

**Testimony of David Henkin
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**Before the Senate Environment
and Public Works Committee**

**Hearing on S. 2225 and the Readiness and Range
Preservation Initiative**

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Aloha, Mr. Chairman and members of the Committee. My name is David Henkin, and I have come here today from Hawai`i, to testify on behalf of Earthjustice, the non-profit law firm for the environment-dedicated to protecting the magnificent places, natural resources, and wildlife of this earth and to defending the right of all people to a healthy environment. I thank Chairman Jeffords and the Committee for this opportunity to testify regarding the exemptions proposed in the Department of Defense's (DOD) *Readiness and Range Preservation Initiative* and Senate Bill 2225.

I have been a staff attorney for Earthjustice in its mid-Pacific office in Honolulu, Hawai`i for the past seven years, working on a variety of issues involving the Endangered Species Act, Migratory Bird Treaty Act, and other federal and state environmental laws. Before moving to Hawai`i in 1995, I worked on similar issues in my home state of California.

On behalf of Earthjustice, I am here today to strongly urge Senators on the conference committee for the DOD Authorization bill and this Senate Environment and Public Works Committee to oppose exemptions for the DOD from our nation's environmental and public health laws. The Administration's *Readiness and Range Preservation Initiative* seeks broad exemptions from the Clean Air Act, the Resource Conservation and Recovery Act (RCRA), Superfund (CERCLA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the Marine Mammal Protection Act (MMPA). If adopted, these exemptions would severely compromise our nation's efforts to protect the air we breathe, the land on which we live, and the rich diversity of plants and animals with which we share this planet.

We commend the Senate Armed Services Committee for not including these exemptions in the Senate DOD Authorization bill, S. 2514, and thank the entire Senate for keeping these exemptions out of the bill that subsequently passed on June 28, 2002. Unfortunately, the struggle against these anti-environmental riders is not over, since the House version of the DOD Authorization bill (H.R. 4546) includes provisions that seek to weaken protections for endangered species and migratory birds.

BAD ESA EXEMPTION RIDER IN FY 02 SUPPLEMENTAL APPROPRIATIONS BILL

The House version of the FY02 Supplemental Appropriations bill includes a rider that seeks to exempt the DOD from complying with important substantive and procedural protections of the Endangered Species Act when DOD decisions such as hiring and defense contracting result in increased off-base water consumption that threatens imperiled species or their habitats. If adopted, this rider could be used to establish a dangerous new precedent for shielding the indirect impacts of DOD actions from review and for relieving the DOD of its duty to mitigate those impacts. There is no valid reason to apply a standard of analysis for DOD activities that is less protective than the standard that applies to the activities of every other federal agency.

The indirect effects of federal actions can be far more damaging than the direct effects. Because of this, the need to consider indirect effects is a well-established principle in many of our nation's environmental laws, including the ESA. The exemption rider in the House version of the FY02 Supplemental Appropriations bill seeks to not only do away with the consideration of potentially destructive indirect impacts, but may also bar analysis of impacts from interrelated

and interdependent actions that would not occur but for an action taken by the DOD. This would further weaken vital protections Congress intended the ESA would provide endangered and threatened species and their habitats.

In addition to listed species and their habitats, private, state and county water users who share water basins with DOD installations could suffer from passage of this rider. By shielding the DOD from responsibility for off-base impacts resulting from DOD decisions, the rider would shift the burden to other water users either to mitigate the effects of those impacts or risk losing access to water on which they have historically relied.

Were this rider to become law, the DOD could attempt to exempt many potentially destructive actions from the ESA simply by outsourcing its functions through defense contracts, since the DOD may no longer be held accountable for water consumption occurring off base that is “not under the direct authority and control” of the Secretary of Defense. Such decisions greatly threaten national ecological treasures such as Arizona’s San Pedro River, where the Army’s Fort Huachuca is located. The San Pedro River, federally designated as a National Riparian Conservation Area and recognized by the Nature Conservancy as one of the world’s eight “Last Great Places,” supports 82 species of mammals and 385 species of birds. The House rider seeks to allow the DOD to carry out actions likely to cause the extinction of listed species without any consideration, through the ESA section 7 consultation process, of mitigation measures or reasonable alternatives that might spare those species.

Earthjustice, along with the overwhelming majority of the American public and over 20 national environmental groups, believes that the DOD should follow the law, as do other agencies and the public. A Zogby International poll conducted on April 19, 2002 found that 85% of registered voters believe government agencies such as the DOD should not be exempt from complying with America’s environmental laws. Rather than seek to avoid its obligations under federal environmental laws, the DOD should set an example in protecting and restoring our nation’s environmental heritage. We urge Senators to oppose any such exemptions in both the DOD Authorization bill and the FY 02 Supplemental Appropriations bill.

THE FARALLON DE MEDINILLA CASE AND THE PROPOSED MIGRATORY BIRD TREATY ACT EXEMPTION

Turning to the anti-environmental provisions of the DOD proposal and the House DOD Authorization bill, I would like first to discuss briefly the Migratory Bird Treaty Act litigation involving the Navy’s bombing of the island of Farallon de Medinilla (FDM) in the Northern Mariana Islands. This is the case the DOD is using to justify its request for a blanket exemption from the MBTA. In December 2000, the Center for Biological Diversity, represented by Earthjustice, sued the Navy for violating the MBTA by bombing nesting seabirds at FDM, despite the Navy’s knowledge that its bombing kills migratory birds and despite the U.S. Fish and Wildlife Service’s (FWS) denial of the Navy’s application for an MBTA permit, due to the Navy’s failure to satisfy the law’s basic requirements. FDM, an island of 206 acres, is home to more than a dozen species of migratory birds protected by the MBTA and the international treaties it implements, including one of only two breeding colonies of the great frigatebird in the

Mariana island chain and the largest known nesting site for masked boobies in the Mariana and Caroline islands.

On March 13, 2002, Judge Emmet G. Sullivan of the District of Columbia District Court issued an order holding that the Navy's bombing of FDM without an MBTA permit is illegal and, on May 1, 2002, issued a preliminary injunction halting for thirty days all military training exercises at FDM that could harm or kill migratory birds. The D.C. Circuit Court stayed the preliminary injunction on May 21, 2002. Following Judge Sullivan's subsequent issuance of a permanent injunction, the D.C. Circuit granted a stay of that injunction pending appeal on June 5, 2002.

Even though the Navy is now free to train at FDM as it sees fit, the DOD is using the isolated example of this still unresolved litigation to seek an across-the-board exemption from the MBTA for training activities by all branches of the military everywhere. It is seeking to leverage an isolated dispute over a 206-acre island in the middle of the Pacific to exempt 25 million acres of DOD land across the country. If successful in securing this exemption, the DOD could wipe out untold numbers of migratory birds and destroy their nesting and breeding areas without any assessment of biological impacts, any effective oversight, or any real accountability.

There is simply no reason for this exemption. It has been more than eighty years since the MBTA was enacted in 1918 to implement the International Convention for the Protection of Migratory Birds between the United States and Great Britain. In all that time, the FDM case is the only example the DOD can point to where it believes the MBTA may possibly interfere with military training. In the FDM case, the Department of Justice attorney has represented to the court that both the DOD and FWS think the Navy can get a permit under existing law by applying for a different "special use" permit.

I say, "may possibly" because the FDM case is still working its way through the judicial system and has yet to produce a final outcome. In light of the D.C. Circuit's stay of the district court's injunction, allowing the Navy to train at FDM while the court considers the appeal, there is neither any urgency nor any need to enact legislation weakening the MBTA now.

THE PROPOSED ENDANGERED SPECIES ACT EXEMPTION

Having spent much of my career working to protect essential recovery habitat for Hawai'i's imperiled plants and animals, my primary expertise is in the application of the Endangered Species Act's critical habitat provisions. Accordingly, I will focus the remainder of my testimony discussing why the proposed ESA exemption is unnecessary to ensure military preparedness and why, if enacted, it would spell disaster for important efforts to bring endangered species from the brink of extinction to recovery.

Both S. 2225 and H.R. 4546 (the focus of the upcoming conference committee) contain similar provisions seeking to exempt lands that the DOD owns or controls from critical habitat designations whenever there is an Integrated Natural Resources Management Plan (INRMP) that addresses special management considerations for the listed species found there, and their habitats. While we recognize the DOD's need to train to defend our national interests, such a

broad exemption is not needed to accomplish this goal. We urge Senators to ensure that this ESA exemption is not included in the DOD authorization bill for several reasons:

1. The ESA Exemption Seeks to Exclude All DOD Lands from Critical Habitat

The broad wording of the proposed ESA exemption seeks to effectively exclude all DOD lands from critical habitat. To be exempt, the only condition is that the land in question have an INRMP that “addresses endangered or threatened species and their habitat.” S. 2225, § 2017 (emphasis added); see also H.R. 4546, § 312 (INRMP must “address[] special management considerations or protection”). There is no requirement that the INRMP’s management be adequate to respond to the species’ needs. Rather, as long as the INRMP discusses listed species and their habitats and proposes some form of management, it would pass muster, and the land it covers would be automatically exempt from critical habitat designation.

The Sikes Act mandates that each INRMP provide, to the extent “[c]onsistent with the use of military installations to ensure the preparedness of the Armed Forces,” some management of the species and habitats found on the installation in question. 16 U.S.C. § 670a(b). Since all INRMPs must “address” listed species and habitats to some extent, then all DOD lands with a final INRMP would automatically be excluded from critical habitat designation should the proposed exemption become law.

2. The ESA Exemption Seeks to Eliminate an Important Tool for Species Recovery

To appreciate the serious blow that the proposed ESA exemption would deal to efforts to bring endangered and threatened species back from the brink of extinction, one must first understand the vital and unique role critical habitat plays in promoting species recovery.

When it first promulgated the ESA, Congress recognized that habitat loss is “the major cause of the extinction of species worldwide.” H.R. Rep. No. 95-1625 at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455. Accordingly, Congress established as a primary purpose of the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

To further this goal, in 1978, Congress amended ESA section 4 to require that FWS and the National Marine Fisheries Service (NMFS) generally must designate critical habitat at the same time that they list any species as endangered or threatened. Congress mandated critical habitat designation for imperiled species because it confers important protection beyond that provided by listing alone. Under ESA section 7(a)(2), federal agencies must consult FWS or NMFS to ensure that any action they authorize, fund or carry out will not “jeopardize the continued existence of any [listed] species.” 16 U.S.C. § 1536(a)(2). For species with designated critical habitat, each federal agency must, in addition, guarantee that its actions will not “result in the destruction or adverse modification” of that habitat. 16 U.S.C. § 1536(a)(2).

By definition, critical habitat includes areas “essential to the conservation of [listed] species.” 16 U.S.C. § 1532(5)(A). “Conservation,” in turn, means recovery of these species “to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. §

1532(3). Thus, while the first ESA section 7(a)(2) duty not to “jeopardize the continued existence” of listed species helps to protect them from extinction, critical habitat designation allows these species to recover to a non-imperiled status, the ultimate goal of the ESA.

In lobbying for the ESA exemption, the DOD glosses over the significant lowering of the bar of endangered species protection that may result should this provision become law. The DOD emphasizes that it would still have to consult FWS and NMFS under ESA section 7(a)(2), but fails to mention that, in cases where essential recovery habitat is currently unoccupied by listed species, consultation might not be triggered at all absent a formal designation of the habitat as “critical habitat.” Consultation for potential impacts to essential recovery habitat that is unoccupied is likely not to occur with an INRMP alone.

For species that are endangered, dispersal into currently unoccupied territory, is in most cases, key to their recovery. In Hawai`i, where many plant species have been reduced to single populations, it is vital to protect areas historically occupied – but currently unoccupied – if we are to have any chance of increasing the numbers and distribution of these plants to save them from extinction. Other species, like the Florida panther, may rely on unoccupied habitat to provide dispersal corridors between currently occupied areas.

Moreover, without critical habitat designated, the standards against which any consultations that did take place would measure DOD activities would be much less protective. Rather than ensuring that the DOD’s activities would not destroy habitat that is essential to species recovery, the DOD is seeking a requirement only to avoid “jeopardy,” that is, pushing a species to extinction. The DOD proposal could have the effect of precluding a species from having any chance at recovery.

When one considers that the DOD controls over 25 million acres of land, home to over 300 federally listed species, the implications for species recovery of the DOD’s proposed exemption is enormous. For example, the Army’s Makua Military Reservation on O`ahu is home to over thirty endangered plants, many of which are found only in the Makua area, and nowhere else.

3. There is No Need to Weaken the ESA to Achieve Military Readiness

Before eliminating essential protection for recovery habitat on DOD lands, one must take a hard look at whether this drastic measure is necessary. Review of the ESA shows that the law already contains the flexibility the DOD needs to ensure that it can prepare to defend our nation.

Under ESA section 4(b)(2), before FWS or NMFS can designate critical habitat, they must “tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2) (emphasis added). Thus, if DOD has a valid concern that designating critical habitat on a particular facility would interfere with vital training activities, the ESA already provides a mechanism to express those concerns and to seek exclusion of specific areas on a case-by-case basis.

The critical habitat designation process for the coastal California gnatcatcher, a threatened bird, illustrates how the existing section 4(b)(2) process takes into consideration concerns about

military readiness. As originally proposed, the critical habitat designation for the gnatcatcher would have included about 40 percent of Marine Corps Base Camp Pendleton. 65 Fed. Reg. 63680, 63690 (Oct. 24, 2000). During the public comment periods on the proposal, the Marines expressed concerns that, if finalized, the designation would interfere with vital training activities. The FWS took due note of the Marines' concerns and, pursuant to section 4(b)(2), issued a final rule that excluded all of Camp Pendleton from critical habitat for the California gnatcatcher.

Unlike the careful case-by-case balancing required under section 4(b)(2), the proposed blanket ESA exemption seeks to exclude areas from critical habitat, even if they manifestly have no connection to military readiness. The expansive wording of the proposed exemption extends to all lands "owned or controlled" by DOD, including military exchanges, recreational facilities such as golf courses, commissaries, water treatment facilities, and so forth. Section 4(b)(2)'s existing mechanism for evaluating national defense needs is a far superior way to address the DOD's concerns.

Moreover, the ESA, as currently written, already provides for the potential situation when military activity that might be curtailed by critical habitat designation. Section 7(j) gives the DOD an automatic exemption from any provision of the ESA – including the prohibition on adversely modifying or destroying critical habitat – whenever "the Secretary of Defense finds that such exemption is necessary for reasons of national security." 16 U.S.C. § 1536(j). No other federal agency has this power to demand an automatic exemption from the ESA's requirements.

Thus, if critical habitat designation were to conflict with military training activities vital for national security, the Secretary of Defense already has the authority to ensure that training will take place, untrammelled by restrictions imposed by critical habitat, or, for that matter, any other ESA provision. The fact that the Secretary of Defense has never felt the need to invoke the automatic exemption provisions of section 7(j) belies the DOD's current claim that the proposed exemption is needed to ensure military readiness.

The ESA, as currently written, already gives the DOD the tools it needs to ensure, on a case-by-case basis, that critical habitat will not interfere with vital training. There is no reason to give the DOD a sweeping exemption from all critical habitat designations, since, in most cases, no conflict between habitat protection and military readiness actually exists.

4. INRMPs Are Inadequate Substitutes for Critical Habitat

The DOD's suggestion that INRMPs can substitute for critical habitat ignores crucial differences between the type of protection that each provides. First, because the Sikes Act mandates that INRMPs tailor their management programs to be consistent with the military mission of the installation in question, the protective measures an INRMP can require are inherently limited in scope. In contrast, ESA section 7(a)(2)'s prohibition on adverse modification or destruction of critical habitat establishes uniform standards for all federal agencies – including the DOD. Critical habitat provides more protection than INRMPs ever could.

Second, because it comes into play during section 7 consultation, which involves a case-by-case analysis of the likely impacts of proposed military activity, critical habitat ensures that the evaluation of a species' habitat needs will always be based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). In contrast to this dynamic process, INRMPs are static documents, generally updated only once every five years. 16 U.S.C. § 670a(b)(2). They do not guarantee that decisions will always be based on the latest and best science, as critical habitat does.

Third, because INRMPs are on-the-ground management plans, their effectiveness depends entirely on their funding level. Without funding, INRMPs provide no benefit to listed species or their habitat.

For example, on the island of O`ahu, FWS recently refused to exclude six Army installations with INRMPs – Dillingham Military Reservation, Kawaihoa Training Area, Kahuku Training Area, Makua Military Reservation, Schofield Barracks Military Reservation, and Schofield Barracks East Range – from proposed critical habitat designations for endangered and threatened plants on the grounds that "there is currently no guarantee of long-term funding for management actions that are ongoing or future management actions." 67 Fed. Reg. 37108, 37161.

In contrast to INRMPs, the restrictions on habitat-destroying federal projects that critical habitat imposes are always there, protecting species regardless of funding.

Fourth, because the prohibition on adversely modifying critical habitat applies to all federal agencies, critical habitat reaches a broader set of federal threats than INRMPs, which regulate activities only on military installations. Thus, even if an INRMP contained the most proactive habitat management restrictions imaginable and were fully funded, an installation commander may have no power to stop another federal agency from carrying out activities off-base, even if the activities were certain to harm habitat resources within installation boundaries. In contrast, critical habitat reaches all federal activities, whether they take place inside or outside designated habitat.

A recent proposal to expand the runways at Kahului Airport on Maui to accommodate direct flights from abroad vividly illustrates the vital role critical habitat can play in protecting essential recovery habitat – like that found on many military installations – from indirect federal threats. The National Park Service strongly opposed the airport expansion on the ground that it would increase the rate of introduction of invasive alien species, which eventually would spread to Haleakala National Park, degrading the native habitat found there. However, because Kahului Airport is located outside park boundaries, there was little park managers – whose primary mission is to protect the park's native species and ecosystems – could have done to prevent the Federal Aviation Administration ("FAA") from approving the expansion plans had the State of Hawai`i not withdrawn them because of unfavorable economic conditions. In contrast, were critical habitat designated within park boundaries, the FAA would have to ensure that any airport expansion would not likely result, even indirectly, in adverse modification of that essential

recovery habitat. See 67 Fed. Reg. 15856, 15954 (Apr. 3, 2002) (noting that designation affects “regulation of airport improvement activities by the FAA”).¹

Similarly, the only way to ensure that federal activities outside DOD lands will not adversely modify essential recovery habitat on DOD lands is through critical habitat designation. INRMPs only apply to within installation boundaries and, thus, cannot prevent harm from outside federal activities.

5. The DOD is Seeking a Less Demanding Standard than Current FWS Policy

To persuade Congress to adopt the proposed ESA exemption, the DOD has argued that it is nothing more than a codification of the current FWS policy to exclude from critical habitat those areas that currently receive adequate special management considerations and protection for essential recovery habitat. The standard for exemption in the proposed ESA amendment – that DOD lands have an INRMP that merely “addresses” species and habitat management issues – is much less demanding than the standard FWS currently applies.

Before excluding DOD lands from critical habitat, FWS insists that they meet the following three criteria:

(1) a current INRMP must be complete and provide a conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions as necessary.

67 Fed. Reg. at 15905.

The DOD’s recent experience with critical habitat designations in Hawai`i contradicts its claim that the proposed ESA exemption is nothing more than a codification of current FWS policy. In case after case, FWS has found INRMPs to be inadequate substitutes for critical habitat.

- On Kaua`i, FWS found that management actions on lands under Navy control at Barking Sands and Makaha Ridge “are not sufficient to address the factors inhibiting the long-term conservation” of the endangered plants found there. 67 Fed. Reg. 3940, 3998 (Jan. 28, 2002).
- On O`ahu, FWS concluded that existing management actions at six Army installations (Dillingham Military Reservation, Kawaihoa Training Area, Kahuku Training Area, Makua Military Reservation, Schofield Barracks Military Reservation, and Schofield Barracks East Range) and for lands under Navy control at Lualualei are not “sufficient to address the primary threats to [listed plant] species” and that “appropriate conservation management strategies have [not] been adequately funded or effectively implemented.” 67 Fed. Reg. 37108, 37164 (May 28, 2002); see also id. at 37161-63.

¹ For that reason, the superintendent of Haleakala National Park lobbied heavily for the park’s inclusion in critical habitat when FWS proposed critical habitat for endangered and threatened plants on Maui.

- In designating critical habitat for the O`ahu `elepaio, a forest bird, FWS reviewed the INRMPs for three Army installations (Fort Shafter, Makua Military Reservation, and Schofield Barracks) and for Pearl Harbor Naval Magazine Lualualei, finding that “no military installation on O`ahu has completed a final INRMP that provides sufficient management and protection for the elepaio.” 66 Fed. Reg. 63752, 63762 (Dec. 10, 2001).
- On the Island of Hawai`i, FWS found that management at the Army’s Pohakuloa Training Area “is not sufficient to address many of the factors inhibiting the long-term conservation of any of [the] ten [federally listed plant] species” found there. 67 Fed. Reg. 36968, 37002 (May 28, 2002).

Thus, after reviewing INRMPs across the state, the Service found that none of them provided adequately for the long-term conservation of Hawai`i’s endangered and threatened species and their habitats. By excluding these same installations from critical habitat, the proposed ESA exemption would be a major setback in the struggle to save imperiled species in Hawai`i – and throughout the country – from extinction.

CONCLUSION

In summary, Earthjustice strongly opposes the DOD’s proposal to deprive migratory birds and essential recovery habitat on DOD lands of vital legal protections. Until the FDM litigation reaches a final resolution, it is premature for Congress to assess whether any changes to the MBTA are necessary or appropriate. As for the ESA, the current law provides assurances that training that is truly essential to national security will continue. We urge Senators on the conference committees to reject the exemptions found in the House version of the DOD Authorization bill and the FY 02 Supplemental Appropriations bill, which would weaken our country’s most important environmental and public health laws.

Thank you for the opportunity to testify today.