESA in two separate, but reinforcing, ways to exempt DOD lands from critical habitat designation.<sup>18</sup> These amendments were sought by the DOD and essentially codify the two methods recently used by the FWS in practice to exclude

7. Pub. L. No. 105-85, 111 Stat. 1629 (codified as amended at 16 U.S.C. §670a (2000)).

8. Thomas Ledvina, *Conserving Biodiversity and Ensuring Military Readiness—Implementing the Sikes Act Improvement Act*, SG039 ALI-ABA 31 (2001).

9. See CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES* 434 (5th ed. 2002). References to the FWS or the Secretary of the Interior with regard to carrying out their duties under the ESA should be read to include the National Marine Fisheries Service (NMFS) and the Secretary of Commerce where applicable. “An annoying quirk complicates the” ESA. *Id.* The Secretary of the Interior carries out his duties under the ESA through the FWS and has jurisdiction over terrestrial species, freshwater species, and some marine species. The Secretary of Commerce carries out his duties under the ESA through the NMFS, which is subordinate to the National Oceanic and Atmospheric Administration. The NMFS has jurisdiction over most marine species and most anadromous fish. Additionally, the FWS and the NMFS share jurisdiction over certain species.

10. See 16 U.S.C. §670a(a)(2).

11. See *id.* §670a(a)(1)(B), (b)(2).

12. See *id.* §670a(a)(3) (program must still be “[c]onsistent with the use of military installations to ensure the preparedness of the Armed Forces”).

13. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 8 ELR 20513 (1978).

14. COGGINS ET AL., *supra* note 9, at 434-35. This Article assumes the reader is generally familiar with the ESA. Well-respected and comprehensive sources of information on the ESA are LAWRENCE R. LIEBESMAN & RAFFAEL PETERSEN, *ENDANGERED SPECIES DESKBOOK* (Envtl. L. Inst. 2003) and MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 261 (3d ed. 1997).

15. WILLIAM H. RODGERS JR., *ENVIRONMENTAL LAW* §9.9(D)(4)(a)(i) (2d ed. 1994). The Secretary of the Interior, or the Secretary of Commerce for marine species, is required to identify and maintain a list of species that are endangered or threatened due to the condition of their habitat, over utilization by humans, disease or predation, or other factors. 16 U.S.C. §1533(a)(1). An endangered species is defined as one that is in danger of extinction throughout all or a significant portion of its range. *Id.* §1532(6). A threatened species is defined as one that is likely to become endangered in the foreseeable future. *Id.* §1532(20). A species can also be delisted if it becomes extinct or if it recovers to the point where protection is no longer needed. RODGERS, *supra*.

16. See RODGERS, *supra* note 15, §9.9(D)(4)(a)(ii). The Secretary must designate critical habitat at the same time that the species is listed. 16 U.S.C. §1533(a)(3). Critical habitat is defined as habitat essential to the conservation of the species and includes habitat that is occupied by the species and has “physical or biological features essential to the conservation of the species and which may require special management considerations or protection.” *Id.* §1532(5)(A)(i). Unoccupied habitat that is “essential to the conservation of the species” can also be designated as critical habitat. *Id.* §1532(5)(A)(ii).

17. *Id.* §1531(b), (c). In drafting the ESA, Congress used clear and explicit language to prevent federal agencies from claiming that they could not comply with the ESA due to competing priorities and responsibilities. See H.R. CONF. REP. NO. 93-740 (1973).

18. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433 (to be codified at 16 U.S.C. §1533).

DOD lands from critical habitat.<sup>19</sup> First, the ESA was amended to prohibit the Secretary<sup>20</sup> from designating critical habitat on DOD lands that are subject to an INRMP that the Secretary has determined, in writing, “provides a benefit” to the listed species for which critical habitat is being considered.<sup>21</sup> Second, the ESA was further amended to require the Secretary to consider impacts on “national security,” in addition to economic and other impacts, before designating critical habitat.<sup>22</sup>

A careful reading of the two amendments reveals the emergence of two distinct classes of INRMPs, both of which may result in the exclusion of a DOD installation from the designation of critical habitat. An INRMP that “provides a benefit” to the listed species meets a higher standard and results in the mandatory exclusion from the designation of critical habitat on the subject installation.<sup>23</sup> An installation whose INRMP does not meet the higher standard may nonetheless be excluded by the FWS when it balances the benefits of designation against national security impacts.<sup>24</sup> Of the two, it is the latter that causes environmentalists the greater concern.

#### IV. Legislative Relief Was Unnecessary and Unjustified

The amendments to the ESA enacted by the 2004 Authorization Act were unnecessary and unjustified for several reasons. First, the amendments were not needed because the regulatory flexibility inherent in the implementation of the ESA was already effective at protecting training. Second, the legislative relief provides no remedy for most of the DOD’s examples of ESA interference with training. Finally, the amendments are broader than what the DOD asked for.

##### A. Regulatory Flexibility Was Effective at Protecting Training

The FWS used its discretion, in all but a few cases, to exclude military installations from the final designation of critical habitat when there was a completed or nearly completed INRMP that addressed the listed species.<sup>25</sup> The FWS proposed, but eventually excluded DOD lands from critical habitat in most cases. Even when the FWS has designated critical habitat on DOD lands, it has expressed a willingness to amend the designation if new information concerning training effects becomes available or if the INRMP is sufficiently improved.<sup>26</sup> On numerous occasions, the FWS con-

sidered the DOD’s objections to proposed critical habitat and then worked closely with the affected installation to evaluate the INRMP and potential negative training impacts.<sup>27</sup> This has routinely resulted in the exclusion of DOD lands from critical habitat designations based on both the adequacy of the INRMP to provide the necessary “special management” for the listed species, or based on a balancing of the benefits.<sup>28</sup> In light of initial findings that the proposed critical habitat was essential to the conservation of the species, the FWS demonstrated great flexibility in finding alternative grounds, when they existed, for excluding DOD installations from critical habitat that would compromise effective military training.<sup>29</sup>

##### 1. The “Gnatcatcher Rule” Was Never Struck Down

The first method that the FWS developed to exclude DOD installations from critical habitat designation was to rely on the adequacy of the INRMP to provide special management for the listed species.<sup>30</sup> The FWS determined that habitat that was managed to this standard was by definition not critical habitat because it did not need further protection. In the case of the threatened Coastal California gnatcatcher (*polioptila californica californica*) (gnatcatcher) and the endangered San Diego fairy shrimp (*branchinecta sandiegoensis*) (fairy shrimp), the FWS proposed but eventually excluded Marine Corps Air Station Miramar (MCAS Miramar) and Marine Corps Base Camp Pendleton (Camp Pendleton) from critical habitat designation.<sup>31</sup> The FWS first excluded MCAS Miramar because there was a completed INRMP in place that provided for the special management needs of the gnatcatcher, thus negating the need for critical habitat. This became known as the gnatcatcher rule and installations began to rely on it, but the legal basis of the rule was soon threatened.

##### a. *Natural Resources Defense Council, Inc. v. U.S. Department of the Interior*<sup>32</sup>

Shortly after the FWS issued its final designation of critical habitat for the gnatcatcher and fairy shrimp, the Natural Resources Defense Council (NRDC) filed suit challenging the

19. See READINESS AND RANGE PRESERVATION INITIATIVE, FACTSHEET: THE ENDANGERED SPECIES ACT’S CRITICAL HABITAT PROVISION (2003), available at <http://www.denix.osd.mil/denix/Public/Library/Sustain/RRPI/trpi.html> (last visited on Apr. 24, 2004).

20. See *supra* note 9 and accompanying text.

21. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433 (to be codified at 16 U.S.C. §1533).

22. *Id.*

23. *Id.*

24. *Id.*

25. See, e.g., Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. 63438, 63443-45 (Oct. 23, 2000) (to be codified at 50 C.F.R. pt. 17); Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. 63680, 63688 (Oct. 24, 2000) (to be codified at 50 C.F.R. pt. 17).

26. See, e.g., Final Determinations or Nondesignations of Critical Habitat for 101 Plant Species From the Island of Oahu, [Hawaii], 68

Fed. Reg. 35950, 36072 (June 17, 2003) (to be codified at 50 C.F.R. pt. 17).

27. See, e.g., Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443-45; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688.

28. *Id.*

29. Compare Proposed Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. 5946, 5949-51 (Feb. 7, 2000) (designating most of Camp Pendleton and MCAS Miramar as critical habitat); Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688 (excluding most of Camp Pendleton and all of MCAS Miramar from critical habitat); Proposed Designation of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. 12181, 12183-85 (Mar. 8, 2000) (designating most of Camp Pendleton and MCAS Miramar as critical habitat); Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443-45 (excluding most of Camp Pendleton and all of MCAS Miramar from critical habitat).

30. Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688; Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443.

31. *Id.*

32. 275 F. Supp. 2d 1136 (C.D. Cal. 2002).

exclusions as arbitrary and capricious.<sup>33</sup> In two separate cases, developers filed suits challenging the designation of critical habitat for failing to fully analyze the economic effects.<sup>34</sup> Although the NRDC suit challenged the gnatcatcher rule in part, the court granted an FWS motion for voluntary remand of the critical habitat designation for further balancing analysis.<sup>35</sup> The court specifically upheld the requirement that the FWS fully analyze the impacts when balancing the benefits of designating critical habitat against the benefits of not designating critical habitat.<sup>36</sup> The court stayed the three pending cases and allowed remand, but ordered that the designations would remain in force until the FWS redesignated critical habitat.<sup>37</sup>

#### b. *Center for Biological Diversity v. Norton*<sup>38</sup>

In another suit, filed by the Center for Biological Diversity, the FWS decision to exclude U.S. Forest Service (Forest Service) lands that were managed in accordance with a land and resource management plan (LRMP) was held to be “knowingly unlawful.”<sup>39</sup> An LRMP is analogous to an INRMP and the FWS applied the gnatcatcher rule rationale to exclude Forest Service lands from critical habitat.<sup>40</sup> The court specifically struck down the FWS interpretation of the ESA allowing it to exclude from critical habitat areas that are covered by “adequate management or protections . . . already in place.”<sup>41</sup> Although the management plan at issue was an *inadequate* LRMP, the FWS rationale for exclusion was the same as that used for excluding DOD lands pursuant to a completed and adequate INRMP.<sup>42</sup> This part of the holding was a major catalyst in the DOD’s decision to seek legislative relief even though no other court has since ruled on the issue.<sup>43</sup> Although, the court’s decision understandably caused the DOD some concern, it did not necessitate the legislative relief enacted.

#### 2. Balancing of the Benefits Was Upheld

The second method used by the FWS to exclude DOD lands from critical habitat was to exercise its discretion after balancing the benefits of designating critical habitat against the benefits of not designating critical habitat.<sup>44</sup> In the case of Camp Pendleton, the FWS excluded nearly all of the installation from critical habitat of both the gnatcatcher and the fairy shrimp after balancing the benefits.<sup>45</sup> Specifically, the FWS determined that the benefits of exclusion including continued essential training exceeded the benefits of designation, which would only prevent adverse habitat modification that is already protected by the INRMP and the consultation requirements of the ESA.<sup>46</sup> The court in *Natural Resources Defense Council* did not directly address the exclusion of Camp Pendleton based on a balancing of the benefits, but reinforced the duty of the FWS to fully analyze the economic impacts and other relevant factors before balancing the benefits. The court in *Center for Biological Diversity*, however, expressly upheld the FWS discretion and authority to exclude tribal lands from the designation of critical habitat.<sup>47</sup> The court specifically found that the ESA unambiguously grants the FWS the discretion to “exclude an area from critical habitat designation if, after considering ‘the economic impact, and any other relevant impact,’ it determines that the benefits of excluding the area outweigh the benefits of designating that area as critical habitat.”<sup>48</sup> The court further found that the working relationship with the tribe was a relevant “other impact” properly considered.<sup>49</sup> This part of the court’s decision should have comforted the DOD because it fully endorsed the FWS’ discretion to exclude DOD installations from critical habitat after balancing the benefits taking into consideration the “other impact” of negative effects on training. It clearly did not require the DOD to seek legislative relief.

#### 3. The DOD’s Fear of Regulation by Litigation Was Unreasonable

Despite the FWS’ flexibility, the DOD felt it was one court decision away from being subjected to massive critical habitat designations that would cripple readiness and training.<sup>50</sup> This fear of “regulation by litigation” was unreasonable due to the decision in *Center for Biological Diversity*. While the court threatened the gnatcatcher rule, it also specifically upheld the FWS’ discretion through a balancing of the bene-

33. *Id.* at 1137.

34. *Rancho Mission Viejo v. Babbitt*, No. CV 01-8412 SVW (CTx) (stayed by *Natural Resources Defense Council*, 275 F. Supp. 2d at 1156); *Building Indus. Ass’n of S. Cal. v. Norton*, No. CV 01-7028 SVW (CTx) (stayed by *Natural Resources Defense Council*, 275 F. Supp. 2d at 1156).

35. 275 F. Supp. 2d at 1156.

36. *See id.* at 1141-42 (agreeing with the court’s view of the required economic impact analysis in *New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1285, 31 ELR 20614 (10th Cir. 2001)).

37. *Id.*

38. 240 F. Supp. 2d 1090 (D. Ariz. 2003).

39. *Id.* at 1100.

40. *See id.* at 1097.

41. *Id.* at 1097-1103.

42. *See* Final Designation of Critical Habitat for the Mexican Spotted Owl, 66 Fed. Reg. 8530, 8533, 8537 (Feb. 1, 2001) (to be codified at 50 C.F.R. pt. 17); Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688.

43. *See, e.g., Military Environmental Legislative Proposals, supra* note 3 (statement of Gen. William L. Nyland, USMC, Assistant Commandant of the Marine Corps, explaining the effect of the *Center for Biological Diversity* decision on the validity of the gnatcatcher rule) [hereinafter Gen. Nyland Statement].

44. *See, e.g.,* Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443-46; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688-91.

45. *See id.* The FWS did not exclude from critical habitat the parts of Camp Pendleton that are leased to the state of California. These parts are used as a state park and are not used by Marines for training. *Id.*

46. Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63445-46; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63690.

47. *Center for Biological Diversity*, 240 F. Supp. 2d at 1105.

48. *Id.* at 1105.

49. *Id.*

50. *See, e.g.,* Gen. Nyland Statement, *supra* note 43 (indicating that failure to codify the gnatcatcher rule in light of *Center for Biological Diversity* could subject more than 50% of Camp Pendleton and MCAS Miramar to critical habitat designation).

fits.<sup>51</sup> Likewise, *Natural Resources Defense Council* bolstered the FWS' discretion to exclude while reaffirming its duty to fully analyze the impacts.<sup>52</sup> Both methods used by the FWS to exclude DOD installations from critical habitat designation were legally supportable. The gnatcatcher rule was still unchallenged as applied to *effective* INRMPs albeit less supported by the statute than the court endorsed balancing of the benefits.<sup>53</sup> *Center for Biological Diversity* was viewed as the beginning of the end for the FWS flexibility when, in fact, it actually strengthened the FWS authority to exclude DOD lands from critical habitat. This misreading of the case law resulted in the DOD seeking extraordinary legislative relief when the flexibility of the FWS was still effective.

#### 4. "Workarounds" Were Effective

"Workarounds" are another way that the FWS' flexibility allowed training to continue despite the presence of endangered and threatened species. "Workaround" is the term used to describe the detailed coordination between a DOD installation and the local FWS field office resulting in an agreement to modifying training to the extent necessary to allow the training to go forward without harming endangered or threatened species.<sup>54</sup> Virtually every military installation has success stories of effective training conducted while protecting natural resources.<sup>55</sup> The DOD began to discount the success of workarounds while it was seeking legislative relief from critical habitat designation.<sup>56</sup> As Major Gen. William G. Bowdon explained to Congress: "Workarounds are insidious in nature, in that they provide the illusion that the training has been accomplished."<sup>57</sup>

More telling are the numerous success stories of the FWS and a DOD installation working together to solve an endangered species problem while allowing realistic training to continue. Two examples of successful workarounds involve red-cockaded woodpeckers at Marine Corps Base Camp Lejeune, North Carolina, and "mud ops" at Marine Corps Base Hawaii, Kaneohe Bay. In an effort to protect the woodpecker, a 200-foot buffer zone is imposed on each cluster of inhabited trees.<sup>58</sup> The trees are marked with a white band and Marines often treat them as land mines.<sup>59</sup> Training within the buffer zones is restricted to transient missions.<sup>60</sup> Marines on foot or in vehicles are not allowed to occupy buffer zones for extended periods of time; however they are allowed to use small arms blank ammunition.<sup>61</sup> This workaround has been successful in allowing continued, but restricted, training use of the red-cockaded woodpecker habitat on the base while nearly doubling the woodpeckers' population since 1990.<sup>62</sup> This success has also led to a more aggressive research program to determine if the woodpecker can continue to recover without the restrictive buffer zones.<sup>63</sup> The annual "mud ops" at Kaneohe Bay is another example of a successful workaround. Kaneohe Bay is home to all four endangered Hawaiian waterfowl.<sup>64</sup> Invasive plant species threaten the ability of these endangered species to nest in the mud flats along the shores of the Nu'upia Ponds.<sup>65</sup> Normally, Marines are prohibited from training with the 26-ton amphibian assault vehicles in this part of the base, but because the vehicles break up the matting caused by the invasive plants and allow the waterbirds to nest, it has become a celebrated annual event.<sup>66</sup> Marines gain valuable training operating their tracked vehicles over unfamiliar and diverse terrain while helping endangered species to propagate.<sup>67</sup>

These examples are indicative of the willingness of the FWS to cooperate and work closely with individual DOD installations to find a balance that allows training without adversely affecting listed species. There are necessarily instances where workarounds result in unrealistic and relatively worthless training.<sup>68</sup> This extreme is the exception, not the rule. Under the ESA as amended, workarounds will continue to play a vital role in facilitating training in the vi-

51. See *Center for Biological Diversity*, 240 F. Supp. 2d at 1100-03.  
 52. See *Natural Resources Defense Council*, 275 F. Supp. 2d at 1140-42.  
 53. See generally *Center for Biological Diversity*, 240 F. Supp. 2d at 1096-1100 (refusing to give the FWS *Chevron* deference (*Chevron*, U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984)) for its interpretation of the ESA allowing it to exclude from the definition of critical habitat, areas that are already protected by other means).  
 54. See *Threats to Armed Forces Readiness: Hearings Before the Subcomm. on Military Readiness Range Encroachment of the House Armed Services Comm.*, 107th Cong. (May 16, 2002) (statement for Dr. Paul W. Mayberry and Raymond F. DuBois describing workarounds) [hereinafter *Mayberry & DuBois on Threats*]; see also *Environmental Impact of Defense Authorization Act: Hearings Before the Senate Environmental and Public Works Comm.*, 107th Cong. (July 9, 2002) (statement of Jamie Rappaport Clark, Sr. Vice President for Conservation Programs, National Wildlife Federation, describing workarounds).  
 55. See generally *FY [Fiscal Year] 2004 Defense Authorization: Hearings Before the Subcomm. on Readiness of the Senate Armed Services Comm.*, 108th Cong. (Apr. 1, 2003) (statement of Julie A. MacDonald, Special Assistant to the Assistant Secretary of the Interior for Fish, Wildlife, and Parks, discussing examples of FWS and DOD cooperation in conservation).  
 56. See *Mayberry & DuBois on Threats*, *supra* note 54 (discussing the insidious nature of workarounds); see also *FY 2004 Defense Authorization*, *supra* note 55 (statement of Jamie Rappaport Clark, Sr. Vice President for Conservation Programs, National Wildlife Federation, alleging that the U.S. Department of Navy wanted to "discourage any negotiation of solutions to species conservation challenges by Marines or Navy personnel in the field, lest these locally-developed 'win-win' solutions undercut DOD's arguments on Capitol Hill that the ESA is broken") [hereinafter *Clark on Readiness*].  
 57. See Major Gen. Bowdon Statement, *supra* note 3 (explaining that workarounds are not a valid replacement for realistic training because they often cause events to be segmented in time, space, and context nullifying the tactical decisionmaking value of training).

58. MARINE CORPS BASE CAMP LEJEUNE, INTEGRATED NATURAL RESOURCE MANAGEMENT PLAN 66 (2001) [hereinafter *LEJEUNE INRMP*].  
 59. *Id.* See *Clark on Readiness*, *supra* note 56 (describing workarounds at Camp Lejeune).  
 60. See *LEJEUNE INRMP*, *supra* note 58, at 66.  
 61. *Id.* Marines are prohibited from digging, bivouacking, and vehicles must stay on roads. *Id.*  
 62. *LEJEUNE INRMP*, *supra* note 58, at 67.  
 63. *Id.* at 67 (describing the Mission-Capable Long-Range RCW Management Plan implemented in 1999).  
 64. Diane C. Drigot, *Safeguarding Hawaii's Endangered Stilts*, ENDANGERED SPECIES BULL., Nov./Dec. 2000, at 8. (Hawaii's endangered waterbirds present at Marine Corps Base Hawaii include the ae'o (Hawaiian stilt), 'alae keo'keo (Hawaiian coot), 'alae ula (Hawaiian gallinule), and koloa (Hawaiian duck).)  
 65. *Id.* (discussing the matting effects of pickleweed).  
 66. *Id.* (stating that the amphibian assault vehicles break up the matting and create "moats and islands" that prevent predation and assist in nesting and feeding of the Hawaiian stilt).  
 67. *Id.*  
 68. See *Mayberry & DuBois on Threats*, *supra* note 54 (stating that workarounds can result in learning bad habits termed "negative training").

cinity of endangered and threatened species. The amendments do not provide the DOD with a remedy for the “insidious” effects of workarounds. Suggestions offered in Section VII may help to reduce the occurrence of the few extreme workaround cases resulting in unrealistic and ineffective training.

### 5. Inadequate INRMPs Receive No Exclusion

When an INRMP is found to be *inadequate* for the protection of listed species, the DOD installation should not be exempt from the designation of critical habitat. The FWS has been flexible by only designating critical habitat on DOD installations where it found that the INRMP inadequately provided special management for a listed species or when the critical habitat designation does not affect training.<sup>69</sup> When designating critical habitat for 101 plant species on the island of Oahu, Hawaii, the FWS did not exclude two U.S. Navy installations because the INRMP was found to be inadequate for the listed species and because there was no discernable impact on training.<sup>70</sup> The FWS did, however, state that it would amend the designation if new information became available or if the INRMP is sufficiently improved.<sup>71</sup> This was also true when the FWS decided not to exclude certain non-training areas of Camp Pendleton from critical habitat for the gnatcatcher and fairy shrimp.<sup>72</sup> Meanwhile, the FWS was excluding all of Camp Pendleton’s training areas from critical habitat.<sup>73</sup> Under the exemption granted by the recent amendments, the Navy lands in Hawaii would still be designated as critical habitat because an inadequate INRMP cannot “provide[ ] a benefit to the listed species.”<sup>74</sup> On the other hand, the non-training area critical habitat designations on Camp Pendleton would not stand as long as the designated areas are covered by the installation’s INRMP, because the recent amendments exclude all DOD-controlled lands.<sup>75</sup> Therefore, the recent occasions where FWS has designated critical habitat on DOD lands are not examples of regulatory inflexibility but rather examples of when exclusion is simply not justified, either because of an inadequate INRMP or because the critical habitat in question is not located in a training area. Further, these limited examples of failed workarounds do not support the legislative relief sought by the DOD where FWS balancing or an adequate INRMP would remedy the problem.

69. See, e.g., Final Designation or Nondesignations of Critical Habitat for 101 Plant Species From the Island of Oahu, [Hawaii], 68 Fed. Reg. at 36072; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63691; Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63446.

70. Final Designation or Nondesignations of Critical Habitat for 101 Plant Species From the Island of Oahu, [Hawaii], 68 Fed. Reg. at 36072.

71. *Id.*

72. Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63691; Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63446.

73. *See id.*

74. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.

75. *See id.*

### B. The DOD’s Requested Legislative Relief Provides No Remedy

While seeking legislative relief, the DOD often referred to the adverse affect of the ESA on military training and readiness. The DOD provided numerous examples of the adverse effects on training exercises due to actual endangered species but provided only a few examples of how critical habitat has interfered with military training. The adverse effects on training due to the presence of endangered species are unpersuasive in justifying an exemption from critical habitat.

The DOD’s proposal for legislative relief contained the very language initially passed in the U.S. House of Representatives’ version of the bill.<sup>76</sup> The DOD specifically wanted its lands to be exempt from critical habitat designation when an INRMP met the special management purpose that designation of critical habitat would have.<sup>77</sup> To support its request, the DOD cited to specific examples of how endangered species encroached on realistic training and readiness.<sup>78</sup> Ironically, the most well known instances of endangered species interference with realistic military training show precisely why the relief sought, and gained, will not provide any remedy.

The anecdotal evidence provided by the DOD centered on endangered individuals’ effects on training, not on the effects due to critical habitat, that for the most part was not designated. One often cited example of training disruption is nesting by the California least tern and western snowy plover on the beaches of Camp Pendleton.<sup>79</sup> This creates unrealistic training and certification exercises because landing beach access and egress routes are severely restricted, often requiring administrative movement instead of tactical maneuver.<sup>80</sup> At first glance, this is a compelling example of the negative impacts of endangered species on training. The problem with this example is that there is no critical habitat and only a relatively short section of the beach is actually restricted during one-half of the year.<sup>81</sup> Therefore, any exemption from critical habitat designation will not enhance am-

76. See Readiness and Range Preservation Initiative, *Legislative Language: A Bill*, at [http://www.denix.osd.mil/denix/Public/Library/Sustain/RRPI/Documents/legislative\\_language\\_2003.doc](http://www.denix.osd.mil/denix/Public/Library/Sustain/RRPI/Documents/legislative_language_2003.doc) (last visited on Apr. 24, 2004).

77. See Readiness and Range Preservation Initiative, *Sectional Analysis: Division A—Dep’t of Defense Authorizations*, at [http://www.denix.osd.mil/denix/Public/Library/Sustain/RRPI/documents/rrpi\\_sectional\\_analysis\\_2003.doc](http://www.denix.osd.mil/denix/Public/Library/Sustain/RRPI/documents/rrpi_sectional_analysis_2003.doc) (last visited on Apr. 24, 2004).

78. See, e.g., Gen. Nyland Statement, *supra* note 43.

79. See *Impact of Environmental Issues on Military Readiness, Hearings Before the Subcomm. on Readiness and Management Support of the Senate Armed Services Comm.*, 107th Cong. (Mar. 20, 2001) (statement of Major Gen. Edward Hanlon Jr., USMC, Commanding General, Marine Corps Base, Camp Pendleton, describing the effects of nesting season on amphibious exercises) [hereinafter Major Gen. Hanlon Statement].

80. *See id.*

81. EARTHJUSTICE, THEY CAN’T HANDLE THE TRUTH: THE PENTAGON’S MYTHS ABOUT WHY THEY NEED EXEMPTIONS FROM ENVIRONMENTAL LAWS (2003), available at [http://www.earthjustice.org/policy/pdf/Military\\_myths.pdf](http://www.earthjustice.org/policy/pdf/Military_myths.pdf) (last visited Apr. 24, 2004). About 2 or 3 of the 17 miles of Camp Pendleton’s beach is restricted from large-scale amphibious landings during nesting season. *Id.* The restrictions are the result of the consultation process. *Id. Contra* Major Gen. Hanlon Statement, *supra* note 79 (stating that in March 2000, a Marine Expeditionary Unit conducting Special Operations Capable certification was restricted to 500 yards of beach due to the nesting of the California least tern).

phibious training at Camp Pendleton. The birds will continue to nest and the Marines must continue to avoid them. Critics also point out that a freeway and railroad parallel the beach, channeling units under a limited number of bridges anyway.<sup>82</sup> Another example occurs in Arizona on the Barry M. Goldwater aerial gunnery range used by the Marine Corps and U.S. Air Force for bombing and strafing training.<sup>83</sup> The presence of the endangered Sonoran pronghorn antelope often disrupts live fire aerial and maneuver training on the range.<sup>84</sup> Here too, the exemption from critical habitat will not remedy the problem because no part of the range is actually designated as critical habitat.<sup>85</sup> The endangered animals remain on the range and must not be “taken.” The DOD presented several other like examples of endangered species interference with training, most of which did not involve critical habitat and which therefore will not be remedied by the amendments.<sup>86</sup>

### C. The Amendments Are Too Broad

The DOD requested legislative relief because it was concerned about the adverse effects on training and training areas due to critical habitat designation.<sup>87</sup> The amendments are too broad because they prohibit the FWS from designating critical habitat on *any* DOD lands, not just training areas.<sup>88</sup> There are many places on an installation where the designation of critical habitat may be entirely consistent with use of those lands. “A military installation can be viewed as a ‘tale of two cities.’”<sup>89</sup> There is a municipal face and a combat training face to each installation.<sup>90</sup> The municipal face of an installation is composed of areas such as

82. EARTHJUSTICE, *supra* note 81. See also Major Gen. Hanlon Statement, *supra* note 79 (noting the limiting effect of I-5 and the railroad on amphibious and air operations).
83. See Mayberry & DuBois on Threats, *supra* note 54 (describing the effects of the endangered Sonoran pronghorn antelope on training at the Goldwater Range); EARTHJUSTICE, *supra* note 81.
84. See Mayberry & DuBois on Threats, *supra* note 54 (describing the effects of the endangered Sonoran pronghorn antelope on training at the Goldwater Range).
85. See *id.* (describing the effects of the endangered Sonoran pronghorn antelope on training at the Goldwater Range); EARTHJUSTICE, *supra* note 81 (noting that DOD’s proposed legislation would not provide a remedy for this situation because there is no designated critical habitat for the Sonoran pronghorn antelope on the Goldwater Range).
86. See, e.g., Major Gen. Hanlon Statement, *supra* note 79 (noting the presence of endangered red-cockaded woodpeckers and sea turtles without critical habitat). But see *Military Environmental Legislative Proposals*, *supra* note 3 (statement of Gen. John M. Keane, USA, Vice Chief of the Army, describing restriction on training at Fort Irwin due to critical habitat designated for the desert tortoise); *Endangered Species Programs on Defense Department Lands*, *supra* note 3 (statement of Rear Admiral Robert T. Moeller, USN, Deputy Chief of Staff for Operations, Plans, and Policy, U.S. Pacific Fleet, describing the effects felt by the Pacific Missile Range Facility on the Island of Kauai, Hawaii, when the FWS designated critical habitat for an endangered species of grass that is not even present on the installation).
87. See Gen. Nyland Statement, *supra* note 43 (describing the Readiness and Range Preservation Initiative as maintaining the status quo so that training can continue); see Mayberry & DuBois on Threats, *supra* note 54 (stating that the exemption proposals would only apply to military readiness activities).
88. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.
89. See Gen. Nyland Statement, *supra* note 43 (describing the two faces of a military installation).
90. *Id.*

housing, schools, parks, and other areas that can be designated as critical habitat without adverse effects on training.<sup>91</sup> The DOD was not seeking relief from environmental responsibilities associated with the municipal function of installations.<sup>92</sup> Camp Pendleton, for instance, has several areas that are actually designated as critical habitat for the gnatcatcher, fairy shrimp, and arroyo toad (*Bufo californicus*) but that do not adversely affect training.<sup>93</sup> These critical habitat areas include land leased for agriculture and land leased to the state of California and used as a state park.<sup>94</sup> There is no training preservation reason preventing these areas from being designated and managed as critical habitat; however, under the ESA as amended, no part of Camp Pendleton, whether municipal or combat training in nature, can be designated as critical habitat if its INRMP is certified to provide a benefit to a given listed species. Clearly, the amendments are too broad by exempting DOD lands from critical habitat when some of those lands are not used for training.

### V. Endangered Species Are Still Protected on DOD Lands

Endangered species are still protected on DOD lands without the designation of critical habitat, for two significant reasons. First, critical habitat does not add significant protection to endangered species on DOD installations because the DOD is still required to comply with all of the other requirements of the ESA. Second, INRMPs provide effective protection and conservation of endangered species and their habitat.

#### A. The DOD Is Still Required to Comply With the ESA

Even when the DOD enjoys the exemption from critical habitat designation, endangered species are still protected on their lands because the DOD is still required to comply with all of the other legal requirements of the ESA. These requirements include the duty of all federal agencies to conserve endangered species, the requirement to consult with the FWS, and the prohibition on takes.

#### 1. The DOD Has an Affirmative Duty to Conserve Endangered and Threatened Species

The ESA requires that each federal agency use its authority to conserve endangered and threatened species.<sup>95</sup> The U.S. Supreme Court endorsed the same policy language as a mandate required by the ESA in *Tennessee Valley Authority*

91. *Id.*

92. *Id.* (stating “we seek no relief from any of [our municipal side environmental] responsibilities”).

93. See Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9414, 9430 (Feb. 7, 2001); Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63691; Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63446.

94. See *id.*

95. 16 U.S.C. §1531(c). The ESA further defines “conserve” to mean using “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* §1532(2).

*v. Hill*,<sup>96</sup> stating that federal agencies have a duty to protect endangered species even if this frustrates the agency's primary mission.<sup>97</sup> Consequently, the DOD has an affirmative duty to conserve listed species even if it compromises its mission of national security. In the event that the DOD's primary mission is frustrated, the national security exemption could be invoked.<sup>98</sup> Until the impacts of the affirmative action requirement in the interests of listed species reaches this threshold, a national security exemption is unwarranted. Until that threshold is reached, the DOD is still required to comply with the ESA mandate in addition to its own explicit conservation mission.<sup>99</sup>

## 2. The Consultation Requirement Protects Endangered Species and Their Habitat on DOD Lands

The consultation requirement of the ESA provides the most significant protection to endangered and threatened species and their habitat on DOD lands. DOD installations are still required to consult with the FWS when they propose any action that is "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of habitat.<sup>100</sup> Even when a DOD installation is exempt from critical habitat, it still must consult with the FWS for actions that directly affect the listed species or that adversely modify its habitat.<sup>101</sup>

Consultation under the ESA is a three-step process.<sup>102</sup> First, the installation must contact the FWS to determine if an endangered or threatened species may be present.<sup>103</sup> Second, a biological assessment must be prepared to determine whether the contemplated action is likely to affect a listed

species.<sup>104</sup> Finally, if a listed species is likely to be affected, then the agency must formally consult with the FWS to produce a biological opinion (BO) to determine whether the action will jeopardize the species, or adversely modify its habitat.<sup>105</sup> If so, then the action cannot proceed without FWS determination of acceptable alternatives that avoid the jeopardy or adverse modification of habitat.<sup>106</sup> Even if the BO does not find jeopardy, the FWS can still require measures to mitigate the impacts.<sup>107</sup> Failure to comply with the BO leaves the agency liable in the event that an unpermitted take occurs.<sup>108</sup> In some cases, an agency will be liable if it complies with an FWS BO that is found to be clearly erroneous.<sup>109</sup>

The FWS and many conservationists agree that designating critical habitat on a species-by-species basis is not the best way to protect endangered and threatened species.<sup>110</sup> A better way of protecting and conserving endangered and threatened species is through ecosystem management.<sup>111</sup> DOD regulations require INRMPs to provide ecosystem management planning on DOD lands.<sup>112</sup> The FWS has long taken the position that designating critical habitat does not add anything to the protection of most listed species that is not already provided by the initial listing of the species and the consultation process.<sup>113</sup> The FWS supports its position by relying on the redundancy and overlap of the jeopardy standard for consultation and the conservation standard for designating critical habitat.<sup>114</sup>

The FWS routinely resists designating critical habitat as "not prudent" under the ESA.<sup>115</sup> According to FWS regulations, it is not prudent to designate critical habitat when "the species is not threatened by taking or other human activity" or when "such designation of critical habitat would not benefit the species."<sup>116</sup> The FWS has frequently found that designating critical habitat will not add any benefit to listed species. This is especially true on publicly owned lands where the consultation requirement attaches to any federal action that may affect listed species. In support of its position, the FWS compares its regulations for the "jeopardy" and "adverse modification" standards under the consultation process to find that the standards are the same.<sup>117</sup> If the standards are the same, then critical habitat is irrelevant because the effects on the species will include the effects on

96. 437 U.S. 153, 8 ELR 20513 (1978).

97. *Id.* at 185.

98. See 16 U.S.C. §1536(j). Many commentators have criticized DOD for not taking advantage of the existing national security exemption. See Clark on Readiness, *supra* note 56 (stating that the national security exemption could be used to solve "site-specific conflicts between training needs and species conservation needs"); *Oppose the Department of Defense Readiness and Range Preservation Initiative*, at <http://www.defenders.org/habitat/dod/4103.pdf> (last visited Apr. 24, 2004). Perhaps these commentators were sincere in pointing out to the DOD a missed opportunity for wholesale abrogation of the mandates of the ESA, or more likely, they were well aware of the practical limitations that prevent any installation from ever receiving such an exemption. The practical limitations of invoking the national security exemption are so great that it has never been used; therefore, it does not support the argument that the critical habitat amendments were unnecessary. The high political capital cost deters DOD officials from even requesting the exemption. See Clark on Readiness, *supra* note 56 ("[I]t is not politically palatable to make a decision to circumvent an environmental law."). The national security exemption has never been a practicable option for DOD installations because it is intended to be used only in times of emergency, not for day-to-day operations. See Gen. Nyland Statement, *supra* note 43. The "[e]xemptions, like the automobile tool box, are necessary for emergency situations; they should not, however, be necessary every day for the daily commute to work." *Id.* See also BEAN & ROWLAND, *supra* note 14, at 264-65.

99. See generally BEAN & ROWLAND, *supra* note 14, at 236-39 (stating that §7(a)(1) of the ESA is a "relatively unexplored" provision with the potential to take on much greater significance if read to force federal agencies to choose an alternative action that provides the best species conservation if it accomplishes the agency's purpose).

100. 16 U.S.C. §1536.

101. *Id.*

102. *Thomas v. Peterson*, 753 F.2d 754, 763, 18 ELR 20743 (9th Cir. 1985).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Bennett v. Spear*, 520 U.S. 154, 170, 27 ELR 20824 (1997) (stating that the agency disregards a BO "at its own peril").

109. *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1157, 32 ELR 20640 (D. Ariz. 2002) (holding that the "Army committed clear error in judgment when it relied on the Final BO, which failed to consider all the relevant factors").

110. See BEAN & ROWLAND, *supra* note 14, at 277-81.

111. *Id.*

112. See DOD Instruction 4715.3, Environmental Conservation Program §4.2 (May 3, 1996).

113. Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31871, 31872-73 (June 14, 1999).

114. *Id. Contra Conservation Council of Haw. v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 31 ELR 20500 (5th Cir. 2001).

115. 16 U.S.C. §1533(a)(3).

116. 50 C.F.R. §424.12(a)(1)(i), (ii).

117. *Id.* §402.02.

the habitat. Many commentators agree that destroying habitat that is critical to the species must, by definition, also jeopardize the species.<sup>118</sup> On the other hand, critical habitat must be of some significance to the courts because no court has enjoined a federal project where critical habitat was not designated.<sup>119</sup>

In most cases of DOD consultation with the FWS, the jeopardy standard covers the adverse modification standard because adverse modification of occupied habitat will place the species in jeopardy.<sup>120</sup> The FWS does, however, admit that the definitions of “jeopardize” and “adverse modification” can yield different results in cases where critical habitat is designated outside of the species current range.<sup>121</sup> This is a rare case for DOD lands, because the FWS has only designated unoccupied critical habitat in limited instances.<sup>122</sup> The FWS has been reluctant to designate unoccupied critical habitat on DOD lands because of the adverse effects on military training and readiness.<sup>123</sup> Designating training areas as critical habitat would cause severe training restrictions, if not a complete closure, even when no particular endangered species is actually affected. In that case, the installation would have to consult with the FWS whenever it proposed a training event because most valuable military training is inherently destructive and would potentially adversely modify designated critical habitat.

Under the ESA as amended, once the FWS certifies that an INRMP “provides a benefit” to the listed species, that installation will be exempt from critical habitat designation whether the land is occupied by the listed species or not.<sup>124</sup> Training events and projects that could affect occupied habitat will still require consultation with the FWS because affecting occupied habitat will affect the species itself.<sup>125</sup> Therefore, unoccupied habitat will pose no threat to training while occupied habitat will still trigger the consultation requirements of the ESA thus protecting actual species wherever located.

### 3. The DOD Is Prohibited From “Taking” Endangered Species

DOD installations are prohibited from “taking” endangered species or their habitat without a permit.<sup>126</sup> The ESA prohibits unpermitted “takes,” which means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”<sup>127</sup> The FWS has further defined “harm” very broadly to include modification of habitat that actually kills or injures a listed species by “significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering.”<sup>128</sup> Likewise, the FWS has defined “harass” as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.”<sup>129</sup> The regulations, therefore, prohibit a vast array of direct and indirect effects on listed species and their habitat.

Exemptions from taking prohibitions or permits are routinely issued to the DOD and allow the incidental take of species when the take is in compliance with the BO or pursuant to an otherwise lawful activity.<sup>130</sup> There can be no permitted takings without formal consultation with the FWS for a proposed action.<sup>131</sup> A taking without a permit subjects the installation to enforcement action, civil penalties, citizen suit, or even criminal prosecution.<sup>132</sup> In addition to the ESA mandate to preserve endangered species and the requirement to consult with the FWS, a DOD installation otherwise exempt from the designation of critical habitat is still prohibited from “taking” listed species.

#### B. INRMPS Protect Endangered Species

An INRMP itself is not a substitute for critical habitat because it is a planning tool, while critical habitat is a protective status. This distinction is important because it requires an examination of the effects of both an INRMP and critical habitat on a particular species. The protective effect of an INRMP is at least as protective as the designation of critical habitat because an INRMP requires public comment,<sup>133</sup> FWS concurrence,<sup>134</sup> and FWS “certification” to qualify for mandatory exclusion of the DOD installation from critical habitat.<sup>135</sup> Additionally, INRMPS and FWS decisions to certify an INRMP or to otherwise exclude DOD lands from critical habitat are final agency actions subject to judicial review.<sup>136</sup>

118. See BEAN & ROWLAND, *supra* note 14, at 261.

119. See Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 309-10 (1993). Some courts have reached for a valuable distinction between the two regulatory definitions even while noting the explicit overlap. See, e.g., *Sierra Club*, 245 F.3d at 441 (finding that the jeopardy standard protects the species from threats to its survival and the adverse modification standard protects the species from threats to its actual recovery).

120. 16 U.S.C. §1536(a); cf. *Greenpeace v. National Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1260 (W.D. Wash. 1999).

121. Brief for Appellees at 25, 2000 WL 33980707, at \*17, *Sierra Club*, 245 F.3d at 434 (No. 00-30117). See BEAN & ROWLAND, *supra* note 14, at 261-62. Distinguishing between occupied and unoccupied critical habitat reconciles the legislative history of the ESA and the FWS regulations. *Id.* For occupied critical habitat, the duty to avoid jeopardy and the duty to avoid destruction or adverse modification of critical habitat are the same. *Id.* For unoccupied critical habitat, the ability of the species to recover can be diminished by destruction or adverse modification of critical habitat without directly affecting a member of the species. *Id.*

122. See, e.g., Final Designation or Nondesignation of Critical Habitat for 95 Plant Species From the Islands of Kauai and Niihau, [Hawaii], 68 Fed. Reg. 9116, 9192 (Feb. 27, 2003) (to be codified at 50 C.F.R. pt. 17).

123. See, e.g., Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443-45; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688.

124. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.

125. 16 U.S.C. §1536.

126. *Id.* §1538 (2000). The ESA prohibits “[v]irtually all dealings with endangered species, including taking, possession, transportation, and sale.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 8 ELR (1978).

127. 16 U.S.C. §1532(19).

128. 50 C.F.R. §17.3.

129. *Id.*

130. 16 U.S.C. §1536(o); *id.* §1539(a)(1)(B).

131. *Id.* §1536(b)(4).

132. *Id.* §1540.

133. Sikes Act Improvement Act of 1997, §2905(d), 16 U.S.C. §670a note (2000).

134. 16 U.S.C. §670a(a)(2).

135. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.

136. See Administrative Procedure Act, 5 U.S.C. §§701-706.

## 1. Public Comment on INRMPs Is Required

Public comment is important to the planning process because it gives the public an opportunity to raise issues that the installation, the FWS, and the state wildlife agencies may overlook.<sup>137</sup> The Sikes Act requires public input in the development of INRMPs and for changes to existing plans.<sup>138</sup> DOD regulations allow but do not require that an INRMP be produced in accordance with the National Environmental Policy Act (NEPA)<sup>139</sup> procedures.<sup>140</sup> In any case, DOD policy is to allow the public a minimum of 30 days to review and comment on the proposed INRMP.<sup>141</sup> In addition, DOD policy is to provide the FWS and the state wildlife agency with copies of public comments as they are collected in order to permit their appropriate consideration of the issues raised.<sup>142</sup> Although the requirement for public comment adds to the legitimacy of an INRMP's ability to protect listed species, the fact that the public comment procedure is not uniform throughout the DOD is often seen as a weakness.<sup>143</sup>

## 2. FWS Concurrence With DOD INRMPs Is Required

Congress ensured that INRMPs would be protective of endangered and threatened species by requiring FWS concurrence with the plan.<sup>144</sup> The Sikes Act requires that an INRMP reflect the "mutual agreement" of the FWS and the state wildlife agency "concerning conservation, protection, and management of fish and wildlife resources" and that the INRMP will be prepared "in cooperation with" the FWS and the state wildlife agency.<sup>145</sup> DOD regulations require that the FWS and the state wildlife agency concur with the DOD that the INRMP provides for the conservation, protection, and management of fish and wildlife resources.<sup>146</sup> The only exception to this requirement is when the state or federal agency objection is outside of their area of expertise or con-

trary to the applicable state or federal law.<sup>147</sup> This exception would not apply to the FWS or state wildlife agency objection to an INRMP provision regarding endangered or threatened species conservation based on the ESA or other applicable law because this would fall squarely within their area of expertise and authority. The FWS applies the consultation "jeopardy" standard to determine whether concurrence is granted to a particular INRMP.<sup>148</sup> Prior to granting approval, the FWS requires either a decision from the installation commander that the INRMP will not affect any listed species or designated critical habitat, a concurring endorsement from the FWS field office stating that the INRMP is not likely to adversely affect any listed species or designated critical habitat, or a final biological opinion finding that the INRMP is not likely to jeopardize any listed species or adversely modify any designated critical habitat.<sup>149</sup> Thus the FWS, in accordance with the Sikes Act, must concur that an initial INRMP or revision, at a minimum, will not jeopardize any listed species.

## 3. Exemption Requires FWS Certification of INRMPs

The Secretary of the Interior is prohibited from designating critical habitat on DOD lands only after the installation's INRMP has been certified that it "provides a benefit" to the listed species.<sup>150</sup> Previously when promulgating final critical habitat, the FWS routinely exempted DOD lands from critical habitat based on the reasoning that the particular INRMP adequately protected the listed species and therefore no additional special management was necessary or based on a balancing of the benefits.<sup>151</sup> The amendments codified and strengthened this practice by adding the requirement that the FWS first determine that the INRMP "provides a benefit" to the considered listed species before it excludes the installation from critical habitat.<sup>152</sup> This does not however prevent the FWS from exercising its discretion under the gnatcatcher rule or under a balancing of the benefits to exclude a DOD installation from critical habitat. Therefore, it is pivotal to determine what "provides a benefit" actually means. Clearly, it is a heightened, but undefined, standard.<sup>153</sup> Depending on how the term is ultimately defined, the "provides a benefit" standard will add some level of additional protection to listed species.

## 4. Decisions Are Subject to Judicial Review

Citizen suits have frequently sought judicial review of federal agency decisions and failures to act under the Administrative Procedure Act (APA).<sup>154</sup> In fact, the very issues that the DOD sought legislative relief from were based in part on

137. See Memorandum from Raymond F. DuBois, Undersecretary of Defense (Installations and Environment), Implementation of Sikes Act Improvement Act: Updated Guidance 3 (Oct 10, 2002), available at <http://www.denix.osd.mil/denix/Public/ES-Programs/conservation/Legacy/sikes/max0002.pdf> and [http://www.denix.osd.mil/denix/Public/ES-Programs/conservation/Legacy/sikes/sikes\\_Act\\_Guidance\\_November5.doc](http://www.denix.osd.mil/denix/Public/ES-Programs/conservation/Legacy/sikes/sikes_Act_Guidance_November5.doc) (last visited Apr. 24, 2004) [hereinafter DOD Memo].

138. See Sikes Act Improvement Act of 1997, §2905(d)(1), 16 U.S.C. §670a note.

139. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§4321-4370f).

140. DOD Memo, *supra* note 137, at 3.

141. *Id.*

142. *Id.*

143. Telephone Interview with Beth Lowell, Legislative Policy Director, Endangered Species Coalition (Mar. 11, 2004) [hereinafter Lowell Interview].

144. 16 U.S.C. §670a(a)(2) (2000). The Sikes Act prior to the 1997 amendments authorized but did not require cooperative plans mutually agreed upon by the FWS, state agency, and the DOD. DOD Memo, *supra* note 137, at 1.

145. 16 U.S.C. §670a(a)(2).

146. See DOD Memo, *supra* note 137, at 1-2. Interestingly, the FWS does not use the word "concur" but uses the word "approval" instead. See Memorandum from the Acting Director of the U.S. Fish and Wildlife Service, to the Regional Directors, Guidance for Coordination on DOD Sikes Act INRMPs (June 8, 2001), available at <http://www.fws.gov/r9dhcbfa/sikes.pdf> (last visited Apr. 24, 2004) [hereinafter FWS Memo].

147. See DOD Memo, *supra* note 137, at 2.

148. See FWS Memo, *supra* note 146, at 7.

149. *Id.*

150. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.

151. *E.g.*, Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. at 63443-45; Final Determination of Critical Habitat for the Coastal California Gnatcatcher, 65 Fed. Reg. at 63688.

152. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.

153. See discussion *infra* Part VI.A.

154. 5 U.S.C. §701-706.

citizen suits and the threat of citizen suits.<sup>155</sup> The journey began when the NRDC and the Center for Biological Diversity sued the FWS for failing to designate critical habitat for the gnatcatcher and fairy shrimp.<sup>156</sup> These suits were successful and the courts ordered the FWS to designate critical habitat.<sup>157</sup> When Camp Pendleton and MCAS Miramar were excluded from the final designations, the NRDC sued again, challenging the FWS exclusion as arbitrary and capricious under the APA.<sup>158</sup> The legitimacy of an INRMP to protect listed species is enhanced by the ability of the public to challenge the completion of an INRMP and FWS decisions to certify an INRMP or otherwise exclude DOD installations from the designation of critical habitat. Judicial review provides an important safeguard for ensuring that INRMPs provide effective protection of endangered and threatened species on military installations.

There are three decision points in the development of an INRMP where a citizen suit can challenge the FWS or DOD action.

#### a. INRMP/NEPA Challenge

First, when a DOD installation completes an INRMP, whether in accordance with NEPA or not, the procedure and adequacy of the plan can be challenged. If an INRMP is completed using the NEPA process, it can be challenged when the commander of the installation issues a finding of no significant impact (FONSI) or record of decision (ROD).<sup>159</sup> If an INRMP is completed without using the NEPA process, it can be challenged when the plan is approved or signed by the commander of the installation.<sup>160</sup> In either case, the final agency action of INRMP approval, issuing a FONSI, or issuing a ROD is subject to judicial review under the APA as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>161</sup> Judicial review of an INRMP based on failing to comply with NEPA procedures is the most predictable challenge because the NEPA case law is well established.<sup>162</sup> This is not

the case for an INRMP completed in the absence of NEPA procedures. It is arguable that every INRMP should trigger NEPA as major federal action that may significantly affect the environment.<sup>163</sup> Second, while the Sikes Act requires public participation, it does not require the specific public notice and participation requirements of NEPA and the Council on Environmental Quality (CEQ) implementing regulations. An INRMP completed without using NEPA can be challenged as an arbitrary and capricious decision to forego NEPA or to approve the INRMP.<sup>164</sup> Also, the completion of an INRMP may be challenged as “not in accordance with the law” if the public participation requirement of the Sikes Act is violated.<sup>165</sup>

#### b. Exclusion Challenge

Next, the FWS may decide to exclude DOD lands from critical habitat designation even when it has not determined that the applicable INRMP “provides a benefit” to the listed species. The FWS can exclude DOD lands based on the gnatcatcher rule or based on a balancing of the benefits after considering economic, national security, and other relevant impacts.<sup>166</sup> In either case, the decision to exclude is subject to judicial review under the APA.<sup>167</sup> The *Center for Biological Diversity* decision indicates that the gnatcatcher rule is more likely to be struck down while a decision to exclude an area from critical habitat after balancing the benefits is likely to be upheld.<sup>168</sup>

#### c. Certification Challenge

Finally, the FWS is prohibited from designating critical habitat on a DOD installation when it has determined, in writing, that the installation’s INRMP “provides a benefit” to the listed species.<sup>169</sup> This exclusion cannot be challenged under the APA because it is now prohibited by the ESA; however, the certification that the INRMP “provides a bene-

155. See generally *Natural Resources Defense Council v. Department of the Interior*, 113 F.3d 1121, 27 ELR 20971 (9th Cir. 1997) (resulted in the court ordering the FWS to designate critical habitat for the gnatcatcher); *Southwest Ctr. for Biodiversity v. Department of the Interior*, No. CV 98-1866 (S.D. Cal. Sept. 16, 1998) (resulted in the court ordering the FWS to designate critical habitat for the fairy shrimp); *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) (rejecting the FWS rationale for excluding Forest Service lands, subject to a forest plan, from critical habitat designation for the Mexican spotted owl).

156. See *Department of the Interior*, 113 F.3d at 1121; *Southwest Ctr. for Biodiversity*, No. CV 98-1866 (ordering the FWS to designate critical habitat). See also APA, 5 U.S.C. §706(1) (judicial review may be used to compel an agency to take action such as designating critical habitat).

157. See *Department of the Interior*, 113 F.3d at 1121; *Southwest Ctr. for Biodiversity*, No. CV 98-1866.

158. See *Natural Resources Defense Council v. Department of the Interior*, 275 F. Supp. 2d 1136, 1137 (C.D. Cal. 2002); 5 U.S.C. §706(2) (stating when a court may “hold unlawful and set aside agency action”). See also *supra* Part IV.A.1.a.

159. See 5 U.S.C. §704 (only final agency actions are reviewable).

160. See *id.* Completing and approving an INRMP is a final agency action subject to judicial review. See *id.* The decision not to apply NEPA is also a final agency action. See *id.*

161. 5 U.S.C. §706(2).

162. There are no reported cases involving challenges to INRMPs but INRMPs are analogous to other federal agency resource management plans. Cf. *Central S. Dakota Grazing Dist. v. Secretary, Dep’t of*

*Agric.*, 266 F.3d 889, 32 ELR 20192 (8th Cir. 2001) (challenging a Forest Service forest plan and EA setting grazing levels); *Sierra Club v. Marita*, 46 F.3d 606, 25 ELR 20514 (7th Cir. 1995) (challenging forest management plans exclusion of conservation biology principles as contrary to the National Forest Management Act and in violation of NEPA); *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045, 16 ELR 20508 (D. Nev. 1985) (challenging a Bureau of Land Management (BLM) management framework plan as contrary to law); see also *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 33 ELR 20025 (10th Cir. 2002) (challenging the failure of the BLM to prevent off-road vehicle use, failure to implement a land use plan, and failure to apply NEPA in the face of changed circumstances), *cert. granted*, 124 S. Ct. 462 (U.S. Nov. 3, 2003) (No. 03-101).

163. 42 U.S.C. §4332(2)(C). “The reported NEPA decisions and commentary on them are voluminous.” COGGINS, *supra* note 9, at 392 (citing as general reference 2 LAW OF ENVIRONMENTAL PROTECTION ch. 9 (Sheldon Novick et al. eds., *Env’tl. L. Inst.* 2001)).

164. See 5 U.S.C. §706(2)(A).

165. See *id.*

166. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433. See, e.g., *Final Determination of Critical Habitat for the San Diego Fairy Shrimp*, 65 Fed. Reg. at 63443-45; *Final Determination of Critical Habitat for the Coastal California Gnatcatcher*, 65 Fed. Reg. at 63688.

167. See 5 U.S.C. §706(2).

168. *Supra* Part IV.A.1.-3. See *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1102, 1105 (D. Ariz. 2003).

169. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433.

fit” to the listed species is subject to judicial review as a final agency action.<sup>170</sup> A challenge to the certification will have little chance of success once the FWS determines what “provides a benefit” means and correctly applies it.<sup>171</sup> Pursuant to the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>172</sup> test, courts will defer to the agency’s reasonable interpretation of an ambiguous statutory provision. The term “provides a benefit” is ambiguous especially in light of the legislative history of this provision.<sup>173</sup> As long as the FWS develops a reasonable regulatory interpretation, it will be given deference. The only issue for the court to decide will be whether the administrative record supports the certification that the INRMP meets the “provides a benefit” standard.

## VI. Balancing Conservation and Military Training

Although INRMPs effectively protect endangered and threatened species on DOD lands without adversely affecting military training, there is room for improvement. First, the FWS should use the formal notice-and-comment rulemaking procedure to effectively define the “provides a benefit” standard. Second, the DOD should promulgate regulations requiring that all INRMPs be completed in accordance with NEPA. Finally, the DOD must ensure appropriate funding for INRMP required actions including buffer zone acquisitions.

### A. The FWS Must Effectively Define the “Provides a Benefit” Standard

The 2004 Authorization Act is not clear on what the “provides a benefit” standard means, but because the language was selected in the conference committee, the definition of “benefit” can be parsed out between the different versions of the bill passed by the House and the U.S. Senate.<sup>174</sup> The House passed its version of the bill using the DOD proposed language prohibiting the designation of critical habitat “if the Secretary determines that such plan addresses special management considerations or protection.”<sup>175</sup> This language essentially codified the gnatcatcher rule. The Senate, on the other hand, passed a more stringent version prohibiting the designation of critical habitat:

170. See 5 U.S.C. §706(2).

171. The FWS has not clarified what “provides a benefit” means as of the time of this writing. This process is analogous to the §7 consultation process where the FWS issues a BO including alternatives and mitigation requirements required for an agency to proceed with a project without violating the ESA. This usually results in a “safe harbor” for the agency as long as it complies with the BO. In *Center for Biological Diversity v. Rumsfeld*, the court considered whether the BO finding no jeopardy met the standards of effective mitigation measures. 198 F. Supp. 2d 1139, 1152, 32 ELR 20640 (D. Ariz. 2002). The court held that the BO was arbitrary, capricious, and not in accordance with the law. *Id.* Specifically, the court found that the standard of effective mitigation to avoid species jeopardy was not met. *Id.* Likewise, a future court will decide whether a certification of an INRMP by the FWS meets the ESA standard of “provides a benefit” as defined by the FWS. *Cf. Sierra Club v. Marsh*, 816 F.2d 1376, 17 ELR 20717 (9th Cir. 1987). See *infra* Part VI.A. for suggested criteria for determining what “provides a benefit” means.

172. 467 U.S. 837, 842-45, 14 ELR 20507 (1984).

173. See H.R. CONF. REP. NO. 108-354, at 1185-87 (2003) (resolving the differences between the House and Senate standards).

174. See *id.*

175. *Id.* at 1185-86.

[I]f the Secretary of the Interior determines in writing that— (1) the management activities identified in the plan will effectively conserve the threatened species and endangered species within the lands or areas covered by the plan; and (2) the plan provides assurances that adequate funding will be provided for such management activities.<sup>176</sup>

Therefore, the meaning of “provides a benefit” lies somewhere between special management that does not cause jeopardy and effective conservation. Finally, the conference report directs the FWS to evaluate INRMPs consistently with its current practice.<sup>177</sup>

The FWS must define what “provides a benefit” means so that INRMPs will be effective in protecting endangered species on DOD lands without adversely affecting training. The FWS must do this in a clear and concise manner so that FWS field offices and DOD installations know what the standard is and can plan and fund INRMPs accordingly. The FWS should use the formal notice-and-comment rulemaking process to allow the public an opportunity to comment on the proposal and to ensure that an FWS certification that an INRMP “provides a benefit” to the listed species is given deference when challenged.

### 1. Current FWS Practice

Prior to the enacted amendments, the FWS established guidelines for determining when an INRMP provided adequate special management to the extent that an installation could be excluded from critical habitat.<sup>178</sup> To decide whether a plan provided adequate special management or protection, the FWS considered three criteria: (1) whether the plan provides a conservation benefit to the species; (2) whether there are assurances that the management plan will be implemented; and (3) whether there are assurances that the conservation effort will be effective.<sup>179</sup> These criteria appear sufficient for evaluating an INRMP to determine whether it “provides a benefit” to the species; however, whether intentional or not, the legislative process has created a heightened standard that is still “consistent with current practice.”<sup>180</sup> To meet the new and more stringent “provides a benefit” standard, the FWS will have to re-evaluate its current criteria for special management, or develop new criteria altogether.<sup>181</sup> To be “consistent with current practice” the FWS should retain the current criteria for determining whether to concur with the initial INRMP and for future critical habitat designations on DOD lands where the INRMP is not certified as “provid[ing] a benefit.”

### 2. Suggested Additional Criteria: History

Consistent with its current guidelines, the FWS should add a history component to the existing criteria for special man-

176. See *id.* at 1186.

177. See *id.* at 1185-87.

178. See FWS Memo, *supra* note 146, at 9.

179. *Id.* See, e.g., Final Designations or Nondesignations of Critical Habitat for 101 Plant Species From the Island of Oahu, [Hawaii], 68 Fed. Reg. at 36066.

180. See H.R. CONF. REP. NO. 108-354, at 1186-87 (“Consistent with current practice, the Secretary would [sic] establish criteria that would be used to determine if an INRMP benefits the listed species for which critical habitat would be proposed.”).

181. See *id.*

agement to create an enhanced set of criteria for determining whether an INRMP meets the more stringent “provides a benefit” standard. To define where the balance lies, the FWS should consider and give appropriate weight to the concerns of the Senate expressed in its version of the bill.<sup>182</sup> The Senate was concerned with effective conservation and adequate funding.<sup>183</sup> Effective conservation can be ensured by an INRMP based on good science and good management. Providing assurances that INRMP activities will be adequately funded is more problematic for individual DOD installations. The installation can have every intention of funding an INRMP but Congress makes the ultimate budget decisions regarding how and when appropriations can be spent.<sup>184</sup> An installation may not be able to obligate itself to fund an INRMP project beyond the current fiscal appropriations without violating federal appropriations law.<sup>185</sup> To resolve both of the concerns of the Senate, the FWS should establish a history component as part of its criteria. Considering an INRMP’s history of performance will provide a good indication of future conservation results. Likewise, considering the funding history of the INRMP will give a good indication of installation and service commitments to funding. Neither history subcomponent must be definitive on whether the INRMP “provides a benefit,” but adding these considerations to the three special management criteria will result in the effective evaluation of an INRMP with regard to whether it “provides a benefit” to the considered species. The additional history component will account for the heightened standard produced by the conference committee and will be “consistent with [the] current practice[s]” of the FWS.

### 3. Formal Rulemaking

The FWS should promulgate a regulation using the formal notice-and-comment rulemaking process to include all of the stakeholders, including the public, in the development of criteria used to determine whether an INRMP “provides a benefit” to species.<sup>186</sup> The FWS should establish and coordinate closely with a small working group of agency representatives and public participants to fine-tune the criteria to be proposed. Once a proposed set of criteria is established, the general public should be given notice of the proposed rule

and an opportunity to evaluate and comment on it.<sup>187</sup> Public participation will allow the public to raise issues and make suggestions that the FWS and other agencies may have overlooked. Once the comments are evaluated, the FWS and the DOD should issue the final criteria as a joint regulation under the ESA implementing regulations.<sup>188</sup> A joint regulation will provide both the FWS and the DOD with a firm method and set of criteria for the evaluation of INRMPs. Additionally, because the FWS can expect to be sued for violations of the ESA and the APA, a joint regulation defining the “provides a benefit” standard will ensure that the FWS certification of an INRMP will be given deference under the *Chevron* test.<sup>189</sup>

### B. All INRMPs Should Be Subject to NEPA

Conservation groups have been critical of the inconsistent public comment procedures used to develop INRMPs.<sup>190</sup> NEPA procedures can eliminate these concerns as well as assist the installation in developing an effective INRMP. NEPA analysis is triggered by “major Federal actions significantly affecting the quality of the human environment.”<sup>191</sup> An INRMP arguably triggers NEPA because it is intended to guide the installation’s conservation program and thus should affect wildlife and human uses.<sup>192</sup> The Sikes Act requires public participation, but neither the Sikes Act nor DOD regulations have dictated a particular format.<sup>193</sup> Consequently, each service can satisfy the public participation requirement differently. INRMPs that are not completed in accordance with NEPA can be randomly formatted and difficult to follow. For these INRMPs, the public comment procedures are not uniform thus diminishing the ability of the public to be involved. The notice-and-comment process of NEPA gives the general public an opportunity evaluate and submit comments on the proposed plan.<sup>194</sup> Developing an INRMP using NEPA will result in uniform public participation throughout the DOD. This will make it easier for installations to comply with the Sikes Act and DOD regulations requiring public comment and will also assist the installation in making a better informed decision.

The DOD should promulgate regulations requiring that an environmental assessment (EA), an environmental impact statement (EIS), or a FONSI as may be applicable, be completed for every INRMP. Because INRMPs are produced to conserve and manage the natural resources of an installation, including endangered and threatened species, most INRMPs are determined to pose no significant adverse affect on listed species. Thus, in most cases where NEPA is

182. S. 1050, 108th Cong. §322 (2003).

183. See H.R. CONF. REP. NO. 108-354, at 1186-87; 149 CONG. REC. S14417-02, S14421 (daily ed. Nov. 6, 2003) (statement of Senator Jeffords).

184. See Antideficiency Act (ADA), 31 U.S.C. §1301(a).

185. See 31 U.S.C. §1341(a)(1). Congress closely monitors violations of the ADA. ADA issues often cause attorneys within the DOD to go to “war” with each other over self-endorsed interpretations of the ADA based on ambiguous but hotly debated provisions of the Act, regulations, and Government Accounting Office guidance. See generally U.S. GOVERNMENT ACCOUNTING OFFICE (GAO), PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (2d ed. 1991) (providing a basic reference source for federal appropriations law). The first rule is that you cannot spend money on anything that Congress has not authorized. 31 U.S.C. §1301(a). The second rule is that the commander is given wide latitude to determine if an expense is allowed by a particular authorization. See U.S. GAO, *supra*, at 4-15, 4-17. Conversely, there is no discretion to obligate the government for future expenses absent express authorization from Congress. 31 U.S.C. §1341(a)(1). The Sikes Act allows funds to be obligated for INRMPs over 18 months beginning in the fiscal year that the funds are appropriated. 16 U.S.C. §670c-1(b).

186. 5 U.S.C. §553(c).

187. *Id.*

188. Cf. 50 C.F.R. ch. IV (2003) (joint regulations of the FWS and the NMFS).

189. *Supra* Part V.B.4.c.

190. See Lowell Interview, *supra* note 143.

191. 42 U.S.C. §4332(C).

192. See *id.*; cf. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1227, 32 ELR 20734 (10th Cir. 2002) (requiring the FWS to prepare an EIS for the designation of critical habitat due to the designation’s effects on the human environment including modified water usage).

193. See Sikes Act Improvement Act of 1997, §2905(d), 16 U.S.C. §670a note (2000); DOD Memo, *supra* note 137, at 3.

194. See 42 U.S.C. §4332; 40 C.F.R. §1501.4(e)(2); *id.* §1503.1.

applied, an EA of an INRMP results in a FONSI.<sup>195</sup> This is a step forward, but public participation in an EA is less rigid than that required for an EIS.<sup>196</sup> The heightened “provides a benefit” standard should now be the goal of every DOD INRMP; therefore, an INRMP that does not provide a benefit to the listed species will have a less beneficial impact on the listed species than does critical habitat. Because the determination of whether the INRMP “provides a benefit” will be made in the future by the FWS for undetermined listed species or currently unlisted species, an EIS will more thoroughly identify these issues in advance. The decision to conduct only an EA or to forgo NEPA altogether may lead to legal challenge and even future adverse training impacts if the INRMP later fails to “provide[ ] a benefit” resulting in critical habitat designation. Just requiring NEPA analysis for every INRMP will result in a better informed decision, a uniform document format, and more predictable public participation procedures as dictated by CEQ and DOD regulations. Requiring an EIS for every INRMP will add well-established public participation procedures providing the public with more meaningful input throughout the development of the INRMP.

### C. INRMPs Must Be Sufficiently Funded

Some conservation groups have claimed that INRMPs are unreliable because they are not funded.<sup>197</sup> Despite this inaccurate generalization, there are funding challenges that the DOD must overcome. The ESA as amended gives individual DOD installations more leverage to ensure that their INRMPs are sufficiently funded.<sup>198</sup> To ensure that an INRMP “provides a benefit” to endangered species without adversely affecting training, the DOD must prioritize and appropriately fund those programs that have the potential to adversely affect the most important training. DOD installations are already required to fund all INRMPs to a level where they comply with appropriate law.<sup>199</sup> This also means that some INRMPs may not be funded to achieve more than mere compliance.<sup>200</sup> If military training and readiness is to be protected, the DOD will have to allocate enough funds to ensure that each installation’s INRMP meets the requirements and of the ESA as amended and the standards of the FWS.<sup>201</sup> If necessary funds are not provided, then the indi-

vidual installation will have a difficult time ensuring its INRMP “provides a benefit” to the listed species.<sup>202</sup> Failing to meet this standard could jeopardize military training and readiness if it results in the designation of critical habitat on training areas. Obviously, no level of funding will cure an inadequate INRMP. Likewise, a perfect INRMP is equally inadequate if its implementation projects are not funded.

Prioritizing funding also means that some areas may be left without the protection of the exemption. These installations may have to rely on designation exclusion based on the adequacy of the INRMP to provide special management, or based on a balancing of the benefits. Failing these, the DOD may have to accept the designation of critical habitat where the INRMP alone is inadequate for the protection of the listed species.

### D. Buffer Zone Acquisitions

Closely related to adequate funding of INRMPs is the requirement for increased appropriations for buffer zone acquisition.<sup>203</sup> The DOD must develop new ways of providing benefits for endangered and threatened species. This will become more and more difficult as urban sprawl continues to press against the fence lines of DOD installations causing those installations to become the only areas where listed species can survive. It will also become increasingly more difficult to provide a benefit to the listed species without adversely affecting effective military training. The acquisition of buffer areas is one way that the DOD can greatly expand its capacity to provide a benefit to endangered species thus minimizing any adverse effects on training. Routine INRMP projects such as habitat restoration are easily funded, while expensive land acquisitions for use as a buffer or habitat bank must receive special appropriations for that purpose.<sup>204</sup> Ideally, an installation would purchase property immediately adjacent to its fence line for use as a buffer zone. This buffer zone property provides needed habitat, insulates the installation from other types of developmental encroachment, and insulates the surrounding community from base operational impacts such as noise.<sup>205</sup> Unfortunately, most installations are not surrounded by undeveloped land available for purchase. Although once mostly isolated, military bases are now magnets for commercial and residential development. Thus it may be too late for most installations to acquire title to adjacent property. In that case

195. See 40 C.F.R. §1501.4.

196. Compare *id.* (requiring a 30-day public review period of a draft FONSI only if the proposed action is similar to “one which normally requires [an EIS]” or if the proposed action is “without precedent”), with 40 C.F.R. §1503.1 (requiring the agency to request comments from the public and to affirmatively solicit comments from interested parties before preparing a final EIS).

197. See Press Release, Center for Biological Diversity, House Republican Radicals May Undo Bipartisan Senate Compromise on Military Environmental Exemptions (Aug. 21, 2003), available at <http://www.biologicaldiversity.org/swcbd/press/dod8-21-03.htm> (last visited Apr. 24, 2004) (stating that INRMPs “are often never funded or implemented”).

198. See DOD Memo, *supra* note 137, at 10 (providing budgeting guidance for INRMPs); see generally FWS Memo, *supra* note 146, at 11 (describing the three criteria used to determine whether an INRMP provides adequate special management).

199. DOD Memo, *supra* note 137, at 10.

200. See *id.*

201. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433; see generally FWS Memo, *supra* note 146, at 11 (describing the three criteria

used to determine whether an INRMP provides adequate special management).

202. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §318, 117 Stat. 1392, 1432-1433; H.R. CONF. REP. No. 108-354, at 1185-87; see generally FWS Memo, *supra* note 146, at 11 (inadequate funding of an INRMP can affect the three criteria used to determine if an INRMP provides special management for a species).

203. See National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-136, §2811, 116 Stat. 2458, 2705-2707 (to be codified at 10 U.S.C. §2684a).

204. See generally 10 U.S.C. §2676 (“No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law.”).

205. See Major Gen. Hanlon Statement, *supra* note 79 (stating that not everyone views helicopter, jet and artillery noise as the “sound of freedom” and that urbanization encroaches upon military training ranges when developers build housing projects within 2,500 meters from live tank and artillery ranges resulting in increased noise complaints).

the installation must look beyond the immediate area of the installation and seek to acquire buffer areas wherever suitable. In addition to managing these buffer areas with limited installation staff, many bases have entered into partnerships with conservation organizations to manage the acquired lands.<sup>206</sup> These acquisitions should prove to be effective in meeting the “provides a benefit” standard but are still dependent on adequate funding. The DOD must aggressively continue to acquire interest in property for conservation purposes.

## VII. Conclusion: The ESA Is Still Strong on DOD Lands

The DOD mission of military readiness can coexist with the mission of conservation. The ESA as amended does not skew the balance between the two missions. Congress has provided the DOD with an opportunity to become exempt from having its lands designated as critical habitat, but Congress did not make it easy for the DOD to take advantage of that exemption. The DOD must be able to conduct effective

and realistic combat training in order to prepare for and prosecute the global war on terror. Congress expects that, but Congress still expects the DOD to comply with the ESA. When servicemembers' lives are at risk, as they are today, Congress has a moral obligation to ensure that their training is as effective as possible. If Congress wants the DOD to be effective at winning wars and preserving endangered species, then they must ensure that DOD installations have the fiscal resources to do both.

The DOD now has an incentive to ensure that its INRMPs meet the “provides a benefit” standard because if it fails, training areas can be designated as critical habitat, threatening the training and readiness mission. The DOD should work closely with the FWS to define the “provides a benefit” standard and criteria. The DOD must ensure that it sufficiently funds its INRMPs to meet the new standard and must go to Congress for additional appropriations if it cannot. Finally, the DOD must revise its regulations to reflect the heightened importance of INRMPs in support of its training mission requirements. Specifically, requiring installations to apply NEPA when developing an INRMP will standardize public participation procedures for INRMPs.

As the amendments to the ESA are put into practice, it will become evident that the DOD is not exempt from critical habitat designations except under very narrow conditions requiring remarkable levels of effort and funding. The ESA is still strong on DOD lands. It still protects endangered species and their habitat, even on DOD installations.

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206. See, e.g., Gen. Nyland Statement, *supra* note 43 (describing Camp Lejeune's membership in the Onslow Bight Forum and partnership with The Nature Conservancy resulting in the acquisition of 2,500 acres adjacent to tank and rifle ranges); Major Gen. Hanlon Statement, *supra* note 79 (describing Camp Pendleton's membership in the South Coast Conservation Forum, and efforts to acquire interest in lands that could assist in the conservation of protected species).