

# Report for Congress

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## **The Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Current Law and Legislative Proposals**

**Updated May 30, 2003**

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# The Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Current Law and Legislative Proposals

## Summary

The relationship of military readiness activities of the Department of Defense (DOD) to the Migratory Bird Treaty Act (MBTA) and to the Endangered Species Act (ESA) was the subject of legislative proposals in the 107<sup>th</sup> Congress and again is in the 108<sup>th</sup>. P.L. 107-314 was silent as to ESA issues, but does contain MBTA provisions. Section 315 of P.L. 107-314 directs that regulations be developed to exempt the Armed Forces from MBTA penalties for the incidental taking of migratory birds during military readiness activities. Until such regulations are finalized, § 315 provides that the prohibitions of the Migratory Bird Treaty Act do not apply to the incidental taking of migratory birds by a member of the Armed Forces during military readiness activities. However, during the interim period until regulations are finalized, the Secretary of Defense, in consultation with the Secretary of the Interior, is to minimize and mitigate, to the extent practicable, adverse impacts of the readiness activities on affected migratory birds.

Under the ESA, the Secretary of the Interior (and in some circumstances the Secretary of Commerce) can designate “critical habitat” after taking into account economic or “any relevant impacts.” Section 322 of S. 1050, as passed on May 22, 2003, would add new provisions to Title 10 of the United States Code to preclude the designation of critical habitat by the Secretary of the Interior on DOD lands if an Integrated Natural Resources Management Plan (INRMP) is completed for that area that the Secretary determines in writing will “effectively conserve” the listed species in the planning area, and that contains assurances that adequate funds will be provided for the planned activities.

H.R. 1588, as passed by the House on May 22, 2003, also precludes designation of critical habitat on DOD lands by the Secretary of the Interior or the Secretary of Commerce if the relevant Secretary determines an INRMP “addresses” the ‘special management considerations or protection’ for listed species “as those terms are used” in the ESA. Since a court has recently held that the way the FWS has used those terms administratively was a misinterpretation of the ESA, this wording may present issues of interpretation. The bill would also add an express requirement that the impact on national security be added to the list of impacts that must be considered when critical habitat is designated anywhere.

This report provides background on the statutes and proposals involved and will be updated as circumstances warrant.

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# The Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Current Law and Legislative Proposals

## Introduction

This report provides a brief overview of how the Endangered Species Act (ESA)<sup>1</sup> and the Migratory Bird Treaty Act (MBTA)<sup>2</sup> and their relevant regulations currently apply to military training and readiness activities of the Department of Defense (DOD). Military activities may “take” protected creatures directly (*e.g.*, killing with ordnance during rifle, gunnery or assault drills), or might destroy habitat (*e.g.*, artillery or bombing practices), even if these results are not the purpose of the activities. The applicability of the MBTA and ESA to military readiness activities was controversial in the 107<sup>th</sup> Congress and has been discussed again in the 108<sup>th</sup> Congress.

Although bills in the 107<sup>th</sup> Congress addressed both the ESA and the MBTA, P.L. 107-314 is silent as to the Endangered Species Act. Section § 315 of that act directs that new MBTA regulations be developed to exempt the Armed Forces for incidental taking of migratory birds during military readiness activities.<sup>3</sup> Until such regulations are finalized, § 315 provides that the prohibitions of the MBTA do not apply to the incidental taking of migratory birds by a member of the Armed Forces during military readiness activities. However, during the interim period the Secretary of Defense, in consultation with the Secretary of the Interior, is to minimize and mitigate, to the extent practicable, adverse impacts of the readiness activities on affected migratory birds. Judicial review is preserved, but expedited in that challenges to the regulations directed by the Act must be filed not later than 120 days from the date the regulations are published in the Federal Register. This act is discussed more fully below.

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<sup>1</sup> Pub. L. No. 93-205, 87 Stat. 884, 16 U.S.C. §§1531 *et seq.*

<sup>2</sup> Act of July 3, 1918, ch. 128, 40 Stat. 755, 16 U.S.C. §§703 – 712.

<sup>3</sup> The final version was changed from previous versions, both with respect to both the MBTA and the Endangered Species Act ESA. H.R. 4546 as passed by the House on May 10, 2002, included provisions in §§311 and 312 relating to military readiness activities and the MBTA and ESA respectively. Section 1201 of S. 2225 contained similar, but slightly different provisions. However, S. 2514, the DOD authorization bill reported by the Senate Armed Services Committee and passed by the Senate, did not contain any ESA or MBTA provisions. The enacted language eliminated the ESA provision of H.R. 4546 and changed the MBTA provisions.

In the 108<sup>th</sup> Congress, the Administration sent proposals for legislative changes regarding the ESA and other environmental statutes to the Congress. Both S. 1050 and H.R. 1588 address designation of critical habitat issues and both passed in their respective chambers on May 22, 2003.

This report discussed the statutes and issues involved and the various proposals regarding the ESA and MBTA. It will be updated as circumstances warrant.<sup>4</sup>

## The Endangered Species Act

The ESA is a federal statute that attempts to prevent the extinction of species of plants and animals by providing special protections to those species listed as “endangered” (those in danger of extinction throughout all or a significant portion of its range, other than certain insect pests)<sup>5</sup> or “threatened” (those so declining as to be likely to become endangered within the foreseeable future),<sup>6</sup> and to foster the “conservation,” or recovery, of those species to the point where they no longer need the protections of the Act.<sup>7</sup>

**Applicability to Federal Activities.** The ESA expressly applies to activities of the federal government. The Act defines “person” as including “any officer, employee, agent, department, or instrumentality of the Federal Government ....”<sup>8</sup> “Federal agency” is defined as any department, agency, or instrumentality of the United States.<sup>9</sup> The ESA requires several things of all federal agencies:

1) that “a person” not “take” any species of fish or wildlife listed as endangered.<sup>10</sup> Take includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to do any of these things. “Harm” is defined in a regulation as including destruction of habitat that kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.<sup>11</sup>

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<sup>4</sup> For current developments with respect to these issues see David M. Bearden, CRS Report for Congress, RL31456, *Defense Cleanup and Environmental Programs: Authorizations and Appropriations for FY 2003*; and IB10072, *Endangered Species: Difficult Choices*.

<sup>5</sup> 16 U.S.C. §1532(6).

<sup>6</sup> 16 U.S.C. §1532(20).

<sup>7</sup> 16 U.S.C. §§1531(b) and (c)(1), 1532(3), and 1536(a).

<sup>8</sup> 16 U.S.C. §1532 (13).

<sup>9</sup> 16 U.S.C. §1532 (7).

<sup>10</sup> 16 U.S.C. §1538(a)(1)(B). This prohibition is extended to include threatened species by regulation. 50 C. F. R. §17.31.

<sup>11</sup> 50 C.F.R. §17.3. This definition was upheld by the Supreme Court against a facial challenge in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

2) that agencies insure that actions they approve, fund, or carry out, not be likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat designated by the appropriate Secretary as critical to a species. To this end, each agency is to consult with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), as appropriate, to avoid such jeopardy or destruction.<sup>12</sup>

3) that all non-Department of Interior agencies have a duty to utilize their authorities “in furtherance of the purposes of [the Act],”<sup>13</sup> (one of which is the “conservation,” of species), and this is declared to be the policy of Congress as well.<sup>14</sup> The terms “conserve” or “conservation” are defined basically as bringing a species to the point where it no longer needs the protections of the Act,<sup>15</sup> and thus goes beyond merely avoiding jeopardy.

**Exceptions for Federal Activities That “Take”.** The ESA contains several alternatives by which DOD activities could proceed despite a likelihood that members of a listed species might be taken. First, the §7 consultation procedure allows the taking of listed creatures if the FWS or NMFS concludes that the action will not jeopardize the continued existence of a listed species.<sup>16</sup> An agency may be required to adopt reasonable and prudent alternatives to its original proposed action and to comply with other terms and conditions required by the Secretary of the Interior.<sup>17</sup>

In instances of irreconcilable conflict between a desired agency activity and the avoidance of jeopardy, the ESA provides an exemption process whereby a high-level “Endangered Species Committee” may be convened to consider a possible exemption from the penalties of the Act for an agency action.<sup>18</sup> The process for obtaining an exemption is somewhat rigorous and time-consuming and the exemption process has seldom been utilized. The process also seems to contemplate exemptions for particular, individual, proposed agency actions, rather than for generic or recurring types of activities.

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<sup>12</sup> Basically, the Secretary of the Interior has jurisdiction regarding terrestrial species and the Secretary of Commerce has jurisdiction over marine or anadromous species.

<sup>13</sup> 16 U.S.C. §1536(a)(1).

<sup>14</sup> 16 U.S.C. §1531(b).

<sup>15</sup> 16 U.S.C. §1532(3).

<sup>16</sup> See 50 C.F.R. §402.

<sup>17</sup> In FY 2001, for example, FWS conducted 1,161 formal consultations, of which 71 resulted in findings of jeopardy or adverse modification of critical habitat. In all 71 cases, FWS offered “reasonable and prudent” modifications that would avoid jeopardy or adverse modification, thereby allowing all the proposed actions to go forward. FWS Budget Justification, FY 2003, at 57.

<sup>18</sup> 16 U.S.C. §1536(e) - (p).

An exemption cannot be granted if the Secretary of State, after a review of the proposed agency action, certifies that granting the exemption and carrying out an action would violate an international treaty obligation or other international obligation of the United States.<sup>19</sup> This provision might affect the availability of an exemption for military readiness activities that would destroy migratory birds.

Notwithstanding any other provision of the Act, under §7(j) of the ESA (16 U.S.C. §1536(j)), an exemption must be granted for an agency action if the Secretary of Defense finds the exemption is necessary for reasons of national security. However, this alternative is only available as part of the Committee process, and apparently would only apply to a particular national security activity that is likely to jeopardize the continued existence of the species in question. An exemption under this section of the Act has never been sought, nor have there been any attempts to administratively develop general exemptions for on-going or recurring activities.

## The Migratory Bird Treaty Act

**Application to Federal Activities.** The MBTA is less clear than the ESA in several respects, including its applicability to federal activities. The MBTA is a criminal environmental statute, enacted in 1918 to implement the International Convention for the Protection of Migratory Birds signed by the United States and Great Britain (acting for Canada) only a few years earlier.<sup>20</sup> Section 2 (16 U.S.C. §703) sets out the types of prohibited conduct and states: “Unless and except as permitted by regulations ... , it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to do these acts, [or] possess ... any migratory bird, [or] any part, nest, or eggs of any such bird ....” None of these terms is defined in the Act.<sup>21</sup> Note that “harm,” a term used in the ESA that encompasses significant habitat destruction, is not present in the MBTA. Section 6 (16 U.S.C. §707) makes “any person, association, partnership, or corporation” who violates the MBTA or regulations thereunder subject to penalties. “Person” is not defined.

Courts have split on the issue of whether the MBTA applies to federal agencies. The Supreme Court assumed without discussion that §2 applied to Forest Service and Bureau of Land Management logging planning decisions for lands inhabited by a bird protected by the MBTA.<sup>22</sup> In 1997, two circuit-court decisions, both involving Forest Service timber sales, held that the MBTA does *not* apply to federal agencies.

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<sup>19</sup> 16 U.S.C. §1536(i).

<sup>20</sup> 39 Stat. 1702 (1916). Since 1918, the MBTA also has become the vehicle for implementing bilateral migratory bird treaties between the United States and Mexico (1936), Japan (1972), and the Union of Soviet Socialist Republics (1978).

<sup>21</sup> Fish and Wildlife Service regulations define “take” broadly for purposes of the MBTA (and specified other wildlife statutes) to embrace several of the MBTA-listed items. “Take,” the regulations state, “means to pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to attempt the foregoing. 50 C.F.R. §10.12.

<sup>22</sup> *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 437-438 (1992).

Each circuit – the Eighth Circuit in *Newton County Wildlife Ass’n v. U.S. Forest Service*,<sup>23</sup> and the Eleventh Circuit in *Sierra Club v. Martin*<sup>24</sup> – drew support for this conclusion from the §6 criminal penalties language that mentions “any person, association, partnership, or corporation,” terms that these courts concluded did not include the United States. Considering the MBTA as a whole, they found no violation of the MBTA by the federal agencies – which apparently means they concluded that §2 (articulating what is unlawful behavior) also did not apply as a matter of law.

However, in *Humane Society of the United States v. Glickman*,<sup>25</sup> involving a Department of Agriculture goose management plan, the District of Columbia Circuit ruled in favor of federal-agency coverage, noting that §2 neither premises its prohibitions on the acts of “any person,” nor makes an exception for federal agencies. Even assuming that “person” under the separate penalty provisions of §6 does not reach federal agencies, the court continued, this is not dispositive in that the MBTA can be enforced by means other than criminal penalties – in particular, by injunction. The Department of the Interior decided not to appeal *Humane Society*.

Most recently, the United States District Court for the District of Columbia in *Center for Biological Diversity v. Pirie*,<sup>26</sup> held that the United States had violated the MBTA by its live fire military training activities that killed migratory birds on an island in the Marianas without a permit. The court again noted that §2 (addressing unlawful acts) is worded generally, and that relief other than criminal penalties was available in the form of injunctive relief. The court initially ruled only on the liability issue, asked for additional briefing on many questions, including the availability and structuring of possible injunctive relief. The court subsequently enjoined the Navy from continuing its activities and required it to apply for a permit from FWS. On June 5, 2002, the court stayed the injunction, thereby allowing training activities to continue, and expedited the briefing schedule.

The MBTA is unclear in other ways as well. Because the definition of “take” does not include “harm” or “harass,” as does the ESA, the application of the Act to habitat destruction or other indirect take is unclear. It also lacks the express recognition of “incidental take” that §10 and (by implication) §7 of the ESA contain, and there has been some confusion between “unintentional” takes relevant to possible convictions under §6 of the Act, and “incidental” takes, where a deliberate action taken for a particular purpose also results in a taking or killing. These distinctions are important to military readiness activities where deadly force may be used that kills protected birds and destroys habitat, but where such killing or destruction is not the purpose of the activities.

**“Intent”.** Courts applying a criminal statute may need to probe the “scienter” of a defendant – the defendant’s intent or knowledge of facts that are elements of the

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<sup>23</sup> 113 F.3d 110 (8<sup>th</sup> Cir. 1997).

<sup>24</sup> 110 F.3d 1551 (11<sup>th</sup> Cir. 1997).

<sup>25</sup> 217 F.3d 882 (D.C. Cir. 2000).

<sup>26</sup> 191 F. Supp. 2d 161 (D. D.C. 2002), 2002 U.S. Dist. LEXIS 4112.

crime. Intent in this sense may focus of whether a defendant intended to do the acts that resulted in the harm, regardless of whether the exact results that ensue were intended. At times, lay people confuse “unintended” used in the context of criminal provisions with “incidental” as that term is used in the ESA, meaning the actions were taken intentionally, but were for a different purpose. Courts have often concluded that intent is immaterial to misdemeanor violations under §6(a) of the MBTA – that if a person commits acts that kill a protected bird, that is a violation.<sup>27</sup> In contrast with the misdemeanor provision, a *felony* under §6(b) results only when the defendant “knowingly” either takes a migratory bird (with intent to sell) or sells or attempts to sell such birds.<sup>28</sup> The word “knowingly” was added by a 1986 amendment.<sup>29</sup> The Navy in the *Pirie* case may have confused unintentional acts with incidental acts when it essentially argued that it had not violated the MBTA because it did not intend to kill birds – in the sense that killing the birds was not the purpose of its actions. The *Pirie* court noted (p. 35) that the Navy knew it was killing birds, even though that was not the Navy’s purpose; that the MBTA applies to both intentional and unintentional takings (p. 36); and that the prosecutorial discretion of the FWS did not make the Navy’s actions unreviewable (p. 44).

**Direct vs. Indirect Take.** Other cases involve discussions of possible MBTA liability for direct vs. indirect, and incidental takes. In *Seattle Audubon Society v. Evans*,<sup>30</sup> the Ninth Circuit addressed claims that the MBTA prohibits the Forest Service and Bureau of Land Management from logging timber from lands that may provide habitat for a protected bird. In rejecting this claim, the court held that previous cases only addressed *direct*, though unintended, bird deaths. They do not suggest, the Ninth Circuit said, that habitat destruction, leading *indirectly* to bird deaths, is a “taking” under the MBTA. The court bolstered this conclusion by juxtaposing the MBTA, which does not include “harm,” with the ESA, which does. In revealing contrast, noted the court, neither the MBTA nor its regulations makes any mention of habitat modification. Rather, MBTA regulations describe, in the words of the court, “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.”<sup>31</sup>

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<sup>27</sup> In *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), it was found sufficient if a defendant created hazardous circumstances that ultimately killed migratory birds, though the defendant had no intention of harming such birds. In *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9<sup>th</sup> Cir. 1978), birds died after feeding on a crop sprayed with a registered pesticide. See also *United States v. Corrow*, 119 F.3d 796 (10<sup>th</sup> Cir. 1997), whose strict liability holding was followed in *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1073-1074 (D. Colo. 1999), which held that the MBTA regulates both “intentionally harmful” and “unintentionally harmful” conduct, and rejected the reading that the MBTA regulated only the conduct exhibited by hunters and poachers.

<sup>28</sup> 16 U.S.C. §707(b).

<sup>29</sup> Pub. Law No. 99-645, § 501.

<sup>30</sup> 952 F.2d 297 (9<sup>th</sup> Cir. 1991).

<sup>31</sup> *Id.* at 302. District court decisions in accord include *Citizens Interested in Bull Run, Inc.* (continued...)

There evidently is even some confusion as to what constitutes direct harm. Since *Seattle Audubon*, other cases have found no takings, even, for example, for the harvesting of trees during nesting season, which arguably killed birds directly.<sup>32</sup> The courts in both *Mahler* and *Newton County*<sup>33</sup> quoted the “conduct of the sort engaged in by hunters and poachers” language from *Seattle Audubon* in seeming to rule out MBTA coverage of timbering under any circumstances.<sup>34</sup> Another post-*Seattle Audubon* decision to the contrary merely *assumed* that timber cutting could violate the MBTA, and thus is weak precedent.<sup>35</sup>

**Permits.** Under §2 of the MBTA, those takes that are not permitted under the regulations are unlawful; the *Pirie* case faulted the Navy for conducting its live fire training operations without a permit. Although the regulations set out many types of permits, none currently specifically address DOD training or readiness activities. Evidently, various DOD activities have been permitted in the past under the permit to kill depredating birds,<sup>36</sup> but the FWS denied a permit for the training exercises in question in *Pirie*. “Special purpose” permits<sup>37</sup> may be issued for activities related to migratory birds which are otherwise outside the scope of the standard form permits if an applicant presents a “compelling justification.” However, there are no current standards for permitting or regulating military readiness and training activities, and this permit has not been used to date. The *Pirie* court noted that the FWS had refused to issue the Navy a permit because FWS asserted that it lacked the authority to issue permits authorizing *unintended* conduct (p. 13) (by which they appear to have meant *incidental* conduct). If this remains the position of the FWS, special purpose permits may continue to be unavailable to the Navy. The court asked for additional briefing on the permit authority of FWS under the MBTA, and subsequently enjoined the Navy from additional activities, while also ordering the Navy to apply for a permit. The court noted that FWS had denied the permits in the past, and therefore a temporary injunction was appropriate. The court also stated that it would take prompt action if there were either administrative or congressional

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<sup>31</sup> (...continued)

v. Edrington, 781 F. Supp. 1502 (D. Ore. 1991), and Portland Audubon Society v. Lujan, 1991 Westlaw 81838 (D. Ore. May 8, 1991).

<sup>32</sup> *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996).

<sup>33</sup> *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F. 3d 110 (8<sup>th</sup> Cir. 1997).

<sup>34</sup> In *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070 (D. Colo. 1999), the court vigorously rejected that part of *Seattle Audubon* which may be read to hold that the MBTA regulates only the conduct exhibited by hunters and poachers. However, because this case involved a criminal information alleging electrocution of protected birds when they landed on defendant’s transmission lines, the court had no occasion to comment on whether its something-more-than-hunters-and-poachers view reached as far as habitat modification.

<sup>35</sup> *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11<sup>th</sup> Cir. 1997). In *Humane Society of the United States v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000), the court observed that “[t]he *Martin* court’s assumption that timber harvesting could violate the [MBTA] is not shared by others.”

<sup>36</sup> 50 C.F.R. §21.41.

<sup>37</sup> 50 C.F.R. §21.27.

action (May 1, 2002 Order, at 19).<sup>38</sup> The Navy has applied to FWS for a special purpose permit and action is currently pending. On June 5, 2002, the court stayed its injunction, thereby allowing training activities to continue.

**Executive Order.** An executive order signed by President Clinton imposes additional obligations on federal agencies to protect migratory birds.<sup>39</sup> Section 2 of the executive order defines “take” as defined in 50 C.F.R. §10.12,<sup>40</sup> and as including both “intentional” and “unintentional” take. It defines “intentional take” as take that is the purpose of the activity in question, and “unintentional take” as take that results from, but is not the purpose of, the activity in question (again confusing unintentional and incidental takes). The order then commands each federal agency whose actions are likely to have a “measurable negative effect” on migratory birds to enter into a memorandum of understanding with the Fish and Wildlife Service, to the extent permitted by law, to “minimize” the intentional take of species of concern, and “lessen” the amount of unintentional take.

The executive order’s definition of “take” is not dispositive for purposes of divining the meaning of “take” as used in the MBTA, of course, though a court might accord it some persuasive value.

## 107<sup>th</sup> CONGRESS

### House Bills

**Section 311 of H.R. 4546 as Passed by House – Changes to the MBTA.** Sections 311 and 312 of H.R. 4546 as passed by the House would have amended the MBTA and ESA respectively. It will be recalled that the *Pirie* case found that the military training activities of the Navy conducted on an island in the Marianas violated §2 of the MBTA. Evidently, according to that case, the Navy in that instance was conducting operations without a permit, based on the initial position of the FWS that the FWS lacked the authority to issue a permit for incidental taking of protected birds. The training activities in question are seen as crucial to the Navy, and are frequent and recurring, a type of activity not easily accommodated under the current system. The FWS later concluded that it did have the authority to issue permits.

Section 311 would have amended §3 of the MBTA (which authorizes the Secretary of the Interior to promulgate regulations to implement the Act), by adding a new subsection that defines “military readiness activity” and provides that “Section

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<sup>38</sup> Section 3 of the MBTA authorizes the Secretary to issue regulations, but “[s]ubject to the provisions [of the Act] and in order to carry out the purposes of the conventions.” Therefore, the issue of the current authority of the Secretary to issue permits may again come before the courts.

<sup>39</sup> Responsibilities of Federal Agencies to Protect Migratory Birds, Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001), still in effect as of March 20, 2003.

<sup>40</sup> See note 4 *supra*.

2 shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned.” (Emphasis added.)

Because §2 of the MBTA, as discussed above, sets out what behavior is unlawful under that Act, § 311 would appear to have made all incidental take of migratory birds during military readiness activities lawful. The provision did not require the military to prioritize readiness activities, or to avoid or minimize harm, nor was any permitting process established or required, despite Committee report language to that effect.<sup>41</sup> If §2 did “not apply” to readiness activities, arguably there was nothing that needed a permit.

**Section 312 of H.R. 4546 – Changes to the ESA.** Section 312 of H.R. 4546 as passed by the House would have eliminated the designation of critical habitat on military lands that were “subject to” an integrated natural resources management plan (INRMP) under the Sikes Act,<sup>42</sup> and if the Secretary determined that such a plan “addressed” special management considerations or protection (as those terms are used in section 3(5)(A)(i));” two requirements that were somewhat vague as to what might be required. This provision was not enacted, but similar provisions are contained in the Administration’s proposal in the 108<sup>th</sup> Congress and are discussed more fully under that part of this report. In addition, although the ESA currently allows the Secretary to consider “all relevant impacts” during the designation process, §312 would have added “the impact on national security” after “the economic impact,” thereby expressly requiring consideration of national security issues during any designation process.<sup>43</sup>

## Senate Bills

S. 2514, reported by the Senate Armed Services Committee did not contain ESA and MBTA provisions. However, S. 2225 did contain such provisions, which are discussed here. Section 1201 of S. 2225 would have added a new chapter to Title 10 of the United States Code to address the relationship of military readiness activities to the ESA and MBTA and certain other topics beyond the scope of this report. A new §2016 would have added definitions of “military readiness activities” and “combat” or “combat use” that were similar to those in the House bill.

**ESA Provisions.** New §2017 would have addressed the ESA and the MBTA (and marine mammal protection as well). As to the ESA, §2017(a) would have stated that *completion* of an INRMP under the Sikes Act that “addresses” endangered or threatened species and their habitat per se would provide the “special management considerations or protections” that are part of the definition of what might constitute critical habitat in the ESA. The INRMP plan, S. 2225 continues, “precludes designation of critical habitat” for the lands or areas covered by the Sikes Act plan.

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<sup>41</sup> H.Rept. 107-436 at 294 (2002).

<sup>42</sup> H.Rept. 107-436 at 295 (2002).

<sup>43</sup> Section 3 of S. 911 would also add language to require consideration of the “impacts to military training and operations” as part of the designation of critical habitat process.

This provision differs from the House version in that it expressly requires a completed Sikes Act plan, but is similar to the House language in that it would eliminate critical habitat designation on those lands if there is an INRMP that “addresses” species. Therefore, the comments made above with respect to the this language apply to the Senate provision as well.

**MBTA Provisions.** New §2017(b) would have provided that DOD military readiness activities would be authorized “without further action by the Secretary of the Interior” provided that DOD must “minimize taking of migratory birds to the extent practical and necessary” to further the purposes of the Act (by which it is not clear whether the MBTA or the new statute is intended), “without diminishment of military training or other capabilities, as determined by the Department.”

This language might have eliminated the issuance of a permit by the Secretary of the Interior for DOD military readiness activities. It also required DOD to minimize taking of migratory birds, to the extent practical and necessary “without diminishment” of military training or other capabilities. It is not clear to what extent the “without diminishment” wording might affect the number of takings. The remainder of the sentence refers to takings “resulting from military training or other capabilities” and it is not clear what activities were encompassed within this phrasing, since only “military readiness activities” was defined in the bill. Therefore, the scope of the waiver was not clear. In addition, the relevant determinations were to be made by the Department, and as such might not have been reviewable by a court.

## **P.L. 107-314**

The enacted version of H.R. 4546<sup>44</sup> is silent on the ESA, but § 315 provides for new interim MBTA provisions, and the conference report discusses the ESA.

**MBTA.** Section 315 provides that during a period of time, § 2 of the Migratory Bird Treaty Act (which makes taking listed migratory birds unlawful) does not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned. Military readiness activity is defined in subsection (f) as including: (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. Other activities are expressly excluded from the definition, including “routine operation of installation operating support functions” (with several examples set out), operation of industrial activities, and the construction or demolition of facilities used for these purposes.

The period during which the interim provisions are to be in effect is to last from the date of enactment until whenever new regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities are

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<sup>44</sup> See H.Rept. 107-772 (2002), set out at 148 Cong. Rec. H8092 *et seq.* (Daily ed. November 12, 2002).

“prescribed,” all challenges to them have been exhausted, and the regulations have taken effect.

The new MBTA regulations are to be developed by the Secretary of the Interior, but with the concurrence of the Secretary of Defense. Section 315(d) states that the Secretary of the Interior shall “prescribe” the regulations not later than the expiration of the one-year period beginning on the date of enactment. It is not clear whether this means the regulations need only be proposed within the one-year time, or must be finalized within that time. The explanatory material in the conference report does not answer this question, but arguably the section read as a whole seems to mean the regulations are to be completed within that time.<sup>45</sup> Judicial review of the regulations is preserved, but is expedited in that all challenges must be filed within 120 days of the date the regulations appear in the Federal Register.

During the interim period in which the Armed Forces are exempted from the prohibitions of the MBTA, the Secretary of Defense, in consultation with the Secretary of the Interior, is to identify measures to minimize and mitigate, to the extent practicable, any adverse impacts of authorized military readiness activities on affected species of migratory birds, and to monitor the impacts of military readiness activities on affected species.

**ESA.** The public law is silent as to ESA issues, but the explanatory material in the conference report states that while compliance with environmental laws is expected, “unique challenges” often face the Armed Forces, one of which is the balancing of habitat protection with necessary activities. The conference report calls for the Secretary of Defense to provide the relevant committees with recommendations for legislative proposals the Secretary considers necessary to accomplish avoidance of designation of critical habitat on bases that could affect military training through protections provided by Integrated Natural Resources Management Plans, and recommendations on pursuing a cooperative approach in managing natural and cultural resources throughout the Armed Forces. The relevant text of the conference report reads as follows:

The conferees believe that all federal agencies, including the Armed Forces, should be required to comply with all federal environmental laws. However, due to their unique military training and operational responsibilities, the Armed Forces often face unique challenges in balancing the obligations to comply with environmental laws and sustain military readiness. Examples of these challenges include increasing limitations and restrictions on lands and waters which are currently set aside for military training exercises as well as significant restrictions on the times and conditions under which military training exercises can be conducted. The conferees are concerned that future designations of critical habitat on military training ranges could have an adverse impact on the military’s readiness capabilities.

The conferees strongly endorse the consultative process through which the military services work with the Fish and Wildlife Service to ensure the protection of threatened and endangered species by adopting effective Integrated Natural

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<sup>45</sup> H.Rept. 107-772 at H8450.

Resources Management Plans at military installations. The conferees are concerned that questions have been raised regarding whether the protections provided by these Integrated Natural Resources Management Plans, such as the one at Marine Corps Base, Camp Pendleton, California, are sufficient to avoid the need for future designations of critical habitat that could adversely affect military training. Nevertheless, the conferees encourage the Department of the Interior and the Department of Defense to pursue a cooperative approach in managing natural and cultural resources throughout the Armed Forces.

The conferees direct the Secretary of Defense to provide the Committees on Armed Services of the Senate and the House of Representatives recommendations for any legislative proposals that he considers necessary to accomplish these stated goals.<sup>46</sup>

## 108<sup>th</sup> Congress

The Administration submitted a legislative proposal to the 108<sup>th</sup> Congress to again address the designation of critical habitat on Department of Defense lands. The proposal stated that an Integrated Natural Resources Management Plan (INRMP) completed under the Sikes Act Improvement Act for lands or “other geographical areas” owned or controlled by DOD or designated for its use that “addresses” endangered or threatened species and their habitat “provides the ‘special management considerations or protection’ required under the ESA and precludes designation of critical habitat for the lands, but does not eliminate the § 7 requirement to consult on actions likely to jeopardize the continued existence of listed species. The full text reads:

2017. Military readiness and the conservation of protected species

(a) The completion of an Integrated Natural Resources Management Plan, pursuant to the Sikes Act Improvement Act (16 U.S.C. 670a), for lands or other geographical areas owned or controlled by the Department, or designated for its use, that addresses endangered or threatened species and their habitat, provides the ‘special management considerations or protection’ required under the Endangered Species Act (16 U.S.C. 1532(5)(A)) and precludes designation of critical habitat for any such land or geographical areas under section 4 of the Endangered Species Act (16 U.S.C. 1533).

(b) This section does not remove the requirement for agency consultation under section 7(a)(2) of the Endangered Species Act (16 U.S.C. 1536(a)(2)).

H.R. 1588, as passed on May 22, 2003, takes a similar approach – but with important differences – and also adds an additional express requirement that impacts on national security be considered when critical habitat is designated.

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<sup>46</sup> H.Rept. 107-772 at H8452.

Current law recognizes that habitat destruction is a very important factor in the endangerment of species,<sup>47</sup> and the appropriate Secretary is to designate critical habitat, which is defined in part as areas in which are found physical or biological features essential to the conservation of the species and which may require special management considerations or protection.<sup>48</sup> The appropriate Secretary is to designate critical habitat on the basis of the best scientific data available and after taking into consideration the economic impact, and “any other relevant impact,” of specifying any particular area as critical habitat. The Secretary also may exclude any area from designation if he determines that the benefits of exclusion outweigh the benefits of specifying an area, unless he determines, based on the best scientific and commercial data available, that failure to designate an area as critical habitat will result in the extinction of the species concerned.<sup>49</sup>

The Sikes Act<sup>50</sup> requires a planning process for military installations, which are defined as any lands or interest in lands owned by the United States and administered by the Secretary of Defense or a military department (except those for civil works) and includes all public lands withdrawn or reserved for use by the Secretary of Defense or a military department.<sup>51</sup>

The Sikes Act planning process is not the same as the designation of critical habitat process under the ESA. Under the Sikes Act, the Secretary of Defense is directed to carry out a program to provide for the conservation and rehabilitation of natural resources on military installations,<sup>52</sup> and the Secretary of each military department is to prepare and implement an integrated natural resources management plan for each military installation unless an installation lacks significant natural resources.<sup>53</sup>

These plans are to be developed in cooperation with the Secretary of the Interior, acting through the Director of the FWS and the head of each appropriate state fish and wildlife agency.<sup>54</sup> Consistent with other federal law, and consistent with the use of military installations to ensure the preparedness of the Armed Forces, a plan shall “to the extent appropriate and applicable,” provide for fish and wildlife management, land management, forest management and fish and wildlife-oriented recreation, habitat enhancement or modifications, enforcement of applicable natural resources

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<sup>47</sup> 16 U.S.C. §1533(a)(1)(A).

<sup>48</sup> 16 U.S.C. §1531(5). The FWS has not been designating critical habitat for many listed species. As of May 16, 2002, out of 1,258 listed plants and animals, 152 species have at least some portion of their range designated as critical habitat. FWS website: [www.endangered.fws.gov](http://www.endangered.fws.gov)

<sup>49</sup> 16 U.S.C. § 1533(b)(2).

<sup>50</sup> Pub. L. No. 86-797, 74 Stat. 1052, amended significantly in 1997 by the Sikes Act Improvement Act, Pub. L. No. 105-85, Div. B, title XXIX, 111 Stat. 2116.

<sup>51</sup> 16 U.S.C. §670.

<sup>52</sup> 16 U.S.C. §670a(a)(1)(A).

<sup>53</sup> 16 U.S.C. §670a(a)(1)(B).

<sup>54</sup> 16 U.S.C. §670a(a)(2).

laws and regulations, and other things, but with “no net loss” in the capability of military installation lands to support the military mission of the installation.<sup>55</sup> There are no express standards or requirements with respect to endangered or threatened species, and the ESA presumably currently functions as an overlay of requirements when listed species are present.

In contrast, a critical habitat designation is developed based on the best available scientific information with the conservation of endangered species as the goal. A designation may include military lands, but without military preparedness as a focus. Some have argued that clarification of the way in which the two purposes – that of protecting endangered species and that of maintaining military training and readiness – are to be reconciled would be advisable, and that some means of prioritizing the military needs and better facilitating their accomplishment within parameters might also be desirable. Others assert that the need for special provisions has not been adequately demonstrated.

H.R. 1588 as passed precludes designation of critical habitat if the relevant Secretary determines that an INRMP “addresses” “special management considerations or protection” as those terms are used in the ESA. “Addresses” is a general term and the provision does not contain any standards with which compliance is required or which would establish equivalence with the “special management considerations or protection” referenced in the ESA. Therefore, there would appear to be broad administrative discretion in determining how much detail a plan must contain to “address” listed species and provide protections, and the adequacy of INRMPs appears difficult for a court to review.

Several administrative interpretations bear on this legislative language. The FWS and others have asserted that designation of critical habitat provides little additional protection to most listed species beyond the protections provided by the requirement to avoid jeopardy anyway.<sup>56</sup> To the extent this assertion appears to be true, it arises from a FWS regulation that has recently been held to be unlawful. It will be recalled that under the ESA federal agencies must consult on actions that *either* might jeopardize a species *or* cause the destruction or adverse modification of critical habitat. However, the FWS has conflated these two duties by defining “destruction or adverse modification” as meaning “a direct or indirect alteration that appreciably diminishes the value of critical habitat for *both the survival and recovery* of a listed species ...”<sup>57</sup> and then interpreting this last phrase as essentially meaning “survival,” and therefore as being synonymous with jeopardy in most instances.<sup>58</sup>

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<sup>55</sup> 16 U.S.C. §670a(b).

<sup>56</sup> *See* 64 Fed. Reg. 31872.

<sup>57</sup> 50 C.F.R. § 402.02. (emphasis added.)

<sup>58</sup> *See* 64 Fed. Reg. 31872, which states: “For almost all species, the adverse modification and jeopardy standards are the same ....” Whatever Congress may have intended by its directive to avoid destruction or adverse modification of critical habitat, and whatever may be said about the agency’s interpretation of its own phrase referring to “both survival and recovery,” it is an elementary rule of statutory construction that a statute is to be interpreted

Because it conflated two statutory requirements, the agency then concludes that designation of critical habitat generally adds nothing that is not already covered by the jeopardy concept. As a result, the FWS has given designation a very low priority,<sup>59</sup> substituting instead general agency assertions that agency consideration of habitat needs and effects has been adequate. However, the courts have found that the agency does have a duty to designate critical habitat,<sup>60</sup> and the regulation in question has been held to be unlawful.<sup>61</sup>

The United States Court of Appeals for the Fifth Circuit held that 50 C.F.R. §402.02 was facially invalid in that it requires consultation with respect to an agency's destruction of critical habitat if both survival as well as recovery of a species is affected – which standard devolves to a jeopardy standard in practice in almost all cases. However, the court noted that the ESA defines critical habitat as that which is 'essential for the conservation' (i.e. recovery) of a species – a much more generous standard that could encompass more habitat. By equating destruction of critical habitat with jeopardizing a species, the regulatory interpretation eliminated the role of critical habitat and rendered statutory language surplusage, and was not a valid interpretation.

If the FWS interpretation of critical habitat has incorrectly assigned it a minor role in species protection, then altering critical habitat protections on military lands arguably may raise important issues.

Also, the ESA defines "critical habitat" as "areas ... on which are found those physical or biological features (I) essential to the conservation of the species *and* (II) *which may require special management considerations or protection; and ...*" (Emphasis added.) The FWS has interpreted this language as meaning that if a management plan exists that provides special management and protection measures for an area, that area no longer meets the definition of critical habitat and cannot be designated.<sup>62</sup>

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<sup>58</sup> (...continued)

to avoid rendering any of its provisions inoperative or superfluous. 2A SUTHERLAND STAT. CONST. § 46.06 (5<sup>th</sup> ed.)(1992 Rev.). *See also*, MICHAEL J. BEAN AND MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 251-261 (3d Ed.1997), Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990).

<sup>59</sup> The FWS materials accompanying the June 14<sup>th</sup> notice state that FWS designated critical habitat for 113 of the listed 1,168 species, or about 9% at that time.

<sup>60</sup> *See, e.g.*, Conservation Council for Hawaii v. Babbitt, 24 F. Supp. 2d 1074, 1078 (D. Hi. 1998), in which the court set deadlines for the FWS to designate critical habitat for a number of species, even if funds were short (a situation plaintiffs alleged FWS was partially responsible for), and that agency relief from the burdens of listing lies with the Congress.

<sup>61</sup> *Sierra Club v. United States Fish and Wildlife Service; National Marine Fisheries Service*, 245 F. 3d 434 (5<sup>th</sup> Cir. 2001). The inconsistency of the regulation with the ESA was noted in *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Service*, 248 F. 3d 1277, 1283 (10<sup>th</sup> Cir. 2001).

<sup>62</sup> *See, for example*, 67 Fed. Reg. 67968, 67982-67985 (November 7, 2002).

Special management and protection for the species are not required if adequate management and protection are already in place. Adequate management or protection is provided by a legally operative plan/agreement that addresses the maintenance and improvement of the primary constituent elements important to the species, and that manages for the long-term conservation of the species .... We consider several factors to determine if a plan provides adequate management or protection. These factors are: (1) Whether there is a current plan specifying the management actions and whether such actions provide sufficient conservation benefit to the species; (2) whether the plan provides assurances that the conservation management strategies will be implemented; and (3) whether the plan provides assurances that the conservation management strategies will be effective (*i.e.*, provide for periodic monitoring, adaptive management, and revisions as necessary). If all of these criteria are met, then the lands covered under the plan would likely no longer meet the definition of critical habitat and designation would no longer be appropriate.<sup>63</sup>

A recent district court case has said of the analogous situation of a management plan on Tribal lands, that this FWS interpretation of the ESA definition of critical habitat is “nonsensical”<sup>64</sup> and a “tortured construction ... impermissible and contrary to law.”<sup>65</sup> The court felt the statutory language meant that habitat that may need special management and protections was eligible for critical habitat designation – regardless of how that special management and protection might be provided. The court further noted that the FWS interpretation would eliminate “a crucial part” of the § 7 consultation requirement – that federal agencies consult on adverse modification of critical habitat, and that other recent court cases on related matters should have put FWS on notice that its approach was “untenable and in contravention of the ESA.”<sup>66</sup>

As passed, H.R. 1588 would amend the ESA to essentially incorporate the current FWS interpretation of the definition of critical habitat. The bill states that the Secretary [of Interior or Commerce] shall not designate DOD lands as critical habitat that are subject to an INRMP *if the Secretary determines* that such plan addresses special management considerations or protection *as those terms are used* in the ESA. (Emphasis added.) As discussed in the preceding section of this report, however, at least one court has now determined that the FWS reading of those terms is not how they actually are used in the Act.

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<sup>63</sup> *Id.*, at 67982. In evaluating whether a plan is likely to be implemented, the FWS looks to whether: (a) a plan or agreement exists that specifies the actions being implemented; (b) there is a timely schedule for implementation; (c) there is a high probability that the funding source(s) or other resources necessary to implement the actions will be available; and (d) the party(ies) have the authority and long-term commitment to implement the plan. In determining whether an action is likely to be effective, FWS considers whether: (a) the plan specifically addresses the management needs, including reduction of threats to the species; (b) such actions have been successful in the past; (c) there are provisions for monitoring and assessment of the effectiveness of the management actions; and (d) adaptive management principles have been incorporated into the plan.

<sup>64</sup> *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1099 (D. Az. 2003).

<sup>65</sup> *Id.*, at 1100.

<sup>66</sup> *Id.*, at 1103.

H.R. 1588 would also add consideration of the impact on national security to the expressly stated impacts that the Secretary considers when designating critical habitat. The bill also states that nothing in the paragraph relating to non-designation of critical habitat on DOD lands would affect the requirement to consult under section 7(a)(2) of the ESA – though it appears it would do so in that no critical habitat could be designated on DOD lands if the Secretary makes the finding that the relevant INRMP addresses special management considerations, thereby eliminating consultation on adverse modification of critical habitat. Consultation would still occur on actions likely to jeopardize a listed species, and the prohibitions of §9 on takings would remain – and, as discussed, takings could include harming a species through destruction of its habitat that kills or injures directly or through certain behavioral changes. Although the change would eliminate one subject of consultation – adverse effects on critical habitat, – the consultation process may still result in the modification of proposed agency actions or in a jeopardy opinion being rendered on other grounds, such that a military agency might still need to consider going through the exemption process.<sup>67</sup>

S. 1050, as passed on May 22, 2003 also would preclude designation of critical habitat on DOD lands in some circumstances, but only if the Secretary determines in writing that the management activities identified in an INRMP “will effectively conserve” listed species in the area covered by the plan and that the plan provides assurances that adequate funding will be provided for such management activities. The “will effectively conserve” language arguably would impose a more strict requirement than the current interpretation of FWS would – but the FWS standard may not be lawful.

Under the ESA, all federal agencies have a general duty to “conserve” species, which means to bring them to the point where they no longer need the protections of the Act, i.e. to recover them.<sup>68</sup> Critical habitat is that which is “essential to the conservation of the species.” The Senate language – by requiring that the *management activities* identified in an INRMP effectively conserve listed species – arguably is broad and addresses the general duty to conserve, rather than speaking only to some requirement equivalent to designating critical habitat.

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<sup>67</sup> As reported from committee, H.R. 1588 also would have changed the general ESA language which currently requires that critical habitat be designated for all listed species “to the maximum extent prudent and determinable.” The “prudent and determinable” language functions as exceptions to the absolute requirement for designation that otherwise applies – critical habitat might not be designated if it is not determinable (as, for example, if so little is known about a species), or is not prudent (for example, if there are only 12 individuals left of one species on a very limited habitat and collectors might destroy them if their location were known). H.R. 1588, as reported, would have stricken the “prudent and determinable” language and substituted “necessary.” This change would have eliminated the general requirement that critical habitat be designated in every case, subject to the two exceptions discussed above, and substituted a determination by the Secretary concerned that designation is “necessary” for that species. This would have been a significant change, and one that would apply to all designations, not just those on DOD lands. The language was deleted before passage.

<sup>68</sup> 16 U.S.C. § 1532(3).

The Senate provision is an addition to Title 10 of the United States Code, rather than an amendment to the ESA, and only addresses the Secretary of Interior and not ESA-related actions that might be taken by the Secretary of Commerce. The Senate language repeats the language on not affecting the requirement to consult under § 7 of the ESA, but does not add an express requirement to consider impacts on national security to the elements that must be weighed in designating critical habitat.

To summarize, completion of an INRMP that “addresses” endangered or threatened species and their habitat arguably is not equivalent to a requirement to designate critical habitat, and also may not provide special management considerations or protection as those terms are used in the ESA. Furthermore, a court has held that the presence of special management considerations or protection in a management plan does not eliminate the necessity to designate critical habitat. In addition, Sikes Act INRMPs meet military objectives first and ESA objectives only secondarily – a difference that some may see as a necessary or desirable accommodation to military readiness needs, and some may not.<sup>69</sup>

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<sup>69</sup> The term “military readiness activities” is defined as it was in the 107<sup>th</sup> bills, in terms of combat related activities. However, the proposal this year elaborates on what constitutes “combat” or “combat use” as including all forms of armed conflict and “operational employment,” and support function necessary for either armed conflict and operational employment. The term “operational employment” is not defined and could be broad. The ESA provisions of the proposal are not keyed to military readiness, but other environmental exceptions are.