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## Conservation Issues on Military Lands: Some Thoughts on a Framework for Successful Mission Integration — Est Modus in Rebus

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# CONSERVATION ISSUES ON MILITARY LANDS: SOME THOUGHTS ON A FRAMEWORK FOR SUCCESSFUL MISSION INTEGRATION *Est Modus in Rebus*

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## Table of Contents

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 431 |
| II.  | THE "RAISON D'ETRE" OF THE ARMED SERVICES .....  | 433 |
| III. | ENVIRONMENTAL LAWS' IMPACT ON THE MILITARY .....   | 433 |
| IV.  | CAMP LEJEUNE'S EXPERIENCE: THE RED-COCKADED<br>WOODPECKER (RCW) (PICOIDES BOREALIS) .....  | 434 |
| V.   | A COMPREHENSIVE PLAN TO PROTECT THE RCW .....  | 435 |
|      | A. <i>Education</i> .....  | 436 |
|      | B. <i>Review Regional Recovery Objectives</i> .....  | 436 |
|      | C. <i>Identify Realistic Training and<br/>        Mission Requirements</i> .....   | 437 |
|      | D. <i>Establish Realistic Mission Compatible<br/>        Recovery Goals</i> .....  | 438 |
|      | E. <i>Consider the "Safe Harbor" Policy as a<br/>        Means to Achieve MCRG while Reducing or<br/>        Eliminating Training Restriction in<br/>        Priority Training Areas</i> ..... | 438 |
|      | F. <i>Implement a Management Strategy</i> .....  | 439 |
| VI.  | CONCLUSION .....   | 439 |

## I. INTRODUCTION

With the advent of the "environmental movement," or more specifically the spate of environmental laws directly applicable to federal agencies, military commanders must now reconcile two seemingly conflicting missions - national defense and environmental conservation. In the arena of resource protection there can be no more palpable skirmish between competing responsibilities than that brought about by the Endangered Species Act (ESA). Explicitly charged, all federal agencies shall "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species . . . ."<sup>1</sup> To ensure no federal agent could parse words, thus

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1. 16 U.S.C. § 1536(a) (2000); *see also* 16 U.S.C. §1531(c)(1) (2000).

confounding the protectionist function now placed upon the federal sector, "conservation" is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."<sup>2</sup> That this duty exists is beyond cavil,<sup>3</sup> although the means and method of achieving conservation are, appropriately, left within the sound discretion of the federal agency involved.<sup>4</sup> Amid such syncretistic hopes, dire predictions flourished: military leaders would be unable to reconcile the duties imposed by the ESA and their organic missions; realistic military training would suffer to the detriment of national defense and would endanger the lives of our combat troops; or, the regulatory burden being so onerous and the regulations so complex, we would witness a rash of military leaders being tried for environmental crimes. While none of these apocalyptic consequences have "come home to roost," certainly litigation has at times been used to threaten national security interests or as a means to protect interests other than conservation concerns.<sup>5</sup> Overall, however, the balance has been struck between these seemingly competing missions.

This presentation will explore some of the elements contained in the more successful programs implemented by the Marine Corps. While it is not intended to be a "paradigm" of essential elements, nor are the programs and ideas outlined limited to the Marine Corps, this presentation is intended to briefly review some conservation management elements, within the context of the ESA, that have proven to be successful. Success is achieved when the military can fully and completely perform its organic mission of national defense while still implementing conservation measures under the ESA. One caveat, despite sound fundamentals, a conservation plan can only be successful if the stakeholders thoroughly understand the missions, roles, responsibilities and, most importantly, how public money is appropriated to and the constraints placed upon the military concerning the expenditure of public funds. While these constraints are not unique to the military, it has been my experience that many sister federal agency representatives are unaware of the technical requirement related to the obligation of money. Thus, the parties involved in the negotiation and implementation of conservation measures must

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2. 16 U.S.C. § 1532(3).

3. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

4. *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990).

5. See, e.g., *Strahan v Linnon*, 967 F. Supp. 581 (D. Mass. 1997).

understand the legal and regulatory "drivers" that define how the agency "does business."

## II. THE "RAISON D'ETRE" OF THE ARMED SERVICES

The "raison d'être" of the Armed Services of the United States is simply stated: to prepare, train, and equip its soldiers, sailors, airmen, and Marines to fight and win wars. More specifically, the Navy is "organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war . . . ."<sup>6</sup> Likewise, the Marine Corps "shall be organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operation as may be essential to the prosecution of a naval campaign."<sup>7</sup> Marines understand that "the primary goal of Marine Corps Leadership is to instill in all Marines the fact that we are warriors first. The only reason the United States of America needs a Marine Corps is to fight and win wars. Everything else is secondary."<sup>8</sup>

## III. ENVIRONMENTAL LAWS' IMPACT ON THE MILITARY

Against this warrior culture and the magnitude of the military's organic mission, there appeared an accession of environmental protection laws that imposed requirements ostensibly at odds with the military mission. Of particular concern were those environmental statutes that had the potential to have the most immediate and palpable impact on military training, i.e., The Endangered Species Act and The Marine Mammal Protection Act (MMPA). Due to the fulsome protections granted endangered or threatened species, these statutes had the greatest potential to curtail, limit, enervate, or terminate realistic military training, thus degrading the ability of the military to successfully carry out its organic national defense mission.

The reason the ESA and MMPA have such devastating potential in the short-term is their impact on the military's ability to conduct real-world contingency operations and engage in realistic military training. The presence of an endangered/threatened plant or animal in a training area either grossly curtails or eliminates training. The ability to fight and win wars comes with a price:

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6. 10 U.S.C. § 5062(a) (2000).

7. 10 U.S.C. § 5063(a) (2000).

8. MARINE CORPS MANUAL, 1980 Chg. 3, Para. 1100.1 (1980).

military exercises and training must be done under conditions and in a manner that simulate, as closely as possible, the conditions and effects of actual combat. Military installations, with the associated ranges and training areas, have as a matter of necessity vast tracks of undeveloped land and natural resources. As a consequence military installations have become "de facto" refuges for many species that either retreat to the installation in the face of ongoing "urbanization" of the surrounding community or remain within the species' historic range on an installation that has preserved a favorable habitat. Military training, with the use of weapons, heavy machines, live ordnance and sudden concentrations of large numbers of troops, are considered environmental anathema and have the potential to "take" endangered or threatened species.<sup>9</sup> Thus when commanders must encumber military training or cease such training altogether due to the presence of endangered or threatened species, the primary mission of the military is jeopardized.

However, despite many hardships, the Marine Corps has been successful in balancing the two missions. This presentation will explore some of the characteristics that contributed to that success and is based in large part on the successful Red-cockaded Woodpecker recovery program implemented at the Marine Corps Base, Camp Lejeune, North Carolina..

#### IV. CAMP LEJEUNE'S EXPERIENCE: THE RED-COCKADED WOODPECKER (RCW) (*PICOIDES BOREALIS*)<sup>10</sup>

Named for the small red streak (cockade) found on the male of the species, the RCW is a non-migratory bird with an historic range across the southern United States: from Texas to southeast Missouri, extending east throughout Virginia, North and South Carolina, Georgia, and Florida. Due in part to the destruction of favorable habitat, namely more mature pine forests throughout the region and the encroachment of hardwood midstory attributed to fire suppression efforts, the RCW has seen a dramatic decline and is currently listed as an endangered species afforded protection

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9. The term "take" is used in this context to include the broad definition of take under § 2 of the Endangered Species Act, i.e., "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (2000). In turn, "harass" is broadly defined as an intentional or negligent act which creates a likelihood of injury to wildlife by annoying it to a degree that significantly disrupts normal behavioral patterns. 50 C.F.R. §17.3 (2001).

10. Much of the information about the RCW is taken from the Camp Lejeune Mission Compatible Plan for the Comprehensive Long Range Management of the Red-cockaded Woodpecker (May 1999).

under the Endangered Species Act.<sup>11</sup> Unique in its nesting habits, the RCW is the only woodpecker that exclusively uses living trees to excavate its cavities. Although thought to prefer the longleaf pine for cavity excavation, the RCW prefers mature trees (over 60 years old), which are usually infected with a heart rot fungus that softens the tree's heartwood. Optimal habitat for the RCW, for nesting and foraging, encompasses a more mature "pine dominated stand" with scarce midstory growth. With optimal conditions, 100 acres of foraging habitat will support an RCW "group." As the quality of habitat diminishes, acreage requirements increase to 200 acres per group as an average.

Home to nearly 150,000 Marines and Sailors, family members, retirees, and supporting personnel, Camp Lejeune is the Marine Corps' foremost east coast training base comprising approximately 151,000 acres. The primary mission of Camp Lejeune is to provide military training facilities and ranges for Marines and Sailors of the II Marine Expeditionary Force. Training activities extend across the Marine Corps' doctrinal fighting posture to include air, artillery, and infantry forces coupled with combat support operations. These training functions are categorized into seven broad classifications: vehicle operations, infantry operations, engineering operations, helicopter/fixed wing operations, Military Operations in Urban Terrain, firing range operations, and combat support operations. Geographically, the base is divided by public highway into two primary areas designated as "Mainside" (approximately 110,000 acres) and "the Greater Sandy Run" area (GSRA) (41,000 acres). Mainside contains approximately 37,000 acres of pine and pine-hardwood forest (the primary habitat of the RCW) and the GSRA has approximately 11,000 acres of pine or pine- hardwood areas.

#### V. A COMPREHENSIVE PLAN TO PROTECT THE RCW

As of 1999, there were 52 clusters of RCW with 48 active clusters (46 of which contained breeding pairs). All clusters are located on the Mainside portion of the base, with a majority of them located on the periphery of the base's main live fire impact area. Due to the provision of the Endangered Species Act, which created numerous restrictions on training activities in or near identified RCW clusters, consultation with the United States Fish and Wildlife Service (USFWS) has been ongoing. In order to comply with its section 7 responsibilities, base officials sought to implement a RCW management strategy that would promote its conservation

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11. The RCW was listed as an endangered species on Oct. 13, 1970. 35 Fed. Reg. 16,047 (Oct. 13, 1970).

mandate, reduce or eliminate restrictions on military training operations and provide for incidental take as needed. A comprehensive plan based upon a biological assessment was developed and approved by the USFWS pursuant to a biological opinion. This plan represents one of the more successful efforts to strike a balance between military training/national defense and the agency's conservation requirements and is a model for ESA implementation on military bases. The plan's comprehensive strategy serves to educate the stakeholders, provides for the inventory of available RCW habitat and training areas, establishes priority training sites given current and foreseeable requirements, establishes Mission Compatible Recovery Goals (MCRG),<sup>12</sup> implements habitat management activities that would achieve the MCRG while reducing or eliminating training restrictions in priority training areas, and adopts the USFWS "safe harbor" concept to a military situation.

While many elements of this plan may not apply to other installations, given the unique nature of the mission, habitat or species involved, or due to other regulatory restrictions associated with the particular species in question, the following elements of the plan present a strategy for reconciling military training/national defense with conservation.

#### *A. Education*

Although cliché, education and insight by the stakeholders are fundamental to any successful effort to balance conservation with effective training. What may be a matter of common sense and part of the universal psyche of one organization may be wholly foreign to another. Most Marines, and those associated with the Marine Corps, through inculcation, understand both the Marines' warrior culture and the primacy of training for combat under realistic circumstances through the use of live fire exercises. This necessity engenders from the critical role the Marine Corps plays in being a forward deployed force capable of responding on short-notice, with sustained combat capabilities, to crisis situations worldwide. The grave consequences of this mission and purpose naturally and indisputably compel training that closely imitates combat or near-combat situations- leading to the axiom "we train as we fight." For Marines, this fundamental precept requires the use of those means, systems, weapons, and tactics that are designed to inflict casualties upon the hostile forces. As a foreseeable consequence, however,

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12. MCRG recognizes the balance that must be struck between existing and anticipated training needs and conservation requirements of the RCW.

there is an environmental price paid by the use of such measures during training. Related to the Endangered Species Act, that consequence encompasses a "take" as that term is broadly defined under the ESA.

Similarly, for the professionals of the United States Fish and Wildlife Service, conservation and the purposes of the Endangered Species Act are matters of grave importance - in some cases, to those who are entrusted with its enforcement, it is certainly a national priority, if not equal to the military mission. It has been my experience that professionals on both sides do not fully understand or appreciate, in a meaningful way, the roles, missions and functions of the other. This education process must be a hands-on realistic affair. Sitting in the comfort of conference rooms, discussing mission and roles will not lead to a full appreciation or understanding of the consequences and concerns involved. Rather, real understanding only comes when environmental professionals are personally and intimately exposed to military training. Visits to the field, weapons demonstrations, accompanying troops in tactical exercises, and enduring some of the simulated contingencies designed to ensure combat readiness are essential components of the education process. Theoretical discussions with concomitant nods of agreement or understanding do not replace the enlightenment that comes with personal exposure and experience.

### *B. Review Regional Recovery Objectives*

As management and recovery plans are regional in scope, both the USFWS and military planners should understand the contribution the military installation is asked to make in order to achieve regional recovery of the species.

### *C. Identify Realistic Training and Mission Requirements*

The balance that must be struck between reducing or eliminating restrictions on valuable military training sites and the conservation of the particular species in question requires that everyone involved in the process set realistic goals and targets. Congress has mandated that both missions coexist on military installations, but the agencies responsible for implementation must prioritize missions to accomplish the overall objectives mandated. For the military this translates into prioritizing training areas, both current and future. This prioritization is obviously derived from land availability, mission capabilities and needs, current use, anticipated future use, characteristics of weapons employed, and safety concerns. Further designation of priority training areas should be made between "high" and "low" priorities, which allow



some refinement and flexibility to the process. This classification establishes a baseline upon which agency representatives can balance recovery goals with military training needs. The fundamental purpose of classification as a priority training area is to reduce or eliminate training restrictions in those specified areas by managing species populations away from such areas or allowing such takings under the imprimatur of "safe harbor" or enhancement of propagation or survival provisions.<sup>13</sup>

*D. Establish Realistic Mission Compatible Recovery Goals*

Having identified priority-training sites, recovery goals for an installation would reflect and account for the military mission based upon the availability and quality of suitable habitat. Such goals take into account existing habitat, priority training areas, future suitability, installation land use management plans, current distribution, and training and operational needs. Such goals also take into account both the optimal land available for the species conservation/recovery as well as resource minimums that will support a population with sound management practices. This flexibility would allow planners to "trade" land for best management practices elsewhere on the installation in order to support changes in operational and mission contingencies.

*E. Consider the "Safe Harbor" Policy as a Means to Achieve MCRG while Reducing or Eliminating Training Restriction in Priority Training Areas*

The "safe harbor" policy, applicable to non-federal property owners, provides for voluntary habitat management activities conducive to the recovery of the listed species in question, with the purpose of increasing available habitat for an endangered and threatened species. In return for favorable resource management, USFWS grants assurances that additional land, water, and natural resource use restriction would not be imposed as a consequence of the conservation efforts.<sup>14</sup> As the Service has no authority to mandate beneficial conservation measures, and private landowners are concerned that any conservation practices would attract or increase the presence of protected species to their land, with concomitant restrictions on take, the "safe harbor" policy strikes a balance between the statutory authority of the Service and the legitimate concerns of the private landholder. It creates an

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13. See 50 C.F.R. Subpart C (2001).

14. See 64 Fed. Reg. 32,717 (1999).

incentive to engage in beneficial resource measures without the corresponding risk to the economic development of the property. Similar in concept, military installations can agree to certain management practices designed to reach the MCRG specifically in those areas that would minimize conflicts with training requirements. This can be done concurrently or in phase, by allowing incidental take in high priority training areas as the population elsewhere is augmented, thus reducing or eliminating training restrictions in critical training areas.

#### *F. Implement a Management Strategy*

Incorporate a mission compatible plan that will attain the MCRG yet allow incidental take by the relocation of species away from high priority training areas or the reduction/elimination of training restrictions either in anticipation of population growth or as a consequence of such growth. Identified research areas and recruitment populations can be designated to study the effects of reducing or eliminating training restrictions. Monitoring of effects will allow military authorities, in coordination with USFWS, to fine-tune restrictions and conservation measures to optimize species population growth with the concomitant reduction of training restrictions. Attainment of the MCRG should allow military authorities to eliminate most, if not all, of the training restrictions that still exist. It must be recognized by all parties that this is a long process, subject to successes and setbacks inherent in species population and growth. Immediate results will not be obvious, rather, sustained and incremental conservation and recovery is the objective.

### VI. CONCLUSION

While these considerations form a generic construct of an effective management plan, the key factor in success is the understanding each side has with the missions and methods of the other. Innovative measures similar to the "safe harbor" concept, flexibility in implementation, and realistic goals provide the foundation of a successful conservation plan.

