REGULATORY ENCROACHMENT, THE OUTER CONTINENTAL SHELF LANDS ACT, AND THE NEW MARITIME ENCROACHMENT

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This Article explores modern military encroachment challenges and Department of Defense (DoD) responses in three parts. Part I addresses traditional land-use encroachment dynamics and measures that the DoD has implemented to mitigate land-use encroachment impacts on military training activities. Part II illustrates the impacts of regulatory encroachment on maritime training operations in the Pacific Ocean, the complexities involved with environmental regulatory compliance, and the mitigation measures adopted or imposed by the DoD to continue military training activities in that arena. Part III synthesizes the lessons presented by DoD responses to land use and regulatory encroachment issues and explores those lessons in the context of a new maritime encroachment paradigm posed by the increased offshore drilling proposed by the Trump Administration.

INTRODUCTION

The term "encroachment" in the military context traditionally describes the conflict arising when military training at land-based installations negatively affects a surrounding civilian community. However, across the latter half of the 20th century encroachment challenges evolved from being local conflicts typically addressed on an *ad hoc* basis by individual training ranges and bases, to a complex, interwoven network of military regulations, environmental statutes, and coordinated inter-service training systems.[1] Especially after the implementation of a number of novel environmental protection statutes in the 1970s, encroachment has developed into a dynamic, mission-impacting challenge for military commanders and policymakers alike. In the decades since the 1970s, the Department of Defense (DoD) has developed a range of policies and procedures to address traditional land use encroachment, and has experienced significant disruption in its training operations as the result of regulatory compliance issues. Faced with the potential for novel encroachment conflicts presented by the Trump Administration's proposed exponential increase in offshore drilling along the American coastline, the DoD must implement the hard lessons learned in navigating past traditional and regulatory encroachment issues.

The DoD has generally defined encroachment as "the cumulative result of any and all outside influences that inhibit normal military training and testing."[2] Under this more expansive definition of encroachment, military encroachment doctrines and approaches to resolution have historically involved two general

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[1] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-614, MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES 5 (2002) [hereinafter GAO-02-614].

[2] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-621T, MILITARY TRAINING: DOD APPROACH TO MANAGING ENCROACHMENT ON TRAINING RANGES STILL EVOLVING 1 n.2 (2003) [hereinafter Holman Testimony] (containing statement of Barry W. Holman, Director Defense Infrastructure Issues, before the Senate Committee on Environment and Public Works, 107th Congress).

paradigms. The traditional encroachment paradigm involves the sprawl of an urban residential area near a military installation encroaching on military activities because of the resulting increased civilian proximity to "live-fire ranges for artillery, armor, small arms, and munitions training" and other training areas and exercises which are noisy, dangerous, or both.[3]

The second, more modern encroachment paradigm involves military compliance with various environmental statutes and implementing regulations enacted in the 1960s and 1970s, and the resulting geographical and operational training limitations. In addition to already existing land use and regulatory compliance paradigms, the Trump Administration's proposed exponential expansion of outer continental shelf oil and gas leasing has the potential to create a third significant encroachment paradigm, where maritime training conflicts with the development and exploration of offshore drilling. Especially in light of the historically limiting impacts of land-use and regulatory historical encroachment paradigms on naval operations, close examination of the possibility of maritime encroachment resulting from offshore drilling expansion—including an analysis of which strategies may be available to mitigate those impacts—is necessary.

This Article will explore modern encroachment challenges in three parts. Part I addresses traditional land-use encroachment dynamics and measures which the DoD has implemented to mitigate encroachment impacts on military training activities. Part II illustrates the outsized impacts regulatory encroachment has had on maritime training operations in the Pacific Ocean, and the complexities involved with environmental regulatory compliance. Part III synthesizes the lessons presented by DoD responses to land use and regulatory encroachment issues and explores those lessons in the context of a new maritime encroachment paradigm posed by the increased offshore drilling proposed by the Trump Administration.

I. TRADITIONAL LAND USE ENCROACHMENT ISSUES AND THE NAVY

Similar to the broad DoD definition of encroachment, the Navy defines encroachment as "private development adjacent to an installation, range, or [operations area], certain environmental restrictions, or growing competition for resources such as waterfront, airspace and frequency spectrum" which impede "the ability to conduct operations, and training or testing in realistic environments."[4] Prior to the early 2000s, military encroachment issues largely centered around conflict arising as a result of population growth in urban areas, which in turn caused suburban sprawl towards existing military installations sited in what had previously been lightly populated rural areas.[5] However, in 2002, the General Accounting Office (GAO) issued a watershed report scoping the breadth and depth of the DoD's encroachment concerns.[6] The 2002 GAO report identified eight encroachment issues causing a real loss of training capabilities at four installations and two major commands, and noted that the DoD had no comprehensive plan to collect data, take administrative action, or enact legislative proposals to mitigate encroachment effects.[7] Naval Air Station Oceana (NAS Oceana) at Virginia Beach, VA was specifically identified as an installation facing encroachment challenges, as urban sprawl had led to a proliferation of noise

[3] Ryan Santicola, *Encroachment: Where National Security, Land Use, and the Environment Collide*, THE ARMY LAWYER (July 2006), at 2.
[4] DEP'T OF THE NAVY, OPNAVINST 11010.40, 1–2 (2007).
[5] Santicola, *supra* note 3, at 2.
[6] GAO-02-614, *supra* note 1.
[7] *Id.* at 3, 13–15, 24.

complaints based on aviation training operations.[8] As a result of the 2002 GAO report, the DoD ordered each of the service branches to conduct an analysis of training requirements and encroachment effects. It also formed the Sustainable Ranges Initiative to act as a coordinating body for all DoD encroachment issues and to provide a centralized approach to policy, legislative initiatives, and compatible land use activities.[9]

Following the 2002 GAO report, and in response to the DoD requirement, the Navy implemented an Encroachment Management Program (EMP) in 2007 to proactively address potential traditional land-use encroachment issues.[10] The EMP's stated foundation is the "identification and assessment by [military commanders] of all encroachment impacts . . . to ensure operational sustainment."[11] The EMP contemplates "active engagement with local, State, other Federal agencies, and community leaders" as the means of preventing encroachment impacts and promoting compatible development of lands adjacent to military facilities and training areas.[12] Although land use incompatibility is still a major challenge for shore-based Naval installations, and is likely to remain so indefinitely based on continuing trends toward suburban sprawl, the proactive approach required by the Navy's EMP and the greater DoD Sustainable Range Initiative (and its progeny) have created a relative stasis. Local communities near military installations recognize the economic and employment benefits accompanying a base, and installation and Region commanders are empowered and required to engage with local entities to ensure continued training opportunities.[13] Further, training data collection and sharing across the military services provides the military with the data stream necessary to make intelligent basing decisions and coordinate with other federal agencies to preserve training sustainability.[14]

Indeed, since being specifically identified as an at-risk installation for land-use encroachment, NAS Oceana has made tremendous progress in addressing encroachment based on suburban sprawl. NAS Oceana and Navy Region Mid-Atlantic, in keeping with the Navy's EMP, work closely with local communities as part of a robust land-use management partnership to ensure sustainable training operations. In 2005, the Navy partnered with Virginia Beach, VA and other neighboring municipalities to conduct a Joint Land Use Study (JLUS), which identifies three distinct Air Installations Compatibility Use Zones (AICUZ) with associated land-use control recommendations.[15] The city subsequently enacted its APZ-1 ordinance as an amendment to its Comprehensive Plan, inventorying existing land use conditions within a "Clear Zone" surrounding NAS Oceana, and requiring all new development or redevelopment in at-risk noise pollution areas to be consistent with Navy requirements.[16] Similarly, the City of Chesapeake, VA, in coordination with the Navy, Virginia state authorities, and neighboring municipalities, funds an "Encroachment Protection Acquisition Program," which matches state funding in order to acquire privately owned properties impacted by the AICUZ and "Accident Potential Zones" identified in

[8] *Id.* at 12.
[9] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-86, DEFENSE INFRASTRUCTURE: DOD EFFORTS TO PREVENT AND MITIGATE ENCROACHMENT AT ITS INSTALLATIONS, (2016) [hereinafter GAO-17-86].
[10] OPNAVINST 11010.40, *supra* note 4, at 3.
[11] *Id.*
[12] *Id.*
[13] GAO-17-86, *supra* note 9, at 10–12.
[14] *Id.* at 21.
[15] CITY OF VIRGINIA BEACH, COMPREHENSIVE PLAN – IT'S OUR FUTURE: A CHOICE CITY, § 1.6 1-137 (2018).
[16] *Id.* at 1–144.

the JLUS, and reduces potential conflicts between local military installations and private property within Chesapeake.[17]

Across the past two decades, the burgeoning partnership between and among Navy installations and host communities in the Hampton Roads, VA area exemplifies the increased capability of the Navy to proactively identify, address, and mitigate encroachment impacts and sustain training capabilities. Unfortunately, however, the Navy's learning curve with regard to the regulatory encroachment paradigm has been much steeper and more costly.

II. ENVIRONMENTAL COMPLIANCE ENCROACHMENT AND THE NAVY: THE HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING RANGE AS A CASE STUDY

As environmental laws have developed in both scope and effect, the encroachment effect of limitations on military training and operations created a second encroachment paradigm which is more regulatory in nature. The National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and other environmental statutes impose a number of requirements and responsibilities on the Department of Defense and the Navy. These requirements have both direct and indirect impacts on when, where, and how the military conducts its training and testing. Whereas NEPA and the ESA have universal impacts on military operations and actions across the DoD, the MMPA naturally has an outsized impact on Naval operations as compared to other actions within DoD. Consequently, the Navy has wrestled with environmental law compliance during at-sea training and testing for the better part of three decades now, particularly with regard to the use of sonar and live explosives during intensive training operations. The strict requirements of MMPA, ESA, and NEPA compliance, combined with steadfast opposition from environmental groups, has led to regulatory maritime encroachment, including significant limitations and impositions on training exercises and other non-deployment at-sea Naval activities. As explained in greater detail below, this regulatory maritime encroachment is exemplified by a series of litigated environmental lawsuits, judicial settlements, and policy changes related to the Navy's Hawaii-Southern California Training and Testing (HSTT) Study Area, a complex spanning millions of nautical square miles in the Pacific Ocean.[18]

Balancing the national security requirements for realistic, at-sea training and environmental compliance has proven both costly and time consuming, particularly in the HSST Study Area. The difficulty in striking the appropriate balance between environmental protection and training operations has led to decades of litigation between environmental groups, the National Marine Fisheries Service (NMFS), and the Navy related to training operations around the Pacific coast and Hawaii. As background, sound navigation and ranging, or sonar, is a catch-all term for at-sea navigational and targeting systems which project and/or receive sound waves and their reflections off of underwater objects in order

[17] *See generally* NALF Fentress Encroachment Protection Acquisition Program, CITY OF CHESAPEAKE, VA., https://bit.ly/33ibsPY (last accessed on Mar. 30, 2020) (providing general information about the program).

[18] *See* Amended Order Granting Conservation Council's Motion for Summary Judgment, Granting NRDC's Motion for Summary Judgment, Denying NRDC's Motion for Leave to Submit Extra-Record Evidence, and Granting in Part and Denying in Part Defendants' Motion to Strike, *Conservation Council for Hawaii, et al. v. Nat'l Maritime Fisheries Service, et al.*, 97 F. Supp. 3d 1210 (D. Haw. 2015), https://bit.ly/2PFKklG [hereinafter *Conservation Council* Summary Judgment Order] (disposing of both Civil No. 13-00864 SOM/RLP and Civil No. 14-00154 SOM/RLP).

to measure distances, identify hazards, or locate vessels.[19] While passive sonar systems are effectively listening systems which receive and translate sound waves and noises being produced in the undersea environment, active sonar systems project pulses of sound energy into the water in order to locate submarines, mines, or other undersea features which are too quiet to be detected using passive technology.[20] Sonar arrays can operate at different frequencies, and may be operated onboard ships, submarines, and aircraft or be towed systems, which are deployed to trail a vessel at-sea.[21] Prior to the late 1990s, concern over sonar use was generally focused on its use as a research tool. However, since the early 2000s, the Navy and NMFS have been embroiled in litigation surrounding sonar use and its impact on marine mammals.[22] The Navy primarily uses mid- and low-frequency sonar systems, which have both been subject to legal challenges based on scientific assertions that sonar may harm certain marine mammals under certain conditions.[23]

For purposes of exploring regulatory maritime encroachment, statutory regulation, litigation, and judicial settlements regarding mid-frequency active sonar (MFAS) system usage in the HSTT area provide an illuminating example of the difficulties of compliance and limiting impacts of environmental regulation on military training operations. The MMPA, ESA, and NEPA are the primary statutes affecting Navy training operations in the HSTT. The MMPA establishes a "moratorium on the taking . . . of marine mammals . . . during which time no permit may be issued for the taking of any marine mammal," subject to three express exceptions.[24] The MMPA broadly defines "take" to mean "to harass, hunt, capture or kill, or [attempt of the same] any marine mammal.[25] For military purposes, there are two primary bases within the statute for authorized takes of marine mammals. First, maritime military actions may be exempt from the MMPA if, "after conferring with the Secretary of Commerce," the Secretary of Defense determines the actions are necessary for national defense.[26] More germane to most training activities, though, the MMPA was amended in 2003 to provide that "incidental take" permits may be issued for military readiness activities as a "specified activity (other than commercial fishing) within a specified geographical region," for periods of not more than seven consecutive years.[27] The 2003 Amendments also modified the statutory definition of harassment in the military readiness context, establishing heightened criteria for establishing harm arising to the level of harassment as compared to the general definition.[28]

Like the MMPA, the ESA also imposes significant legal requirements on the Navy related to its maritime operations. The ESA broadly prohibits the "take" of specifically listed endangered and threatened species, which include a significant number of marine mammals who inhabit the Pacific Ocean.[29] The

[19] *Sound Navigation and Ranging*, U.S. FLEET FORCES COMMAND FLEET INSTALLATIONS AND ENVTL. READINESS, https://bit.ly/2PsdHbn (last visited on Feb. 25, 2020).
[20] *Id.*
[21] *Mid- and Low-Frequency Sonar*, U.S. DEP'T OF JUSTICE, ENV'T AND NATURAL RES. DIV. (Updated May 15, 2015), https://bit.ly/30jFOzr (last visited on Feb. 25, 2020).
[22] EUGENE H. BUCK AND KORI CALVERT, CONG. RESEARCH SERV. REPORT RL33133, *Active Military Sonar and Marine Mammals: Events and References*, 1 (Feb. 11, 2008).
[23] KRISTINA ALEXANDER, CONG. RESEARCH SERV. REPORT RL34403, WHALES AND SONAR: ENVIRONMENTAL EXEMPTIONS FOR THE NAVY'S MID-FREQUENCY ACTIVE SONAR TRAINING, 2 (Feb. 18, 2009).
[24] 16 U.S.C. 1371 § 101 (2018).
[25] 16 U.S.C. 1362 (13) (2018).
[26] National Defense Authorization Act for FY2004, P.L. 108-136 § 319(f) (2003).
[27] 16 U.S.C. 1371 § 101(a)(5)(A)(ii) (2018).
[28] Alexander, *supra* note 23, at 2–3.
[29] 16 U.S.C. § 1538 (2018).

ESA broadly defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[30] Similar to the permitting requirements of the MMPA, an agency seeking to engage in any activity which might jeopardize a protected species or adversely modify its critical habitat is required to consult with the cognizant department in order to assess the impact of the proposed activity on any nearby endangered species.[31] The ESA further provides for the issuance of "incidental take" permits where agency action would not "jeopardize" a protected species, with express limitations on the amount and type of take authorized and reasonable measures necessary to mitigate the impact of any such taking.[32]

In contrast to the substantive "take" prohibitions and permitting processes contained with the MMPA and ESA, NEPA requires the Navy to include detailed environmental analyses when taking "major" actions.[33] As implemented through regulations promulgated by the Council on Environmental Quality (CEQ), federal agencies must include either or both of an environmental assessment (EA) and a more complex environmental impact statement (EIS), if the action is anticipated to "significantly [affect] the quality of the human environment."[34] As is common practice among federal agencies, the Navy has sought to include required impact assessments under the MMPA and ESA within the NEPA process for its operation of sonar in the HSTT. It is exactly this intersection of law and the complex, scientific, and frequently hotly contested EIS process which led to a new era of regulatory encroachment affecting Naval training activities in the HSTT.

The first major environmental challenge of the Navy's MFAS use in the Pacific theater was brought in 2007 by a conglomeration of environmental groups and the California Coastal Commission. It sought declaratory and injunctive relief related to the Navy's integrated major training exercises in waters off of southern California.[35] In *NRDC v. Winter*, environmental groups challenged the Navy's failure to prepare an EIS before conducting 14 major training exercises, arguing that the Navy's actions in preparing an EA but not an EIS, despite anticipating significant levels of harassment and take of marine mammals, and the CEQ's subsequent approval of "alternative arrangements" to allow for the continued use of MFAS while complying with NEPA requirements, violated NEPA.[36] In *Winter*, the California District court noted that the Navy's own EA anticipated more than 564 instances of "Level A" harassment involving physiological harm to marine mammals and more than 167,000 instances of "Level B" or behavior-altering harassment as the result of scheduled training exercises. It also found the Navy's action in promulgating an EA with a Finding of No Significant Impact (FONSI) to be arbitrary and capricious. Based on that finding, the district court imposed significant injunctions on the use of MFAS for the remaining 11 scheduled Navy exercises in the Southern California area.[37] On appeal, the Ninth Circuit affirmed the District Court's action, leaving in place significant restrictions on the Navy's training exercises, including requiring the shutdown of MFAS when a marine mammal is detected within 2,200 yards of a sonar-emitting source, and requiring an almost total power-down of sonar use in

[30] 16 U.S.C. § 1532 (19) (2018).
[31] 16 U.S.C. § 1536 (a)(2) (2018).
[32] 16 U.S.C. § 1536 (b)(4) (2018).
[33] 52 U.S.C. § 4332 (2)(c) (2018).
[34] 40 C.F.R. §§ 1501.3, 1501.4 (2020).
[35] *See* BUCK AND CALVERT, *supra* note 22, at 14–15. Notably, the Navy had already been embroiled in a decade of environmental challenges related to low-frequency active sonar systems at the time the complaint was filed in *NRDC v. Winter*, 518 F.3d 658, 669–70, 677–79 (9th Cir. 2008).
[36] *NRDC v. Winter*, 518 F.3d 658, 669–70, 677–79 (9th Cir. 2008).
[37] *Id.* at 676.

"surface ducting conditions," where sonar sound carries further than would otherwise be the case.[38] The Ninth Circuit Court also left undisturbed a 12-nautical-mile coastal exclusion zone, monitoring requirements before and during MFA use during scheduled exercises, and a second exclusionary zone around the Catalina Basin and the San Clemente islands.[39] The Ninth Circuit Court similarly left undisturbed limitations imposed on the Navy's training operations included in an executive exemption issued to negate claimed violations of the Coastal Zone Management Act (CZMA).[40]

The *Winter* case eventually found its way to the Supreme Court, which granted certiorari to address whether the lower courts had correctly applied equitable principles in enjoining the Navy's training activities. By a narrow 5-4 majority, the Supreme Court vacated the two injunctive limitations imposed by the District Court and upheld by the Ninth Circuit, noting that the standard for injunctive relief required a showing that "irreparable harm was likely," rather than probable, and that the lower courts had incorrectly balanced the environmental interest posited by the plaintiffs against the national security interests relied on by the Navy in contesting the injunctions.[41] The Supreme Court reasoned that, as a threshold matter, the lower courts had erred in applying a "probable" standard for the likelihood of irreparable harm, particularly where the Navy had not challenged four of the six limitations imposed. Citing *Mazurek v. Armstrong*,[42] the Supreme Court held that the plaintiffs' request for injunctive relief based only "on a possibility of irreparable harm was inconsistent with [the] characterization of injunctive relief as an extraordinary remedy . . . ."[43] The Supreme Court, in vacating the challenged injunctions, further relied on a substantially different balancing of the public interest than that applied by the lower courts. The Court reasoned that "antisubmarine warfare is one of the Navy's highest priorities," and gave judicial deference to senior Navy officials' statements that 2,200-yard shutdown requirements would effectively negate the purpose of training under realistic conditions, leaving strike groups more vulnerable to enemy submarines.[44] The Court then concluded, "[w]e do not discount the importance of plaintiffs' ecologic, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises . . . ."[45]

Although the Navy eventually prevailed at the Supreme Court with the reversal of the 2,200-yard shutdown and "surface-ducting" restrictions, the *Winter* litigation nonetheless resulted in a number of limitations on Naval training activities which simply did not exist in 2006. Given the strictly procedural nature of NEPA, and the import the courts placed on the national security interests fostered by realistic MFAS training, the Navy's decision to proceed on an EA/FONSI basis instead of pursuing a full EIS demonstrates the responsive, vice proactive nature of the Navy's response to regulatory maritime encroachment.

Not long after the conclusion of *Winter*, environmental groups raised yet another challenge to the Navy's use of MFAS in the HSTT region. In 2013, having learned through the *Winter* litigation the cost of relying on a lengthy EA/FONSI analysis rather than an EIS, the Navy coordinated with NMFS to

[38] *Id.* at 701–03.
[39] *NRDC v. Winter*, 530 F. Supp. 2d 1110, 1118–21 (C.D. Cal. 2008).
[40] *NRDC v. Winter*, 518 F.3d 658, 674 (9th Cir. 2008).
[41] *Winter v. NRDC*, 555 U.S. 7, 24–26 (2008).
[42] 520 U.S. 968 (1997).
[43] *Winter*, 520 U.S. at 22.
[44] *Id.* at 28–29.
[45] *Id.* at 33.

prepare an EIS for proposed training operations in the HSTT from 2013 to 2018, including concurrent coordination on required MMPA and ESA environmental assessments.[46] The Navy initially published a Notice of Intent to develop an EIS on July 15, 2010, and prepared its draft EIS in May of 2012, after conducting extensive "scoping" activities including holding six public meetings in Utah, California, and Hawaii, and considering email and written comments regarding the EIS during the public comment period.[47]

The proposed rule authorizing Naval training activities in the HSTT, including anticipated Level A and B harassment or "takes" of 39 species of marine mammals, was published on December 24, 2013.[48] The final rule, even prior to its challenge, included ten specific mitigation measures developed and agreed upon by the Navy and NMFS to effect the "least practicable adverse impact" on marine mammal species in consideration of personnel safety, practicality of implementation, and impact on effectiveness of training as required by the MMPA.[49] Notwithstanding the exponentially more robust effort by the Navy and NMFS to meet NEPA, MMPA, and ESA requirements in permitting MFAS training activity, environmental groups still took issue with the proposed final rule, leading to more protracted litigation surrounding the HSTT range.

In *Conservation Council for Hawaii et al. v. National Marine Fisheries Service et al.*,[50] NRDC and a coalition of environmental groups and local government entities filed suit against NMFS and the Navy regarding the proposal renewal of NMFS incidental take authorizations for marine mammals in the HSTT. The *Conservation Council* petitioners argued that the final rule authorizing incidental takes was arbitrary and capricious and failed to meet the requirements of NEPA, the MMPA, and the ESA.[51]

In a blistering order granting summary judgment in favor of the plaintiffs, the District Court held the NMFS determination—that the Navy's proposed training in the HSTT would have a "negligible impact" under the MMPA—was so insufficiently supported as to be arbitrary and capricious.[52] Specifically, the court rejected the agencies' assertion that the "take" to be evaluated under for its impact is the *anticipated take*, a lesser number, rather than the authorized take, noting that the express language of the MMPA requires consideration of the authorized take.[53] Further, allowing review as posited by the Navy and NMFS could result in the authorization of nearly unlimited takes, as unmooring the "negligible impact" finding from the actual number and type of takings authorized creates a legal fallacy where there the "authorized" takes are exponentially greater than the theoretical "anticipated" takings.[54] The court further explained, "although MMPA provisions have been adjusted with respect to military readiness activities, those adjustments do not permit the Navy to skirt the MMPA purely to avoid having its training and testing activities

[46] *Conservation Council* Summary Judgment Order, *supra* note 18, at 5.
[47] NAVAL FACILITIES ENGINEERING COMMAND, SOUTHWEST/EV21.CS, HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING ACTIVITIES DRAFT ENVTL. IMPACT STATEMENT/OVERSEAS ENVTL. IMPACT STATEMENT (May 2012), ES-5-6, https://bit.ly/2PhG6AO (last visited on Mar. 1, 2020).
[48] Takes of Marine Mammals Incidental to Specified Activities; U.S. Navy Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area, 78 Fed. Reg. 78105 (Dec. 24, 2013) [hereinafter 2013 Final HSTT MMPA Take Rule].
[49] 2013 Final HSTT MMPA Take Rule at 78113–78114.
[50] 97 F. Supp. 3d 1210 (D. Haw. 2015).
[51] *Id.*
[52] *Conservation Council* Summary Judgment Order, *supra* note 18, at 18.
[53] *Id.* at 18–19.
[54] *Id.*

uninterrupted."[55] The court then noted a multitude of analytical and factual discrepancies contained within the record to determine that the administrative record did not support the ultimate determination of negligible impact.[56]

The *Conservation Council* court similarly found the NMFS "No Jeopardy" finding under the ESA to be arbitrary and capricious. Although NMFS prepared a 516-page Biological Opinion in support of that determination, the court struck down "No Jeopardy" findings for both whale and turtle endangered species as arbitrary and capricious. Regarding the former, the court noted that NMFS' "No Jeopardy" finding flows only from "repeated, conclusory statements," and that the agency erred in reasoning that lethal takes of individual animals among an endangered species would not likely reduce the fitness of individual whales (notwithstanding their deaths), and accordingly are not likely to reduce the viability of affected whale populations.[57] Similarly, regarding the "No Jeopardy" finding for endangered turtle species, the court wholesale rejected the issuance of an uncapped number of turtle takes due to vessel strike, noting that authorizing an unlimited number of takes "makes it impossible for NMFS to justify" a finding of "No Jeopardy."[58]

Lastly, the court determined that the Final Environmental Impact Statement (FEIS) prepared by the Navy in consultation with NMFS was arbitrary and capricious in that it failed "to analyze a true 'no action' alternative and fail[ed] to analyze alternatives with less environmental harm."[59] The court noted that each of the alternatives considered within the FEIS involved the continuation of Navy training activity in the HSTT, and that NMFS improperly abandoned its role in determining whether to authorize the takes requested by the Navy, substituting instead an analysis of differing levels of Navy activity.[60] The court bluntly concluded that "with what it called a 'no action' alternative, NMFS was assuming the very take activities the Navy was proposed to engage in. This is a glaring deficiency in the FEIS."[61] The court similarly rejected the validity of determinations in the FEIS that time and area restrictions were "impractical," noting that the agencies' failure to reasonably address and consider comments recommending such limitations constituted a failure to conduct the "hard look" at environmental consequences required of NEPA.[62]

As a result of the *Conservation Council* court's summary judgment award in favor of the environmental groups, the Navy entered into a judicial settlement with the various plaintiffs as a means of resolving the matter without further litigation. Pursuant to the stipulation, approved in September of 2015, the Navy agreed to conduct training operations within the HSTT in accordance with the mitigation measures and limitations contained within the Final Rule promulgated by NMFS, associated letters of authorization (LOAs), the EIS, and 19 additional limitations regarding location, time, and types of training where

[55] *Id.* at 19.
[56] *Id.* at 22–39 (noting NMFS failure to include population stock analyses for all potentially impacted marine mammal species in the area, failure to utilize "best available science" in disregarding "potential biological removal" (PBR) levels and authorizing mortality takes in excess of PBR levels for individual species, and ultimately concluding that "the deficiencies growing out of a total failure to consider clearly important information are glaring enough that the court finds it unnecessary to make judgment calls.").
[57] *Id.* at 49–50.
[58] *Conservation Council* Summary Judgment Order, *supra* note 18, at 53.
[59] *Id.* at 57.
[60] *Id.* at 59–60.
[61] *Id.*
[62] *Id.* at 61, 64–65 (citing to *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003)).

MFAS use is authorized.[63] Of particular note, the original EIS and associated NMFS LOAs were premised on the Navy conducting 14 major training exercises (MTE) per year, including the use of MFAS and underwater explosives to provide realistic training for the certification of carrier strike groups and as part of international "Rim of the Pacific" (RIMPAC) exercises.[64] Under the *Conservation Council* settlement, the Navy agreed to limit training in specific areas surrounding the Hawaiian islands to, at most, five MTEs, and to significant curtailment on the use of MFAS during other training exercises.[65] The settlement also prohibited the Navy from utilizing MFAS during MTES and wherever possible for smaller training exercises in specified areas around the island of Molokai, and imposed seasonal limitations on MFAS use along specified areas off the coast of California.[66]

All told, the Navy's freedom to utilize MFAS in its training activities in the HSTT went from being relatively unconstrained to being subject to a litany of self-imposed mitigation measures, limitations required by executive authorizations under the CZMA, the unchallenged restrictions within *Winter*, and the 19 additional restrictions contained within the *Conservation Council* settlement. The dispositive lesson is not so much that the Navy has failed to engage with environmental groups or to attempt to balance its military readiness needs with the web of environmental laws applicable to MFAS use. The lesson instead is that the complexity of environmental compliance is such that the Navy should anticipate and adapt to regulatory encroachment in its maritime operations in the same manner that it has learned to proactively engage with local and state governments to mitigate traditional "land use" encroachment. That lesson is even more apt in light of the potential impacts of Executive Order 13795 (EO 13795), which has the potential to affect a combined "land use" type-encroachment *and* regulatory encroachment on military readiness exercises, particularly along the west coast of the United States.

III. THE TRUMP ADMINISTRATION AND THE ENCROACHMENT POTENTIAL OF INCREASED OFFSHORE DRILLING

Legal scholars describe the regulation of offshore drilling in the United States as "a constellation of federal laws and a complicated nexus of federal agencies . . . [forming] something of a morass."[67] However, under the current administration, the government has proposed an exponential expansion of the availability and sale of offshore mineral leases, which in turn could lead to encroachment impacts on Naval maritime operations. The potential for this impact is particularly significant, as the proposed expansion would reverse offshore drilling policies which have prevailed over the past 30 years. A brief analysis of the statutory framework and recent regulatory history of offshore drilling is helpful in fully examining the encroachment-type impacts which might accrue from expanded drilling.

The Outer Continental Shelf Lands Act (OCSLA) is the principle federal statute governing offshore drilling, establishing a policy that "the outer

[63] Stipulated Settlement Agreement and Order; Maps "1" – "4," *Conservation Council for Hawaii, et al. v. Nat'l Maritime Fisheries Service, et. al.*, Civil No. 13-00864 SOM/RLP and 14-00154 SOM/RLP, (D. Haw., Mar. 15, 2015) [hereinafter *Conservation Council* Settlement].
[64] U.S. DEP'T OF THE NAVY, HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING DRAFT ENVTL. IMPACT STATEMENT/OVERSEAS ENVTL. IMPACT STATEMENT INFORMATIONAL MATERIALS, https://bit.ly/30iJyBr (last visited on Mar. 2, 2020).
[65] *Conservation Council* Settlement, *supra* note 63, at 8–9.
[66] *Id.* at 9–10. *See also id.* at "Map 3."
[67] David Pettit & David Newman, *Federal Public Law and the Future of Oil and Gas Drilling on the Outer Continental Shelf*, 17 ROGER WILLIAMS U. L. REV. 184, 187 (2012).

Continental Shelf is a vital national resource reserve . . . which should be made available for expeditious and orderly development."[68] In order to manage the development of those resources, OCSLA requires the Secretary of the Interior to prepare and maintain an oil and gas leasing program for all lands constituting the outer Continental Shelf (OCS), subject to specific environmental, location, timing, and economic balancing.[69] OCSLA defines the "outer Continental Shelf," as "all submerged lands lying seaward and outside of the lands beneath navigable waters . . . of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."[70] Effectively, the OCS is composed of all of the seabed and subsoil underlying the United States' territorial seas and exclusive economic zone (EEZ), except for the respective three or nine-mile boundary left to the states under the Submerged Lands Act.[71] Under OCSLA, the Secretary of the Interior must promulgate a five-year leasing program including a schedule of proposed lease sales indicating "the size, timing, and location of leasing activity which will best meet national energy needs."[72]

Against this statutory background, the potential for offshore drilling and exploration has been an incredibly dynamic field over the past decade. In 2011, reacting in part to the catastrophic Deepwater Horizon oil spill in the Gulf of Mexico, the Department of the Interior dissolved its Mineral Management Service, reorganizing the Department's management of the OCS and creating the Bureau of Ocean Energy Management (BOEM), "responsible for managing development of the nation's offshore management in an environmentally and economically responsible way."[73] Under the Obama Administration, BOEM promulgated a five-year leasing plan which proposed a lease sale schedule of 11 lease sales in four OCS "planning areas" in the Gulf of Mexico and Alaska coastline.[74] The BOEM 2017–2022 plan (2017 Plan), in keeping with decades of prior precedent, proposed no new leasing along the entire Pacific coast of the United States, reasoning that the energy needs of the nation could be met without drilling or exploration in planning areas other than the four contained within the plan.[75] Notably, the 2017 Plan was finalized in November of 2016, shortly before President Trump took office. Given the "midnight" nature of the final five-year plan, which is subject to notice and comment rulemaking requirements under the Administrative Procedures Act (APA), its promulgation was viewed as an intentional roadblock to President Trump's campaign plan to drastically expand U.S. offshore oil production, as any revisions to the five-year plan would require similar APA compliance.[76]

In response, on the eve of his 100th day in office, President Trump issued EO 13795 ordering the Secretary of the Interior to "give full consideration to revising the schedule of proposed oil and gas lease sales," to include annual lease sales to the maximum extent permitted by law in BOEM planning areas across the Gulf of Mexico, Arctic Sea, Mid-Atlantic, and South Atlantic.[77] Under the Order,

[68] 43 U.S.C. § 1332 (2018).
[69] 43 U.S.C. § 1344(a) (2018).
[70] 43 U.S.C. § 1331(a) (2018).
[71] BUREAU OF OCEAN ENERGY MGMT, NAT'L OCEANIC AND ATMOSPHERIC ADMIN, SO WHAT? ZONES, LIMITS, AND MARITIME JURISDICTIONS IN THE MARINE ENVIRONMENT, https://bit.ly/2XiUlJV (last visited on Mar. 5, 2020).
[72] 43 U.S.C. § 1344(a) (2018).
[73] BUREAU OF OCEAN ENERGY MGMT, DEP'T OF THE INTERIOR, THE REORGANIZATION OF THE FORMER MMS, https://bit.ly/316GKqd (last visited on Mar. 3, 2020).
[74] BUREAU OF OCEAN ENERGY MGMT, DEP'T OF THE INTERIOR, 2017–2022 OCS OIL AND GAS LEASING FINAL PROGRAM, S-2, 11-1 (November 2016).
[75] *Id.* at 608, 8-22 to 8-23.
[76] Paul Rogers, *Obama Blocks New Oil Drilling Off California, West Coast Through 2022*, THE MERCURY NEWS (Nov. 19, 2016), https://bayareane.ws/33cluRv/.
[77] Exec. Order No. 13795, 82 Fed. Reg. 20815 (May 3, 2017).

the Secretary of the Interior is required to consult with the Secretary of Defense in revising the five-year plan.[78] EO 13795 expressed broad changes in policy perspectives, finding that "America must put the energy needs of American families and businesses first and continue implementing a plan that ensures energy security and economic vitality for years to come."[79] EO 13795 was the first volley in a number of regulatory and administrative measures taken by the Trump Administration to vastly increase the scope and scale of oil development along the OCS, in keeping with his stated intentions while campaigning.

In compliance with the President's directive to revisit the 2017 Plan, in January 2018 BOEM promulgated a substantially modified five-year plan for the years 2019 to 2024 (2019 Plan).[80] The 2019 Plan is a near complete reversal of BOEM OCS leasing strategy under the Obama administration and the 2017 Plan. As compared to proposing 11 lease sales in only four of BOEM's "planning areas," the 2019 Plan "would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019–2024 period," via 47 lease sales in 25 of the 26 BOEM planning areas.[81] Using just the Pacific Coast as an example, the 2019 Plan contemplates seven lease sales along the Pacific coastline beginning as early as 2020.[82] Historically, the most recent lease sale in the Pacific Region was in 1984, and the Southern California Planning Area has existing Federal leases and production from 23 platforms, with no new permits issued since 1984.[83]

The Pacific Region considered in the 2019 Plan encompasses an area of more than 248 million acres, so it stands to reason that not every oil lease sale will implicate Naval training operations. [84] Accordingly, the real potential of any limitation on military training activities as a result of the proposed expanded offshore drilling and exploration will not be measurable until actual leaseholds have been sold and exploration activities commence in earnest. However, the Navy can and should expect some level of encroachment on training activities as OCS drilling and exploration increases in the Pacific. Notably, in addressing military activities in the Pacific Region, the 2019 Plan contemplates that military training activities in the Pacific are "critical to military readiness and to national security."[85] Notwithstanding that favorable introduction to the importance of military readiness, the 2019 Plan then immediately contemplates limitations on military activities, noting that "[s]ome of the most extensive offshore areas used by DOD include U.S. Navy at-sea Operational Areas," and that training and testing activities could "occur during any season . . . and could be concentrated within a smaller geographic area than the OPAREA footprint."[86] As noted by one Republican senator when questioned about his support for potential oil drilling in the Great Lakes, "I think we have to get the oil where it is."[87] Although the Senator in question has been excoriated for his comment, it is a fact that oil resources can only be extracted from where they are geographically located. With

[78] *Id.*
[79] *Id.*
[80] BUREAU OF OCEAN ENERGY MGMT, DEP'T OF THE INTERIOR, 2019–2024 NATIONAL OCS OIL AND GAS LEASING DRAFT PROPOSED PROGRAM, (January 2018) [hereinafter 2019 BOEM Plan]. Notably, the 2019 BOEM Plan has not been finalized due to litigation surrounding the President's revocation of prior executive withdrawals in the Arctic Sea and Alaska. *See League of Conservation Voters v. Trump et al.*, 363 F. Supp 3d 1013 (D. Alaska 2019).
[81] 2019 BOEM Plan, *supra* note 80, at 2, 8.
[82] *Id.* at 8.
[83] *Id.* at 4-1.
[84] *Id.*
[85] *Id.* at 6-22.
[86] *Id.*
[87] Cary Spivak, *Russ Feingold Says Ron Johnson "Is Willing to Hand Over the Great Lakes to the Oil Companies,"* POLITIFACT.COM (Sept. 3, 2010), https://bit.ly/2PeTZ2v.

that truth in mind, conflict over competing maritime usages between military training and offshore oil development is comparable to land-use encroachment, and likely as inevitable. Moreover, this new maritime "sea-use" encroachment was created by regulatory changes in BOEM's interpretation of its obligations under OCSLA, making this new encroachment model a hybrid of the regulatory and land-use encroachment paradigms. In light of EO 13795 and BOEM's subsequent regulatory drive to increase American offshore production in the OCS, the Navy and the DoD will have to be proactive in preserving maritime training and testing ranges and programs against this new encroachment threat.

The Navy has historically opposed offshore drilling in Southern California, noting more than 20 years ago that offshore oil rigs pose "an unacceptable safety hazard" to ships, submarines, and military operations off the coast.[88] However, a 2007 Navy settlement with oil companies regarding development near the Point Mugu training area (part of both the SOCAL range and the cumulative HSTT) may serve as a blueprint for the avoidance of major encroachment complications. [89] The Woodside Oceanway project proposed a deep-water, mobile port with three potential sites for ship-to-ship petroleum transfers, including sites within or close to the Point Mugu range.[90] The Navy, while coordinating with Federal approval authorities for the project, outlined a proposed settlement with Woodside Natural Gas, Inc. containing explicit limitations on the manner in which the Oceanway project could inhibit the Point Mugu range.[91] Of note, the proposed settlement contemplated Woodside's rotation between three alternative transfer sites, subject to an annual limit on transfers within the Point Mugu range, "not to interfere" limitations for other activities, and allowing the Navy a "right of refusal" for activities within or affecting the training range.[92]

The Woodside Oceanway project was ultimately withdrawn by its parent company due to economic concerns but remains a possible example of the means by which the Navy can seek to mitigate potential encroachment effects from offshore drilling.[93] However, much like the early military responses to encroachment issues arising from urban sprawl, "the Navy does not have a standard approach to sea-based energy infrastructure," and addresses conflicts on a site-by-site basis.[94] The Woodside model certainly could serve to form the framework for the Navy's approach to *ad hoc* projects, and entering into legally enforceable agreements with BOEM leaseholders would provide the Navy with justiciable legal remedies in the event of breach by the oil companies. However, the Woodside Oceanway project is an imperfect template considering the broad range of activities required to locate, develop, and extract deep-water oil resources. Specifically, the Woodside Oceanway project involved a mobile offshore liquid natural gas transfer platform which could be moved between sites. For new projects and oil leases, Woodside-type limitations on oil companies might be feasible for early exploration phases. Based on current technologies, most exploratory offshore drilling is conducted either by "jackups," an oil rig

[88] Nora Zamichow, *Navy Brands Offshore Oil Rigs Training Hazard*, LOS ANGELES TIMES, Oct. 26, 1989, at B1.
[89] Stuart Parker, *Navy Reaches Tentative Agreement on West Coast Energy Project*, INSIDE THE NAVY Vol. 20, (Nov. 26, 2007), at 7–8.
[90] Notice of Woodside Natural Gas Inc. OceanWay Secure Energy Liquefied Natural Gas Deepwater Port License Application, 72 Fed. Reg. 51488, 51353–54 (Sept. 7, 2007).
[91] DEPT. OF THE NAVY, OFFICE OF THE ASST. SEC'Y (INSTALLATIONS AND ENV'T), LETTER TO U.S. MARITIME ADMINISTRATION AND U.S. COAST GUARD, 2 (Oct. 31, 2007), https://bit.ly/31br58T.
[92] *Id.*
[93] Rick Wilkinson, *Woodside Petroleum Shelves OceanWay LNG Terminal*, OIL AND GAS J. (Jan. 16, 2009).
[94] Parker, *supra* note 89, at 3; *see also* GAO-02-614, *supra* note 1, at 3.

which is movable but requires the extension of "legs" to the seabed for stability, or more expensive semisubmersible or drillship rigs which are held in position by anchors or dynamic positioning.[95] These fungible assets could be subject to time and place-of-use limitations to meet naval training and testing needs without undue economic disruption to the oil companies, much as with the Woodside Oceanway project offshore terminal. However, once large deposits of hydrocarbons have been found, a permanent platform is typically built to allow their extraction.[96] Where large oil reserves might be located within individual ranges or OPAREAs, and particularly on the oil-rich California coastline, encroachment issues are likely to be caused by the permanent presence of large rigs and related maritime shipping.[97]

In light of the potentially permanent nature of at least some portion of the lease sales proposed in the 2019 Plan, an *ad hoc* approach to "sea-use" encroachment would waste the lessons learned in the development of the DoD's extensive, programmatic response to "land-use" encroachment. Resolution by individual settlements would alleviate the immediate headache proposed by an individual project or at least the exploratory phases thereof, but would constitute a short-sighted failure to anticipate and proactively address what could be a massive proliferation of permanent structures across the Pacific coastline.

Conversely, the best alternative to address the "sea-use" encroachment challenges is to leverage the DoD's experience in resolving encroachment issues ashore and maintain a programmatic, proactive approach to assert the Navy's interests. However, such a programmatic response would be heavily susceptible to the political influence. As discussed above, the Navy and the DoD currently execute a Sustainable Ranges Initiative and an EMP to collect data, report potential issues, and provide policy-level guidance to commanders in coordinating with other governmental entities.[98] Given the directive in EO 13795 that the Secretary of the Interior consult with the DoD in implementing its five-year plan, the opportunity exists to "fence off" or otherwise impose limitations on potential lease sale locations based on maritime training and testing needs.[99]

However, the DoD's response and coordination with BOEM is still very much in its nascency. The only publicly available DoD response to the 2019 Plan is a letter from the Deputy Assistant Secretary of Defense (Force Education and Training), promising further DoD review of mission compatibility in the 2019 Plan's proposed leasing areas.[100] The DoD response also states an intent to "distinguish areas where [it] will request restrictions from oil and gas activity," but again, no further public information regarding those potential locations is currently available.[101] Although the DoD has stated its intentions to seek the reservation of necessary training ranges, and has the available data to empirically support any objections to a proposed lease area from the Sustainable Range Initiative and EMP programs, the ultimate resolution of those requests will depend on BOEM and executive determinations as to relative economic value of the drilling activity as compared to limiting military (and particularly Navy) OPAREAs.

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[95] *Id.*
[96] *Offshore Drilling*, NATURALGAS.ORG, https://bit.ly/2PcwOpH (last visited on Mar. 10, 2020).
[97] Mark J. Kaiser & Brian Snyder, *A Primer on the Offshore Contract Drilling Industry*, 44 OCEAN DEV. & INT'L L. 287, 288 (2013).
[98] *See* GAO-17-86, *supra* note 9, at 3–4.
[99] Exec. Order No. 13795, 82 Fed. Reg. 20815 (May 3, 2017).
[100] OFFICE OF THE ASST. SEC'Y OF DEF., DEP'T OF DEF., LETTER TO THE BUREAU OF OCEAN ENERGY MGMT (Feb. 1, 2018), https://bit.ly/2XjiGzk.
[101] *Id.*

IV. CONCLUSION

In conclusion, it is incumbent on DoD and Navy senior leadership to vocalize and substantiate concerns regarding the potential encroachment issues posed by expanded offshore drilling *before* the 2019 Plan is finalized, and to leverage its Congressional liaison branches to ensure legislative awareness of those concerns before the oil industry expends significant resources within and around training ranges. To rely on an old Navy cliché, hope is not a course of action. If the Navy and the DoD are to meaningfully address this new maritime encroachment paradigm, early and vocal intervention is required to ensure that the military is able to "adequately prepare [its] young men and women for the operations and potential combat service which they may be required to perform in service to this Nation."[102] Given the extensive limitations posed by environmental regulations, the proposed shrinkage of Navy OPAREAs in the Pacific poses a distinct risk that the limited training environments will no longer match real-world conditions. As near-peer military competitors, Russia and China pose more risk to maritime security now than at any time in the past four decades. With the emergence of renewed threats to military operations in the Pacific and beyond, additional maritime encroachment limitations which curtail "real-world" training conditions could have major national security implications. As such, preserving military training to the maximum extent possible is a "no-fail" endeavor. In light of the vast economic and financial interests contemplated by expanded offshore drilling, the military must abandon its normally insular posture regarding external economic activities to ensure executive and congressional visibility on the value and necessity of maritime training grounds and activities to national security.

[102] *Challenges to National Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. 32 (2001) (statement of Admiral William J. Fallon and statement of Lieutenant General Larry R. Ellis that military personnel "must train in the field and train often under conditions that replicate war fighting"), https://bit.ly/3gjjxaN.