

## Homeland Security and Environmental Regulation: Balancing Long-Term Environmental Goals with Immediate Security Needs

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### I. INTRODUCTION

At 8:45 a.m. on Tuesday, September 11, 2001, the first of two airliners crashed into the World Trade Center twin towers.<sup>1</sup> Twenty minutes later, a second plane slammed into one of the world's tallest skyscrapers,<sup>2</sup> a symbol of American ingenuity and commerce. In an image forever embedded in the American spirit, the twin towers fell. An hour later, a third airliner crashed into the Pentagon, and a fourth crashed into the ground in Pennsylvania.<sup>3</sup>

Over 3,000 lives were lost that day in events that President George W. Bush called "evil, despicable acts of terror."<sup>4</sup> The president vowed that the United States would "find and punish those responsible for [these] horrific, catastrophic terror attacks."<sup>5</sup> In those moments, our nation underwent a paradigm shift: Overnight, homeland security became the primary objective of government.<sup>6</sup>

The scope of homeland security law touches every aspect of federal law. It encompasses not only laws designed to combat terrorism but also laws intended to protect public welfare and critical infrastructures.<sup>7</sup> It is at this junction where homeland security law and environmental law intersect. One of the main missions of environmental law is to protect public health and safety; therefore, such law will likely become part of the homeland security landscape.<sup>8</sup>

Numerous chemical facilities and petroleum refineries located in the United States contain toxic chemicals capable of endangering

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1. September 11 News.com, <http://www.september11news.com/USAWebArchives.htm> (last visited Jan. 27, 2006).

2. *Terror Attacks Hit U.S.*, CNN.COM, Sept. 11, 2001, <http://archives.cnn.com/2001/US/09/11/worldtrade.crash/story.html>.

3. *Id.*

4. Ian Christopher McCaleb, *Bush: U.S. Feels "Quiet, Unyielding Anger,"* CNN.COM, Sept. 12, 2001, <http://archives.cnn.com/2001/US/09/11/white.house/>.

5. *Id.*

6. Ed Bethune, *Homeland Security and Environmental Law: Impacting and Influencing Each Other*, SPECIAL COMMITTEE ON HOMELAND SECURITY NEWSL. (ABA Sec. of Env't, Energy, and Res., Chicago, Ill.), July 2004, at 2, available at <http://www.abanet.org/environ/committees/homelandsecurity/newsletter/jul04/homeland0604.pdf>.

7. *Id.*

8. *Id.*

more than one million people if released.<sup>9</sup> Accordingly, the Environmental Protection Agency (EPA) has determined that Clean Air Act provisions enacted prior to September 11 provide the agency with authority to address site security concerns at chemical plants.<sup>10</sup> The Clean Air Act's Risk Management Program requires submissions from chemical facilities detailing risks that could occur in the event of an explosion or significant toxic chemical release.<sup>11</sup> Additionally, the Public Health Security and Bioterrorism Preparedness Act of 2002 amended the Safe Drinking Water Act, and now the EPA is responsible for conducting vulnerability assessments and preparing emergency response plans to protect the nation's community water systems.<sup>12</sup>

Pollution is another area in which environmental concerns and national security intersect. National defense is one of the largest causes of pollution in this country.<sup>13</sup> Eighty percent of federal Superfund sites are controlled by the Department of Defense (DOD).<sup>14</sup> The Navy alone produces thirty-five million pounds of hazardous wastes each year, and in 1981, the military produced 92,000 metric tons of hazardous waste.<sup>15</sup> Environmental legislation designed to protect public health and safety is equally as critical when applied to these defense activities as it is when applied to private industry.

Not only does the goal of homeland security blanket the scope of federal laws, but some states are also passing anti-terrorism legislation that impacts environmental regulation.<sup>16</sup> Prior to September 11, New Jersey passed legislation containing more stringent requirements than the federal Clean Air Act, and the New Jersey Environmental Commissioner was called to testify before the Senate in November 2001 regarding New Jersey's focus on "risk analysis, prevention, and preparedness."<sup>17</sup> In a similar vein, Maryland enacted "the first statewide

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9. Michael J. Penders & William L. Thomas, *The Specter of Ecoterror: Rethinking Environmental Security After 9/11*, 17 NO. 6 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (2002).

10. U.S. GEN. ACCOUNTING OFFICE, GAO-03-439, HOMELAND SECURITY: VOLUNTARY INITIATIVES ARE UNDER WAY AT CHEMICAL FACILITIES, BUT THE EXTENT OF SECURITY PREPAREDNESS IS UNKNOWN 16 (2003), available at <http://www.gao.gov/new.items/d03439.pdf>.

11. *Id.*

12. Bethune, *supra* note 6, at 4.

13. John S. Applegate, *National Security and Environmental Protection: The Half-Full Glass*, 26 ECOLOGY L.Q. 351, 380 (1999) (reviewing STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT (1996)).

14. David W. Goewey, Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513, 515 (1987). A Superfund site is an area contaminated by hazardous waste that has been marked for cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act. Donald A. Brown, *EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund*, 15 COLUM. J. ENVTL. L. 241, 246 (1990).

15. Goewey, *supra* note 14, at 516.

16. See Penders & Thomas, *supra* note 9.

17. *Id.* The New Jersey hazardous chemical program requires facilities to compile a vulnerability assessment for scenarios that might have negative off-site impacts. *Id.*

chemical security legislation in the United States” in May 2004.<sup>18</sup> Maryland’s legislation applies “to facilities that store, dispense, use, or handle hazardous materials” and requires the Maryland Department of the Environment “to adopt hazardous material security regulations applicable to these facilities.”<sup>19</sup>

Despite this close relationship between environmental concerns and national defense, the DOD has often complained that environmental laws and regulations hamper its ability to adequately train troops for war. Prior to September 11, the DOD issued a report listing seven regulatory programs that negatively impacted its operations.<sup>20</sup> Despite a Government Accounting Office report concluding that the DOD was unable to quantify negative impacts on training resulting from forced compliance with environmental laws,<sup>21</sup> the department lobbied Congress in 2003 to grant it broad exemptions from key provisions of six major environmental laws.<sup>22</sup> In short, the DOD is eager to avoid compliance with most major environmental legislation.

It seems clear the conflict between homeland security and environmental regulation will be ongoing. This note seeks to examine the historical relationship between the two bodies of law and proposes that environmental regulation can provide a new paradigm in which to consider national security concerns. Furthermore, this note posits that existing environmental regulations can be used as a significant advantage in the homeland security context and that the DOD can benefit from the controls imposed by environmental legislation.

Part II of this note will examine the historical relationship between environmental regulation and national security concerns. Part

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18. James Stuhltrager, *Homeland Security Affects Environmental Laws*, TRENDS (ABA Sec. of Env’t, Energy, and Res., Chicago, Ill.), Mar./Apr. 2005, at 12.

19. *Id.*

20. Kim DePaul, *Maritime Sustainability Issues & Action Plan 4-5* (Office of Under Sec’y of Def. Pers. & Readiness, Working Paper, 2000) in Memo from Patrick J. Meehan, Acting Deputy Under Secretary of Defense (Environmental Security) to Director, Operational Test and Evaluation et al. (May 14, 2001), available at <http://www.peer.org/docs/dod/navyworking.pdf> [hereinafter Meehan Memo]. The memorandum listed the seven regulatory programs in order of severity of their impact on training: the Marine Mammal Protection Act, the Endangered Species Act, the National Marine Sanctuaries Act, the Coastal Zone Management Act, the Magnuson-Stevens Act, the Executive Order on Coral Reefs, and the Executive Order on Marine Protected Areas. *Id.*

21. U.S. GEN. ACCOUNTING OFFICE, GAO-02-614, *MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES 3* (June 2002), available at <http://www.gao.gov/new.items/d02614.pdf>.

22. Catherine M. Vogel, *Military Readiness and Environmental Security—Can They Co-Exist?*, 39 REAL PROP. PROB. & TR. J. 315, 328 (2004). The major environmental laws from which the DOD requested exemption include: the Migratory Bird Treaty Act, the Endangered Species Act, the Marine Mammal Protection Act, the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Resource Conservation and Recovery Act. *Id.* The DOD requested a blanket exemption from the Endangered Species Act even though the Act already contained a provision for exemption for national security reasons. *See id.* at 333. Other than the amendment to the Migratory Bird Treaty Act, Congress rejected all of the DOD’s proposed amendments. *Id.* at 329.

III will analyze developments in homeland security law and environmental regulation since September 11 and will examine the effect of environmental regulation on the military. Finally, Part IV will demonstrate how federal and state environmental legislation may be used to increase homeland security and how environmental regulation can benefit the DOD.

## II. EXAMINING THE HISTORICAL RELATIONSHIP BETWEEN ENVIRONMENTAL REGULATION AND NATIONAL SECURITY

### A. *Historical Conflicts*

Traditionally, environmental regulation and national defense have been at odds with each other. In reality, however, the majority of conflicts between the military and environmental concerns are simply incidental to legitimate military activities.<sup>23</sup> The stockpiling of nuclear weapons for national defense, the use of chemical warfare such as Agent Orange, unexploded land mines, and other unexploded ordnance are all environmental hazards incident to small wars and military training activities.<sup>24</sup> In addition, the day-to-day activities of the military result in substantial air and water pollution.<sup>25</sup>

The legacy of the Cold War was a litany of hazardous wastes, nuclear contamination, polluted air, water, and soil, and the destruction of numerous natural and cultural resources.<sup>26</sup> Nuclear weapons were tested and stored for more than forty years, from 1945 to 1989, at facilities in thirty-four states covering 2.4 million acres.<sup>27</sup> Massive amounts of hazardous waste created by the DOD were “deliberately dumped in unlined pits or landfills, injected into wells, burned in the open air, or left in containers that are now corroded and leaking. The environmental impact of these actions, perfectly legal throughout much of this period, is enormous. So is the cost of cleaning up after them.”<sup>28</sup> Despite obvious harm to the environment, the effects of na-

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23. Applegate, *supra* note 13, at 350, 351.

24. *Id.*

25. *Id.* For example, the production of nuclear, chemical, and biological weapons creates contamination and toxic waste. Scott M. Palatucci, *The Effectiveness of Citizen Suits in Preventing the Environment from Becoming a Casualty of War*, 10 WIDENER L. REV. 585, 586 (2004). Other harmful consequences from day-to-day military activities include fallout from weapons testing, disposal of unused weapons, and air and water pollution caused by fleets of military ships and vehicles. *Id.* The environmental damages from military activities are well documented. In Massachusetts, people living near a military reservation have an increased risk of lung cancer after toxic munitions contaminated the water; and in Vieques, Puerto Rico, the area children have an increased rate of cancer due to spent munitions on bombing ranges contaminating the water. *Id.* at 587.

26. Nancye L. 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, 110 (2002).

27. *Id.* at 113.

28. *Id.* (quoting DYCUS, *supra* note 13, at 94).

tional defense were tolerated because destruction of the environment was viewed as an acceptable price to pay for national security.<sup>29</sup>

Even as the Cold War ended and environmental harms were better understood as threats to public health and safety, the DOD continued to argue such consequences were acceptable. In the months prior to September 11, the DOD contended that environmental regulations seriously hampered military training activities.<sup>30</sup> A memo from the Acting Deputy Under Secretary of Defense dated May 14, 2001, noted

[t]he cumulative or additive effect of complying with more than one regulatory program, some with overlapping jurisdiction concerning the same natural resources . . . can place the range or operating area in the position [of] complying with duplicative procedures for preserving and/or conserving the same or multiple species. Compliance can thus be costly from the perspective of time, expenditures, and ultimately lost opportunity to train or conduct tests.<sup>31</sup>

The Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) both have significant effects on military training and readiness, demonstrating the unique relationship of national security to the environment.<sup>32</sup> Ambiguities in the definition of “harassment” under the MMPA have prevented the Navy from deploying its \$350 million Surveillance Towed Array Sensor System Low Frequency Active Sonar, even though the Russian and French navies already use the system.<sup>33</sup> Similarly, land use restrictions imposed by the ESA reduce the military’s flexibility to use its land for training and testing.<sup>34</sup> The ESA imposes an affirmative duty on federal agencies to conserve species listed as threatened or endangered under the Act, limiting federal actions that affect such species.<sup>35</sup> The affirmative duty imposed by the ESA on the military is significant given the amount of federal land controlled by the military and the unique nature of that land. The U.S. Army is “the fifth largest steward of federal lands,” owning or administering 25 million acres of land.<sup>36</sup> The Air Force manages 9 million acres, and the Navy and Marines manage 3.5 million acres of federal lands.<sup>37</sup>

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29. *Id.* at 110.

30. *See id.* at 117.

31. Meehan Memo, *supra* note 20, at 3-4.

32. Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance*, 8 ENVTL. LAW. 457, 487, 493 (2002).

33. *Id.* at 485.

34. *Id.* at 494.

35. David N. Diner, *The Army and the Endangered Species Act: Who’s Endangering Whom?*, 143 MIL. L. REV. 161, 162 (1994).

36. *Id.*

37. MICHELE LESLIE ET AL., *CONSERVING BIODIVERSITY ON MILITARY LANDS: A HANDBOOK FOR NATURAL RESOURCES MANAGERS* § 1.2 (1996), available at <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Biodiversity/biodiversity.html>.

When compared with other federal landholders, the number of listed endangered species located on DOD lands is disproportionately greater, reflecting “the wide range of training environments and strategic locations” required by the military.<sup>38</sup> Many military bases are the last remaining refuge for threatened species as cities expand and habitats are destroyed.<sup>39</sup> It follows that species are affected when economic pressures force the Army to close installations.<sup>40</sup> Reducing the amount of land available for training only increases pressure on remaining bases, while simultaneously, the presence of endangered species reduces training flexibility.<sup>41</sup> Resulting concerns for military commanders include wildlife protection, range and training viability, noise issues, and urban growth constraints.<sup>42</sup> The reduction in military training capacity due to environmental issues is commonly known as “encroachment.”<sup>43</sup>

In response to continued complaints from several top military commanders about encroachment, the Government Affairs Committee of the U.S. House of Representatives held hearings on May 9, 2001.<sup>44</sup> Representative Dan Burton testified that

combat training is being hemmed in . . . by commercial development, environmental regulations, airspace restrictions and conflicts over use of the radio frequency spectrum. . . . The burden of protecting wildlife and habitat may be overwhelming the primary training mission. . . . The term encroachment is used because these developments gradually operate to crowd out the large scale, realistic training indispensable to force readiness.<sup>45</sup>

Additionally, the commander of the U.S. Air Force Air Combat Command testified that

[t]he cumulative effects of endangered species, noise sensitive areas, and population expansion have resulted in less than optimum training opportunities for our aircrews and constrained testing of weapon systems[.] . . . Presently, many units are routinely denied the full range of airspace required for practicing modern tactics, causing an impact to readiness.<sup>46</sup>

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38. *Id.*

39. See Vogel, *supra* note 22, at 318.

40. Diner, *supra* note 35. In fact, eighteen Army bases, fourteen Navy bases, six Marine bases, and sixteen Air Force bases have been recommended for closure by the 2005 Base Realignment and Closure Commission. 2005 Base Closure Recommendations, <http://www.g2mil.com/2005.htm> (last visited Jan. 27, 2006).

41. Kiamos, *supra* note 32, at 494.

42. *Id.*

43. See *id.*

44. Bethurem, *supra* note 26, at 120.

45. *Id.* at 120-21 (quoting *Challenges to National Security: Constraints on Military Training: Hearing Before the H. Comm. on Government Reform*, 107th Cong. (2001) (opening statement of Rep. Dan Burton, Chairman of the Comm. on Government Reform), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:75041.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:75041.wais)).

46. *Id.* at 121 (quoting *Challenges to National Security: Constraints on Military Training: Hearing Before the H. Comm. on Government Reform*, 107th Cong. (2001) (testimony of General Jumper, Commander, Air Combat Command, U.S. Air Force), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=F:75041.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=F:75041.wais)).

Exemplifying the tension between defense and the environment, efforts were being made on the environmental side to force the department's hand at the same time the DOD was arguing for less stringent application of environmental laws to military training.<sup>47</sup> The Military Environmental Responsibility Act was introduced by several U.S. Representatives on June 13, 2001.<sup>48</sup> The bill had several purposes: 1) to require full compliance from the DOD with federal and state environmental laws designed to protect public health and the environment; 2) to waive sovereign immunity and revoke any exemptions from environmental laws granted to the DOD; and 3) to signal to the judicial branch that the DOD is to be given no special treatment in regard to compliance with federal and state environmental laws.<sup>49</sup> In addition to the proposed legislative action, environmental groups attempting to pressure the DOD filed lawsuits designed to block the Navy's expansion of Fallon Naval Air Range by 120,000 acres; to oppose the Army's expansion of its training area in the Mojave Desert; to request removal of Navy forces from Vieques, Puerto Rico; to protect an endangered desert tortoise; and to end the use of the Barry M. Goldwater Range in Arizona.<sup>50</sup>

The EPA was involved in the fray as well, attempting to use the Safe Drinking Water Act to force the DOD to clean up military bases prior to September 11.<sup>51</sup> Those provisions would have governed an estimated twenty-five facilities nationwide.<sup>52</sup> While the Safe Drinking Water Act requirements were less stringent than Comprehensive Environmental Response, Compensation, and Liability Act requirements,<sup>53</sup> the Safe Drinking Water Act would have enabled the EPA to maintain control over military activities causing significant water pollution.<sup>54</sup> Given the unitary executive policy, which states that the EPA cannot bring a judicial action against another executive agency without the president's consent, this development was significant.<sup>55</sup> This type of power struggle between the EPA and the DOD over environmentally destructive activities is an example of the fluctuating relationship between the DOD and the environment.

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47. *Id.* at 123.

48. *Id.*

49. *Id.* at 118.

50. *Id.*

51. *EPA Flexes Drinking Water Muscle over Second Military Superfund Site*, HAZARDOUS WASTE NEWS, May 8, 2000 [hereinafter *Drinking Water*].

52. *Id.*

53. *Id.* The Comprehensive Environmental Response, Compensation, and Liability Act was passed in 1980 as a response to concerns over improper disposal of hazardous wastes. Brown, *supra* note 14. The Act addresses the problem of hazardous waste disposal by first identifying contaminated sites in need of remediation and then providing for cleanup of those sites by enforcement actions, cooperative agreements, or use of a fund. *Id.*

54. *Drinking Water*, *supra* note 51.

55. See Applegate, *supra* note 13, at 373.

### B. *The Military and the Environment—Shared Goals*

Despite a historically tumultuous relationship, environmental regulation and national security have not always been on opposite sides. After three DOD officials were convicted for illegal waste storage and disposal in 1989, Secretary of Defense Dick Cheney issued a memorandum stating that “the Department of Defense [will] be the [f]ederal leader in agency compliance and protection. We must demonstrate commitment with accountability for responding to the Nation’s environmental agenda.”<sup>56</sup> Mr. Cheney also stated that “[d]efense 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.”<sup>57</sup>

Based on those convictions, the DOD created a new environmental program aimed at cleaning up existing hazardous waste and nuclear contamination.<sup>58</sup> The program was later expanded to include prevention of pollution by hazardous waste, “protection of natural and cultural resources,” compliance with the ESA, and compliance with the National Historic Preservation Act.<sup>59</sup> Currently, the program, headed by the deputy undersecretary of defense for environmental security, focuses on four aspects of environmental compliance: restoration, compliance, pollution prevention, and conservation.<sup>60</sup> The DOD’s environmental program is an example of its ability to act in an environmentally friendly manner while accomplishing its mission of national security.

In fact, the military has a “proud” history of stewardship of natural resources.<sup>61</sup> This stewardship began in 1823 when timber was considered a strategic resource.<sup>62</sup> Prior to the creation of the Forest Service and National Park Service, the Army managed federal lands set aside as national parks.<sup>63</sup> The Army has had great success protecting the endangered red cockaded woodpecker through its restoration of the Longleaf Pine ecosystem in the southeastern United States.<sup>64</sup>

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56. Julie G. Yap, Note, *Just Keep Swimming: Guiding Environmental Stewardship out of the Riptide of National Security*, 73 *FORDHAM L. REV.* 1289, 1306-07 (2004) (quoting Seth Shulman, *Operation Restore Earth*, *ENV’T*, Mar./Apr. 1993, at 38).

57. Stephen Dycus, *NEPA Secrets*, 2 *N.Y.U. ENVTL. L.J.* 300, 300 (1993) (quoting Def. Sec’y Dick Cheney, Address to Defense and Environmental Initiative Forum, Washington, D.C. (Sept. 3, 1990)).

58. Bethurem, *supra* note 26, at 114-15.

59. *Id.* at 115.

60. *Id.*

61. *LESLIE ET AL.*, *supra* note 37, § 1.3.

62. *Id.*

63. See Darrin Hostetler, *The Wrong War, with the Wrong Enemy, at the Wrong Time: The Coming Battle over the Military Land Withdrawal Act and an Experiment in Privatizing the Regulation of Public Lands*, 29 *ENVTL. L.* 303, 317 (1999).

64. *Id.*

Further, millions of acres of military lands remain unspoiled and intact.<sup>65</sup> Large tracts of land, originally established as buffer zones for the bases, now serve as de facto wildlife preserves and may be used for a variety of environmental purposes.<sup>66</sup> For example, the only portion of the Columbia River not yet modified for hydroelectric power flows through the Hanford Reservation.<sup>67</sup> At the Fernald facility in Ohio, removal of hazardous wastes and demolition of industrial buildings will preserve vanishing wetlands, create a new prairie over a radioactive site disposal area, and provide green space in a suburban area.<sup>68</sup> In suburban Denver, military operations and radioactive contamination protect the area occupied by the Rocky Mountain Arsenal; yet, when remediated, it will contain the country's largest wildlife refuge.<sup>69</sup> A study of the military's environmental record conducted by the Rand Corporation concluded that it may "be the most environmentally conscious of all federal landowners," having "far less impact on the environment than ranching or timber harvesting."<sup>70</sup>

Not only is the military capable of being an environmentally prudent land steward, but environmental agencies are also capable of assisting with national security threats. The EPA, along with the Occupational Safety and Health Administration and several independent environmental service firms, were enlisted to monitor the World Trade Center site for air contaminants after the September 11 attacks.<sup>71</sup> The monitoring activities measured air contamination to assess both threats to rescue workers from exposure and chemical and biological threats such as anthrax, mustard gas, and the plague.<sup>72</sup> The EPA continuously updated its website, providing the results of the environmental monitoring.<sup>73</sup> Finally, the EPA is also capable of flexing its regulatory muscle to protect both air and water from the potentially disastrous consequences of a terrorist attack on a hazardous facility.<sup>74</sup>

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65. *Id.*

66. Applegate, *supra* note 13, at 384.

67. *Id.*

68. *Id.*

69. *Id.* at 385.

70. Hostetler, *supra* note 63, at 316.

71. *Environmental Services Firm Enlisted to Help Monitor Terrorist Attack Sites*, ENVTL. LAB. WASH. REP., Oct. 25, 2001.

72. *Id.*

73. *Id.*

74. *See supra* notes 10-12, 51-54 and accompanying text.

III. DEVELOPMENTS IN HOMELAND SECURITY LAW AND ENVIRONMENTAL REGULATION IN THE WAKE OF SEPTEMBER 11

A. *The Post-9/11 Paradigm Shift Toward National Security: Malama Makua v. Rumsfeld*<sup>75</sup>

The tragic events of September 11 caused a paradigm shift that, overnight, made homeland security “[reign] supreme as the primary objective of government.”<sup>76</sup> Because of this paradigm shift, the military may once again have a national security “trump card.”<sup>77</sup> The Malama Makua litigation in Hawaii illustrates this “paradigm shift.”<sup>78</sup>

A citizen group, the Malama Makua, filed suit in 1998 against the U.S. Army, arguing that Army training plans at the Makua Military Reservation failed to comply with the National Environmental Policy Act.<sup>79</sup> The Army used the military reservation from 1985 to 1998 for live fire and combined arms maneuver training.<sup>80</sup> In addition to endangered marine mammals and numerous species of threatened and endangered flora and fauna, the training range at Makua contained a significant native Hawaiian religious site and numerous secret burial caves.<sup>81</sup> The native Hawaiians were concerned about the safety of their sacred cultural sites as well as the effects of contamination from open waste pits reaching their fishing and swimming areas.<sup>82</sup>

In spite of a frustrating process involving litigation, negotiation, hearings, and protests, the parties could not achieve a compromise.<sup>83</sup> Yet, after September 11, the Army secured a compromise with the native Hawaiians that allowed it to conduct convoy ambush training at Makua in return for an agreement not to use the most destructive artillery.<sup>84</sup> Malama Makua board member Sparky Rodrigues noted, “[w]hile we don’t believe that any military training at Makua is appropriate, we understand the Army’s desire to make sure its soldiers are prepared to defend themselves.”<sup>85</sup> “The world changed on the 11th of September. It changed a lot of things . . . . It was hard to separate Makua from what had happened on Sept. 11.”<sup>86</sup> The remarkable shift

75. 163 F. Supp. 2d 1202 (D. Haw. 2001).

76. Bethune, *supra* note 6.

77. Bethurem, *supra* note 26, at 127.

78. *Id.* at 129; Yap, *supra* note 56, at 1308.

79. *Malama Makua*, 163 F. Supp. 2d at 1205.

80. *Id.*

81. *Id.* at 1208, 1211; Yap, *supra* note 56, at 1309.

82. *Malama Makua*, 163 F. Supp. 2d at 1213; Bethurem, *supra* note 26, at 128.

83. Bethurem, *supra* note 26, at 129.

84. William Cole, *Agreement Crafted on Makua Training*, HONOLULU ADVERTISER, Dec. 5, 2003, at 1A.

85. *Id.*

86. Bethurem, *supra* note 26, at 129 (quoting Gregg Kakesako, *Tragedy in New York Lifts Makua Impasse*, STAR-BULL., Oct. 5, 2001, available at <http://starbulletin.com/2001/10/05/news/story2.html>).

in native Hawaiian attitudes regarding military training at Makua demonstrates the power of September 11 to affect public opinion regarding the environmental consequences of military training.

### B. *Developments in Homeland Security Post-9/11*

The current “war on terrorism” began on October 7, 2001.<sup>87</sup> The terrorist attacks on the World Trade Center and Pentagon, along with the resulting war on terrorism, caused a dramatic shift in the way environmental regulation relates to national security. Now, more than ever, environmental laws are used to increase national security.

#### 1. New Roles for Environmental Regulation

Congress created the Department of Homeland Security on November 25, 2002.<sup>88</sup> The new department combined twenty-two federal agencies, programs, research centers, and 170,000 employees.<sup>89</sup> Homeland security concerns, however, encompass more than fighting a war abroad or preventing terrorist acts in this country. One commentator writes,

[s]ecurity concerns can no longer be confined to traditional ideas of soldiers and tanks, bombs and missiles. Increasingly they include the environmental resources that underpin our material welfare. These resources include soil, water, forests, and climate, all prime components of a nation’s environmental foundations. If these foundations are depleted, the nation’s economy will eventually decline, its social fabric will deteriorate, and its political structure will become destabilized. The outcome is all too likely to be conflict, whether in the form of disorder and insurrection within a nation or tensions and hostilities with other nations.<sup>90</sup>

To protect these resources, the EPA has begun to play a more important role in homeland security. The Public Health Security and Bioterrorism Preparedness Act of 2002 delegated the responsibility for all the nation’s community water systems to the EPA, leaving it to ensure that those systems use effective methods to protect the public from any intentional contamination of the water supply.<sup>91</sup> In addition, the EPA now coordinates with the U.S. Customs Service.<sup>92</sup> Pursuant to the EPA’s Homeland Security Strategic Plan, the U.S. Customs Ser-

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87. *Id.* at 124. On October 7, 2001, the United States military began attacks against the Taliban regime and al Qaeda training camps in Afghanistan. *Id.*

88. *See* Pub. L. No. 107-296, §101, 116 Stat. 2135, 2142 (2002) (codified as amended at 6 U.S.C. § 111 (Supp. II 2002)).

89. Ekundayo B. George, *Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government Be Held Liable for Not Attaining This Goal?*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 651, 668 (2003).

90. *Id.* at 654-55 (quoting NORMAN MYERS, *ULTIMATE SECURITY: THE ENVIRONMENTAL BASIS OF POLITICAL STABILITY* 31-34 (1993)).

91. 42 U.S.C. § 300i-3 (Supp. II 2002); Bethune, *supra* note 6, at 4.

92. Mary Beth Polley, *U.S. Customs to Provide More Information to EPA; Homeland Security*, PESTICIDE & TOXIC CHEMICAL NEWS, Jan. 20, 2003, at 20.

vice will provide the EPA access to its confidential automated records system, allowing the EPA to track and evaluate chemical substances entering the United States.<sup>93</sup>

The EPA has further determined that certain provisions in the Clean Air Act may provide the agency with the authority necessary to address site security concerns at chemical plants.<sup>94</sup> The U.S. General Accounting Office concluded in June 2001 that the EPA could improve its emissions monitoring with wider use of advanced technologies.<sup>95</sup> Better emissions monitoring not only protects public health in general but also aids homeland security because biological and chemical warfare agents will be detected more rapidly by the EPA.

In addition to the EPA's increased role in homeland security, developments in environmental regulation regarding chemical facilities on both federal and state levels are strengthening the bond between environmental legislation and national security. Numerous chemical facilities and petroleum refineries located in the United States contain amounts of toxic chemicals that, if released, would endanger over one million people.<sup>96</sup> Two pieces of proposed federal legislation aim to address this threat by creating a new system of regulations to govern the chemical industry.<sup>97</sup> Both pieces of legislation would place the Department of Homeland Security in a position to act in an environmentally friendly manner by creating laws addressing security concerns at certain chemical sites.<sup>98</sup> State legislatures, in some cases showing remarkable foresight, have also passed laws governing the chemical industry and its responses to emergency situations.<sup>99</sup> Such actions combine elements of environmental responsibility with management practices to ensure site security.

Elements of wise environmental practices "designed to assure compliance with law, minimize or eliminate the use of the most hazardous substances and wastes, reduce emissions and releases, and improve process efficiencies" may effectively address security concerns, as well as environmental concerns.<sup>100</sup> Sophisticated environmental management information systems involve multi-layered defenses and encryption technologies and are capable of tracking environmental compliance while monitoring for minute amounts of biological and chemical warfare agents, changes in weather conditions, and off-site

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93. *Id.*

94. *See supra* note 10 and accompanying text.

95. U.S. GEN. ACCOUNTING OFFICE, GAO-01-313, ENVIRONMENTAL PROTECTION: WIDER USE OF ADVANCED TECHNOLOGIES CAN IMPROVE EMISSIONS MONITORING 4, 9 (2001), available at <http://www.gao.gov/new.items/d01313.pdf>.

96. Penders & Thomas, *supra* note 9.

97. Stuhltrager, *supra* note 18.

98. *Id.*

99. *See id.*

100. Penders & Thomas, *supra* note 9.

releases.<sup>101</sup> One military base employing such a system saved 400,000 gallons of water per day, and another facility eliminated an on-site chemical storage warehouse.<sup>102</sup>

## 2. The DOD's Encroachment Concerns

Environmental regulation's increased role in homeland security and its proven effectiveness in addressing some major security concerns has done little to sway military opinion of most major environmental legislation. The military continues to complain about encroachment issues, despite a June 2002 General Accounting Office report concluding that the DOD rarely reports any loss of readiness resulting from the need to comply with environmental laws.<sup>103</sup> The report recognized that encroachment does place some limitations on a unit's ability to train but maintained that "the overall impact on readiness and training costs is not well documented."<sup>104</sup>

While the General Accounting Office was conducting its systematic study of encroachment issues, the DOD identified eight major areas of encroachment concern.<sup>105</sup> One of the fundamental issues was the "designation of critical habitat under the Endangered Species Act," which the DOD maintained decreased its ability to use its lands as it desired.<sup>106</sup> Also on the list were the application of environmental statutes to military munitions, balancing ocean protection mandates with training needs, the application of the Clean Air Act to emissions generated by defense installations, and the application of environmental laws mandating noise reduction.<sup>107</sup> According to DOD officials, "uncertainties" about the enforcement of these regulations as well as pressure from citizen and environmental groups limit the department's ability to plan, program, and budget for compliance.<sup>108</sup>

In that spirit, a March 7, 2003, memo from Deputy Defense Secretary Paul Wolfowitz to the secretaries of the Army, Navy, and Air Force directed each branch to consider exemptions from environmental laws whenever possible and provided protocol to do so.<sup>109</sup> The deputy secretary's memo noted the military's past history of land

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101. *Id.*

102. *Id.*

103. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 21, at 16-17.

104. *Id.* at 9. The report further noted that in the few instances in which training units did report lower levels of readiness, they did not list encroachment concerns as the cause. *Id.* at 16.

105. *Id.* at 5.

106. *Id.* at 6.

107. *Id.* at 6-8. The other three issues identified by the DOD included competition for the frequency spectrum; competition for airspace; and infringement of business or housing developments on military training ranges. *Id.*

108. See *id.* at 6.

109. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretaries of the Army, Navy, and Air Force (Mar. 7, 2003) (on file with author).

stewardship but contended that the time had come to serve national defense:

While I believe we should be commended for our past restraint in this regard, I believe it is time for us to give greater consideration to requesting such exemptions in cases where environmental requirements threaten our continued ability to properly train and equip the men and women of the Armed Forces.<sup>110</sup>

The memo identified seven major environmental laws that enable the president to issue exemptions from their provisions if it is in the “paramount interest of the United States.”<sup>111</sup>

a. *The Clean Water Act*

The first of these laws, the Clean Water Act, has the objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>112</sup> The major goals of the Clean Water Act include eliminating the discharge of pollutants into navigable waterways, prohibiting the release of toxins at harmful levels, and controlling nonpoint source water contamination.<sup>113</sup> The Act, however, allows the president to exempt “any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States . . . .”<sup>114</sup> Exemptions made by the president in the paramount interest of the United States last for no more than one year, but the president is allowed to make additional one-year exemptions upon new findings of necessity.<sup>115</sup>

Furthermore, the Clean Water Act allows the president, upon making a paramount interest determination, to issue regulations exempting “any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property” owned by the Armed Forces or the National Guard.<sup>116</sup> Unlike the exemptions for executive branch instrumentalities in general, the president is only required to reconsider these regulations at three-year intervals.<sup>117</sup>

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110. *Id.*

111. *Id.* The seven environmental laws that allow exemptions in the interest of the United States are the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act, the Noise Control Act, the Public Health Service Act (Safe Drinking Water Act), the Marine Protection, Research, and Sanctuaries Act, and the Coastal Zone Management Act. *Id.*

112. Clean Water Act, 33 U.S.C. § 1251(a) (2000).

113. *Id.* § 1251(a)(1), (3), (7).

114. *Id.* § 1323(a).

115. *Id.*

116. *Id.*

117. *Id.*

b. *The Resource Conservation and Recovery Act*

The second act, the Resource Conservation and Recovery Act (RCRA), creates a national policy to decrease or terminate the production of hazardous materials whenever possible.<sup>118</sup> Hazardous waste that is created “should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.”<sup>119</sup> Despite this strongly worded national policy, RCRA contains similar provisions allowing the president to exempt any solid waste management facility in the executive branch from RCRA requirements whenever he makes a paramount interest determination.<sup>120</sup> The Act provides that the president must report to Congress each January any exemptions granted and his reasons for granting them but does not provide any mechanism for Congress to override those exemptions.<sup>121</sup>

c. *The Clean Air Act*

One of the primary goals of the third act, the Clean Air Act, “is to encourage or otherwise promote reasonable [f]ederal, [s]tate, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.”<sup>122</sup> To that end, every entity of the federal government, including its officers and employees, must comply with air pollution requirements, whether federal, state, interstate, or local.<sup>123</sup> The Clean Air Act specifies that these federal entities are subject to pollution control measures “in the same manner, and to the same extent as any nongovernmental entity.”<sup>124</sup>

The Clean Air Act, however, contains several provisions exempting federal instrumentalities for reasons determined by the president. First, the Clean Air Act grants the president the same broad exemption power for reasons “in the paramount interest of the United States” as contained in the Clean Water Act and RCRA.<sup>125</sup> The Act also contains provisions allowing the president to issue regulations exempting property owned by the Armed Forces or National Guard from the requirements of the Act.<sup>126</sup> As with the Clean Water Act, the president is only required to review these regulations every three years.<sup>127</sup> Finally, the Act specifically exempts “military tactical vehi-

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118. Resource Conservation and Recovery Act, 42 U.S.C. § 6902(b) (2000).

119. *Id.*

120. *Id.* § 6961(a).

121. *See id.*

122. Clean Air Act, 42 U.S.C. § 7401(c) (2000).

123. *Id.* § 7418(a).

124. *Id.*

125. *See id.* § 7418(b).

126. *Id.*

127. *Id.*

cles” from the provisions of the inspection and maintenance programs of other provisions.<sup>128</sup>

d. *The Noise Control Act*

The Noise Control Act was passed in 1972 in response to a congressional finding that unchecked noise presents a danger to the nation’s health and welfare.<sup>129</sup> “[T]he major sources of noise [pollution] include transportation vehicles and equipment, machinery, appliances, and other products in commerce . . . .”<sup>130</sup> The Noise Control Act directs federal agencies to comply with all regulations aimed at noise reduction but allows the president to exempt any activity or facility of the executive branch, including noise emission sources, if the paramount interest of the country would be served.<sup>131</sup>

e. *The Public Health Service Act*

The Public Health Service Act, which incorporates the provisions of the former Safe Drinking Water Act, gives the administrator of the EPA the authority to set national primary drinking water standards to protect public water quality.<sup>132</sup> The Act subjects any federal facility engaged in activities that may result in the contamination of water supplies, or engaged in underground injection activities that endanger drinking water supplies, to all federal or state requirements for the protection of public water.<sup>133</sup> Although the United States has expressly waived its immunity from suit for violations of these provisions, again the president is given broad authority to exempt executive branch facilities from compliance if he makes a paramount interest determination.<sup>134</sup> The statute provides no guidance as to what exactly amounts to the “paramount interest” of the United States.

f. *The Marine Protection, Research, and Sanctuaries Act*

The Marine Protection, Research, and Sanctuaries Act establishes a national policy “to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.”<sup>135</sup> In furtherance of that policy, the Act prohibits any person from transporting materials within or

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128. *Id.* § 7418(c).

129. *See* 42 U.S.C. § 4901(a)(1) (2000).

130. *Id.* § 4901(a)(2).

131. *Id.* § 4903(b).

132. *See* 42 U.S.C. § 300g-1 (2000).

133. *Id.* § 300j-6(a).

134. *Id.*

135. Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401(b) (2000).

outside of the United States for the purpose of ocean dumping.<sup>136</sup> The Marine Protection, Research, and Sanctuaries Act, however, allows the EPA administrator to issue permits for ocean dumping, provided a certain set of criteria are satisfied and the dumping will not adversely affect water quality.<sup>137</sup>

The administrator is required to consult with the secretary of the Army when an ocean dumping permit might interfere with civil works projects maintained by the Army.<sup>138</sup> The Act further provides that the president can exempt any federal facility from state law dumping requirements if he makes a paramount interest determination.<sup>139</sup> While this exemption is not as broad as other national security exemptions, it essentially provides the president *carte blanche* to ignore state permitting requirements. Furthermore, there is no time limit on exemptions under the Marine Protection, Research, and Sanctuaries Act.<sup>140</sup>

g. *The Coastal Zone Management Act*

The final act, the Coastal Zone Management Act, intends “to preserve, protect, develop,” restore, and enhance the nation’s coastal areas.<sup>141</sup> Under the Act, all coastal states are required to develop management plans and submit them to the secretary of commerce.<sup>142</sup> The secretary is not allowed to adopt a state’s plan without adequately considering the views of any federal agency affected by the program.<sup>143</sup>

Despite the Act’s requirement that the secretary of commerce consider the views of any federal agency affected by a state’s coastal management program, the Act allows the secretary to submit a written exemption request to the president for any federal facility not in compliance with a state management plan.<sup>144</sup> The president may grant the exemption if it “is in the paramount interest of the United States.”<sup>145</sup> There is no time limit on this exemption.<sup>146</sup>

In addition to the above statutes allowing exemptions in the paramount interest of the United States, there are three environmental statutes that allow the president to exempt the DOD for reasons of “national security.” The following sections will discuss those three

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136. *Id.* § 1411(a).

137. *Id.* § 1412(a).

138. *Id.*

139. *Id.* § 1416(d)(3).

140. *See id.*

141. Coastal Zone Management Act, 16 U.S.C. § 1452(1) (2000).

142. *Id.* § 1454.

143. *Id.* § 1456(b).

144. *Id.* § 1456(c)(1)(B).

145. *Id.*

146. *See id.*

statutes: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the ESA, and the Toxic Substances Control Act.

h. *The Comprehensive Environmental Response, Compensation, and Liability Act*

Congress created CERCLA to “achieve prompt clean-up of polluted lands and make those responsible for the pollution pay for the clean-up.”<sup>147</sup> CERCLA applies equally to all three branches of government, including their agencies, and to all nongovernmental entities.<sup>148</sup> Unlike most other environmental acts, CERCLA contains specific national security provisions.<sup>149</sup> These provisions authorize the president to “issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the United States at that site or facility.”<sup>150</sup> Such orders include exemptions from CERCLA requirements when necessary.<sup>151</sup> Any exemption must be reported to Congress within thirty days and may not exceed a period of one year, subject to extension by additional presidential orders.<sup>152</sup>

i. *The Endangered Species Act*

The ESA provides that all federal agencies shall aspire to conserve and protect threatened and endangered species.<sup>153</sup> The secretary of interior makes the determination of threatened or endangered species based on several factors, including habitat destruction, disease, predation, existing regulatory mechanisms, and other manmade factors affecting the species’ existence.<sup>154</sup> Additionally, the secretary is obligated to designate critical habitat for these species.<sup>155</sup> The secretary, however, is prohibited from designating critical habitat for an endangered or threatened species on land owned or controlled by the DOD, or designated for use by the DOD.<sup>156</sup> The prohibition has one limitation; the land owned or controlled by the DOD must be “subject

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147. Robert S. Jones II, Note, *Can Equity and CERCLA Co-Exist?* *Blasland v. City of North Miami*, 11 *SOUTHEASTERN ENVTL. L.J.* 77, 77 (2002).

148. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9620(a)(1)–(2) (2000).

149. *See, e.g.*, § 9620(j).

150. *Id.* § 9620(j)(1).

151. *Id.*

152. *Id.*

153. Endangered Species Act, 16 U.S.C. § 1531(c) (2000).

154. *Id.* § 1533(a)(1).

155. *Id.* § 1533(a)(3).

156. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318(a), 117 Stat. 1392, 1433 (2003) (to be codified at 16 U.S.C. § 1533(a)(3)(B)).

to an integrated natural resources management plan prepared under” section 101 of the Sikes Act.<sup>157</sup>

j. *The Toxic Substances Control Act*

The Toxic Substances Control Act (TSCA) is another environmental regulation with an exemption for national security. Congress enacted the TSCA in response to the large number of chemicals and mixtures that people and the environment are exposed to each year, some of which may pose an unreasonable risk to human health.<sup>158</sup> It reflects a policy that “adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards.”<sup>159</sup>

The national defense waiver in the TSCA requires the EPA administrator to waive compliance with the Act upon the president’s request.<sup>160</sup> The president is responsible for making a determination “that the requested waiver is necessary in the interest of national defense.”<sup>161</sup> There is no time limitation on a TSCA waiver.<sup>162</sup>

3. The Readiness and Range Preservation Initiative—The DOD Argues for Additional Exemptions

Despite the exemptions already in place in most major regulations, the DOD proposed the Readiness and Range Preservation Initiative (RRPI) for inclusion into the National Defense Authorization Act for Fiscal Year 2004 against a background of terrorist acts and complaints about encroachment on military bases.<sup>163</sup> This initiative was actually an expanded version of a similar bill that was included in the National Defense Authorization Act for Fiscal Year 2003, which Congress largely rejected notwithstanding a provision amending the Migratory Bird Treaty Act.<sup>164</sup> The RRPI specifically included a blanket exemption from the Migratory Bird Treaty Act’s prohibition against incidental “takings” of birds by the DOD.<sup>165</sup> The 2004 pro-

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157. *Id.* The Sikes Act requires the secretary of defense to create programs providing for natural resource conservation on military land. 16 U.S.C. § 670a(a)(1)(A) (2000). The programs are coordinated by the U.S. Fish and Wildlife Service and the state fish and wildlife agency where the installation is located. *Id.* § 670a(2).

158. Toxic Substances Control Act, 15 U.S.C. § 2601(a)(1)-(2) (2000).

159. *Id.* § 2601(b)(2).

160. *Id.* § 2621. “The Administrator shall waive compliance with any provision of this chapter [15 U.S.C. §§ 2601 et. seq.] upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.” *Id.*

161. *Id.*

162. *See id.*

163. *See* Vogel, *supra* note 22, at 319.

164. *Id.* at 319-20.

165. *Id.* at 328. The Migratory Bird Treaty Act makes it unlawful to take, kill, or possess a migratory bird in the absence of a permit. 16 U.S.C. § 703 (2000); Vogel, *supra* note 22, at 321.

posed RRPI requested modifications to six environmental laws for the sake of military readiness: the Migratory Bird Treaty Act, the ESA, the MMPA, the Clean Air Act, CERCLA, and the Resource Conservation and Recovery Act.<sup>166</sup> Further, the RRPI allows integrated natural resources management plans, currently required under the Sikes Act, to satisfy an ESA provision calling for “special management considerations or protection” of endangered species.<sup>167</sup>

While Congress ultimately rejected most of the DOD’s requested modifications, in November 2003, Congress adopted the provisions amending the ESA and MMPA.<sup>168</sup> The amendments to the ESA provide that no areas of critical habitat for an endangered species can be designated on military lands if the military has an integrated natural resource management plan under the Sikes Act.<sup>169</sup> The military has effectively become the master of its own destiny because an adequate special management plan abrogates the jurisdiction of the Fish and Wildlife Service under the ESA.<sup>170</sup> This position is particularly troublesome given the military’s growing immunity to citizen suits aimed at forcing the military to comply with environmental regulations.<sup>171</sup>

Congress also amended the MMPA to allow the military greater flexibility by changing the definition of “harassment.”<sup>172</sup> Harassment for the purpose of military readiness activities is defined as “any act that injures or has the significant potential to injure a marine mammal” instead of the much broader definition of “any act . . . which has the potential to injure . . . or has the potential to disturb a marine mammal.”<sup>173</sup> The amendments further allow a general two-year exemption for reasons of national defense, with additional exemptions as determined necessary by the secretaries of defense, commerce, and

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A take is defined by the Fish and Wildlife service as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12 (2004); Vogel, *supra* note 22, at 321. The term has been interpreted by courts to include both intentional and unintentional takings. Vogel, *supra* note 22, at 321.

166. S. 747, 108th Cong. § 316 (2003); Vogel, *supra* note 22.

167. S. 747, § 2017.

168. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 318(a), 319(a)-(c), 117 Stat. 1392, 1433, 1433-34 (2003) (to be codified at 16 U.S.C. §§ 1362(18), 1371(a)(5), 1533); Yap, *supra* note 56, at 1315-16.

169. National Defense Authorization Act for Fiscal Year 2004 § 318(a); Yap, *supra* note 56, at 1315-16. The Sikes Act was originally passed in 1960 and covers management of natural resources on military installations. 16 U.S.C. § 670 (2000); Vogel, *supra* note 22, at 337. The Act was most recently amended in 1997 and requires the DOD to conserve and rehabilitate the natural environment of its military bases. 16 U.S.C. § 670a(a)(1)(A); Vogel, *supra* note 22, at 337. Military installations with significant natural resources prepare integrated natural resource management plans to encompass fish and wildlife management, land management, forest management, wildlife protection, wetland preservation, sustainable use of resources, and readiness capabilities. 16 U.S.C. § 670a(b); Vogel, *supra* note 22, at 337-38.

170. See Yap, *supra* note 56, at 1316.

171. See Palatucci, *supra* note 25, at 588; *infra* notes 179-88 and accompanying text.

172. Yap, *supra* note 56, at 1316.

173. 16 U.S.C. § 1362(18) (2000); National Defense Authorization Act for Fiscal Year 2004 § 319(a); Yap, *supra* note 56, at 1316.

interior.<sup>174</sup> Finally, the amended Act makes the “impact on the effectiveness of the military readiness activity” a consideration when determining “the least practicable adverse impact on [a] species or stock.”<sup>175</sup> The result is that instead of a standard based on the wellbeing of the marine mammals, the standard mandates consideration of negative effects on military operations.<sup>176</sup>

Although the amendments to the ESA and MMPA adopted by Congress in November 2003 do not remove an ESA requirement for agency consultation on such lands, the amendments signaled a loss of bargaining power on the part of other executive agencies. For example, the United States Fish and Wildlife Service reduced its recommendation of critical habitat for birds in Guam from 24,803 acres to 376 acres, after the military exemption was passed.<sup>177</sup> The executive branch now regulates its own actions on “twenty-five million acres containing over 300 endangered and threatened species.”<sup>178</sup>

Part of the reason the military advocated for exemptions so avidly was to avoid litigation by environmental groups.<sup>179</sup> For example, the Rural Alliance for Military Accountability, leading a nationwide league of environmental groups, filed lawsuits to require reconsideration of the Air Force flight training program and to stop a proposed training range that would affect three million acres in Nevada, Idaho, and Oregon.<sup>180</sup> Additionally, the Wilderness Society has opposed Army plans to expand its Fort Irwin, California base of operations.<sup>181</sup> The land is home to a desert tortoise listed as a threatened species under both the federal ESA and the California Endangered Species Act.<sup>182</sup> To offset the 118,000 acres it acquired in 2002 for training exercises, the Army purchased 250,000 acres of former ranch land.<sup>183</sup> The land acquisition was intended to enable the Army to set aside space for the threatened tortoise, but environmental groups main-

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174. National Defense Authorization Act for Fiscal Year 2004 § 319(b). The secretary of defense must confer with the secretaries of commerce and interior before issuing any extensions to existing exemptions. *Id.* These exemptions may be issued for any activity at any time because they are not dependant on conditions of war or national emergency. Yap, *supra* note 56, at 1317 n.221.

175. National Defense Authorization Act for Fiscal Year 2004 § 319(c); Yap, *supra* note 56, at 1317.

176. Yap, *supra* note 56, at 1317.

177. Elizabeth Shogren, *The Nation; Guam's Birds Threatened as Air Force Project Takes Wing; U.S. Biologists Fear the "Fastest Extinction" of Some Species as a Base Expansion Is Planned with Exemption from Environmental Rules*, L.A. TIMES, Dec. 5, 2004, at A23.

178. Yap, *supra* note 56, at 1316.

179. See Bethurem, *supra* note 26, at 118.

180. *Id.*

181. *Id.*

182. Allison A. Freeman, *Tortoises: Army Acquires 250,000 Acres for Reptile in Mojave Desert*, ENV'T & ENERGY PUB. LAND LETTER, Jan. 20, 2005.

183. *Id.*

tained that the land currently occupied by the tortoise is crucial to its survival.<sup>184</sup>

In 1979, the plaintiffs in *Weinberger v. Romero-Barcelo*<sup>185</sup> brought suit against the secretary of defense, secretary of the navy, and others to halt Navy operations on Vieques, Puerto Rico.<sup>186</sup> Twenty years after the U.S. Supreme Court's refusal to grant injunctive relief to the plaintiffs in that case, the Mayor-elect of Vieques sent a letter to President Clinton noting that he won his campaign on a platform of achieving immediate and permanent cessation of all military activities in Vieques.<sup>187</sup> Other environmental challenges to military activities included neighboring complaints that shut down several air bases in southern California; commercial airspace requirements that forced the Marines to give up training airspace at Camp Pendleton; endangered tortoises whose presence forced the military to declare a portion of the Twentynine Palms training ground off-limits; and Native American efforts to prevent the Air Force from using its Barry M. Goldwater range.<sup>188</sup>

#### 4. Compliance and Training: A Delicate Balance

The DOD is quick to suggest that compliance with environmental legislation has the potential to severely limit training activities. For example, the DOD argued that fifty-seven percent of the Fort Pendleton, California, base could fall under the provisions of the ESA, including seventeen miles of beach "critical" to training operations, were it not for the prohibition against designating critical habitat on DOD lands.<sup>189</sup> One admiral described the effects of environmental compliance in this manner:

When our vital ranges are not available for training because they are encumbered by encroachments, our state of readiness is at risk. This is complicated by the fact that encroachment issues are complex, varied, and involve multiple federal, state, and local agencies, the Congress, non-governmental organizations and the public. In dealing with its effects, we have borne a significant increase in ad-

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184. *Id.*

185. 456 U.S. 305 (1982). The plaintiffs included the governor of Puerto Rico. *Id.* at 307. The complaint alleged violations of the following: the National Environmental Policy Act; the Clean Water Act; the Clean Air Act; the Noise Control Act; the Resource, Conservation and Recovery Act; the ESA, the National Historic Preservation Act; the Coastal Zone Management Act; the MMPA; the Rivers and Harbors Appropriation Act; various constitutional amendments; legislative and executive directives; and Puerto Rican law. *Id.* at 307 n.1.

186. *Id.* at 307.

187. *Id.* at 320; Eric Montalvo, *Operational Encroachment: Woodpeckers and Their Congressmen*, 20 TEMP. ENVTL. L. & TECH. J. 219, 240-41 (2002).

188. Bethurem, *supra* note 26, at 118.

189. *Hearing on the Readiness and Range Preservation Initiative Before the S. Env't. and Pub. Works Comm.*, 108th Cong. (2003) (statement of Jamie Rappaport, Senior Vice President for Conservation Programs, National Wildlife Federation), available at [http://epw.senate.gov/108th/Clark\\_040203.htm](http://epw.senate.gov/108th/Clark_040203.htm).

ministrative and human costs (time away from home, flight hour costs, travel expenses etc.) to achieve an acceptable level of readiness. In some instances, we have been unable to achieve the desired level.<sup>190</sup>

Although environmentalists have argued that most existing environmental regulations have military exemptions, the DOD maintains that existing exemptions are too limited in scope and are not easily obtained.<sup>191</sup> The DOD argues that existing exemptions are of minimal benefit and duration because they cover limited portions of military training, instead of the broader range of all military readiness activities.<sup>192</sup> The DOD also asserts that the work-arounds required to make training exercises comply with existing environmental regulations prevent troops from “training ‘in the context of a realistic, integrated combat scenario’ and thereby compromise the country’s military readiness.”<sup>193</sup> Despite the military’s vigorous arguments for broad exemptions from existing environmental laws, environmentalists have equally strong objections.

### 5. Environmental Objections to DOD Exemptions

The environmental objections to broad military exemptions are illustrated by the Range Readiness and Preservation Initiative (RRPI). Environmentalists argued that the RRPI was simply a way to allow the DOD to altogether bypass compliance with environmental laws, despite proponents’ arguments that the RRPI would achieve a balance between national security and environmental protection.<sup>194</sup> Environmental groups argued that it was not necessary to grant the DOD additional exemptions from environmental regulations because most major environmental laws already contained provisions allowing the president to issue exemptions “in the paramount interest” of the United States.<sup>195</sup> A few environmental regulations, such as the Toxic Substances Control Act, allowed specific exemptions for reasons of national security.<sup>196</sup> Increasing the number of military exemptions may set a precedent for other agencies or private sector companies desiring relief from the same laws.

Such exemptions, while made in the name of balancing the interests of national security and the environment, often heavily favor de-

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190. *Encroachment Issues Having a Potentially Adverse Impact on Military Readiness: Hearing Before the Subcomm. on Readiness and Management Support of the S. Armed Servs. Comm.*, 107th Cong. 3 (2001) (statement of Vice Admiral James F. Amerault, Deputy Chief of Naval Operations, Fleet Readiness and Logistics), available at [http://www.senate.gov/~armed\\_services/statemnt/2001/010320ja.pdf](http://www.senate.gov/~armed_services/statemnt/2001/010320ja.pdf).

191. Vogel, *supra* note 22, at 347.

192. *Id.*

193. *Id.* at 319 (citations omitted).

194. *Id.* at 328.

195. *See supra* notes 112-46 and accompanying text.

196. *See supra* notes 147-62 and accompanying text.

fense at the expense of environmental compliance. One commentator notes that the military is slowly becoming immune to citizen suits to enforce environmental legislation “given the legislature’s propensity to grant the military blanket exemptions from environmental laws.”<sup>197</sup> Factors such as violations of environmental laws, exemptions from such laws, or weakened enforcement of those laws “have contributed to the existence of more than 27,000 toxic hot spots on 8,500 military properties across the country.”<sup>198</sup>

The lack of accountability on the military’s part is particularly troublesome when viewed in light of the potential retroactive liability facing the DOD in remediating its contaminated sites. The DOD’s potential liability is of such magnitude that it could deplete much of the defense budget as well as force many governmental contractors to consider or file bankruptcy.<sup>199</sup> The estimated cost of cleanup for the DOD’s weapon complex ranges from \$146 billion to \$350 billion, more than the cost to clean up all of the orphaned sites covered under the Superfund.<sup>200</sup> This enormous cost is the result of lax compliance with existing environmental regulations and demonstrates why the DOD must take environmental regulations in stride to ensure long-term national and environmental security.

#### IV. ENVIRONMENTAL LEGISLATION AND HOMELAND SECURITY IN A SYMBIOTIC RELATIONSHIP

##### A. *Environmental Regulation and Homeland Security Go Hand-in-Hand*

The DOD manages over twenty-five million acres of state and federal land, which contains some of the last remaining undeveloped refuges for endangered or threatened species.<sup>201</sup> Military lands are three times as likely to contain endangered species as comparable public lands.<sup>202</sup> Urban sprawl around military bases often means that a military base provides “the last remaining habitat for some endangered or threatened species which have been lost from nearby public or private lands.”<sup>203</sup>

Because military facilities may be the last open areas in the face of urban sprawl, they become “islands of biodiversity.”<sup>204</sup> The U.S. military facilities in Guam, for example, host a number of endangered

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197. Palatucci, *supra* note 25, at 589.

198. *Id.* at 585.

199. *Id.* at 589.

200. Applegate, *supra* note 13, at 355-56.

201. *See supra* text accompanying notes 38-39.

202. *See* Vogel, *supra* note 22, at 317.

203. *Id.* at 318.

204. *Id.*

bird species including seventeen endangered Mariana crows.<sup>205</sup> The tropical forests on Anderson Air Force Base in Guam are necessary for the survival of the endangered Mariana crow and Micronesian kingfisher, according to the U.S. Fish and Wildlife Service.<sup>206</sup> A biologist who has worked on the island since 1987 expressed fears that a billion-dollar plan to expand the base will result in the “fastest extinction I have witnessed in my life.”<sup>207</sup>

At the same time, the military increasingly requires flexibility in its training options, and military officials believe that compliance with stringent environmental regulations hamper their ability to adequately train troops for warfare.<sup>208</sup> Effective coordination between the U.S. Fish and Wildlife Service and the DOD can streamline training operations and protect natural resources at the same time. It is possible to obtain an acceptable level of military readiness without contributing further to the greatest mass extinction of all time; however, accomplishing this goal will require careful balancing of the short term requirements of national security with the long-term environmental consequences of national security.

#### B. *Long-Term Goals Versus Short-Term Needs*

Environmental problems may not manifest immediately and often require long-term solutions.<sup>209</sup> For example, radioactive waste generated by military activities can remain dangerous for thousands of years.<sup>210</sup> The time lag characteristic of environmental problems, coupled with the long-term nature of the required solutions, places environmental concerns in danger of being overlooked in favor of immediate national security needs. “As time frames grow longer and uncertainty grows more extreme, law’s influence on the characteristics and values of present and future generations becomes increasingly important.”<sup>211</sup>

Environmental policy has several “constitutive effects” that define essential qualities of our community.<sup>212</sup> Those constitutive effects shape technology, institutions, individuals, communities, relationships, and values.<sup>213</sup> The constitutive effects of environmental policy may ensure that environmental goals are achieved in accordance with national security needs. Community right-to-know legislation regarding

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205. Shogren, *supra* note 177.

206. *Id.*

207. *Id.*

208. *See supra* text accompanying notes 189-93.

209. *See* Holly Doremus, *Constitutive Law and Environmental Policy*, 22 *STAN. ENVTL. L.J.* 295, 319, 326 (2003).

210. *Id.* at 327.

211. *Id.* at 318.

212. *See id.* at 296-97.

213. *Id.* at 302-07.

the chemical industry demonstrates the constitutive effects of environmental policy. Right-to-know legislation makes communities aware of the potential hazards they face, and such information gives community groups greater leverage.<sup>214</sup> “[T]he community is a potentially powerful restraining force because chemical plant emissions are widely recognized as having direct effects on human health.”<sup>215</sup> Thus, the evaluation of national security requires consideration of the long-term environmental effects of security policies to ensure that the constitutive effects of environmental policy strike a balance between short-term security needs and long-term environmental health. When national security is considered in tandem with environmentally wise practices, environmental policy can ensure that the immediate needs of national security do not compromise long-term environmental goals.

### C. *Advantages of Coordinated Homeland Security and Environmental Regulation*

#### 1. The EPA Should Increase Its Functions as a Security Agency

In the months following September 11, the military rapidly gained support and homeland security became the focus of most government activities. The creation of the Department of Homeland Security was a symbol of this shift in government focus and has implications for all other executive branch agencies. While the military has lately been gaining momentum in its campaign to roll back environmental restrictions on military training activities, the EPA has also been using the cloak of homeland security to increase its own “political weight and influence.”<sup>216</sup> The EPA has performed its quasi-security role successfully. The Public Health Security and Bioterrorism Preparedness Act of 2002<sup>217</sup> places the EPA in control of protecting the national drinking water supply and ensuring that community water systems establish response plans to protect drinking water.<sup>218</sup> The EPA has presented vulnerability assessment seminars to industry leaders and has also cooperated with industry to ensure the safety of important infrastructure components.<sup>219</sup> Congress is considering legislation that would increase the stature of the EPA in homeland security.<sup>220</sup> One congressional school of thought involves placing the EPA

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214. Neil Gunningham, *Environmental Management Systems and Community Participation: Rethinking Chemical Industry Regulation*, 16 UCLA J. ENVTL. L. & POL’Y 319, 382 (1997).

215. *Id.* at 381.

216. See Bethune, *supra* note 6, at 4.

217. Pub. L. No. 107-188, § 401, 116 Stat. 594, 682 (2002) (codified at 42 U.S.C. § 300i-2 (Supp. II 2002)).

218. Bethune, *supra* note 6, at 4.

219. *Id.* at 3.

220. *Id.* at 4.

within the jurisdiction of the Department of Homeland Security, a move that would even further shift the EPA's emphasis from environmental regulation to homeland security preparation.<sup>221</sup>

The EPA is a necessary ally for the DOD to address growing security threats to our nation's environmental resources. The ability of the EPA to quickly address threats, such as oil and chemical spills, is essential to protect both the environment and public health.<sup>222</sup> An alliance between the EPA and the DOD in the areas of chemical facility regulation and hazardous waste regulation is crucial. Numerous statutes such as CERCLA, the Resource, Conservation, and Recovery Act, and the Toxic Substances Control Act have provided the EPA a significant amount of experience with the regulation, cleanup, and recovery of toxic wastes.<sup>223</sup> That experience would be of great service to the DOD.

## 2. The DOD Should Increase Its Functions as an Environmental Agency

Not only will the EPA increase its security functions in the future, but the Departments of Defense and Homeland Security will also need to become more responsive to threats to environmental security. National security, when properly defined, includes environmental security. Traditionally, national security is defined as "a country's preparedness to protect itself from aggression," a role that is "considered the responsibility of the domestic governing body."<sup>224</sup> Environmental security is defined as "the relative safety from environmental dangers caused by natural or human processes due to ignorance, accident, mismanagement or design and originating within or across national borders."<sup>225</sup> When Iraqi troops set fire to more than 700 Kuwaiti oil wells in January 1991 and dumped tremendous quantities of oil into the Persian Gulf, they acted in breach of environmental security.<sup>226</sup> Another example of "environmental terrorism" occurred in the late 1980s, when a Colombian guerrilla group repeatedly attacked the nation's largest oil pipeline in an attempt to undermine the

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221. *See id.*

222. The EPA has a hotline that allows concerned citizens to report oil or chemical spills immediately. *See* EPA, Home Page, <http://www.epa.gov> (last visited Jan. 27, 2006). In addition, the recent experience with Hurricane Katrina has shown that the EPA is able to effectively coordinate with other emergency management agencies such as the Federal Emergency Management Agency. *See* EPA, Hurricane Response 2005, <http://www.epa.gov/katrina/index.html> (last visited on Jan. 27, 2006).

223. *See supra* notes 118-21, 147-52, 158-62 and accompanying text.

224. Bernard A. Weintraub, *Environmental Security, Environmental Management, and Environmental Justice*, 12 *PACE ENVTL. L. REV.* 533, 581 (1995).

225. Penders & Thomas, *supra* note 9.

226. *See* Weintraub, *supra* note 224, at 535-36.

government.<sup>227</sup> The consequence of those attacks was the pollution of area wetlands with more than 600,000 gallons of oil.<sup>228</sup>

Threats to national security through environmental security include both acts of ecoterrorism, such as the Iraqi attacks on Kuwaiti oil fields, as well as threats to preparedness that result from environmental policies.<sup>229</sup> Preparedness threats result “from the knowledge that the country’s environmental policies, while benefiting citizens in the short term, may weaken the country’s strategic position in the long term.”<sup>230</sup> The United States may gain short term advantages by granting the DOD exemptions from waste-regulating statutes like CERCLA or the Resource, Conservation and Recovery Act, but the enormous amounts of money required to clean up those DOD sites in the future may jeopardize long-term national security.<sup>231</sup> Moreover, threats to environmental security are real: After September 11, United States’ soldiers found copies of American chemical trade journals hidden in a former hideout of Osama Bin Laden in Afghanistan.<sup>232</sup> It is not unreasonable to believe that the same terrorists who used planes as weapons might turn to chemical or biological warfare agents to accomplish their objectives.<sup>233</sup>

A government that wishes to protect its environmental security “must internalize the ramifications of operating within a realm of federated environmental management. This means that it will have to engage in a process of identity refinement that potentially includes ceding some of its governing responsibility to another governing body.”<sup>234</sup> To effectively accomplish its goal of providing national security, the DOD should address threats to environmental security.<sup>235</sup> In doing so, the DOD must coordinate with the EPA to establish creative and effective policies that will ensure both long-term environmental and national security.

The EPA’s experience with quasi-security functions and creative, long-term environmental goal-setting will assist the DOD with inventive thinking that will allow the DOD to consider the environmental effects of its actions while effectively promoting national security. Environmental law is more creative than other areas of law due to its

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227. *Id.* at 583.

228. *Id.*

229. *See id.* at 581-82.

230. *Id.* at 582.

231. *See id.*; *supra* notes 118-21, 147-52 and accompanying text.

232. Penders & Thomas, *supra* note 9.

233. *Id.*

234. Weintraub, *supra* note 224, at 585.

235. *See* Penders & Thomas, *supra* note 9 (“[T]he prospect of terrorist groups using chemical, biological, and nuclear weapons ha[s] fundamentally altered the calculus of risk for all of us and brought a public mandate for greater security with a renewed focus on threats of ecoterrorism.”).

subversive nature.<sup>236</sup> The basic premise of environmental regulation is to assume that all other prior endeavors failed and that “every corner of settled law had bypassed their mission.”<sup>237</sup> When the DOD learns to use the EPA’s experience with regulation of toxic and hazardous wastes to its advantage, the DOD will discover something the U.S. Customs Service already knows: Ensuring compliance with environmental regulations actually helps increase national security.<sup>238</sup>

## V. CONCLUSION

Although the needs of national security and aims of environmental regulation have often been at odds, the paradigm shift that occurred in the years since September 11 has changed the relationship between national defense and the environment. Environmental regulations may properly be considered part of the homeland security landscape, and lawmakers can look to past experiences with environmental regulation to create better homeland security policies.

In addition, the DOD, as one of the largest landholders in the United States and the largest stockpiler of hazardous materials, can greatly benefit from environmental laws regulating cornerstones such as endangered species and hazardous wastes. Not only will compliance with existing environmental regulations protect natural resources for future generations, but compliance will also protect the national security of future generations by ultimately reducing compliance costs and saving money for use in defense. Further, coordination of existing environmental laws with the new generation of defense-oriented environmental regulations will allow both the Departments of Defense and Homeland Security to adequately address threats to environmental security.

Environmental regulation and homeland security should easily coordinate because the basic goals of homeland security and environmental law are the same: to use all of the laws in our legal system to “minimize, prevent, punish or remedy the consequences of actions which endanger human life or public welfare [and are] intended to intimidate or coerce civilian populations or governments.”<sup>239</sup> Environmental laws should be considered part of the homeland security

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236. William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who’s*, 39 WASHBURN L.J. 1, 1 (1999).

237. *Id.*

238. Polley, *supra* note 92. After the U.S. Customs Service agreed to provide the EPA with confidential information regarding chemical imports, EPA Administrator Christine Whitman noted that “EPA’s long experience in regulating hazardous and toxic substances, being able to evaluate the type, quantity, origin and destination of chemical substances that are entering the United States will ensure compliance with environmental laws and help us better protect the American people.” *Id.*

239. Bethune, *supra* note 6, at 3 (citations omitted).

landscape.<sup>240</sup> “Defending our national security and protecting our environment are closely linked and share the goals of ensuring our well being and preserving our rich national heritage.”<sup>241</sup>

Planning for national defense in the wake of September 11 has led many in the DOD and the Department of Homeland Security to advocate for rollbacks of environmental restrictions in favor of greater flexibility for military training. The motivation behind those rollbacks was to create the strongest national defense mechanism possible. Advocating for defense at the expense of environmental health, however, does nothing more than offer a false sense of security. Not only will an over-emphasis on national security irretrievably harm the nation’s environmental resources, but the remedial costs that the nation faces will also make defense an even more expensive proposition. The only way to successfully ensure the long-term health of both national security and environmental resources is to consider defense in a new way, in light of environmental concerns.

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240. *Id.*

241. Kiamos, *supra* note 32, at 461.