

7-1-2005

## Who is Encroaching Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns

Natalie Barefoot-Watambwa

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Natalie Barefoot-Watambwa, *Who is Encroaching Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. Miami L. Rev. 577 (2005)

Available at: <https://repository.law.miami.edu/umlr/vol59/iss4/3>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## Comments

### **Who is Encroaching Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns**

*"Defense and the environment is not an either-or proposition . . . . To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense."*<sup>1</sup>

#### I. INTRODUCTION

On November 24, 2003, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2004 authorizing "\$400 billion dollars over the next fiscal year<sup>2</sup> to prepare the military for all that lies ahead."<sup>3</sup> Not only did this Act provide the Department of Defense ("DoD") with financial resources, but the Act also provided the DoD with relief from critical environmental legislation. Embedded in the Act, as part of the military's broader Range and Readiness Preservation Initiative ("RRPI"), were provisions reducing the DoD's obligations under the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA").<sup>4</sup> The DoD claims these circumventions have been necessitated by population growth and urbanization as well as expanding environmental legislation, regulation, and litigation which,

---

1. Dianne Dumanoski, *Pentagon Takes First Steps Towards Tackling Pollution*, BOSTON GLOBE, Sept. 9, 1990, at 79 (quoting then Secretary of Defense Richard Cheney).

2. The fiscal year for the U.S. Government runs from October first through September thirtieth and in this case the budget authorization was retroactive.

3. Press Release, President George W. Bush, Remarks by the President at Signing of H.R. 1588, The National Defense Authorization Act for Fiscal Year 2004 (Nov. 24, 2003), *available at* 2003 WL 22766865.

4. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, §§ 318-19, 117 Stat. 1392, 1433-35 (2004). The alterations to the Endangered Species Act include the prohibition of the Secretary to designate as critical habitat any lands that are owned by, used by, or controlled by the Department of Defense if certain administrative burdens are met. Furthermore, it stipulates that when determining the designation of critical habitat, the impact of that designation on national security must be considered.

DoD says, taken together impede our military forces from being in their most "ready" state.<sup>5</sup> The military has baptized this phenomenon "encroachment," and through the RRPI legislation has sought to remedy some of these hindrances by seeking the amendment of several environmental laws.<sup>6</sup>

Issues of encroachment<sup>7</sup> have recently taken on greater importance as the armed forces have felt increased pressure to be prepared for the worst in the aftermath of the war on terrorism and the lingering sentiment regarding September eleventh. The balance between the protected (our land, people, and resources) and the protectors (our armed forces) is in constant flux. In order to train our protectors to be as prepared as we expect them to be, our armed forces need the ability to experience realistic and authentic combat training situations,<sup>8</sup> which in turn necessitates the destruction or harming of the land and the inhabitants that the forces are in place to protect. It is intuitive that in order to safeguard our nation, some sacrifices to our natural surroundings must be made, but the issue remains as to which situations warrant such sacrifices and to what extent these sacrifices should be made.<sup>9</sup>

---

5. DoD Range and Readiness Preservation Initiative ("RRPI"), Briefing for [illegible] Standing Committee on [illegible] Law, at slide 4, Mar. 31, 2003 (on file with author).

6. The Range and Readiness Preservation Initiative of 2002 includes eight proposed amendments to the ESA, MMPA, Migratory Bird Treaty Act ("MBTA"), the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to relieve the military from environmental laws that the military believes hamper their ability to train in realistic combat situations.

7. From a DoD perspective, encroachment is defined as, "the cumulative result of any and all outside influences that inhibit necessary training and testing." *Critical Challenges Confronting National Security-Continuing Encroachment Threatens Force Readiness: Hearing Before the House Comm. on Government Reform Oversight*, 107th Cong. (2002) (Statement of Dr. Paul W. Mayberry, Deputy Under Secretary of Defense (Readiness), & Mr. Raymond F. DuBois, Jr., Deputy Under Secretary of Defense (Installations and Environment)). Encroachment also includes, "external influences, such as environmental laws and regulations, threatening or constraining testing and training activities on DoD ranges and facilities required for force readiness and weapons acquisition." United States Army Legal Services Agency, *Environmental Law Division Notes: Encroachment: Putting the "Squeeze" on the Department of Defense (DOD)*, 2001 ARMY LAW. 33, 33.

8. The difference realistic training can make in battle has been shown through the past experiences of the DoD.

Realistic demanding training has proven key to survival in combat time and again. For example, data from World Wars I and II indicates that aviators who survive their first five combat engagements are likely to survive the war . . . The ratio of enemy aircraft shot down by U.S. aircraft in Vietnam improved to 13-to-1 from less than 1-to-1 after the Navy established its Fighter Weapons School, popularly known as TOPGUN.

*Endangered Species Programs on Defense Department Lands: Testimony Before the Comm. on House Resources*, 108th Cong. (2003) (statement of Rear Admiral Robert T. Moeller, Deputy Chief of Staff for Operations, Plans and Policy, U.S. Pacific Fleet, Department of the Navy), available at 2003 WL 11717909 [hereinafter Statement of Rear Admiral Moeller].

9. STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 3 (1996).

The 2004 amendments to the MMPA were designed to allow the Navy greater flexibility in the testing and training of active sonar technology: powerful sonar capable of actively detecting underwater objects. Opposition to the use of such technology, and thus, the amendments, stemmed from the fact that high-intensity sonar has been and still remains linked as a cause of world-wide mass beachings of whales and dolphins and of changes in marine life behaviors. Before the amendments reached the floor of Congress through the defense budget, this struggle between the Navy's use of active sonar and the protection of marine mammals under the MMPA had already played out in a limited way in a federal courtroom. The interplay of the legislative amendments with the litigation casts a unique light on this piece of RRPI legislation raising questions about the appropriateness of these particular amendments as a response to the war on terror. By passing the fiscal year 2004 provisions, the United States government made the decision that in the quest for balance, the use of active sonar in realistic combat training was such a situation which warranted the sacrifice of our natural resources. However the insight of the litigation and the extent of the amendments suggests that in making such a decision, Congress, in its concern to equip our armed forces with the resources they deemed necessary to fight the war on terror, did not use the caution, concern, and restraint which the circumvention of such important protective legislation warrants.

This Comment will focus on the Department of the Navy, a branch of the Department of Defense, which has recently been in the forefront of these issues. Part II of this Comment provides an overview of active sonar technology and examples of its possible effects on marine life. Part III looks to the historical issue of encroachment and explores the issues of encroachment which the Navy has been facing and the Navy's attempts to deal with these issues over the past thirty-five years. Part IV explores the lawsuit of *Natural Resources Defense Council v. Evans*<sup>10</sup> which brought to head issues of encroachment under the MMPA when the Northern District of California issued an injunction in August of 2003 to limit the Navy's use of low frequency sonar.<sup>11</sup> Part V analyzes the amendments included in the National Defense Authorization Act of FY 2004, birthed from the broader Range and Readiness Preservation Initiative, by examining how these amendments interact with the decision in *NRDC v. Evans* and answer the encroachment concerns asserted by the DoD. Finally, Part VI compares the purposes of both the environmental legislation against those of the Navy to ascertain whether

---

10. *NRDC v. Evans*, 279 F. Supp. 2d 1129 (N.D. Cal. 2003).

11. *See id.*

there has been an appropriate balance of the interests of naval security with the protection of the environment and human health.

## II. THE PROTECTOR (ACTIVE SONAR) & THE PROTECTED (MARINE LIFE)

On the fifteenth of March 2000, fourteen beaked whales, one spotted dolphin, and two minke whales stranded themselves along one hundred miles of Bahamas coastline while the U.S. Navy was conducting exercises offshore using powerful sonar technology.<sup>12</sup> In response to the beachings, the Navy launched an investigation which, after removing and dissecting the heads of the whales, revealed that "the pattern of damage [was] most consistent with acoustic trauma."<sup>13</sup> "Some type of auditory structural damage findings [were] present in all four beaked whales examined (all showed bloody effusions or hemorrhage near and around the ears)."<sup>14</sup> The "investigation team conclude[d] that tactical mid-range frequency sonars aboard U.S. Navy ships that were in use during the sonar exercise in question were the most plausible source of this acoustic or impulse trauma."<sup>15</sup> The report also concluded that although the exposure to sonar units was the cause of the injuries, the sonar did not kill the whales directly, but instead drove the whales up on to the beaches where they were stranded, leading to their deaths.<sup>16</sup>

Beachings of cetaceans<sup>17</sup> have been on the increase in the past years and fingers are pointed to the use of low- to mid- frequency active sonar, otherwise identified as high-intensity sonar, as the cause of this escalation.<sup>18</sup> It is often the fact that a military warship is within range to the beachings, as was true in the latest strandings of eighty rough-toothed dolphins off Marathon, Florida in March of 2005 and of thirty-

---

12. Betsy Carpenter, *Sound and Fury: Whale Deaths Blamed on Sonar Have Triggered a Heated Debate About Man-made Noise in the Sea*, U.S. NEWS & WORLD REPORT, Dec. 23, 2002, at 50.

13. NAT'L OCEANIC & ATMOSPHERIC ADMIN. & DEP'T OF THE NAVY, JOINT INTERIM REPORT: BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000, at 13 (2001) [hereinafter BAHAMAS STRANDING INTERIM REPORT].

14. *Id.* at 38.

15. *Id.* at ii.

16. *Id.* at 46-47.

17. The word cetacean describes animals which belong to the order Cetacea "which includes fishlike aquatic mammals such as the whale and porpoise." THE AMERICAN HERITAGE DICTIONARY 255 (2d. college ed. 1991).

18. See Torcuil Crichton, *Sharp Rise in Whale Deaths Leads to Call for Sonar Ban*, SUNDAY HERALD (London), July 13, 2003, at 4; see also Ian Sample, *Sound Effect Navy Sonars Blamed for Beached Whales*, THE GUARDIAN (London), Oct. 9, 2003, at 12 (stating that powerful naval sonars are most likely to blame for a series of mass whale beachings in recent years); Michael Hastings, *Whale Killer: Scientists Have New Evidence That Sonar Damages Ocean Wildlife*, NEWSWEEK INT'L, Oct. 20, 2003, at 70 (stating that strandings in the Canaries, Greece, the Bahamas, and off Puget Sound all coincided with sonar tests).

four whales in January of 2005 off the coast of North Carolina.<sup>19</sup> The Florida beaching began “within twenty-four hours, and perhaps less, of exercises conducted off Key West by the USS Philadelphia.”<sup>20</sup> In North Carolina, six Navy ships had been practicing hunting submarines off the coast, causing particular concern for residents of North Carolina as the Navy considers the waters off of North Carolina as one option for the placement of a sonar training range.<sup>21</sup> In the past twenty years, mass strandings and deaths linked to nearby high-intensity sonar exercises have been identified in Hawaii (2004), Washington State (2003), the Canary Islands (2004, 2002, 1989, 1986, 1985), the Bahamas (2000), Madeira (2000), the Commonwealth of Puerto Rico (2002, 2000), the U.S. Virgin Islands (1999, 1998), and in Greece (1996).<sup>22</sup> However, as it has only been recently understood that warships may be a direct cause of the beachings, there may be other instances which have not yet been identified.

#### A. Active Sonar Technology

Active sonar technology differs from passive sonar technology in that rather than passively listening for sounds emitted by an object in the ocean, an active sonar system will transmit sound itself and then listen as that sound bounces off of objects.<sup>23</sup> This mimics the natural echolocation systems which some marine mammals use to navigate and hunt for food.<sup>24</sup> Active sonar falls into three different categories: “low-frequency, which travels the farthest and is often used for search and surveillance; mid-frequency, commonly used in training; and high-frequency, which is the weakest.”<sup>25</sup> Both low- and mid- frequency sonars fall under the umbrella of high-intensity active sonar which have

---

19. Jennifer Babson, *Dolphins' Beaching Closely Followed Sub's Exercises*, THE MIAMI HERALD, Mar. 5, 2005, at A1; Catherine Clabby, *Study Might Save Whales From Ill Effects of Navy Sonar*, THE NEWS & OBSERVER (Raleigh), Feb. 28, 2005.

20. *Id.* Of the eighty stranded dolphins, twenty returned to sea, fourteen were euthanized, and more than thirty were being cared for in order to rehabilitate them. *Id.* Necropsies were being taken to determine if the dolphins suffered acoustic damage. *Id.*

21. Kate Trilout, *Sonar Under Scrutiny*, VIRGINIA PILOT & LEDGER-STAR (Norfolk), May 3, 2005, at 1.

22. Letter from Joel Reynolds, NRDC; Alexander Likhotal, Green Cross International; Jean-Michel Cousteau, Ocean Futures Society; Frederick M. O'Regan, International Fund for Animal Welfare; Naomi A. Rose, Ph.D, Humane Society International; & Mark Simmonds, Whale & Dolphin Conservation Society to the North Atlantic Treaty Organization 6-9 (Feb. 9, 2005) [hereinafter Letter to NATO], available at <http://www.nrdc.org/media/docs/050210a.pdf>.

23. U.S. Dep't of the Navy, SURTASS LFA Systems Description, <http://www.surtass-lfa-eis.com/Description/index.htm> (last visited July 31, 2005).

24. *Id.*

25. Jennifer Babson, *Dolphin Beaching Puts Navy on Defensive About Sonar*, PITTSBURGH POST-GAZETTE, May 9, 2005, at A8.

been associated with dolphin and whale beachings and it is the military-developed low-frequency active sonar ("LFAS") which was the subject of the litigation analyzed in Part IV.<sup>26</sup>

In order to detect an object, the active sonar transmits "pings" of acoustic noise.<sup>27</sup> These "pings" are omnidirectional. Low-frequency sonar can last from six seconds to one hundred seconds with intervals between them ranging from six to fifteen minutes<sup>28</sup> whereas mid-frequency sonar lengths and intervals will generally depend on the specified task.<sup>29</sup> At the source, low-frequency active sonar projects at an approximate level of 215dB, although it is contended that at the convergence zones where the signals begin to combine, the acoustic level can reach 240dB.<sup>30</sup> This is by no means a quiet device; levels of 215dB have been equated to standing next to a fighter jet as it takes off.<sup>31</sup> LFAS can be heard at great distances from the vessel, with levels of 140dB<sup>32</sup> recorded more than four hundred miles from the source vessel.<sup>33</sup> In the 2000 Bahamas stranding the Navy used mid-frequency

---

26. This Comment will focus on low- and mid- frequency sonars; for ease of reference, they will be referred to collectively as high-intensity sonar or separately identify the sonar by its particular name. The major difference between the two is their potential impact as "low-frequency sound waves travel very efficiently in seawater [and therefore] sound from these systems has an even greater geographic reach than mid-frequency sonar and, thus, an even greater potential for environmental harm." Letter to NATO, *supra* note 22, at 5. In the March 2005 beaching in the Florida Keys, both mid- and high-frequency active sonar was used. Babson, *supra* note 25.

27. A ping is a complete sequence of sound transmission. See Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar, 67 Fed. Reg. 46712, 46712 (July 16, 2002) (to be codified at 50 C.F.R. pt 216) [hereinafter Final Rule]. Passive sonars detect acoustic waves generated by an object and work in concert with active sonars by gathering the information from the active sonar pings. See United States of America Department of the Navy, SURTASS LFA Systems Description, <http://www.surtass-lfa-eis.com/Description/index.htm> (last visited July 31, 2005).

28. Final Rule, *supra* note 27, at 46712-13.

29. BAHAMAS STRANDING INTERIM REPORT, *supra* note 13, at 23. For example, constant frequency signals are more useful for detecting movement whereas frequency modulated signals work best in areas where there may be environmental reverberation (although they do not detect movement as effectively as constant frequency signals). *Id.*

30. Final Rule, *supra* note 27, at 46712; see also Letter from Joel Reynolds & Michael Jasny, Senior Attorney & Project Associate (respectively), Natural Resources Defense Council, to Donna Wieting, Chief, Marine Mammal Conservation Division of the National Marine Fisheries Service (May 31, 2001) (copy on file with author), available at <http://www.nrdc.org/wildlife/marine/cjrmj0501.asp>.

31. Profile: Navy Wants to Use Powerful Sonar System, But it May Hurt Underwater Marine Life (ABC News: World News Tonight television broadcast, July 16, 2002).

32. The Department of Labor limits workplace exposure to noise at 115dB for fifteen minutes a day maximum and forbids exposure to impulsive or impact noise beyond 140dB. Occupational Noise Exposure, 29 C.F.R. § 1910.95 (2005).

33. NRDC v. Evans, 279 F. Supp. 2d 1129 (N.D. Cal. 2003).

sonar at source levels exceeding 235dB<sup>34</sup> creating levels of 160dB which could be heard at distances of approximately twenty-one miles.<sup>35</sup> These distances that a sonar ping may travel are influenced by such factors as “water temperature, salinity, topography and the presence of other objects in its path.”<sup>36</sup>

High-intensity sonar is employed by the United States Navy as a “critical element of its antisubmarine warfare” program, and such an active sonar, the Navy says, is vital to the detection of the quieter diesel submarines that are now patrolling our oceans.<sup>37</sup> Active sonar “enables ships to search a larger area more quickly than any other sensor, and it provides the only accurate targeting data for the ship’s antisubmarine warfare (ASW) weapons.”<sup>38</sup> The reliance on active sonar stems from the fear that passive sonar technology will not detect these quiet submarines in a timely manner allowing the enemy submarines to be able to offensively use their weapons against U.S. interests. The Navy views these quiet submarines as “the ultimate stealth weapons” and any undetected enemy submarine as an “underwater terrorist, threatening any surface ship or coastline within its range.”<sup>39</sup> The DoD regards submarine warfare as a sincere threat to our security:

The Russian Federation and the People’s Republic of China have demonstrated that the submarine is a centerpiece of their respective navies. Published naval strategies and current operations of potential adversaries, including Iran and North Korea, have demonstrated the same strategic doctrine. Diesel submarines are deemed a cost-effective platform for the delivery of several types of weapons, including torpedoes, anti-ship cruise missiles, anti-ship mines and nuclear weapons. In addition to the United States, Australia, Canada, and the United Kingdom, 41 other countries, including potential adversary nations such as China, North Korea, and Iran, have modern quiet submarines and many are investing heavily in submarine technology.<sup>40</sup>

Ironically, the use of the high-intensity system will allow enemies to detect the vessel which employ the sonar more easily. However, despite relaying the location of the vessel using the active sonar, such detection permits detection of the enemy submarine long before it poses a danger

---

34. BAHAMAS STRANDING INTERIM REPORT, *supra* note 13, at 23.

35. *Id.* at 28.

36. See Babson, *supra* note 25 (noting that the exact ranges of military sonars are classified).

37. See Statement of Rear Admiral Moeller, *supra* note 8; United States of America Department of the Navy, Why the United States Needs SURTASS LFA, <http://www.surtass-lfa-eis.com/WhyNeed/index.htm> (last visited July 31, 2005).

38. BAHAMAS STRANDING INTERIM REPORT, *supra* note 13, at 56.

39. See United States of America Department of the Navy, Why the United States Needs SURTASS LFA, <http://www.surtass-lfa-eis.com/WhyNeed/index.htm> (last visited July 31, 2005).

40. Statement of Rear Admiral Moeller, *supra* note 8.



to the surface vessel.<sup>41</sup>

## B. *Marine Mammals*

### 1. MARINE MAMMALS AND HIGH-INTENSITY SONAR TECHNOLOGY

Many scientists believe that the use of high-intensity sonar technology may be a cause of what seems to be a global increase in whale strandings. There are two theories of how the sonar affects the cetaceans, causing them to beach themselves. The first theory is that the whales' sensitive sonar detectors are directly damaged by the strong acoustic waves from the high-intensity sonar, causing pain and disorientation which drives the whales to strand themselves on the beach.<sup>42</sup> This theory explains the ruptures and hemorrhaging found in some of the whale and dolphin victims. The second theory is that the exposure to the loud sonar noise causes the whales to become disoriented and confused, compelling them to the surface too quickly which causes decompression sickness otherwise known as "the bends" to SCUBA divers.<sup>43</sup>

Concerns have also been raised by fishermen about the use of high-intensity sonar technology and the collapse of fish stocks, particularly after an Australian study showing that fish exposed to 160dBs at the same frequency and duration as LFAS uses suffered internal injuries, eye hemorrhaging, auditory damage, and mortality.<sup>44</sup> A Norway study also showed that catch rates of haddock and cod fell between forty-five and seventy percent over a two thousand square mile area while low-frequency air guns were being used and did not increase for five days after the use of the guns.<sup>45</sup> There is also concern from the whale-watching industry that high-intensity sonar systems will change the migration patterns of whales, causing disappointment for the tourists and damage to the industry.<sup>46</sup> One of the challenges of active sonar is capturing the actual effects of the use of such sonar. Changes in breeding, migratory, or feeding behaviors in the vast amount of marine species over large geographical areas is difficult to observe, making it quite probable that the effects may be even more pervasive and damaging than those which scientist have been able to concretely identify.

Such damage to marine eco-systems has become a concern on a

---

41. *See id.*

42. Carpenter, *supra* note 12.

43. P.D. Jepson et al., *Gas-bubble Lesions in Stranded Cetaceans: Was Sonar Responsible for a Spate of Whale Deaths After an Atlantic Military Exercise?*, 425 NATURE 575 (2003).

44. David Telfer, *MEP Urges Probe Into Impact of Seismic Devices on Fish Stocks*, ABERDEEN PRESS & JOURNAL (United Kingdom), June 30, 2003, at 19.

45. *Id.*

46. This is especially a concern for Hawaii where a decrease in migrating whales has been observed after tests of LFAS systems last year.

global level as it is not just the U.S. Navy employing such technology.<sup>47</sup> International bodies, such as the IUCN-World Conservation Union and the European Parliament have called upon their members to use high-intensity sonar technology with restraint and caution.<sup>48</sup> The International Whaling Commission, after a report by the Standing Working Group on Environmental Concerns which addressed, among other items, the military's use of sonar, has identified noise as a priority issue.<sup>49</sup> One country, Spain, has taken actual steps to protect marine mammals by introducing "a sonar exclusion zone around the Canary Islands."<sup>50</sup> This was prompted by strandings in 1988, 1989, 1991, as well as 2002, all of which were linked to naval exercises of its coasts.<sup>51</sup> An additional aspect of international concern is that high-intensity sonar is simply extremely loud noise pollution, albeit not so obvious to humans, within sea waters which have become increasingly noisy due to intensified and escalated use.<sup>52</sup>

## 2. MARINE MAMMAL PROTECTION ACT OF 1972

For over thirty years Congress has vested responsibility in the Federal Government to conserve marine mammals through the Marine Mammal Protection Act.<sup>53</sup> Marine mammals, under the act, include those mammals physically structured to survive in the marine environment, including sea otters, whales, dolphins, and manatees, or those mammals, such as polar bears, which primarily inhabit the marine environment.<sup>54</sup> The MMPA was passed based on the fact that certain marine mammals, "are, or may be, in danger of extinction or depletion as a result of man's activities," and that "there was inadequate knowledge of the ecology and population dynamics of such marine mammals."<sup>55</sup> Con-

---

47. Low-frequency sonar is known to be used by the naval forces of the United Kingdom, NATO, France, and the Netherlands. Letter to NATO, *supra* note 22, at 5. Mid-frequency sonar is known to be used by the United Kingdom, France, Germany, Spain, Belgium, Canada, Norway, Italy, the Netherlands, Portugal, Turkey, NATO, and other countries. *Id.* at 4.

48. *Id.* at 12-13.

49. *Id.* at 11-12.

50. Richard Sadler & Geoffrey Lean, *Hi-Tech Military Sonar Systems 'Are Killing Britain's Whales and Dolphins'*, *INDEPENDENT* (London), June 19, 2005, at 17.

51. *Id.*

52. There are worries that increased underwater acoustic noise due to increased traffic on the oceans, use of underwater drilling and LFAS are creating a LOUD environment for all types of marine creatures. In fact a recent phenomenon of fatal collisions between ships and whales has been on the increase due to the combination of the speed, traffic, small crews, bigger vessels, and increased acoustic noise which does not allow the whales enough time to hear the approaching ship. See Public Employees for Environmental Responsibility, *Whale Collisions: Full Speed Ahead*, <http://www.peer.org/campaigns/whales/index.php> (last visited July 31, 2005).

53. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421(h) (2005).

54. *Id.* § 1362(6).

55. *Id.* § 1361(1), (3).

gress further found that "marine mammals were resources of great international significance, esthetic and recreational as well as economic, and . . . they should be protected and encouraged to develop to the greatest extent feasible."<sup>56</sup> The MMPA reflects an intention to broadly protect marine mammals as its protective measures apply not just threatened species, but to all marine mammals.

As well as being broad, the MMPA is rigorous with its protection of marine mammals by "prohibit[ing], with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens on the high seas."<sup>57</sup> A taking, according to the statute, has occurred when a marine mammal has been harassed, hunted, captured, or killed or if there has been an attempt to harass, hunt, capture or kill a marine mammal.<sup>58</sup> Although a take may impact a wide variety of activities and people, the statute does allow for some flexibility and provides for exceptions including exemptions for certain native peoples for subsistence and for scientific research (with the appropriate permit and authorization).<sup>59</sup> Further, the government recognized that during commercial fishing operations, there would be incidental takings of marine mammals and created permits, authorizations, and regulations to control those incidental takings.<sup>60</sup> These extensive protections are further monitored by the Marine Mammal Commission, an independent commission that is to "provide independent oversight of the marine mammal conservation policies and programs being carried out by the federal regulatory agencies."<sup>61</sup> Despite the flexibility added into the MMPA, it remains one of the tougher pieces of environmental legislation, allowing a taking only with a permit. The combination of these protective mechanisms is indicative of the seriousness with which our nation meant to protect these mammals and further reflects the need to maintain such meticulous protection for another thirty years and beyond while increased pressure develops on the stocks with the increased use of the oceans.

### III. ENCROACHMENT AND THE NAVY

The struggle between the use of high-intensity sonar and marine mammal protection is not the first encroachment issue with which the Navy has been dealing. The military's tension with environmental pro-

---

56. *Id.* § 1361(6).

57. NOAA Fisheries: Office of Protected Resources, Laws & Policies, Marine Mammal Protection Act, <http://www.nmfs.noaa.gov/pr/laws/mmpa.htm> (last visited July 31, 2005).

58. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1362(13) (2005).

59. *Id.* § 1371(b), (a)(1).

60. *Id.* § 1371(a)(2).

61. Marine Mammal Commission, About, <http://www.mmc.gov/about/> (last revised May 21, 2004).

tection began with the advent of environmental legislation and has fluctuated in intensity with public opinion and priorities. As the military has taken on more responsibilities as a steward of the environment, it has concurrently subjected itself to environmental laws which have restrained its activities and to litigation taking its diligence in protecting the environment to task.

Perhaps of all the branches of the military, the Navy exposes itself to the greatest level of environmental regulation as it is a unique military service in that it uses land, air, and sea in the performance of its operations and training. In the sea, the Navy operates submarines and ships including cruisers and destroyers as well as using forces such as the Navy Divers.<sup>62</sup> On land, the Navy employs such operative forces as the Seabees, SEALs, and Marines.<sup>63</sup> The Navy also operates a fleet of twelve aircraft carriers, each containing seventy-five to eighty-five fighter/attack aircrafts.<sup>64</sup> Additionally, the Navy makes use of an amphibious assault force consisting of troops and equipment which travel on both water and land.<sup>65</sup> Whenever the Navy performs an activity it must therefore be mindful of the impact it may have on land, air, or water and the cadre of environmental law which accompanies each resource. Moreover, the Navy functions and trains along a treasured and highly-protected eco-systems: our coastlines. Coastlines, critical to Naval operations and necessary for port and land-sea access, have been recognized for their uniqueness and special challenges as they are, "rich in a variety of . . . resources of immediate and potential value" as well as containing habitat areas which are, "ecologically fragile and consequently extremely vulnerable to destruction by man's operations."<sup>66</sup> The use of resources in such fragile environments both terrestrial and marine, exposes the Navy to a host of environmental legislation, particularly ESA, Coastal Zone Management Act and others, and compels the Navy to regulate its behavior within the contours of the wide-range of environmental laws.

This part provides a chronological overview of the changing attitude of the military to the environment. Section A and B describe situations where citizens have challenged Naval activities to practically demonstrate the issues of encroachment that the Navy faces in its opera-

---

62. Navy, Explore the Navy: Navy Life, <http://www.navy.com/navylife> (last visited July 31, 2005).

63. *Id.*

64. Navy, Explore the Navy: Navy Life, Aircraft Carriers, <http://www.navy.com/aircraft> carriers (last visited July 31, 2005).

65. Navy, Explore the Navy: Navy Life, Amphibious, <http://www.navy.com/amphibious> (last visited July 31, 2005).

66. Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465, 1451 (2005).

tions. Section C describes the military's transformation to a protector of the environment, and section D describes a pre-September eleventh attempt to hold the military to even higher standards and the subsequent roll-back of military compliance with environmental regulation through the RRPI package.

### A. *Initial Naval Interactions With Encroachment*

Before the 1970s there were few environmental laws with which to contend and the Navy had a fairly free reign to protect the sovereignty of the United States and the people living within without much questioning by the populace. Although awareness and concern of environmental issues had always existed in some form, the idea of reflecting those concerns through the law in the United States was just rearing its head.<sup>67</sup> The first major shift came in 1962 when Rachel Carson published her famous book, *Silent Spring*, which drew people's attention to the effects of the unrestrained use of pesticides and chemicals in our daily lives and to our health.<sup>68</sup> It took a few years to turn that warning into action, but with the beginning of the 1970s came a dramatic increase in the amount of environmental legislation and the commencement of people's appreciation of their responsibility to the earth around them.<sup>69</sup>

---

67. For a synopsis of global environmental history from ancient civilizations to the present see William Kovarik, Environmental History Timeline, <http://www.radford.edu/~wkovarik/envhist/> (last visited July 31, 2005).

68. RACHEL CARSON, *SILENT SPRING* (1962).

69. See William Kovarik, Environmental History Timeline, 1970-1980, <http://www.radford.edu/~wkovarik/envhist/9seventies.html> (last visited July 31, 2005). The seventies saw the passing of valuable environmental legislation such as Federal Water Pollution Control Act (known as the Clean Water Act, 42 U.S.C. §§ 1251-1387 (2005) (CWA) (passed over President Nixon's veto), Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. §§ 136-136y (2005) (FIFRA), Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2005) (TSCA), National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (2005) (NEPA), Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (2005) (SDWA), Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2005) (RCRA), amendments to create the Clean Air Act, 42 U.S.C. §§ 7401-7671 (2005) (CAA), Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2005) (ESA), Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (2005) (MMPA), and others. See *id.*; National Resource Defense Council, *E-law: What Started it All?*, <http://www.nrdc.org/legislation/helaw.asp#> (last revised May 5, 2000). The Environmental Protection Agency also came into existence in 1970. See William Kovarik, Environmental History Timeline, 1970-1980, <http://www.radford.edu/~wkovarik/envhist/9seventies.html> (last visited July 31, 2005). The decade also saw the launching of many civil society organizations, such as National Resource Defense Council (1970), Friends of the Everglades (1970), Worldwatch Institute (1974), and Earth First! (1979) as well as events targeted at protecting the environment such as the Earth Day (on April 22, 1970) and World Environment Day (June 5, 1977, which marks the beginning of Kenya's Green Belt Movement with the planting of seven small saplings). See William Kovarik, Environmental History Timeline, 1970-1980, <http://www.radford.edu/~wkovarik/envhist/9seventies.html> (last visited July 31, 2005); National Resource Defense Council, *E-law: What Started it All?*, <http://www.nrdc.org/legislation/helaw.asp#> (last revised May 5, 2000).

On January 1, 1970, the National Environmental Policy Act of 1969 (NEPA) came into effect requiring all agencies of the Federal Government to create a systematic approach for considering the environmental consequences of a proposed project during the planning process, and, moreover requiring that for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment," the agency involved must prepare an environmental impact statement (EIS).<sup>70</sup> NEPA is considered to be "our basic national charter for protection of the environment"<sup>71</sup> and exists to ensure that "environmental information is available to public officials and citizens"<sup>72</sup> so that "public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."<sup>73</sup> Legally, the Federal Government, including the Navy, was now required to think about the environmental implications of their activities and measure their environmental costs. Because NEPA was construed by the courts to be entirely procedural, "an agency was free in principle to make a foolish decision but not an uninformed one."<sup>74</sup>

One of the Department of the Navy's first encounters with encroachment litigation involved NEPA. The case of *Citizens for Reid State Park v. Laird*<sup>75</sup> exemplifies the struggle between protection of the environment and military readiness. In January 1972, a group of Maine citizens sought to enjoin the Navy from embarking on Operation Snowy Beach, a series of land, air, and amphibious landing and training exercises conducted over a period of five days in a Maine state park.<sup>76</sup> Operation Snowy Beach involved nine hundred men camping out for four nights in tents, two helicopter landings, seven amphibious tractors landing on the beach, and training exercises in the woods.<sup>77</sup> There would be no live ammunition used, no trees cut, no vehicles off roadways or designated areas, and personnel would use portable chemical toilets.<sup>78</sup> The Navy had not compiled an environmental impact statement (EIS) on whether Operation Snowy Beach would significantly affect the quality of the human environment; however, the record showed that the Navy

---

70. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (2005).

71. Dycus, *supra* note 9, at 12 (citing 40 C.F.R. § 1.500.1(a) (2005) which explains the purpose, policy and mandate behind NEPA).

72. 40 C.F.R. § 1.500.1(b) (2005).

73. *Id.* § 1500.1(c).

74. Dycus, *supra* note 9, at 13 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)).

75. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (1972).

76. *Id.* at 784.

77. *Id.* at 785.

78. *Id.* at 785-86.

had conducted inspections of the exercise area, consulted with the public officials, and considered the scope and the character of the operation before concluding that "the total impact of the operation would be slight" and that Reid State Park was the only area on the Eastern seaboard suitable for this exercise.<sup>79</sup> The court declined to review the Navy's preliminary determinations that there would be no significant environmental effect, and therefore no need for an EIS, where NEPA "plainly commits [such] . . . determination[s] to the agency" and where the statutory language regarding environmental effects was "extremely broad and not susceptible to precise definition."<sup>80</sup> Thus the court limited its function to a determination of whether the agency's decision "has warrant in the record and a reasonable basis in law."<sup>81</sup> To ensure that the training went forward as scheduled the next day, the court dismissed the action with prejudice and with costs.<sup>82</sup>

Initial cases, like this one, demonstrate the beginning of what the DoD would later label encroachment: in this case, a citizen group forcing the Navy to court to justify its failure to issue an EIS before it continued with its scheduled training. The frustrations from both sides are evident and understandable. The Navy, which had been planning Operation Snowy Beach since the spring of 1971, was in court the day before the training was to take place<sup>83</sup> defending its actions and pleading with the court to allow the training to go forward as the Navy felt that Reid State Park was the only area appropriate for a realistic exercise and if prohibited from training at the park, its only alternative was to cancel the entire operation.<sup>84</sup> Conversely, Maine citizens were concerned that nine hundred marines arriving by land, air, and sea into the park, camping for five days, and performing training exercises throughout that time would necessarily create a significant environmental impact on the park and the Navy, as required by law, should have to think about the environmental consequences of its actions by performing a full EIS so that areas of mitigation could be identified.<sup>85</sup> The court accepted the Navy's decision

---

79. *Id.* at 788. Under NEPA, an agency must also determine whether or not the impact of its action will be significant enough to warrant a full EIS. In these cases, the agency prepares an Environmental Assessment (EA) to determine if a full EIS is required and if the agency determines that no EIS is required, then the agency must issue a finding of no significant impact (FONSI). *Dycus*, *supra* note 9, at 12-13 (citations excluded).

80. *Citizens for Reid State Park*, 336 F. Supp. at 789.

81. *Id.* at 789 (quoting *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965)).

82. *Id.*

83. The court's order is dated January 21, 1972, whereas the facts state that the training was to take place January 22-26, 1972. *See id.* at 783-84.

84. *Id.* at 788.

85. "The park has approximately one and one-half miles of shoreline and contains approximately 800 acres, consisting of sand beach, sand dunes, two salt marshes and wooded uplands." *Id.* at 784.

not to file an EIS by recognizing the “full good faith compliance with the substantial and procedural requirements” and limiting its review of the Navy’s interpretation of “significant” to “whether the decision has warrant in the record and a reasonable basis in law.”<sup>86</sup> Although not explicitly taking into consideration national security needs vis-à-vis military training in its opinion, such factors most likely played a role in the court’s decision-making process due to the continued involvement of U.S. troops in Vietnam<sup>87</sup> and the Navy’s all-or-nothing attitude.<sup>88</sup>

### B. *Persona Non Grata*

Due to the fact that the nature of naval operations involve the sea, the Navy has bases all over the world including in places that most would consider picturesque.<sup>89</sup> Warfare training for the Navy by necessity entails the use of these scenic areas. The following are two encroachment examples where compliance with environmental legislation and subsequent litigation by native peoples spanning over many years has literally evicted the Navy from two of its training grounds.

#### 1. THE PACIFIC FLEET: HAWAIIAN ISLANDS

One of the first cases in which the Navy argued to the court that an injunction would have an effect on its readiness capabilities is *Aluli v. Brown*.<sup>90</sup> This legal conflict between the Navy and citizens of Hawaii concerned over the island of Kaho’olawe,<sup>91</sup> the smallest of the eight main islands of the State of Hawaii, arose in 1976 and finally reached a conclusion in November of 2003.<sup>92</sup> Kaho’olawe was used by the Navy

---

86. *Id.* at 788-89. Subsequent C.E.Q. regulations would implicitly reject this interpretation of “significant.” 40 C.F.R. § 1508.27 (2005) (requiring considerations of both context and intensity when interpreting “significantly”). Moreover, the courts would explicitly incorporate the arbitrary and capricious standard of review a year later. *See* Hanly v. Kleindienst, 471 F.2d 823 (1973) (applying the arbitrary and capricious standard of review to NEPA); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (applying the arbitrary and capricious standard to decisions under the APA).

87. As of January 1, 1972, 133,000 U.S. servicemen remained in South Vietnam; the last U.S. troops left Vietnam on April 30, 1975. *See* PBS, Battlefield Vietnam, Timeline, <http://www.pbs.org/battlefieldvietnam/timeline/index3.html> (last visited July 31, 2005).

88. The Navy claimed that if the court would not permit Operation Snowy Beach to take place at Reid State Park, that the “only alternative was cancellation of the operation.” *Citizens for Reid State Park*, 336 F. Supp. 478.

89. On the its recruitment website, the Navy entices potential recruits with images of Australian beaches, Spanish sunsets – two of the ten ports of call that the Navy has in the world spanning six of the seven continents. *See* Navy, Explore the Navy, Experience the World, The Navy Around the World, [www http://www.navy.com/experiencetheworld/navyaroundtheworld](http://www.navy.com/experiencetheworld/navyaroundtheworld) (last visited July 31, 2005).

90. *Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977).

91. The citizens sued as individuals and also as the Protect Kaho’olawe Association.

92. Although concern for the island originated before the year 1976, it was in that year that



“as a site for aerial and surface bombardment” from 1941 to 1990 when the Navy was ordered to halt the exercises.<sup>93</sup> Approximately one quarter of the forty-five square miles of island<sup>94</sup> was used by the Navy for weapons delivery practice to hit targets by both air-to-ground and ship-to-shore exercises.<sup>95</sup> The island had been uninhibited when the Navy began its training there, however it had at one time been occupied.<sup>96</sup> The Navy had performed an EIS in 1972 and had found that eleven of the fifty identified archaeological sites were in the normal target zone.<sup>97</sup> Further archaeological surveying was in the process of being completed when a group of concerned citizens brought suit attempting to enjoin the Navy’s bombing activities.<sup>98</sup>

Although the court found that the Navy was in violation of NEPA and Executive Order No. 11593 (entitled “Protection and Enhancement of the Cultural Environment”) and its implementing regulations, the court denied injunctive relief to the concerned citizen plaintiffs.<sup>99</sup> The court accepted the Navy’s testimony that “the military readiness of the Third Fleet would be reduced by 30 to 40 percent” and found that this reduction in military readiness would be substantial enough to tip the balance of hardships decidedly towards the Navy.<sup>100</sup> The court also found that the Navy did in fact consider alternative sites for their military maneuvers, however that their reasons for rejecting these sites were rea-

---

the lawsuit was filed and when people began staging formal protests. See Bruce Dunford, *Ceremony to Mark Return of Kahoolawe to the State*, HONOLULU STAR-BULLETIN, Oct. 23, 2003, [hereinafter Dunford, *Ceremony*] available at <http://starbulletin.com/2003/10/23/news/index14.html>; Brian Dunford, *Hawaii’s ‘Target Island’ Finds Some Peace*, LOS ANGELES TIMES, Jan. 22, 1995, at B5 [hereinafter Dunford, *‘Target Island’*].

93. *Auli*, 437 F. Supp. at 605. Kaho’olawe was officially placed under the jurisdiction of the Secretary of the Navy in 1953 by President Eisenhower and thereafter reserved for naval purposes. See *id.* In 1990 President Bush ordered the cessation of military use of the island. See Dunford, *Ceremony*, *supra* note 92; Dunford, *‘Target Island,’ supra* note 92. The island was finally officially handed-over from the Navy to state of Hawaii’s Kaho’olawe Island Reserve Commission on November 12, 2003. See Dunford, *Ceremony*, *supra* note 92. The Navy used the island during WW I, WW II, the Korean War, the Vietnam War, and throughout the Cold War; use of the island was critical in finding a design flaw in the Mark XIV torpedo during WW II. See Navy Hawaii, Environment, Kaho’olawe: Meaningful, Safe Use, Military History, [http://www.hawaii.navy.mil/Environmental/Environmental\\_Index.htm](http://www.hawaii.navy.mil/Environmental/Environmental_Index.htm) (last visited July 31, 2005).

94. Kaho’olawe is eleven miles long and six miles wide at the widest point. *Auli*, 437 F. Supp. at 605.

95. *Id.*

96. Only domestic sheep and feral goat were present on the island at the time of the transfer and at the time of the lawsuit. *Id.*

97. *Id.*

98. *Id.* at 605-06.

99. *Id.* at 611-12; National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2005); Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 31, 1971). The plaintiffs had asked the court to enjoin the Navy from using live ordnance on the island until the Navy had complied with the requirements of both NEPA and Executive Order No. 11593. *Id.* at 610.

100. *Id.* at 611.

sonable.<sup>101</sup> The court omitted from its analysis of substantial hardship that were it to issue the injunction, "the readiness of the Third Fleet would only suffer until it reformulated and published an EIS as required under the statute."<sup>102</sup>

Despite the court's sympathetic ear to the loss of military preparedness, the Navy's elusion of an injunction was no victory.<sup>103</sup> The Navy was ordered to comply with the NEPA requirements as well as those applicable to Protection and Enhancement of the Cultural Environment.<sup>104</sup> This also marked the beginning of a battle of the Hawaiian citizens to regain control of the island in order to preserve its natural habitat and the archaeological sites in the spirit of their tradition of *aloha 'aina* or love of the land.<sup>105</sup> "Until the end, military leaders insisted Kahoolawe was vital for training Pacific-area forces," and even implied that a prohibition to use the island may affect decisions on the Navy's presence in Hawaii.<sup>106</sup> In the end, military training was halted, and the Navy agreed to leave, however not without the remediation of the island: the Navy was appropriated four hundred million dollars to fund a ten-year clean up of the island<sup>107</sup> after which another eighteen million was appropriated for the Navy to finalize its clearance operations and demolize from the island.<sup>108</sup> The Navy calls this "the most extensive unexploded ordnance cleanup project in history" involving three million

---

101. *Id.*

102. Kathleen Margareta Ryder, *Vieques' Struggle for Freedom: Environmental Litigation, Civil Disobedience, and Political Marketing Proves Successful*, 12 PA. ST. ENVTL. L. REV. 419, 428 (2004). Those impacts would have been negligible in the long term as the court ordered that a draft EIS be prepared within forty-five days. *Aluli*, 437 F. Supp. at 612.

103. The Navy did achieve somewhat of a victory when the case on appeal reversed the holding that an EIS had to be compiled annually for each annual appropriation. *See Aluli v. Brown*, 602 F.2d 876 (9th Cir. 1979) (reversing *Aluli* to the extent that it required an EIS to be filed for annual appropriation requests).

104. Whereas NEPA requires an EIS to be performed, the Executive Order requires that Federal agencies locate potential sites for the National register of Historic Places and exercise caution until inventories evaluations are performed on those sites. *See Exec. Order No. 11,593*, 36 Fed. Reg. 8,921 (May 31, 1971).

105. The next years would see a series of civil disobedience occupations of the island and include two arrests and imprisonments, two drownings, and bitter legal battles. *See Dunford, Ceremony*, *supra* note 92; Dunford, *'Target Island'*, *supra* note 92.

106. Dunford, *'Target Island'*, *supra* note 92. Defense spending ranks second behind tourism in the Hawaiian economy. *Id.*

107. Press Release, Kaho'olawe Island Reserve Commission, U.S. Navy to Return Island of Kaho'olawe to Hawai'i (Oct. 22, 2003), available at [http://kahoolawe.hawaii.gov/press/Press\\_rel102203.pdf](http://kahoolawe.hawaii.gov/press/Press_rel102203.pdf). The cleanup activity lasted from 1993 to 2003. "Federal law specifically states that the United States is responsible and liable for the unexploded ordnance and environmental remediation on Kaho'olawe." Press Release, Kaho'olawe Island Reserve Commission, Navy Completes Withdrawal From Kaho'olawe (Apr. 8, 2004), available at [http://kahoolawe.hawaii.gov/press/press\\_rel040804.pdf](http://kahoolawe.hawaii.gov/press/press_rel040804.pdf) (quoting Commissioner Burt Sakata of the Kaho'olawe Island Reserve Commission).

108. Press Release, Kaho'olawe Island Reserve Commission, U.S. Navy to Return Island of

hours of cleanup and the removal of over ten million pounds of scrap metal and unexploded ordnance.<sup>109</sup> In this case pleas to save the environment and culture backed with the force of environmental legislation and steady challenges through litigation wore down the Navy's resistance to maintaining the island for its sea and air target-practice.

## 2. THE ATLANTIC FLEET: VIEQUES

A situation similar to that of Kaho'olawe arose in the Atlantic ocean on the island of Vieques: after sixty years of using the island for war maneuvers and twenty years of legal battles, the Navy has left the island.<sup>110</sup> Vieques is an island within the Commonwealth of Puerto Rico, located in the Caribbean. The island provided an ideal tactical location for an air and naval base and consequently the U.S. government purchased two-thirds of the island in the 1940s.<sup>111</sup> The people who lived on the island were resettled to other locations on the island or to St. Croix.<sup>112</sup> It was not until the 1970s when the use of Vieques intensified due to the threat of the Cold War and the Navy's leasing of parts of the island for use by other countries.<sup>113</sup> Due to this increased military presence, civilian jobs were lost and in an attempt to revitalize the economy, the Puerto Rican government embarked on a plan to build a resort on the island; this plan was refused by the Navy for fear that their training would be reduced due to the tourist presence on the island.<sup>114</sup> In 1979 the power struggle began: faced with an economically depressed people and armed with the environmental legislation completed that decade, the Governor of Puerto Rico, the Mayor of Vieques, and other citizens<sup>115</sup> filed suit against the Secretary of Defense, Harold Brown, claiming violation of over fifteen environmental laws and executive orders and seeking to enjoin the Navy from using any portion of the land in Vieques or

---

Kaho'olawe to Hawai'i (Oct. 22, 2003), *available at* [http://kahoolawe.hawaii.gov/press/Press\\_rel102203.pdf](http://kahoolawe.hawaii.gov/press/Press_rel102203.pdf).

109. Navy Hawaii, Environmental, Kaho'olawe: Meaningful, Safe Use, [http://www.hawaii.navy.mil/Environmental/Environmental\\_Index.htm](http://www.hawaii.navy.mil/Environmental/Environmental_Index.htm) (last visited July 31, 2005).

110. Indymedia.org, *U.S. Navy Leaves Vieques After 60 Years of Bombing*, May 8, 2003, <http://www.viequeslibre.addr.com/start.html>.

111. Ryder, *supra* note 102, at 420. Initially Congress planned on building an air and naval base comparable to Pearl Harbor, however after the bombing of Pearl Harbor the plans for building at Vieques were scaled back as the government did not want to risk everything in one location. *Id.* at 420-21.

112. Ryder, *supra* note 102, at 421.

113. *Id.* The Navy leased the island for use by the French, English, Italian, and Dutch militaries. *Id.*

114. *Id.* at 422.

115. The governor at that time was Carlos Romero Barcelo and Radamees Tirado Guevara was the Mayor of Vieques. *Barcelo v. Brown*, 478 F. Supp 646 (D.P.R. 1979). The suit consolidated two separate actions. *Id.* at 651.

the waters surrounding the island for naval training operations.<sup>116</sup> During the initial trial which lasted three months the court heard the testimony of sixty-three witnesses, displayed hundreds of exhibits, and even took two field trips to the island of Vieques.<sup>117</sup> In this case, as in *Citizens for Reid Park v. Laird*,<sup>118</sup> the Navy asserted the argument that Vieques is the only location where the Atlantic Fleet could conduct the full range of exercises under conditions similar to combat.<sup>119</sup> In the end, despite finding that the Navy was in violation of the Federal Water Pollution Control Act ("FWPCA"), Executive Order 11593, and NEPA, the court would not issue an injunction as to do so "would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this nation."<sup>120</sup> The court did order the Navy to comply with the law, while also identifying Vieques as "the only location presently available wherein this training [involving air-to-ground ordnance delivery, Marine amphibious assaults, anti-submarine warfare, surface-to-air missiles, close support bombardment, and electronic warfare] can be conducted within permissible peace time parameters."<sup>121</sup>

This case wound its way up to the Supreme Court with the narrowed purpose of determining whether a violation of the FWPCA required an immediate injunction of all discharges of pollutants identified as not complying with the Act or whether the court had discretion to order other relief to obtain compliance.<sup>122</sup> The court found that there was discretion under the act.<sup>123</sup> A tennis match of litigation ensued over the next years as the Navy lashed back with a suit of its own against the Commonwealth of Puerto Rico appealing the denial of water quality certification concerning the Navy's application for a discharge permit at its Vieques Island training facility.<sup>124</sup> Lawsuits brought by civil society organizations and interested citizens also persisted to keep the courts busy and the Navy's attorneys and management occupied through the next years.<sup>125</sup>

The resistance to the military's use of the island for military exer-

---

116. *Barcelo*, 478 F. Supp at 651-52.

117. *Id.* at 652.

118. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (1972).

119. *Barcelo*, 478 F. Supp at 708.

120. *Id.* at 707.

121. *Id.* at 708. The Navy was ordered to seek an National Permit Discharge E S Permit, to nominate sites on Vieques eligible for listing in the National Register of Historic Places, and to comply with the EIS provisions of NEPA. *Id.*

122. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The First Circuit had found that the court had no equitable discretion under the Act. *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981).

123. *Weinberger*, 456 U.S. at 320.

124. *United States v. Puerto Rico*, 721 F.2d 832 (1983).

125. *See, e.g., United States v. Zenon*, 711 F.2d 476 (1st Cir. 1983); *Water Keeper Alliance v.*

cises reached a pinnacle in 1999 when a civilian security guard was killed and five other people injured after a five hundred pound bomb was accidentally dropped in the wrong location.<sup>126</sup> The resistance now gained renewed vigor and popular support.<sup>127</sup> On May 1, 2003, the U.S. Navy ceased all operations, withdrew from its holdings and turned over control to the U.S. Department of the Interior.<sup>128</sup> But that was not then end of the Navy's ties to the island. On February of 2005 the Environmental Protection Agency ("EPA") placed the Atlantic Fleet Weapons Training Area, which was on the island of Vieques, on the Superfund National Priorities List, a list of the most hazardous waste sites in the United States.<sup>129</sup> The EPA believes that the military training which took place on the island may have caused the land and water to be contaminated with such substances as mercury, lead, copper, magnesium, lithium, perchlorate, TNT, napalm, depleted uranium, PCBs, solvents, and pesticides.<sup>130</sup> Furthermore, Puerto Rico has estimated that cleanup of the island will reach four hundred million dollars.<sup>131</sup> At the closure of the facility the U.S. government had only allocated 2.3 million dollars, however that amount will increase in tandem with the implementation of the closure plan.<sup>132</sup> Additionally, the Navy now has one less base which is, apparently, the only base in the Atlantic where the Navy could create

---

United States, 271 F.3d 21 (1st Cir. 2001); *Vieques Conservation & Historical Trust v. Bush*, 140 F. Supp. 2d 127 (D.P.R. 2001).

126. See Natalia Munoz, WMass to Host Vieques Activists, *THE REPUBLICAN* (Springfield, Ma), Mar. 7, 2005, at B2; see also Indymedia.org, *U.S. Navy Leaves Vieques After 60 Years of Bombing*, May 8, 2003, <http://www.viequeslibre.addr.com/start.html>; Howard Wolinsky, *Charming Isle Sheds Military; With U.S. Gone, Vieques Seeks Way*, *CHICAGO SUN TIMES*, Dec. 26, 2004, at 1.

127. The accidental bombing brought some public figures to assist the cause at Vieques including the Dalai Lama, Hillary Clinton, Jesse and Jacqueline Jackson, and Ricky Martin. Howard Wolinsky, *Charming Isle Sheds Military; With U.S. Gone, Vieques Seeks Way*, *CHICAGO SUN TIMES*, Dec. 26, 2004, at 1.

128. Press Release, United States Department of Defense No. 291-03, Department of Navy Transfers Vieques Property (Apr. 30, 2003), available at [http://www.defenselink.mil/releases/2003/b04302003\\_bt291-03.html](http://www.defenselink.mil/releases/2003/b04302003_bt291-03.html); Pableaux Johnson, *A Relaxed Jewel of the Caribbean Vieques Emerges From Years of Isolation*, *INT'L HERALD TRIBUNE*, Mar. 18, 2005, at 22. The island property has not been returned to the people of Vieques as the U.S. government is completing its environmental assessments. Indymedia.org, *U.S. Navy Leaves Vieques After 60 Years of Bombing*, May 8, 2003, <http://www.viequeslibre.addr.com/start.html>.

129. Press Release, Environmental Protection Agency, EPA Places the Atlantic Fleet Weapons Training Area on Vieques on the Superfund National Priorities List (Feb. 7, 2005), EPA 05-011, 2005 WL 281373 (E.P.A.).

130. *Id.*

131. Indymedia.org, *U.S. Navy Leaves Vieques After 60 Years of Bombing*, May 8, 2003, <http://www.viequeslibre.addr.com/start.html>.

132. Press Release, United States Department of Defense No. 291-03, Department of Navy Transfers Vieques Property (Apr. 30, 2003), available at [http://www.defenselink.mil/releases/2003/b04302003\\_bt291-03.html](http://www.defenselink.mil/releases/2003/b04302003_bt291-03.html); DEP'T OF THE NAVY, DRAFT FINAL CLOSURE PLAN OPEN BURN/ OPEN DETONATION SITE FORMER ATLANTIC FLEET WEAPONS TRAINING FACILITY VIEQUES,

experiences as close to war-like conditions as possible. Ironically, Vieques is turning into an “undiscovered jewel” and a tourist destination due to the fact that the Naval occupation of the island prevented the large-scale development that has overtaken neighboring islands.<sup>133</sup>

### C. *Defense and the Environment: A New Policy of Responsibility*

Embarrassment may have been the single largest factor that motivated the Department of Defense to regard environmental regulation as a part of its mission. The enactment of environmental laws had not significantly change the methods in which the military trained and operated until 1989, when three civilian DoD employees were charged under Resource Conservation and Recovery Act (RCRA)<sup>134</sup> for criminal violations including the illegal waste storage and disposal.<sup>135</sup> The Fourth Circuit flatly rejected the argument that sovereign immunity barred prosecution and affirmed the convictions.<sup>136</sup> As a result of the disrepute the convictions of his employees brought and the simultaneous criticism of the DoD’s environmental record, Secretary of Defense, Dick Cheney, “issued a memorandum to the Secretaries of the Army, Navy, and Air Force declaring that ‘the Department of Defense [will] be the Federal leader in agency compliance and protection. We must demonstrate commitment with accountability for responding to the Nation’s environmental agenda.’”<sup>137</sup>

The conviction of the DoD employees and the challenge of Secretary Cheney inaugurated the decade of the nineties with a new sense of importance to the environmental agenda within all federal agencies, and particularly within the DoD. Since then, the DoD has committed time and both human and capital resources to its environmental programs. The Navy first developed an environmental budget in fiscal year 1991 at a level slightly over one and a half million dollars.<sup>138</sup> In the latest budget appropriation for fiscal year 2005, this figure increased approxi-

---

PUERTO RICO (2004), available at <http://www.epa.gov/region02/vieques/interimobodclosureplan.pdf>.

133. Neighboring islands are facing the impact of high-rise hotels and chain restaurants whereas Vieques maintains a quaint undeveloped feel with white sandy beaches and, until it’s handed back to the people from the U.S. Fish and Wildlife Service, one of the Caribbean’s largest wildlife refuge. See Johnson, *supra* note 128.

134. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992(k) (2005).

135. United States v. Dee, 912 F.2d 741 (4th Cir. 1990).

136. *Id.*

137. Nancye Bethurem, *Environmental Destruction in the Name of National Security: Will the Old Paradigm Return in the Wake of September 11?*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 109, 115 (2002) (quoting Seth Shulman, *Operation Restore Earth*, ENVIRONMENT, March/April 1993, at 38).

138. *The FY 1997 Department of Navy Environmental Budget: Hearing Before the Subcommittee on Defense of the Senate Appropriations Committee*, 105th Cong. (1997) (statement

mately one hundred and eighty-fold to almost 266.8 million dollars, a figure which was a reduction from the environmental appropriations in the fiscal year 2001 budget.<sup>139</sup> This money goes to a variety of areas which the Navy has determined to be important to their environmental program including: cleanup, compliance, conservation, pollution prevention, technology and BRAC, or Base Realignment and Closure.

In addition to initiating a culture of compliance with environmental laws within the Navy, the Navy also started using the same environmental laws offensively to shift environmental liability and cleanup responsibility to responsible private entities. For example, under NEPA the courts found the former owners of Concord Naval Station property were responsible for the cleanup costs required there.<sup>140</sup> The Navy to this day retains its financial and human resource commitment to the environment subject to the recent caveat that environmental laws cannot stand in the way of the Navy's military readiness. The Deputy Chief of Staff for Operations/Plans and Policy for the U.S. Pacific fleet summed up the tension in his Statement to the House Committee on Resources concerning RRPI and asking for amendments to the MMPA and ESA:

We face numerous challenges and adversaries that threaten our way of life. The President has directed us to "be ready" to face this challenge. To fulfill this directive, we must conduct comprehensive and realistic combat training – providing our Sailors with the experience and proficiency to carry out their missions. This requires appropriate use of our training ranges and operating areas and testing weapons systems. The Navy has demonstrated stewardship of our natural resources. We will continue to promote the health of lands entrusted to our care. We recognize the responsibility to the nation in both these areas and seek your assistance in balancing these two requirements.<sup>141</sup>

#### D. *Twenty-First Century Dichotomy: RRPI and the Military Environmental Responsibility Act*

##### 1. THE MILITARY ENVIRONMENTAL RESPONSIBILITY ACT

On June 13, 2001, Congressman Filner<sup>142</sup> introduced the Military

---

of Cheryl A. Kandaras, Principal Deputy Assistant Secretary of the Navy for Installations and Environment).

139. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 301(14), 118 Stat. 1811, 1840 (2004).

140. United States v. Allied Signal Corp., 736 F. Supp. 1553 (N.D. Cal. 1990).

141. Statement of Rear Admiral Moeller, *supra* note 8.

142. Congressman Filner from California represented fellow Representatives McKinney (Georgia), Pelosi (California), Degette (Colorado) and Lewis (Georgia).

Environmental Responsibility Act<sup>143</sup> to the House of Representatives. This legislation was revolutionary in its approach to defense and the environment. Its purposes were threefold:

1. To require the Department of Defense and all other defense-related agencies of the United States . . . to comply with all Federal and State laws that are designed to protect the environment or the health and safety of the public to the same extent as all other entities are subject to those laws.
2. To entirely waive any and all sovereign immunity and to entirely revoke any and all exemptions of the Department of the Defense and all other defense-related agencies of the United States within the United States and abroad that might in any way limit or exempt those agencies from complying with all Federal and State environmental laws designed to protect the health and safety of the public or the environment.
3. To leave no ambiguity for the executive or judicial branches that the Department of Defense and all other defense-related agencies are fully subject to all the requirements and possible enforcement of all Federal and State environmental laws designed to protect the health and safety of the public or the environment.<sup>144</sup>

This law, if it had been enacted, would have leveled the playing field to make the DoD subject to those same laws to which every other citizen or entity of the United States is subject domestically and internationally. It was a daring piece of legislation that would have eliminated “all the defense and national security exceptions and exemptions from all environmental laws.”<sup>145</sup> The Military Environmental Responsibility Act would have further meant “a complete waiver of sovereign immunity, unitary executive privilege and the requirement to comply with all of the local, state and federal environmental laws.”<sup>146</sup>

We will never know if America was ready for such bold legislation, as two months later was the ill-fated date of September 11, 2001. The status of security and the environment shifted. After an attack on American soil, Americans no longer felt completely safe. Our priorities shifted and Congress was ready and obligated by public mandate to provide the military with the tools and support it felt it needed to protect the nation. In the wake of September eleventh, the military is feeling added pressure to perform, to always be “ready” and as RRPI legislation is passed, the military relieves itself from complying with legislation that it feels hampers its ability to be prepared for an attack.

---

143. Military Environmental Responsibility Act, H.R. 2154, 107th Cong. (2001).

144. *Id.* § 2.

145. Bethurem, *supra* note 137, at 123.

146. *Id.*



## 2. THE RRPI PACKAGE

RRPI legislation was in development before September eleventh; the legislation was not a response to the attacks, but rather the DoD seized the opportunity to pass through the legislative process those areas of legislation which had already been identified as encroaching on the DoD's ability to protect the country. The Navy, in particular, had developed a Maritime Sustainability Issues and Action Plan in December of 2000.<sup>147</sup> The Navy had already identified the MMPA as a case in point, claiming that, "[o]riginally enacted to regulate commercial fishing impacts on dolphins, it has been applied by courts, environmental activists, and federal regulatory authorities to restrict military training."<sup>148</sup> The draft action plan criticized the precautionary approach<sup>149</sup> of the regulatory agencies and identified three uncertainties of the MMPA: vague legislative/regulatory definitions of what constitutes an "effect" (this is in relation to the MMPA's definition of harassment as a "taking" of a marine mammal); lack of quality data (for determining a proposed action on distribution and abundance of marine mammals and sea turtles); and limited scientific understanding of acoustic impact on marine mammals.<sup>150</sup> The draft action plan further identified three areas which restricted DoD training operations and testing: buffer areas, restrictions on night-time operations, and prohibitions on the use of explosives.<sup>151</sup>

Congress was first introduced to the notion of encroachment during the Encroachment Hearings before the Committee on Government Reform on May 9, 2001.<sup>152</sup> In 2002 the DoD presented to Congress the Readiness and Range Initiative of 2002.<sup>153</sup> It was a package of eight proposals, three of which were passed in the 2003 fiscal year appropria-

---

147. Pre-Decision Working Papers, Maritime Sustainability Issues and Action Plan (Dec. 17, 2000) (on file with author), available at <http://www.peer.org/docs/dod/navyworking.pdf>.

148. *Id.* at 2.

149. In the action plan, the precautionary approach is considered, "a resource preservation and conservation philosophy where in the absence of scientific information to the contrary, the regulator assumes that the proposed DoD activity will harm the environment." *Id.* at 1.

150. *Id.* at 2.

151. *Id.* at 3. The DoD felt that "substantial buffer areas around sensitive resources such as marine sanctuaries and coral reefs were being imposed in order to guarantee their protection from military activities." *Id.* When acoustic operations are being performed, visual monitoring is deemed essential to identify marine mammals in the area and as such precludes night-time operations as visual surveys could not be permitted. *Id.* Use of explosives was being interpreted to mean that an animal could always be injured or killed which did not allow for ordnance testing and training. *Id.*

152. Bethurem, *supra* note 137, at 120-22.

153. RRPI 2002 "was the product of over 100 days of interagency consultation and coordination." Thomas N. Ledvina, *Defending America – A Question of Balance: The Department of Defense's Range and Readiness Preservation Initiative*, in *Federal Lands and Natural Resources Law* 163, 179 (ALI-ABA Conference, Sept. 18-19, 2003), WL SJ023 ALI-ABA 163.

tions.<sup>154</sup> It was not until the 2004 fiscal year allocations, which occurred after the issuance of the opinion in *NRDC v. Evans*, that Congress accepted the next two provisions of the RRPI package: amendments to the MMPA and the ESA.<sup>155</sup>

#### IV. THE STRAW THAT BROKE THE CAMEL'S BACK – *NRDC v. EVANS*

##### A. *Background to the Suit*

The United States officially implemented the use of low-frequency sonar on July 16, 2002,<sup>156</sup> when the National Marine Fisheries Services (NMFS) issued a Final Rule governing the unintentional takings of small numbers of marine mammals incidental to the operation of the Navy's Surveillance Towed Array Sensor System (SURTASS)<sup>157</sup> Low Frequency Active Sonar (LFAS).<sup>158</sup> The scope of the Final Rule was perceived by some civil society organizations to be extremely broad and, in response, the Natural Resource Defense Council (NRDC) lead<sup>159</sup> a lawsuit in California against Donald Evans, the Secretary of Commerce, claiming that NMFS improperly approved the use of LFAS in as much as seventy-five percent of the world's oceans in violation of the MMPA, ESA, NEPA, and the Administrative Procedures Act (APA).<sup>160</sup> The NRDC sought a permanent injunction to prevent the peacetime use of LFAS technology for training, testing and routine operations.<sup>161</sup> The

---

154. Two conservation provisions were passed as well as an amendment to the Migratory Bird Treaty Act. *Id.* at 179-80.

155. The opinion was issued on August 26, 2003, and the fiscal year allocations for 2004 occurred on November 24, 2003.

156. NRDC asserts that the LFA sonar was a Navy secret until 1994 at which point NRDC began investigating rumors of sound experiments taking place off the coast of California. At this point, the existence of LFA was discovered and that it had already been field-tested in twenty-two operations. After some prodding, the Navy agreed to study the effects of the LFAS on marine life. Dick Russell, *Bad Vibes*, ONEARTH MAGAZINE, Summer 2002.

157. SURTASS is a passive surveillance system deployed on the surface of the ocean. The LFA system is an active sonar employed together with the SURTASS when the target is too quiet to be detected by the passive SURTASS alone. *See* United States of America Department of the Navy, SURTASS LFA Systems Description, <http://www.surtass-lfa-eis.com/Description/index.htm> (last visited July 31, 2005).

158. The application for incidental takings was first made by the Navy to the National Marine Fisheries Service on August 12, 1999. Final Rule, *supra* note 27.

159. Other plaintiffs included The Humane Society of the United States, Cetacean Society International, League for Coastal Protection, Ocean Futures Society, and Jean-Michel Cousteau as an interested individual.

160. Because of issues of standing, the NRDC's only recourse was to bring suit under the Administrative Procedures Act where the standard of review was whether the NMFS's decision granting the final rule was arbitrary and capricious. *NRDC v. Evans*, 279 F. Supp. 2d 1129, 1139-40 (N.D. Cal. 2003).

161. *Id.* at 1129.

NRDC further claimed that the Navy issued an inadequate EIS in violation of NEPA.<sup>162</sup>

### B. *The Injunction & Settlement*

Magistrate Elizabeth Laporte cautiously weighed the interests of the domestic and international public “in the survival and flourishing of marine mammals and endangered species, as well as a healthy marine environment” against the public interest “in protecting national security by ensuring military preparedness and the safety of those serving in the military from attacks by hostile submarines.”<sup>163</sup> The court addressed each piece of legislation alleged to be violated in the final rule (MMPA, NEPA, & ESA) and the respective arguments advanced by each party. The court found that the Navy’s argument prevailed on some issues, but failed to persuade the court that it did not act arbitrarily and capriciously on other issues.

The final result was a permanent injunction “carefully tailored to reduce the risk to marine mammals and endangered species by restricting the sonar’s use in areas that are particularly rich in marine life, while still allowing the Navy to use this technology for testing and training in a variety of oceanic conditions.”<sup>164</sup> Furthermore, the injunction was only to be in place “until the defendants correct the violations identified in this opinion.”<sup>165</sup>

This thoughtful compromise allowed the Navy to train and test the LFA sonar during times of peace, but not without restriction. The Navy was required to revisit those parameters found to have been decided in an arbitrary and capricious manner. Magistrate LaPorte did take the Navy’s interests to heart, but also recognized that it was the Navy itself who has “already delayed deployment by its own failure originally to timely initiate the required environmental processes . . . to ensure that decisions reflect environmental values, to avoid later delay, and to head off potential conflicts.”<sup>166</sup> After the injunction, the Navy entered into a settlement agreement with the plaintiffs regarding low-frequency sonar restricting use of the system to a “defined and limited area of the western North Pacific Ocean.”<sup>167</sup> In order to avoid such any further interrup-

---

162. *Id.*

163. *NRDC v. Evans*, 279 F. Supp. 2d 1129, 1190 (N.D. Cal. 2003).

164. *Id.* at 1191.

165. *Id.*

166. *Id.*

167. Press Statement, National Resource Defense Council, Statement from Joel Reynolds, NRDC, Regarding Navy LFA Settlement (Oct. 13, 2003), available at <http://www.nrdc.org/media/pressreleases/031013a.asp>.

tion with its use of high-intensity sonar, in particular the use of mid-frequency sonar, the Navy continued to pursue its RRPI legislation.

The DoD identifies increased litigation as an issue of encroachment. In a statement before the House Committee on Resources concerning the RRPI, Rear Admiral Robert T. Moeller, specifically identified the initial court order limiting the use SURTASS LFA technology as an issue of concern.<sup>168</sup> He stated that the, "Navy now finds the deployment and operation of one of our most important national security assets constrained by a Federal court as a result of litigation brought by environmental groups."<sup>169</sup> The DoD professes that there has been a six-year delay and over ten million dollars spent on a Scientific Research Project all in connection with the SURTASS LFA, further indicating that the only fruit of their labor has been the injunction, settlement, and the identification of the structural issues within the MMPA.<sup>170</sup>

In this specific case, one must question the proposition that the Navy has been encroached upon by the MMPA and the litigation. The burden on a plaintiff of showing that a decision made during the EIS process was arbitrary and capricious is a significant one, and further deference is given to the interpreting agency. In addition, the provisions for public comment during the EIS process are in place to avoid the very litigation that took place in this case. Used correctly, the public comments should assist in the strengthening base of informational data of the EIS and allow for solid decision-making by also taking into consideration other viewpoints. Had the Navy only taken more care during the EIS process, it would not have faced the litigation and surely, the NRDC would not have succeeded if it nevertheless sought an injunction. As Magistrate LaPorte indicated, the Navy is not the victim of rapaciously litigating environmental organizations; it has rather reaped the seeds which it has sown, by not basing the decisional criteria supporting the parameters of use of SURTASS LFA technology on informed data and analysis.

Rather than correct the violations identified by the court to be in conformance with the MMPA, the DoD continued its efforts to change the requirements of the MMPA. Three months after the settlement agreement, the Navy succeeded and the FY 2004 Budget Authorization was passed with three significant amendments to the MMPA.

## V. *NRDC v EVANS* AND THE RRPI AMENDMENTS TO THE MMPA

RRPI legislation encapsulated in the fiscal year 2004 budget appro-

---

168. *Natural Resource Defense Council, Inc. v. Evans*, 232 F. Supp. 2d 1003 (N.D. Cal. 2002).

169. Statement of Rear Admiral Moeller, *supra* note 8.

170. DoD Range and Readiness Preservation Initiative (RRPI), *supra* note 5, at slides 9-11.

priations essentially altered the MMPA in three different areas: a definitional alteration, the creation of an exemption, and the inclusion of special provisions under the requirements for military readiness activities. Some of the alterations directly address the issues raised under the NRDC litigation, but all deal with changes for military readiness activities.

### A. *Military Readiness Activities*

The MMPA amendments refer to the Migratory Bird Treaty Act ("MBTA") for the definition of a military readiness activity.<sup>171</sup> The MBTA had also been amended as part of the RRPI platform during the previous fiscal year defense authorization<sup>172</sup> to create an exception for the incidental taking of migratory birds during military readiness activities.<sup>173</sup> The MBTA defines a military readiness activity as "(A) all training and operations of the Armed Forces that relate to combat; and (B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use."<sup>174</sup> Not included in the scope of military readiness activities are "the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare, and recreation activities, shops, and mess halls."<sup>175</sup> Further activities not included in the definition are the operation of industrial activities or the construction nor demolition of facilities used for any of those routine operations previously identified.<sup>176</sup>

This definition provides wide latitude and great potential for an activity on a Naval Base or vessel to be considered a military readiness activity. The DoD touts its RRPI legislative component as being, "narrowly-tailored to protect military readiness activities, not the whole

---

171. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371 (2005).

172. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, § 315, 116 Stat. 2458 (2002).

173. This was the sole amendment that made it through Congress after the initial introduction of the RRPI legislative package. The amendments were in response to an injunction issued by the court in a case where the US Navy was sued under the MBTA for the incidental taking of non-endangered migratory birds during military training exercises using live fire on the island of Farallon de Medinilla. *Centre for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D.D.C. 2002). The district court granted a preliminary injunction and the court of appeals stayed the injunction. Had Congress not intervened with the amendment to the MBTA, the injunction, "could have applied to virtually every military training range." Ledvina, *supra* note 155, at 171. After the RRPI amendments the case was dismissed for mootness on appeal. *Id.*

174. Migratory Bird Treaty Act, Pub. L. 107-314, § 315(f), 16 U.S.C. § 703 note (2005).

175. *Id.*

176. *Id.*

scope of Defense Department activities.”<sup>177</sup> DoD further argues that this excludes “activities that have traditionally been of greatest concern to state and federal regulators, and includes only uniquely military activities – what DoD does that is unlike any other governmental or private activity.”<sup>178</sup> As the unique military activities are what differentiates the DoD’s “business” from that of another type of operation or company, the scope and bounds of the legislative changes are limited to those activities, military readiness, which allow the DoD to discharge its unique duty.<sup>179</sup>

It is true that the DoD has limited its amendments only to military readiness activities both in the MMPA and MBTA.<sup>180</sup> Whether this can be considered a narrowly-tailored amendment is debatable. Arguably all activities beyond the day-to-day living of a branch of the military are training and operations that relate to combat and to testing of equipment. Jogging along the beach may be preparing for combat training, as is using live ordnance in a simulated war maneuver. Success in military readiness “will depend on having a modernized joint training infrastructure that supports realistic, combined forces, force-on-force training for our military,” as the conflicts that we are facing are “likely to be short-notice, ‘come-as-you-are’ events,” which means that the training must be as intense during times of peace as it is during preparation for war.<sup>181</sup> Furthermore, it is the Secretary of Defense who determines what a military readiness activity is and, if these interpretations are ever challenged through the courts, deference will be giving to the DoD’s interpretation, and it would be difficult to argue otherwise.<sup>182</sup>

---

177. *Critical Challenges Confronting National Security-Continuing Encroachment Threatens Force Readiness Before the House Comm. on Government Reform Oversight*, 107th Cong. (2002) (Statement of Deputy Under Secretary of Defense (Readiness), Dr. Paul W. Mayberry, & Deputy Under Secretary of Defense (Installations and Environment), Mr. Raymond F. DuBois, Jr.).

178. *Id.*

179. *Id.*

180. The ESA does not take into account military readiness activities as it deals with designating critical habitat. However, it could have narrowly tailored the ESA for those areas designated for its use as only for its use for military readiness activities, but it did not.

181. *Critical Challenges Confronting National Security-Continuing Encroachment Threatens Force Readiness Before the House Comm. on Government Reform Oversight*, 107th Cong. (2002) (Statement of Deputy Under Secretary of Defense (Readiness), Dr. Paul W. Mayberry, & Deputy Under Secretary of Defense (Installations and Environment), Mr. Raymond F. DuBois, Jr.). The statement compared the war of terror which we are facing today to that of Operation Desert Storm where the military had months to prepare for the actual combat and was, consequently, efficiently successful.

182. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S., 837 (1984). The *Chevron* doctrine would only be invoked if the court finds that the statutory language is ambiguous or silent. *Id.* According to the *Chevron* doctrine, the administering agency is the interpreting agency, which under the MBTA would fall under the Secretary of the Interior. However, the amendments specifically provide that the military readiness activities are to be

### B. *Altering the Definition of 'Harassment'*

The first amendment to the MMPA was to create an alternate definition of the word "harassment" for the purposes of military activities and scientific research activities conducted by or on behalf of the Federal Government. The MMPA divides harassment into two levels: Level A and Level B.<sup>183</sup> Level A harassment addresses the potential of an act to *injure* a marine mammal and Level B harassment addresses the potential of an act to *disturb* a marine mammal by causing disruption of behavioral patterns.<sup>184</sup> The DoD, through the amendments, has adjusted Level A harassment, as applicable to a military readiness activity or a scientific research activity conducted on behalf of the Federal Government, to address any act that injures or has the significant potential to injure.<sup>185</sup> This means instead of an activity simply having the potential to injure, there now has to be *actual injury* or a *significant potential to injure*, which lessens the burden quite extensively. Level B harassment, for the purposes of military readiness or Federal Government scientific research, is now defined as any act that disturbs or is likely to disturb by causing disruption of natural behavioral patterns to a point where such behavioral patterns are abandoned or significantly altered.<sup>186</sup> Again, the standard is shifted from one finding harassment when there is a potential of disturbance to a showing that the activity will *actually disturb* or is *likely to disturb*, and not just to behavioral patterns, but only to those patterns that are abandoned or significantly altered.

In the Final Rule, the Navy interpreted Level B harassment to occur when "there is a significant behavioral change in a biologically important activity, such as breeding, migration or sheltering."<sup>187</sup> This interpretation parallels more closely the amended definition for military readiness activities than the literal definitions in the statute. Yet, in the litigation of *NRDC v. Evans*, the court found that the use of the Navy's definition, albeit erroneous, did not cause any harm and that the word disruption in and of itself implicates a significant change, thus their interpretation was not inconsistent with the definition under the MMPA.<sup>188</sup> The court's findings exemplify the fact that the Navy did have room to maneuver within the definition of harassment contained in

---

authorized by the Secretary of Defense, thus it is the Secretary of Defense who will determine what a military readiness activity is under the statute. See 16 U.S.C. § 703 note (2005).

183. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1362(18) (2003).

184. *Id.* (emphasis provided).

185. *Id.*

186. *Id.*

187. See Final Rule, *supra* note 27, at 46721-22.

188. *NRDC*, 279 F. Supp. 2d at 1129.

the MMPA as it had stood, demonstrating that the definition of Level B harassment never encroached upon its LFAS activities.

By changing the potential standard to one of significant potential or likeliness, the entire MMPA analysis is shifted from the dependable precautionary standard to one of uncertainty and guesswork.<sup>189</sup> Before a military readiness or scientific research activity takes place, a decision will be made as to whether that activity has significant potential to harm or is likely to disturb, "requiring a higher degree of proof than science is currently able to provide for many types of serious impacts, such as reduced calving rates."<sup>190</sup> Thus, the potential for error, as well as the likelihood of marine mammals being harmed or injured, is significantly increased. To date, there is scant evidence on the effects of acoustic trauma to the migration, breeding, feeding and sheltering habits of marine mammals. Further the requirement of demonstrating actual injury for harassment before the fact becomes exceedingly difficult since such facts are likely to arise only through an after-the-fact evaluation. This is especially true with a device that has potential to harm at such wide-spread distances as high-intensity sonar is able, so that actual injury occurs when the dead or injured bodies of marine mammals are discovered.

Moreover, one questions why the alternate definition extends not only to military readiness activities, but also scientific research activities funded by the Federal government. The MMPA contains special provisions for scientific research which will allow for the issue of a permit for any takings of marine mammals. A logical interpretation for why this clause was also expanded for scientific research is that it is meant to apply to scientific research dealing with weapons development. The inclusion of scientific research will allow for greater leeway for the Navy to test its weapons or invasive sonar devices which will potentially injure or disturb marine mammals and lift those activities as well to the higher standard of either causing actual injury or disturbance or create a significant potential for injury or likelihood of disturbance.

---

189. The precautionary principle "counsels serious contemplation of regulatory action in the face of evidence of health and environmental risk, even before the magnitude of risk is necessarily known or any harm manifested." David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw. U. L. Rev. 1315, 1315 (2003). When incorporated into the decision-making process, this principle advises to rather err on the side of caution if faced with uncertain factors.

190. Natural Resource Defense Council, Written Statement on Proposals to Amend the Marine Mammal Protection Act of 1972 submitted to the House Armed Services Committee, Subcommittee on Military Readiness, pursuant to the Subcommittee Hearing on environmental Legislative Proposals (March 13, 2003), available at <http://www.nrdc.org/wildlife/marine/cmmpa0303.asp>.



### C. *Exemption*

The second amendment to the MMPA attaches an entire new subsection 'f' allowing for exemptions under the MMPA for reasons of national defense.<sup>191</sup> Under this new provision, the Secretary of Defense need only get the approval of either the Secretary of Commerce or the Secretary of the Interior in order to exempt for a renewable maximum of two years any "category of actions . . . or its components."<sup>192</sup> The only requisite is that the exemption be necessary for national defense. Furthermore, the only reporting requirement under this exemption provision is that of the submitting to "the Committee on Armed Services of the House of Representative and the Committee on Armed Services of the Senate notice describing the exemption and the reasons therefor."<sup>193</sup>

Waiver provisions in environmental legislation have been viewed as acceptable solutions to allow for those extraordinary times in which compliance with such laws may jeopardize the national security. "Congress has inserted provisions into each of the major environmental laws (except NEPA) permitting its waiver in exigent circumstances."<sup>194</sup> This modified MMPA waiver amendment falls quite short of the normal meaning of exigent circumstances, only requiring it to be necessary for national defense, an expansive phrase that may capture numerous situations potentially including, and in fact most likely meant to include, those situations that involve military readiness and preparation.

Additionally, exemptions are traditionally narrowly tailored to address the situation at hand where an exigent circumstance requires either non-compliance with the law or an adjustment of compliance requirements. The MMPA amendments allow for the Navy to be effectively exempt from compliance for a period of two years, forgoing any regular reporting requirements, save the initial notification to the House and Senate Committees. Thus, not only is the period of exemption extensive, but it also does not have to be tailored in any way to the situation on hand. Furthermore there is no requirement for Congress or the Secretary of Defense to monitor the activities under the exemption (beyond the normal monitoring functions of the independent Marine Mammal Commission and its annual Congressional report) for the two-year period. This exemption grants significant power to the Secretary of Defense, and, in turn, into the hands of the Navy who may be exempted from MMPA provisions for a significant period of time and is under no

---

191. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 319, 117 Stat. 1392, 1434 (2004).

192. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(f) (2005).

193. *Id.* § 1371(f)(4).

194. STEPHEN DYCUS, *supra* note 9, at 149.

additional obligation to monitor or report the activities affecting these mammals which the Federal government is required to protect.

#### D. *Special Provisions for Military Readiness Activities*

The final alteration to the Marine Mammal Protection Act focuses in on the allowable incidental taking and harassment of small numbers of marine mammals and provides military readiness activities with special provisions and adjustments to the normal MMPA procedural requirements. The applicable provisions are divided into two sections: one discussing the incidental, but not intentional, taking of marine mammals<sup>195</sup> and the other discussing the incidental taking of marine mammals by harassment.<sup>196</sup>

##### 1. NOTICE REQUIREMENTS

Under the original provisions of the MMPA, incidental takings and harassment include requirements that provide for notice in the Federal Register, in newspapers of general circulation, and through the appropriate electronic media, including provisions to target local communities which may be affected.<sup>197</sup> Both provisions also include an opportunity for public comment.<sup>198</sup> The amendments significantly decrease the requirements for notice by obliging the Secretary to provide notice only in the Federal Register.<sup>199</sup> It is hard to find a purpose served by limiting the notice provisions to publication only in the Federal Register. The provisions for non-military readiness activities are specific to alerting not only the general public, but also the population directly affected along the specified coastal areas.<sup>200</sup> It is excessively burdensome that the coastal populations and the public will now have to monitor the Federal Register to discover if the Navy is conducting activities involving takings that may affect their shoreline and the marine life living there. The concept of notice is just that: to notify potentially affected parties of activities so that they can be aware of the activities happening in the area surrounding their property and further have an opportunity to protect themselves and provide their perspective. The military activities have the potential to be even more damaging than any citizen applying for a permit, yet the Navy has less of a requirement to inform the public. Explanations for such a provision are few; it could effectively be an

---

195. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(5)(A)(i) (2005).

196. *Id.* § 1371(5)(D)(i) (2005).

197. *Id.* § 1371(5)(A)(i), (D)(iii) (2005).

198. *Id.*

199. National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 319, 117 Stat. 1392, 1434 (2004).

200. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(5)(A)(i), (D)(iii) (2005).

attempt to avoid public scrutiny from the takings falling under a military readiness activity.

In granting a taking permit, an evaluation of the method of the taking during the activity is made by the Secretary who authorizes those methods which would have the least practical impact on the marine mammal species or stock. The amendment inserts language requiring that the Secretary consider for the purposes of military readiness activities when making the authorization of taking methods three additional aspects: personnel safety, practicality of implementation, and impact on effectiveness of the military readiness activity.<sup>201</sup> Moreover, it is further mandated that before making the required determination, the Secretary shall consult with the DoD regarding these three additional considerations.<sup>202</sup> This directly addresses the concern the Navy has had that the MMPA, as it was originally enacted, did not address military readiness concerns and rather was aimed at protecting whales from commercial exploitation and preventing dolphins and other marine mammals from accidental death or injury during commercial fishing operations.<sup>203</sup> These amendments address the Navy's concern and force the Secretary to consider the weighty interest of military readiness. This amendment shifts the focus of consideration from the interests of the mammals to the interests of the DoD when dealing with a military readiness activity. An ordinary citizen applying for a permit is forced to pay particular attention to rookeries, mating grounds, and areas of similar significance and on the availability of such species of stocks for subsistence use.<sup>204</sup> A military readiness activity prioritizes the impact of not performing the activity before the impact on marine mammals. One could argue that the new amendments merely even out the military considerations that were not incorporated in the original act. However, when the added proviso of consulting the Secretary of Defense before authorizing of the method of taking so that he or she may advocate on behalf of the Navy, is taken into consideration, there is no even playing field: the advantage clearly falls to the military.

## 2. NUMERICAL & GEOGRAPHICAL LIMITATIONS

The final special amendments under incidental takings and takings by harassment directly address issues brought up during *NRDC v. Evans*. These include what the Navy considers structural deficiencies in the

---

201. *Id.* § 1371(5)(A)(ii), (D)(vi) (2005).

202. *Id.* § 1371(5)(A)(ii), (D)(vi) (2005).

203. Statement of Rear Admiral Moeller, *supra* note 8.

204. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(5)(A)(i)(II)(aa), (D)(ii)(I) (2005).

MMPA identified as the “small numbers” and “specific geographic region” requirements.<sup>205</sup> With regards to military readiness activities, the Navy is not subject to either of these two requirements.

a. Specified Geographic Region

Under incidental takings, suspension of incidental takings and takings by harassment,<sup>206</sup> the Navy is not subject to the “specified geographic region” requirement. In *NRDC v. Evans*, NRDC argued that the identified “provinces” were gargantuan in scale and far too large to meet the MMPA’s specified geographic region requirement.<sup>207</sup> The military countered that the requirement of a specified geographic region meant a region which was no larger than necessary to accomplish the specified activity.<sup>208</sup> The court was persuaded by NRDC’s argument in this case finding that the Final Rule violated the MMPA by failing to limit the take of marine mammals to a specified geographic region and in order to comply with the MMPA, the Navy must only be authorized to operate in a limited number of geographical regions at any given time.<sup>209</sup> The court recognized that SURTASS LFA required fairly large geographic regions (the court did not find that the Navy’s geographic regions were devised in an arbitrary and capricious manner), yet there was nothing limiting the Navy from operating in all fifty-four provinces in a particular year and that the lack of any written limitation was cause to find that this part of the Final Rule was arbitrary and capricious.<sup>210</sup>

To correct the deficiency in the Final Rule, all the Navy was required to do was to write in limitations on the geographic regions. At that point in the litigation, the Navy only had two vessels capable of using LFAS technology, and the Navy had argued that because of this it would in fact be limited to operating in specified geographic regions each year. If this was the case, it would not have been difficult to estimate the regions and to alter the Final Rule to encompass this, thus satisfying the court.<sup>211</sup> Instead, the Navy opted for a full exemption in the amendments, thus allowing the use of mid-frequency sonar to now be unlimited as to geographical region.

---

205. DoD Range and Readiness Preservation Initiative (RRPI), *supra* note 5, at slide 4.

206. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(5)(A), (B) & (C) (2005) (respectively).

207. *Natural Resources Defense Council v. Evans*, 279 F. Supp. 2d 1129, 1142 (N.D. Cal. 2003).

208. *Id.* at 1142.

209. *Id.* at 1147.

210. *Id.* 1142-47.

211. *Id.* at 1146.

### b. Small Numbers

Under the incidental takings and the takings by harassment, the Navy is further exempted from the words “small numbers.”<sup>212</sup> This again was a point of contention in the *NRDC* litigation. *NRDC* had claimed that the Navy had used an erroneous definition of small numbers in its Final Rule as the Navy had defined small numbers to mean a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.<sup>213</sup> The *NRDC* asserted that small numbers and negligible impact were two separate requirements and should be construed so that they have their own independent effect.<sup>214</sup> Thus the Navy’s definition, for example, may allow for a taking of Level B harassment of twelve percent of the stock of elephant seals. If construed together, as the Navy did, that twelve percent may be considered a portion small enough to have a negligible impact on the species or stock. Yet, if the negligible impact and small numbers requirements are construed separately, there might still be an arguably negligible impact, but the numbers of the taking by harassment may not be “small” at all. The court found that the legislative history and case precedent supported the *NRDC* that the two requirements were independent requirements and the Final Rule should take into account their independent effects.<sup>215</sup>

The Navy is now exempt from assuring that the takings of marine mammals when it uses its high-intensity sonar technology remains small. The Navy is only required to ensure that there is no non-negligible impact on the population as a whole. Unfortunately, the combination of the small numbers exemptions and the specific geographic region exemption do not provide for the protection of populations of marine mammals. Arguably the Navy could have a taking of marine mammals which decimates a local population as long as the impact on the species as a whole is negligible.

### E. *A Pound of Cure for an Ounce of Pain*

Traditionally, encroachment issues arise as urban populations expand closer to military areas.<sup>216</sup> As the majority of land under DoD stewardship is open space and wilderness used for training, buffer zones, and ranges, animals, some of which are endangered, inhabit those areas causing additional responsibility for the military and limiting the activi-

---

212. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(5)(F) (2005).

213. *NRDC*, 279 F. Supp. 2d at 1147.

214. *Id.* at 1147-53.

215. *Id.*

216. DoD Range and Readiness Preservation Initiative, *supra* note 5, at slides 4-5.

ties that they may perform.<sup>217</sup> Another method of encroachment identified by the military is caused by the increase in environmental legislation, which in turn provides for increased regulation and administrative burdens on military activities while concurrently allowing for increased opportunity for litigation against a branch of the armed forces. Within the last thirty years, environmental legislation has increased four-fold causing compliance issues as, due to the nature of the military's operations, for the Navy and its operations.<sup>218</sup>

In the case of the MMPA, however, cries of encroachment are turned on their heads. The MMPA was enacted in 1972.<sup>219</sup> The definition of harassment has remained intact until this past 2003 amendment and has not "encroached" upon the Navy any more so than it has in the past thirty-three years (amendments have been made nine times in the last thirty-two years, including the latest military readiness provisions).<sup>220</sup> It is essential to recognize that in this case, it is not the marine mammals that are trodding upon naval ground, but it is the Navy who is encroaching upon the space and area of the marine mammals. As technology develops and becomes more pervasive, it is this technology that interferes, harasses, and kills the mammals. It is legitimate for the military to protest that environmental legislation is becoming more and more confining to their activities, however, the military must also recognize the fact that their activities are becoming more dangerous and more pervasive, and thus more necessary to regulate.

The amendments provide wide exemptions to the Navy and its operations. The terms are vague and subject to broad interpretation, and courts are likely to provide considerable deference to the DoD's interpretation. Furthermore, the amendments remove a significant amount of accountability by the Navy and provide sweeping power and influence to the DoD. These amendments fall short of being narrowly tailored to the situation, or of at least providing some sort of check and balance to the new authorities vested under the amendments, and furthermore, the amendments provide broad exemptions without again the requisite check and balance or limitation to specific situations of need.

Finally the strict protective mechanisms of the MMPA indicate the priority the public places on the protection of marine mammals. The amendments of the MMPA go above and beyond what is necessary to achieve the goal of flexibility for the military. The amendments remove the precautionary standard of the MMPA, change the definitions of key

---

217. Ledvina, *supra* note 153, at 167-69.

218. DoD Range and Readiness Preservation Initiative (RRPI), *supra* note 5, at slide 6.

219. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371 (2005).

220. *Id.*

provisions providing the Navy with the power and ability to destroy local populations of marine mammals, outside of the eye of public notice.

## VI. CONCLUSION: OUR SECURITY AT WHAT EXPENSE?

*A decade later, the Pentagon's proposed legislation begs the question: Should national defense come at the expense of what the military is supposed to be defending?*<sup>221</sup>

RRPI amendments, which were in process before September eleventh, rode the wave of public insecurity of another terrorist attack to move forward the legislative package. However, the MMPA amendments stand out from the other RRPI provisions as there is little connection between fighting the war on terror and key provisions of the MMPA. No country with a substantial submarine program is currently construed (at least in public) as an enemy state, meaning that the critical need for active sonar is some time off. And, at this point, terrorists, to our knowledge do not have access to quiet diesel submarines as instruments of destruction.

It is also questionable if the military had no choice but to amend the MMPA to reach their goal. Perhaps the goal is not necessarily to have more flexibility in the use of the sonar, but rather to save money researching other alternatives, or using other technology on hand. The Navy could quite possibly have found a technical alternative to such extremely powerful pinging by using lots of sonic sources floating on ships or on the sea beds. However such an endeavor would be quite costly due to the implementation and maintenance of such a system.

The military's encroachment agenda attached itself to the momentum of September eleventh couched in the necessity for 'military readiness.' Through these reforms the DoD rid itself of environmental burdens that it ironically claims forms a part of their every day experience and an essential part of their mission. The RRPI amendments to the MMPA, which are incompatible with the war on terror and unnecessary according to NRDC litigation, solve a short-term problem for the Navy, but present long-term problems for not only America, but also for the rest of the world dependant on the oceanic eco-system. The ocean remains the wide, vast area it was once before and the only encroachment arises from the technology of the Navy upon the marine life in the sea. The MMPA amendments are limited solely to those situations which involve combat training. Yet, it is precisely those situations that

---

221. DoD permits, which have been issued since 1994, are typically given for missile firings, which may cause seals to fatally stampede, or for trials in which tons of high explosives are detonated underwater. Letter from Joel Reynolds & Michael Jasny, *supra* note 30.

should cause us concern, and should at least be given the dignity of careful thought before taking place and accordingly limited to time and place in order to protect those animals.<sup>222</sup> In the end, it may be that global opinion forces the United States to revisit these amendments. As international bodies call on their members to use restraint and precaution with such technology, pressure will come to bear on the United States to also limit its use of high-intensity sonar.<sup>223</sup> As our weapons become more pervasive, and encroach upon other species' territories, the answer should not lie in circumventing long-standing environmental legislation, but rather rigorous efforts of compliance to preserve the development of alternative technologies.

NATALIE BAREFOOT-WATAMBWA\*

---

222. Press Release, Natural Resource Defense Council, Above the Law? The Pentagon is Taking Aim at America's Public Health and Environmental Protections (Mar. 12, 2003) (on file with author), available at [www.nrdc.org/media/pressreleases/030312.asp](http://www.nrdc.org/media/pressreleases/030312.asp).

223. Letter to NATO, *supra* note 22, at 12-13.

\* J.D. Candidate, 2005, University of Miami School of Law. I would like to thank Professor Richard L. Williamson, Jr. for his guidance in the writing of this Comment. Additionally, I would like to thank my partner, Brighton Watambwa, my parents, Marnie and Wayne Barefoot, and my sister, Jennifer Barefoot, for their unrelenting support and patience.