

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

### I. (a) PLAINTIFFS

Guam Preservation Trust; National Trust for Historic Preservation; We Are Guahan; Joseph Quinata; Dr. Marilyn Salas; Julian Aguon; and Jillette Leon-Guerrero

(b) County of Residence of First Listed Plaintiff Guam  
(EXCEPT IN U.S. PLAINTIFF CASES)

### DEFENDANTS

Katherine Gregory, Naval Facilities Engineering Command, Pacific; Kyle Fujimoto, Naval Facilities Engineering Command, Pacific; David Bice; Executive Director, Joint Guam Program Office; et al.

County of Residence of First Listed Defendant Honolulu  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

(c) Attorney's (Firm Name, Address, and Telephone Number)  
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### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609		

### V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

### VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 USC § 706; 42 USC § 4321; 16 USC § 470f; 16 USC § 1451

Brief description of cause:

Compel defendants to comply with NEPA, NHPA, and CZMA

### VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint:  
 UNDER F.R.C.P. 23 Declaratory and Injunctive Relief **JURY DEMAND:**  Yes  No

### VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE \_\_\_\_\_

SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

### FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII**

GUAM PRESERVATION  
TRUST; NATIONAL TRUST  
FOR HISTORIC  
PRESERVATION; WE ARE  
GUÅHAN; JOSEPH E.  
QUINATA; DR. MARILYN  
SALAS; JULIAN AGUON; and  
JILLETTE LEON-GUERRERO

Plaintiffs,

v.

KATHERINE GREGORY, Naval

No. \_\_\_\_\_

COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY RELIEF

Facilities Engineering Command,  
Pacific; KYLE FUJIMOTO,  
Naval Facilities Engineering  
Command, Pacific; DAVID  
BICE, Executive Director, Joint  
Guam Program Office;  
JACQUELINE  
PFANNENSTIEL, Assistant  
Secretary of the Navy For Energy,  
Installations, and Environment;  
RAY MABUS, Secretary of the  
Navy; ROBERT GATES,  
Secretary of Defense; NAVAL  
FACILITIES ENGINEERING  
COMMAND, PACIFIC; JOINT  
GUAM PROGRAM OFFICE;  
DEPARTMENT OF THE  
NAVY; and DEPARTMENT OF  
DEFENSE

Defendants.

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## INTRODUCTION

1. This is an action to compel Defendants (hereinafter collectively referred to as Navy or DoN) to comply with the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Coastal Zone Management Act (CZMA), with respect to their decision to select Pågat Village and its surrounding area as the chosen site for a complex of five firing ranges encompassing more than 1000 acres, including ranges for machine guns and rifles. Pågat Village is

a site sacred to the Chamorro people, the indigenous people of the United States Territory of Guam, who to this day constitute approximately half the population of Guam.

2. Pãgat Village has been listed on the National Register of Historic Places since March 13, 1974, and was the first National Register-listed site on the island of Guam.

3. Pãgat Village has also been named by the National Trust for Historic Preservation as one of the 11 Most Endangered Historic Places in America for 2010.

4. Defendants' actions affecting Pãgat Village are part of a larger relocation of Marines from Okinawa to Guam, accompanied by provision for both Army troops and Navy vessels proposed to be accommodated on or in the waters adjacent to Guam. According to DoN, approximately 80,000 people (including 8,600 service members, their 9,000 dependants, contractors, and others) will arrive on Guam (which presently has a population of approximately 175,000). In purported compliance with NEPA, the Navy prepared an Environmental Impact Statement (EIS) on "Guam and CNMI Military Relocation, Relocating Marines from Okinawa, Visiting Aircraft Carrier Berthing, and Army Air and Missile Defense Task Force." The Draft EIS was made public on November 20, 2009, and the Final EIS -- approximately 24,000 pages

long -- was released on July 28, 2010. Public and agency comments on this EIS were directed to the Naval Facilities Engineering Command (NAVFAC) Pacific at Pearl Harbor, Hawaii. [A table of acronyms and abbreviations is attached as Attachment A to this complaint.] The EIS was managed by NAVFAC Pacific in Hawaii and the Joint Guam Program Office (JGPO). A Record of Decision (ROD) was then signed on September 20, 2010. That ROD, which reduces the alternative sites being considered for the firing ranges to two sites, both of which are at Pãgat Village, by its own terms represents final agency action to site the ranges at Pãgat. [A map showing the site of the proposed firing ranges and Pãgat Village (and its surroundings) is attached as Attachment B].

5. Plaintiffs do not contest in this lawsuit the larger relocation of Marines and other forces to Guam, nor do they take issue in this lawsuit with the foreign and defense policy considerations that have caused the Government to seek a base for the Marines other than Okinawa, where controversy has attended their continued presence.

6. What Plaintiffs do contest is Defendants' decision to choose Pãgat Village and its surrounds as the site of the firing range complex (described antiseptically by DoN as the "Route 15" area, named after the road which transects the forests surrounding Pãgat, and which would have to be moved for the proposed firing ranges as part of the Navy's preferred

alternative). In comments on the EIS, Plaintiffs have identified alternative sites for the firing ranges which would be both reasonable and feasible, and which would avoid Pãgat Village and its surrounds. Defendants' failure adequately to evaluate these alternatives violates NEPA.

Specifically:

- (a) DoN refused to consider land not under DOD jurisdiction (except Pãgat), despite the explicit requirement under NEPA to examine alternatives **not** within the agency's jurisdiction;
- (b) DoN improperly dismissed from full consideration multiple reasonable alternative sites, which it had identified but then declined to carry forward for study as alternatives;
- (c) DoN improperly failed to examine the alternative of placing the firing ranges now slated for Pãgat on the Island of Tinian, despite the same EIS proposing that other firing ranges be located on Tinian;
- (d) DoN failed adequately to examine the impacts on the two sites (both at Pãgat) which it **did** carry forward through the FEIS and ROD, most specifically failing adequately to evaluate harm to the cultural resource values associated with Pãgat and the surrounding forests and caves; and

(e) All the while DoN failed to include in its alternatives comparison information contained elsewhere in the 24,000-page EIS, despite the requirement that the alternatives comparison be “based on” the information and analysis presented in the sections of the EIS dealing with the Affected Environment and the Environmental Consequences.

Defendants also violated NEPA with respect to their failure to devote substantial treatment to the proposal and alternatives to it; their failure adequately to examine the environmental consequences of its actions; their failures with respect to mitigation, incorporation by reference, and to recirculate its inadequate Draft EIS, as well as their inadequate Record of Decision.

Defendants further violated the NHPA by failing to complete the Section 106 consultations prior to project approval.

Defendants also violated the CZMA by:

- (a) Failing to submit a legally-adequate consistency determination at least 90 days prior to taking final agency action placing the firing ranges at Pãgat.
- (b) Taking final agency action that is inconsistent with the Guam Coastal Management Program.

## **JURISDICTION AND VENUE**

7. This action arises under NEPA, as amended, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, including the Council on Environmental Quality (CEQ) NEPA Regulations, 40 C.F.R. Parts 1500-1508; under the NHPA, as amended, 16 U.S.C. § 470f and its implementing regulations, 36 C.F.R. Part 800; and under the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*

8. Plaintiffs seek judicial review pursuant to Chapter 7 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. and Section 305 of the NHPA, 16 U.S.C. § 470w-4.

9. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361.

10. This Court may grant declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because a defendant in this action resides in this judicial district and a substantial part of the events or omissions giving rise to the claims occurred in this district.

## **PLAINTIFFS**

12. The mission of Plaintiff Guam Preservation Trust is to preserve and protect Guam's historic sites, culture, and perspectives for

the benefit of its people and its future. It was established by the Government of Guam in 1990 as a nonprofit public corporation to increase public appreciation of Guam's historic places. Guam Public Law 20-151. Its mandated purposes include seeking grants and donations for the acquisition of threatened historic properties as well as supporting activities directly related to increasing public appreciation of, and benefit from, historic places and cultural resources (including public interpretation and presentation). A central component of the Guam Preservation Trust's public interpretation program includes hosting events and performances in direct association with specific historic resources, distributing educational tools for teachers, and publicizing information regarding historic resources and their associations. Its board members and staff use and enjoy Pãgat, walking in the area and its surrounding forest and recalling their ancestors. The Guam Preservation Trust leads hiking tours to the key natural, cultural, and scenic resources at Pãgat -- asking permission to enter the sacred place before each visit. Its ability to enact its mission to preserve and protect Guam's historic sites, culture and perspectives is significantly impeded by the decision to build a live-fire range complex at Pãgat.

13. The Guam Preservation Trust commented in writing on the Environmental Impact Statement which is central to this action. As

required by the DoN's public instructions, these comments were submitted to the Naval Facilities Engineering Command in Pearl Harbor, Hawaii. The Guam Preservation Trust also met in Guam with representatives of Defendants, including Defendant Bice, to urge avoidance of damage to Pãgat Village by relocating the proposed live-fire range complex. The Guam Preservation Trust is spearheading efforts to designate Pãgat Village as the island's first conservation area.

14. Plaintiff the National Trust for Historic Preservation in the United States (National Trust) is a private, nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. 16 U.S.C. §§ 461, 468. With the strong support of its members across the nation, the National Trust works to protect significant historic sites including cultural resources and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has nine regional and field offices around the country, including its Western Office in San Francisco, California, which is specifically responsive to preservation concerns in Guam. The National Trust's members use and enjoy Pãgat, walking in the area and its surrounding forest and appreciating the cultural resources associated with the site. The National Trust commented in

writing on both the Draft and Final Environmental Impact Statement which is central to this action. As required by the DoN's public instructions, these comments were submitted to the Naval Facilities Engineering Command in Pearl Harbor, Hawaii. In addition, the National Trust participated as a consulting party for purposes of reviewing the action under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f; 36 C.F.R. §§ 800.2(c)(5), 800.3(f)(3), beginning in December 2009. The National Trust has also met on multiple occasions in Guam and in Washington, D.C., with representatives of Defendants, including Defendant Bice, to urge avoidance of damage to Pãgat Village. In addition, the National Trust included Pãgat Village in its *2010 List of America's Eleven Most Endangered Historic Places*, because of the threat from the live-fire training range complex.

15. We are Guåhan is a multiethnic organization, whose members consist of teachers, professors, students, attorneys, writers, artists, community organizers, and cultural practitioners. Formed in November 2009 as a response to the release of the Draft Environmental Impact Statement ("DEIS"), We Are Guåhan's mission is to conduct educational programming, facilitate research and disseminate information related to policies and issues affecting the people of Guam. We Are Guåhan has been actively engaged in both the NEPA and NHPA

processes. We Are Guåhan and its members have submitted comments on the Draft EIS, the Final EIS and the Programmatic Agreement (drafted for NHPA purposes but not signed). Over ten months, We Are Guåhan estimates that its lead organizers and other community volunteers have contributed over 6,000 hours of their time to: attending and engaging the community at every public hearing held on the DEIS, gathering over 10,000 signatures on a petition requesting that President Barack Obama address residents' concerns, mobilizing at least 200 people to three separate beautification projects at the possible sites for the firing range complex, conducting three educational tours of environmental resources threatened by the buildup, and bringing together over 800 people total to two rallies protesting buildup actions. Although formed in 2009, We Are Guåhan's members have longstanding connections to the proposed site of the firing range complex. These connections include owning land and homes in areas adjacent to and nearby the proposed firing range complex, and visiting and honoring the cultural and historical significance of Pãgat Village and the surrounding areas. We Are Guåhan has urged the Defendants to consider other alternatives for firing range complex and to consider the significant adverse impacts that the buildup as a whole will have on Guam's culture and cultural resources. To date, these requests have been ignored.

16. Joseph E. Quinata is the Chief Program Officer of the Guam Preservation Trust. He regularly visits Pãgat, often with his family, in order to enjoy the biological and cultural resources there and to commune with ancestors. He intends to continue such visits on a regular basis. Mr. Quinata values the serenity of Pãgat as well as his ability to directly access the area. Development of firing ranges in the area would fundamentally change the character of Pãgat and would interfere with Mr. Quinata's use and enjoyment of the site, as would imposition of restrictions on site access.

17. Dr. Marilyn Salas is a member of the Board of Directors of the Guam Preservation Trust and of its Board of Directors and serves as its Primary lead for issues related to Chamorro culture. She is also a member of the National Trust for Historic Preservation. Dr. Salas received her Bachelor's Degree and Masters in Education from the University of Guam and her Doctorate of Philosophy in Reading from the University of Arizona. She currently serves as Associate Professor at the University of Guam and is the Director of the Center for Chamorro Language and Culture in the University's Micronesian Area Research Center. Dr. Salas regularly visits Pãgat with her students to teach them about Chamorro culture, spiritual identity, and environmental values. Her visits must be timed to correspond with periods when plants of medicinal

value are in abundance. Being of Chamorro ancestry, Dr. Salas also has a deep spiritual connection to the cultural resources at Pãgat and visits the site to be personally inspired by its serenity. She plans to continue visiting Pãgat on a regular basis for these purposes and to use the site as a tool to build appreciation of Guam's culture.

18. Plaintiff Julian Aguon is an indigenous Chamorro activist, author, and attorney and a member of We Are Guåhan. He has written about the rich tradition of ancestor worship on Guam and the right of Chamorro people to access the graves of their ancestors and prevent desecration of the same. One such Chamorro tradition was to bury deceased relatives beneath the family home, which stood on latte stones. In his legal scholarship and writings, Julian has documented the common-law right to access the graves of one's ancestors and called for the protection of ancient Chamorro burial sites and ancestral human remains. Pãgat village has at least 20 latte sets, which indicates the presence of ancestral remains. Julian has visited and plans to continue visiting Pãgat. The construction of a firing range complex at Pãgat village would deny Julian, and other indigenous Chamorros, access to the graves of their ancestors. The construction of a firing range complex anywhere along Route 15 would also constitute a physical, psychological, spiritual, visual, and auditory desecration of ancestral burial sites and remains. In addition,

Julian is a cultural practitioner who chants at ancient burial sites throughout Guam, including Pãgat Village, and who intends to continue this practice into the future and to continue to visit Pãgat Village on a regular basis.

19. Jillette Torre Leon-Guerrero has been an active member of the National Trust since 2007. Leon-Guerrero received her Bachelor's Degree in Anthropology, with a minor in Micronesian Studies, from the University of Guam, and a Master's Degree in Human Relations from the University of Oklahoma. She was appointed to the founding Board of Directors of the Guam Humanities Council by Governor Joseph Ada in 1991 and served as its executive director from 1993 to 1996 and again from 1997 to 2005. Among her accomplishments with the Council was the founding of Guampedia.org, an online encyclopedia and community project which contains a comprehensive online encyclopedic resource about the history, culture and contemporary issues of Guam. She is also a past president of the Guam Women's Club and currently serves as the organization's historian. In addition, Leon-Guerrero is the founder of Guamology.org, a website dedicated to the promotion of the island of Guam, its people, culture, and environment, where she has written on the subject of Chamorro identity and values. Leon-Guerrero visits Pãgat on a recurrent and ongoing basis for educational purposes. Her use and

enjoyment of the cultural resources at Pāgat would be infringed by the DoN's construction of firing ranges at the site. Leon-Guerrero is particularly interested in how the site can be used as an educational tool and promote Chamorro identity and believes that any visual or auditory disruption of the landscape near Pāgat would be detrimental to this goal.

As a person of Chamorro ancestry, Leon-Guerrero appreciates the quiet, peaceful quality of the site and its connection to the past. She plans to return to Pāgat for educational purposes and any reduction of the hours that Pāgat is open for public use would affect her ability to enjoy the site.

### **DEFENDANTS**

20. Defendant Katherine Gregory, Rear Admiral, United States Navy, is the Commanding Officer of the Naval Facilities Engineering Command in Pearl Harbor, Hawaii, the Naval command responsible for receiving the public and agency comments on the Environmental Impact Statement which is the subject of the NEPA claims central to this litigation. As such she supervises the Navy's command publicly responsible for NEPA compliance with respect to that EIS. She is sued in her official capacity. Her official residence is in Pearl Harbor, Hawaii.

21. Defendant Kyle Fujimoto is sued in his official capacity with the Naval Facilities Engineering Command in Pearl Harbor, Hawaii, as the official responsible for receiving the public and agency comments on

the Environmental Impact Statement which is the subject of the NEPA claims central to this litigation. As such he is the Navy official publicly responsible for NEPA compliance with respect to that EIS. His official residence is in Pearl Harbor, Hawaii.

22. David Bice, U.S.M.C. (ret.), is the Executive Director of Joint Guam Program Office and has served in that position since 2007. On information and belief, he is responsible for planning, integration, development, budgeting, construction oversight, and strategic communications for the relocation of military forces to Guam. He is sued in his official capacity.

23. Jacqueline Pfannenstiel is the Assistant Secretary of the Navy for Energy, Installations, and Environment and, in that capacity, she executed the Record of Decision. On information and belief, the JGPO reports to her. She is sued in her official capacity.

24. Ray Mabus is the Secretary of the Navy and has served in that position since 2006. He is responsible for all the affairs of the Department of the Navy, including Energy, Installations, and Environment. He is sued in his official capacity.

25. Robert Gates is the Secretary of Defense and has served in that capacity since 2006. He is responsible for all Department of Defense activities, including the actions of the Department of the Navy. He is

sued in his official capacity.

26. The Naval Facilities Engineering Command, Pacific, is the Naval command responsible for receiving the public and agency comments on the Environmental Impact Statement which is the subject of the NEPA claims central to this litigation. It is the command publicly responsible for NEPA compliance with respect to that EIS. The Command is based in Pearl Harbor, Hawaii.

27. The Joint Guam Program Office has been tasked by the Department of Defense with facilitating, managing, and executing requirements associated with the relocation of Marine Corps assets from Okinawa to Guam. These responsibilities also include installation management functions at Andersen Air Force Base, Guam.

28. The Department of the Navy is responsible for compliance with NEPA, the NHPA, and CZMA with respect to the actions that are the subject of this complaint.

29. The Department of Defense is the parent department of the Department of the Navy and as such bears overall responsibility for compliance with NEPA, the NHPA, and CZMA with respect to the actions which are the subject of this complaint.

## **THE PROPOSALS**

30. DoN proposes to site five ranges for the firing of live

ammunition at the Pãgat Village site. These consist of a machine gun range, a Known Distance (KD) rifle range, a nonstandard small arms range (rifles and pistols), a MRF (rifle) range, and a pistol range. The machine gun range would accommodate both 7.62 mm and .50 caliber machine guns as well as MK19 40 mm projectiles (approximately 1.6 inches in diameter). Development of the firing ranges would require extensive grading and removal of native vegetation; construction of a variety of new buildings and structures, including outdoor bleachers and lighting; development of a network of new roads and parking lots; and installation of fencing, gates, towers, guard booths, and other security infrastructure. Moreover, operation of the firing ranges would close off existing public access to Pãgat and its surrounds, including access to the significant cultural resources at Pãgat Village and would adversely affect the cultural values which the Chamorro people associate with Pãgat and its surrounds. These activities would take place on a site with a number of sensitive environmental values, including rare and culturally-important plant species; habitat for endangered and threatened animal species; limestone forests; karst features; ecologically- and culturally-important groundwater resources; significant scenic and visual resources; and recreational facilities.

**APPLICABLE LAW**  
**NATIONAL ENVIRONMENTAL POLICY ACT**

31. The National Environmental Policy Act (NEPA) § 102(2)(C), 42 U.S.C. § 4332(2)(C), requires “responsible [federal] officials to prepare environmental impact statements (EISs) on proposals for legislation and other “major Federal actions significantly affecting the quality of the human environment.” Essentially NEPA and its “action-forcing” provisions require Federal agencies to look before they leap environmentally so that harmful environmental impacts can and will be avoided.

32. NEPA establishes a national policy to “prevent or eliminate damage to the environment and biosphere.” NEPA § 2, 42 U.S.C. § 4321. The Act recognizes “the critical importance of restoring and maintaining environmental quality,” declares that the Federal government has a continuing responsibility to use “all practicable means” to minimize environmental degradations, and directs that “to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act.” NEPA §§ 101(a), 102(1), 42 U.S.C. §§ 4331(a), 4332(1). The Act further recognizes the right of each person to enjoy a healthful environment. NEPA § 101(c), 42 U.S.C. § 4331(c).

33. NEPA specifically recognizes that it is “the continuing responsibility of the Federal Government to use all practicable means . . . to the end that the Nation may . . . preserve important historic, cultural, and natural aspects of our national heritage . . . .”

§ 101(b)(4), 42 U.S.C. § 4331(b)(4). EISs are to examine the impacts of Federal actions on the “human environment.” § 102(2)(C), 42 U.S.C. 4332(2)(C). All agencies of the Federal Government are to “utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment; . . .” § 102(2)(A), 42 U.S.C. § 4332(2)(A). The environmental impacts which must be studied in environmental impact statements include historic, cultural, and social impacts. 40 C.F.R. 1508.8(b).

34. Under Executive Order No. 11514 (March 5, 1970), as amended by Executive Order 11991 (May 24, 1977), §§ 2(g) and 3 (h), the CEQ has issued regulations binding on all Federal agencies for the implementation of the procedural provisions of NEPA. Those regulation (fully entitled “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act”) became effective in 1979 and binding upon all agencies, including DoN and DOD, as of that date. 43

Fed. Reg. 55,978-56,007 (Nov. 29, 1978), 40 C.F.R. Parts 1500-1508.

Each agency was required by the CEQ NEPA Regulations to adopt “procedures” to supplement those regulations. 40 C.F.R. § 1507.3.

35. Pursuant to the CEQ’s directive, the Navy adopted 32 C.F.R. Part 775.

36. Pursuant to CEQ’s directive, DOD has adopted its own NEPA procedures, including DOD instruction 4715.9.

37. For the reasons stated in paragraphs 1 through-36 above and 38 through 112 below, Defendants’ actions will cause irreparable injury.

38. The “heart” of the environmental impact statement is the alternatives analysis, under which agencies are required to present in comparative form alternatives to proposed causes of action which are to sharply define the issues such that decisionmakers and the public are provided a clear basis for choice among options. NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii), 40 C.F.R. § 1502.14; *see also* NEPA § 102(2)(D), 42 U.S.C. § 4332(2)(D). The relevant section of the CEQ NEPA Regulations, 40 C.F.R. § 1502.14, provides in pertinent part:

**§ 1502.14 Alternatives including the proposed action.**

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 1502.16), it

should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency . . . .

39. The CEQ NEPA Regulations provide that if a Draft EIS is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a corrected revised draft of the appropriate portions. 40 C.F.R. § 1502.9 (a).

40. The CEQ NEPA Regulations further provide that under stated circumstances an agency shall prepare supplements to either draft or final EISs. (Supplemental EIS or SEIS). 40 C.F.R. § 1502.9(c).

41. Clean Air Act § 309, 42 U.S.C. § 7609 (which, despite its title, is not confined to clean air), provides that the U.S. Environmental Protection Agency (US EPA) shall review and comment in writing on the environmental impact of any matter concerning which another agency prepares an EIS. In fulfilling those responsibilities US EPA rates both the

environmental impact of the proposed action and the adequacy of the information presented in the EIS.

### **THE NATIONAL HISTORIC PRESERVATION ACT**

42. Congress enacted the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.*, in 1966 to preserve America’s historic and cultural heritage. Congress specifically declared that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;” and that “the preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, esthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.” 16 U.S.C. § 470(b)(2), (4).

43. Section 106 of the NHPA requires all federal agencies to “take into account” the impact of their actions on historic properties, including sites listed on the National Register of Historic Places, and to do so “prior to” approving any action. 16 U.S.C. § 470f. Section 106 also requires that the agency afford the Advisory Council on Historic Preservation (“Advisory Council”) “a reasonable opportunity to comment” on the project. *Id.*

44. The Advisory Council on Historic Preservation has promulgated regulations implementing Section 106, which are binding on all federal agencies. 36 C.F.R. Part 800. The Section 106 regulations require the agency to engage in a consultation process that involves the State Historic Preservation Office, Advisory Council, Native American tribes, consulting parties, and interested members of the public. 36 C.F.R. §§ 800.1(a), 800.2.

45. Under Section 301 of the NHPA, the term “State” is specifically defined to include the Territory of Guam. 16 U.S.C. § 470w(2). Accordingly, the Guam Historic Preservation Officer qualifies as a State Historic Preservation Officer (SHPO) under the NHPA.

46. When an undertaking will adversely affect one or more historic properties, the federal agency must engage in consultation to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate [those] adverse effects,” 36 C.F.R. § 800.6(a). If the agency, the Advisory Council, and the SHPO are able to reach consensus on ways to resolve the adverse effects, that consensus is reflected in a written Memorandum of Agreement (MOA), which documents how the agency will avoid, minimize or mitigate adverse effects, through consultation with all consulting parties. 36 C.F.R. § 800.6. Where an MOA has been executed, it “shall govern the

undertaking and all of its parts.” 16 U.S.C. § 470h-2(*l*). The regulations also allow the agency to develop a Programmatic Agreement (PA), in lieu of an MOA, in the case of “certain complex project situations or multiple undertakings.” 36 C.F. R. § 800.14(b). In either scenario, the agency must fulfill its Section 106 responsibilities by executing the agreement “prior to” approving the project.

47. In the event the federal agency does not reach consensus on a Section 106 agreement, it may terminate consultation and seek final comments from the Advisory Council. Once the Council’s final comments have been issued, the head of the agency must personally respond and take into account the Council’s comments, again prior to reaching a final decision on the undertaking. 16 U.S.C. § 470h-2(*l*); 36 C.F.R. § 800.7.

48. The Section 106 regulations stress the importance of considering the effects of a federal project at the earliest possible time during project planning, “so that a broad range of alternatives may be considered during the planning process for the undertaking.” 36 C.F.R. § 800.1(c). The regulations reiterate the requirement that Section 106 review must be completed “prior to” the approval of any expenditure of federal funds on the project, and prohibit actions that may “restrict the

subsequent consideration of alternatives to avoid, minimize or mitigate” the project’s adverse effects on historic and cultural sites. *Id.*

### **COASTAL ZONE MANAGEMENT ACT**

49. The Coastal Zone Management Act (CZMA) requires that “[e]ach Federal agency activity...that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved States management programs.” 16 U.S.C. § 1456. To implement this mandate, the CZMA requires that any Federal agency proposing a project impacting the coastal zone (1) certify that such project is consistent with applicable coastal management programs and (2) submit that consistency determination for review by relevant state or local agencies at least 90 days prior to project approval. 16 U.S.C. § 1456; 15 C.F.R. §§ 930.31, 930.36. If the state or local agency objects to the Federal agency’s consistency determination, the Federal agency cannot proceed with the project. 16 U.S.C. § 1456; 15 C.F.R. § 930.43.

### **FACTUAL BACKGROUND**

50. Archaeological investigations have dated Pãgat Village to 700 A.D., and traditional knowledge indicates that occupation may stretch back 3000 years. This ancient coastal village of the Chamorro, the indigenous people of the Mariana Islands, stretches from the plateau of

the pristine limestone forest down to the rugged coastline of Guam, and has always been deeply connected to its host environment of land, water and sea. Tethered inextricably to its connection with an abundant fresh water supply, known as Pãgat Cave, an underground cavern, Pãgat (which means to counsel or advise in the Chamorro language) remains a cultural resource of exceptional importance to the Chamorro people. Pãgat as an archeological site contains the remnants of a large *latte* village (referring to the unique carved stone pedestals, *lattes*, upon which Chamorro buildings rested) that is believed to have been part of a larger exchange network among multiple historic sites (some of which have been defined, others of which await further research) along the coastline.

51. The larger Pãgat Village landscape includes a related site immediately to the north, Pãgat Point, which was likely an agricultural farming area for the prehistoric Pãgat Village settlement. Pãgat Point also includes the historic modern ranch or *lancho* of Juan Cepeda, who collects traditional plants in the limestone forest and coastal areas there in his role as *suruhano* or traditional pain doctor. *Suruhano* are “spirit counselors” or “medicine men” of the Chamorro culture, whose knowledge was and is passed from previous generations. The *suruhano* are believed to possess the ability to communicate with *tatoam ‘na* (ancestral spirits), as well as traditional knowledge of *tinanom* (plants) and *amot* (medicine).

*Suruhano* continue to exist to the present day, gathering medicinal plants and administering *amot* to the Chamorro community. The land not only provides the resources for the preservation of health, but of a traditional Chamorro knowledge based on the ecosystem.

52. Marbo Cave is situated immediately south of Pãgat Village and is regularly visited by members of the Chamorro culture and the resident community. It is filled with fresh water to depths of 50 feet. Visitors swim in the freshwater pool inside the cave (as they do at Pãgat Cave) and visit the archeological sites on the slopes below.

53. Physical and tangible remains from Pãgat Village itself include up to 20 *latte* sets and more than 50 mounds of artifacts and middens. There are also remnants of trails, more than 30 mortars and grinding areas, and an unknown number of caves and rock shelters. In addition to Pãgat Village, there are at least three other historic properties in the immediate area eligible for listing on the National Register of Historic Places.

54. To date only about 60% of the area around Route 15 (the highway that would have to be rerouted to proceed with Defendants' preferred alternative) has been surveyed for cultural resources.

55. Pãgat is the most publicly accessible of all ancient sites on the island of Guam that are not already controlled by one of the branches

of the Armed Services of the United States or in private ownership. Much of the firing range area itself is mapped by the Navy as appearing in the “medium probability” archeological resource area. The FEIS concludes that operation of the firing ranges at the selected site(s) would have an indirect effect on the historic properties on the coastal plain at Pãgat.

56. According to the FEIS, the training range would operate 7 days a week, 24 hours per day. Access to property associated with either Pãgat alternative would be limited to authorized personnel throughout much of the year.

57. The FEIS admits that “selection of the preferred alternative would cause the cessation of present activities on all the Pãgat recreation resources mentioned because the Known Distance (KD) Range Complex is proposed in that location.” The existing hiking trail to Pãgat would be closed to the public. According to the FEIS, there would be an “adverse socioeconomic impact to the community.” There would be “significant adverse impact on GovGuam due to land acquisition.” Significant noise impacts would occur.

58. Equally important as the physical manifestations of the Chamorro heritage is the Chamorro people’s relationships to their ancestors, whose spirits are believed to be present in Pãgat Village and the surrounding forest. To quote a portion of the 20,000 plus page FEIS (a

discussion not reflected among the factors that were evaluated in discussing and comparing alternatives to the Pãgat site):

Regardless of actual legal ownership designations, land on Guam also represents to native Chamorros a sense of place. The island of Guam is often referred to by them as *Tano y Chamorru* or the land of the Chamorros, a reference not to land ownership in the Western sense, but to spiritual ties that a people feel for the cultural birthplace -- in other words, where they belong. Ancient Chamorro beliefs do not place the dead in a higher or lower plane of existence. Instead, they believe that their ancestor's spirits remained in the world, that "a person's soul was *taifinakpo*' (without end) and that the *ante* (spirit) would return to the world its family still lived in with new powers and obligations." Significantly, the ancient Chamorro practice of animism, or the belief that everything in nature contains a spirit or soul, means that these spirits (ancestors) and thus people in general are interconnected and inextricable from nature. In addition, specific ancestral spirits are place-based, causing the need for the living, unfamiliar to certain spirits, to ask permission before entering certain areas.

59. The cultural and traditional significance of the historic Pãgat Village has been summarized in comments to the Navy by the Guam Preservation Trust:

The living traditions and customs of the Chamorro people and historic Pãgat village can be best described through the interrelationships between the people and the land and sea.

## **The People and the Land** *I Taotao yan I Tano*

The relationship between the Chamorro people and the land is paramount for it is through our ancestors or *Saina* that connects us spiritually and physically to the land. The Chamorro people believe that the ancient Chamorros, their ancestral spirits built the world and together (with present day Chamorros) continue to build the world each day.

The historic Pãgat village has all the attributes to clearly describe the relationship between the land and its people. The land lends itself to be from our ancestors, for it is passed down through generations. This is very evident in many villages that still maintain their ancestral lands and continue to pass on their lands to their children.

Also evident is the naming of land areas to represent the families (*As Tumbo*: Where Tumbo family lives) that had /or continue to maintain their land holdings.

The spirits of our ancestors are believed to also be

in one with the plants and animals of the land. The *Tronkon Nunu* or the Banyan tree is the dwelling place of our ancestral spirits. The *Tronkon Nunu* can be found in the historic Pãgat village. The tips of the hanging roots of the *Tronkon Nunu* are used for medicinal purposes. Other herbs and barks are used for medicine for infants, children, and adults. The *Suruhanu* or local healers communicate with the ancestral spirits and use the herbs and barks for medicine to heal the sick.

It is highly revered that whenever one enters a site where the spirits dwell, they must ask for permission before entering and for what purpose they are entering the site. This ensures the respect for the land and/or the sea.

### **The People and the Sea** *I Taotao yan I Tasi*

The Chamorro people have maintained the tradition of fishing for thousands of years. Fish is the main staple of food and this tradition has been passed from generations ago. Fishermen from Pãgat village and the surrounding area have been

fishing in the coast of historic Pãgat village, which is evident from archaeological surveys' findings of fish bones and fishing implements as well as from today's fishermen and their stories.

Traditional fishermen fish to supplement their family's diet as well as to provide for the traditional celebrations of births, funerals, and church events. The fishermen from the Pãgat region are more familiar with the waters off historic Pãgat village than other fishing sites on Guam. The connection between the people and the sea is through the passing of traditions through generations. Although fishing skills and methods have changed over the years, the fishing sites and the knowledge of the sites as well as the species of fish that thrive from those respective sites have been passed on to generations.

60. As well as being listed on the National Register of Historic Places for over 36 years, and as well as being included on the National Trust's 2010 list of the 11 Most Endangered Historic Places in America, Pãgat Village is, according to the FEIS, "of special note because of the

intensity of academic research which has been conducted there over the past half century.” Few sites have received that level of attention on Guam. The Governor of Guam has commented that putting firing ranges at Pãgat will preclude school field trips, significantly impact traditional fishing, and significantly impact recreational resources. The Vice Speaker of the Guam Legislature in his comments stated that “Cultural sites are integral to the preservation of our cultural heritage, to the positive self-concept of our native children, and the tourism industry that sustains our island’s economy.”

61. On September 13, 2010, the Legislature of Guam unanimously passed Resolution 444 directing that Pãgat “***shall not be used for a firing range complex*** and that its historic value and cultural significance must be preserved.” (Italics and bold in the original.) The Navy’s NEPA Record of Decision (ROD) addresses Resolution 444, which specifically opposes siting at Pãgat, without ever mentioning Pãgat in connection with the Resolution (while simultaneously selecting Pãgat as the site of the firing range complex).

62. As set out in paragraph 4 above, the Navy prepared its Environmental Impact Statement on “Guam and CNMI Military Relocation, Relocating Marines from Okinawa, Visiting Aircraft Carrier Berthing, and Army Air and Missal Defense Task Force.” The Draft EIS

was made public on November 20, 2009, with comments to be provided to NAVFAC in Hawaii.

63. The U.S. Environmental Protection Agency (EPA) is charged under sec. 309 of the Clean Air Act, 42 U.S.C. 7609, with reviewing and evaluating every other agency's EISs. EPA rated this DEIS as "Environmentally Unsatisfactory" and "Inadequate Information (E4-3)," the lowest possible ratings.

64. On July 26, 2010, Plaintiffs and their counsel met with representatives of Defendants. At that meeting at Tumon Bay, Guam, Plaintiffs were represented by the Program Director of the Guam Preservation Trust, the Director of the Western Regional Office of the National Trust for Historic Preservation, the Regional Counsel of that organization, and Plaintiffs' outside counsel. The representatives of the Guam Preservation Trust and the National Trust and outside counsel made oral presentations to Defendants and their representatives, who included the Deputy Under Secretary of Defense; Defendant David Bice, Major General, U.S.M.C. (ret.), and Executive Director of the Joint Guam Program Office (JGPO); and approximately 10 other officials and lawyers. After Plaintiffs' presentations General Bice asserted that training was essential for the Marines (with which Plaintiffs take no issue) and that included training with weapons including machine guns and rifles (with

which Plaintiffs take no issue), and that proximity to Asia was critical (with which Plaintiffs take no issue), and then pointed sequentially at several of Plaintiffs' representatives and asserted that if the firing ranges were not located where the Marines wanted them (Pågat Village), "Your children will die," repeating the phrase as he pointed at different individuals.

65. The Final EIS was then released on July 28, 2010. Again comments were due to NAVFAC in Hawaii to be provided in the 30 day period set out by law. 40 C.F.R. § 4503.1 (d) and 1506.10. Both the Guam Preservation Trust and the National Trust provided such comments.

66. The Record of Decision (ROD) was then signed on September 21, 2010. The ROD represents final agency action with respect to Pågat by narrowing the alternatives remaining under consideration to two -- both at Pågat. Specifically the ROD states:

- a. Relative to construction and operation of a live fire training range complex on Guam DoN has elected to defer selection of a specific site in the Route 15 area [Pågat] pending completion of the [NHPA] Section 106 consultation process . . . . Alternative A remains DoN's preferred alternative." (Emphasis added.).
- b. "There are two alternatives for the location of live fire training ranges, both located on the Route 15 area."

- c. “Upon completion of the Section 106 consultation process and selection of a specific site in the Route 15 are [sic] for the construction and operation of a live fire training range complex, access to Pãgat site will be reduced . . . .”
- d. “Upon completion of the Section 106 consultation process under the NHPA and selection of a specific site for the construction and operation of a live firing range complex in the Route 15 area, stakeholder representatives . . . will be invited to consult on an access plan . . . .”
- e. Under “Alternatives Selected” the following appears:
- “As noted earlier, DoN has elected to defer selection of a specific site for the construction and operation of a live fire training range complex in the Route 15 area on Guam pending completion of the Section 106 consultation process under the National Historic Preservation Act (NHPA). Likewise, a selection regarding implementation of a roadway improvement project calling for a realignment of Route 15 is hereby deferred pending selection of a specific site for the construction.” (Emphasis added.)

- f. After selecting Pãgat for the firing ranges, the ROD limits future discussions to the terms of access to the chosen site. “DoN commits within the ROD that it will coordinate with Gov Guam officials on the development of an access plan [to the Pãgat historical site] that provides access to the greatest extent practicable and that will seek public input and hold public meetings on the development of the plan.”
- g. This ROD took final agency action to address the issues relevant to the Marines’ relocation to Guam (including the siting of the firing ranges at Pãgat), but explicitly did not take final agency action with respect to the Navy’s desire to enable the berthing of visiting aircraft carriers at Guam (a project which would involve the removal of coral reefs). That Navy decision was postponed pending the outcome of further studies pursuant to NEPA.

67. DoN proposes to develop at the Pãgat site five separate firing ranges, including machine gun and rifle ranges, to be used by the Marines and others. DoN anticipates that annually 10,134,750 rounds will be fired at the ranges, and that 1013 rounds or fragments could fall outside the target area but within the Surface Danger Zone (SDZ), an area essentially encompassing Pãgat Village. This works out to approximately three rounds falling on Pãgat every day.

68. The land proposed to be taken for the firing ranges is currently owned 42% by the Guam Ancestral Lands Commission (GALC), 25% by the Chamorro Land Trust Commission (CLTC), 25% by the Government of Guam, and 8% by private owners. The GALC and CLTC are both charged with administering ancestral Chamorro lands. The GALC has a mandate to transfer ancestral Chamorro land back to their original owners or heirs. The CLTC is responsible for the administration of public land in a manner that will advance the social, cultural, and economic well-being of the Chamorro people.

#### **VIOLATIONS OF LAW NEPA -- ALTERNATIVES**

69. There are five legal deficiencies associated with DoN's treatment of alternatives under NEPA, any one of which must necessarily lead to rejection of the section of the NEPA FEIS dealing with alternatives, 40 C.F.R. § 1502.14. Specifically:

- a. DoN did not even look at certain reasonable alternative sites impacts because *ab initio*, it refused to consider land not under DOD jurisdiction (except, of course, at Pãgat);
- b. DoN improperly dismissed from full comparison multiple reasonable alternative sites which it had identified but then declined to carry forward for study as alternatives;

- c. DoN improperly failed to examine the alternative of placing the firing ranges slated for Pãgat on the Island of Tinian, despite the fact that DoN plans to place other firing ranges there;
- d. DoN failed adequately to examine the two action sites (both at Pãgat), which it did carry forward, most particularly ignoring the cultural resource values, discussed above, associated with Pãgat and the surrounding forest and caves;
- e. All the while DoN failed to include in its alternatives comparison information contained in other portions of the 20,000-plus page FEIS -- presumably drafted by other preparers.

### **COUNT I**

Violation of National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. § 1502.14(c) (obligation to consider alternatives not within the jurisdiction of the lead agency) -- Failure to Even Consider Reasonable Alternatives in the EIS Because They Were Not on DOD Land

70. Plaintiffs repeat and incorporate all the allegations contained in paragraphs 1 through 69 above and 72 through 112 below.

71. Under NEPA DoN must evaluate and compare “all reasonable alternatives.” 40 C.F.R. § 1502.14. DoN failed to evaluate -- or even to advance in the alternatives comparison -- at least the following

reasonable alternatives:

- a. Placement of the firing ranges on Guam on non-governmental (including non-DOD) lands. This extraordinary decision, directed at the outset by a “verbal” directive from a DOD official, excluded from consideration reasonable alternative sites without ever examining them -- in direct violation of 40 C.F.R. § 1502.14(c), which requires agencies to “examine reasonable alternatives not within the jurisdiction of the lead agency.” DoN explicitly and consciously failed to consider sites not within the jurisdiction of the Defense Department (except, of course, for Pãgat). The EIS then proceeded to prefer the Pãgat sites, which are the only firing range sites not on DOD land that were considered. No other alternative sites not on governmental land were considered. Examples (non-inclusive) of reasonable alternatives which DoN by its *a priori* decision not to examine non-DOD lands, failed even to look at include:

- i. Piti West Coast: Current private Shooting Range across Polaris Point.
- ii. Pago Bay Post WWII Firing Range: Located in the current development. Developer is selling parcel lands for gated community.

iii. Agat Southwest Coast: 1990 proposed multi-development for hotel, golf course, marina, etc.

iv. Inarajan Southeast Coast: 1990 proposed multi-development for hotel, condominiums, townhomes, marina, golf course, etc.

The locations of these four reasonable alternative sites were set out with particularity in a map showing Other Alternate Sites for Firing Ranges submitted as part of Plaintiffs' comments on the EIS. (In doing Defendants' work for them by identifying reasonable non-DOD lands alternatives, Plaintiffs in no way concede that it is their obligation to set out alternatives. Indeed, NEPA squarely places that obligation squarely on the agency. NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C).)

- b. Use of increased virtual training instead of building actual ranges on Guam. Plaintiffs are informed that the prior Commandant of the Marine Corps favored such virtual training, and he too must be presumed to be a reasonable person advocating a reasonable alternative.
- c. The FEIS does not address the issue of alternate sizes for the firing ranges. The Navy's current proposal (for Pãgat) involves five times as much land as was earlier called for.

- d. Throughout, the Navy appears to have made up its mind before the NEPA process. In July, 2008 -- well over a year before release of the DEIS -- a Draft Guam Joint Military Master Plan was issued, indicating the arcs of firing ranges in the Pãgat area (prior to completion of the NEPA process).. That does violence to NEPA.
- e. In its ROD DoN mentioned and dismissed the alternatives set out in this paragraph, thereby denying the public the opportunity to comment on those alternatives.

## **COUNT II**

Violation of National Environmental Policy Act, § 102 (2)(C), 42 U.S.C. § 4332 (2)(C), and 40 C.F.R. 1502.14 (a) (improper discarding of reasonable alternatives without full analysis)

72. Plaintiffs repeat and incorporate all the allegations contained in paragraphs 1 through 71 above and 74 through 112 below.

73. Under NEPA the agency must “rigorously explore and objectively evaluate all reasonable alternatives” but may eliminate ones that are not reasonable. 40 C.F.R. 1502.14(a). Agencies are to “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.” Here DoN proceeded to discard every potential site on existing DOD lands (although 27 percent of Guam’s property is currently held by DOD,

40,000 of the 147,000 acres on Guam).

- a. DoN did so in the most cursory manner imaginable, thereby bypassing the “rigorous” evaluation (1502.14(a)) required of all alternatives in an EIS -- this dispositive winnowing enabled DoN to avoid that detailed scrutiny of all the alternatives it identified (except the two Pãgat alternatives (which, as detailed below, were inadequately evaluated) and the no-action alternative). The document gives every impression of one calculated to suggest a predetermined result (*e.g.*, Navy’s request for funds to reroute Route 15 as part of its preferred alternative).
- b. Moreover, in deciding which alternatives to carry forward for analysis the Navy -- for inexplicable reasons -- considered “Cultural Resources” in deciding where to locate firing ranges on Tinian but did not consider Cultural Resources in deciding where to locate firing ranges on Guam:
  - In the Tinian volume of the FEIS the Navy set out “Step 4 Selection of Alternatives Carried Forward for Analysis” and proceeded to list five criteria for deciding which to carry forward, one of which was: “Cultural Resources: Considerations were made for options that would avoid or minimize impacts to known cultural resources.”

- In the Guam volume of the FEIS, the Navy again set out “Step 4 -- Selection of Alternatives Carried Forward for Analysis,” continuing to say that “Three criteria were identified as necessary to make an alternative reasonable” and then omitted any mention of Cultural Resources.
- c. By way of further example, DoN cites as a reason for discarding certain reasonable alternatives that the potential sites were species recovery areas, without mentioning that the Pãgat sites are similarly used as recovery areas. *Compare* FEIS Vol. 2 at 2-75 (Finegayan unsuitable due to recovery habitat) *with id.* at 10-122 to 10-138 (Pãgat firing ranges would destroy hundreds of acres of recovery habitat for species like the Mariana Crow, Mariana Fruit Bat, and Micronesian Kingfisher.)
- d. At least the following sites appear to be “reasonable” alternative sites which should be carried forward and placed into the alternatives comparison adequately to comply with federal law. While the Marines may wish to have their own rather than Air Force or Navy land (and the Air Force and the Navy may just as soon not have the Marines on their bases), we are, after all, one country with one Department of Defense, whose duty it is to tell the various warring services to do what is best for the people of

Guam and of the rest of America and to follow the law created by Congress for this sort of analysis -- the National Environmental Policy Act. These sites include:

- Navy Munitions Site (NMS). Marine Major General David Bice, Executive Director of JGPO, has said that “the Naval Munitions Area is suitable for the live firing range proposed for Guam;”
- NCTS Finegayan (an alternative supported by the Governor of Guam;
- Andersen AFB - Tarague Beach (the site of an existing Air Force firing range). Marine Corps personnel have also stated that Tarague Beach is a suitable site for the live fire training ranges.
- Andersen AFB - Northwest Field;
- Andersen South;
- Air Force Barrigada; and
- Navy Main Base - Orote Point.

The Navy’s dismissal of these alternative sites can only be described as cursory at best. Lists of reasons why a given site is to be dismissed are set out, but without analysis of them. (It is important to bear in mind that the considerations bearing upon

the choice of alternatives must be included in the NEPA EIS, not in some extrinsic briefing paper or post EIS document that does not permit public comment.) All the sites have their upsides and downsides, but the “dismissal” section of the FEIS does not elaborate on them and compare them. Even the preferred site, Pãgat, is characterized as “not meeting every suitability and feasibility criteria . . . .” One alternative is dismissed in part because of an impact to an overlay refuge, but no comparison is made to Pãgat, which is itself a recovery habitat for multiple species. As the Guam Bureau of Statistics and Plans pointed out to the Navy in its DEIS comments, travel times to firing ranges are not an issue given the small size of Guam.

### **COUNT III**

Violation of National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. 1502.14(c) (obligation to consider reasonable alternatives) -- Failure to Consider the Reasonable Alternative of Siting the Firing Ranges on Tinian, Where DoN Plans to Place Other Firing Ranges

74. Plaintiffs repeat and incorporate all the allegations contained in paragraphs 1 through 73 above and 76 through 112 below.

75. Under NEPA DoN must evaluate and compare “all reasonable alternatives.” 40 C.F.R. § 1502.14. DoN failed to examine the following location as an alternative site for the firing ranges now planned to be located at Pãgat Village:

- a. Placement of some or all of the firing ranges on the nearby island of Tinian. This unexamined alternative is supported by the Speaker of the Guam Legislature, the Chair of the Guam Legislative committee on Homeland Security, the Member of Congress (Delegate) from Guam, and Senator Jim Webb (VA), himself a former Marine, Secretary of the Navy, and military planner on Guam -- presumably all “reasonable” people, supporting this “reasonable alternative.” Plaintiffs are informed and believe that the government of Tinian supports further Marine buildup on that island. As the FEIS states with respect to Tinian, “The land . . . could be developed to accommodate live-fire ranges.” Indeed, a whole volume of the FEIS, Vol. 3, is devoted to the “proposed development of live-fire ranges” on Tinian. Amazingly, however, while treating Tinian as a location for supplemental firing ranges, the FEIS fails to treat it as even an alternative for the firing ranges now planned for Pãgat

Village. Tinian is clearly a reasonable alternative site for the ranges.

#### COUNT IV

Violation of National Environmental Policy Act, § 102 (2)(C), 42 U.S.C. § 4332 (2)(C), and 40 C.F.R. 1502.14 (a) (failure to “rigorously explore and objectively evaluate all reasonable alternatives)

76. Plaintiffs repeat and incorporate all the allegations contained in paragraphs 1 through 75 above and 78 through 112 below.

77. NEPA requires that an agency “[r]igorously explore and objectively evaluate all reasonable alternatives . . . .” 40 C.F.R. § 1502.14(a). This the DoN did not heed. Instead it managed not ever to look at certain reasonable alternatives (*see* paras. 70-71 above) and dismissed without adequate analysis further reasonable alternatives (*see* paras. 72-73 above). Then, when it had eliminated these sites from the rigorous comparisons demanded by NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C), and by the CEQ NEPA Regulations, 40 C.F.R. § 1502.14, DoN proceeded to do a legally inadequate job of examining the impacts on the only two action alternatives it did carry forward -- the two Route 15/Pågat sites.

By way of example of the FEIS' total failure to examine the Pãgat alternatives' impacts, thereby impermissibly skewing the comparison of alternatives:

- a. Cultural resources -- impact on sacred site. The cultural resource values associated with Pãgat Village and its surrounds, are described in paragraphs 1 through 3, 6, 30, and 50 through 61 above. Amazingly, while aware of those values, the Navy chose to exclude them from the comparison of alternatives. Nowhere does the FEIS accurately map the Pãgat area. The three relevant variables -- (1) the sites of the firing ranges and their SDZs (Surface Danger Zone -- where stray bullets and fragments are expected to fall); (2) the cultural sites in and near Pãgat Village, including *latte* sites, Pãgat Cave, Pãgat Point, Pãgat trail, and surrounding forest including the sites of the medicinal herbs used by the *suruhanu*; and (3) the ownership of the land do not appear together on one map in the FEIS, and the 2<sup>nd</sup> and 3<sup>rd</sup> variables do not appear at all. (See 40 C.F.R. § 1502.8. CEQ encourages the “use of appropriate graphics” so that decisionmakers and the public can readily understand them.)

b. Condemnation.

- The FEIS fails altogether to grapple with the realities of condemnation -- essential at Pagat but not at DOD lands -- when the Legislature of Guam has declared it to be “absolutely” opposed to the use or threat to use condemnation of any Guam land, public or private, “for any purpose whatsoever related to the planned military buildup . . .” (Guam Senate Resolution 258).

c. Groundwater Impacts

- The Final EIS is also inadequate in that it fails to evaluate — or even to specifically acknowledge — the potential impact of the firing ranges on groundwater quality and quantity at the freshwater caves in the Pãgat Site Complex. Pãgat contains multiple National Register-eligible historic and cultural resources, and the Navy concedes that the site qualifies as a Traditional Cultural Property (both as an “archaeological site” and as a “non-archaeological property”).
- One of the most important features of Pãgat—both to the ancient Chamorro and to present-day visitors who use the

site for cultural purposes—is a system of caves filled with fresh water. These caves were the sole source of fresh water for the ancient inhabitants of Pågat, and have been identified as a contributing element to the site’s status as a Traditional Cultural Property. *Id.* Despite the undisputed importance of these freshwater caves, the FEIS does not evaluate the extent to which construction and operation of the firing ranges might affect groundwater availability and quality at Pågat. This is a major failure. There is considerable evidence in the EIS that the groundwater at Pågat might be especially vulnerable to contamination and/or diminution as a result of the firing ranges.

- > At Pågat, karst features “are present throughout the area”;
- > “The fast flow of water through the joints and planes of the epikarst does not allow for adsorption, uptake, or microbial processes to remove pollution from groundwater”;
- > “Potential groundwater impacts associated with construction activities include spills, leaks, and sedimentation...that can contribute to groundwater

contamination, [as] well as direct contamination of groundwater resources through percolation”;

- > “The possible impacts connected with operational activities include increases of impervious areas, waste-generating activities, storage of potential contaminants....decreases in groundwater recharge...and saltwater intrusion”;
- > Firing range operations would involve approximately 640 pounds of hazardous materials per year. (This estimate appears (1) arbitrary and (2) unreasonably low.) The estimate appears to be based on the assumption that Guam’s firing ranges would “result in a hazardous material disposal rate of 2% of the known Okinawa rate.” But there is no substantiation for that assumption. And the “known Okinawa rate” appears to refer to *hazardous waste disposal* rather than *hazardous material use*, a critical distinction in light of the fact that some substances used at firing ranges are considered “hazardous materials” but do not, by law, become “hazardous wastes.” Moreover, the Navy’s own hazardous materials/waste estimates for

the Tinian firing ranges are orders of magnitude higher than those presented for the ranges proposed for Pãgat. (4,480 lbs of hazardous materials per year and 90,160 lbs of hazardous waste per year));

- > “Range operations have the potential to leach ammunition and pyrotechnic contaminants to the water”;
- > Construction of the proposed firing ranges would involve extensive grading and fill, and would re-shape the topography of the bluff above the Pãgat Site Complex;
- > Groundwater flows from the site of the proposed firing ranges toward the Pãgat Site Complex;
- > Several of the potential mitigation measures identified for the central part of the island could have significant impacts on the soils/geology of the Route 15 area.

The impacts of these measures are not addressed.

Under these circumstances, it is reasonably foreseeable that the firing ranges could affect the amount and/or quality of the water in Pãgat’s freshwater caves.

Therefore, DoD’s failure to evaluate that potential impact

was arbitrary and capricious. 40 C.F.R. §§ 1502.16, 1508.8.

- DoN also failed to comply with its responsibility to identify, evaluate, disclose to the public, and mitigate the potential impacts of the firing ranges on groundwater at Pågat. The Navy’s attempt to invoke Best Management Practices (BMPs) and/or Low Impact Development Measures (LID) are not adequate to satisfy this responsibility.
  - > First of all, the EIS does not contain sufficient information about the proposed firing ranges to permit a determination about the extent to which BMPs and/or LID could mitigate potential impacts. While the EIS includes a small schematic image indicating that the firing ranges will significantly alter the topography of the bluff above Pågat, it does not contain any meaningful detail explaining how much grading, paving, trenching, and construction will be done as part of the construction of the firing ranges or where, on the site, those activities will take place. Indeed, by the Navy’s own admission, there has been no “site-specific geotechnical investigation” for the

land on which the firing ranges would be sited. The United States Environmental Protection Agency has already informed DoD that the Navy's vague promises to comply with BMPs do not constitute adequate mitigation measures in light of the absence of site-specific information in the EIS.

- > Second, the FEIS' brief discussion of the potential effectiveness of the Navy's BMPs does not appear relevant to the proposed firing ranges. For example, the "success percentage" listed for "metals" does not address lead, the primary "metal" of concern at the firing ranges. Similarly, some of the BMPs identified in the analysis appear are acknowledged to be inappropriate for the karst environment in which the firing ranges are proposed to be sited.
- > Third, although the appendices to the FEIS contain a "Final Low Impact Development Implementation Study," that study does not address the proposed firing ranges or the Pågat site.
- > Fourth, there are numerous documented instances of soil and groundwater at military firing ranges.

> The United States Environmental Protection Agency's comments on the Draft EIS identified many of the same deficiencies identified above. The fact that the EIS preparers did not see fit to fix the fundamental problems identified by a federal agency with plenary authority over environmental quality is a violation of NEPA.

d. Environmental Justice

- Executive Order 12898 requires that the EIS identify and address “disproportionately high and adverse human health or environmental effects” on “minority populations” in “the United States and its territories and possessions.” For purposes of the Executive Order, “minority populations” include “Pacific Islanders” like the Chamorro.

> The FEIS contains a section in which environmental justice is discussed, but that discussion is based on a flawed analytical approach. First, the FEIS improperly restricts environmental justice concerns to children and low-income families. It does not consider disproportionate impacts on the Chamorro

community to be environmental justice impacts, despite the fact that the Chamorro are, quite plainly, a minority population

- > Second, the FEIS improperly excludes from analysis all potential environmental justice impacts related to the following resources: geology and soils, water resources, air quality, airspace, biological resources, cultural resources, visual resources, marine transportation, and hazardous materials. DOD's rationale for doing so — that impacts on these resources have already been deemed less than significant with respect to *the broader environment* — misses the very point of an environmental justice analysis. The environmental justice analysis in an EIS must focus on whether an impact will disproportionately affect *a minority community*. Here, there is a clear, significant impact on Pãgat, an acknowledged historical and cultural resource. Pãgat is an important resource precisely because of its value to a minority community. Therefore, a significant, unmitigated impact on Pãgat will, by definition,

disproportionately affect a minority community.

Executive Order 12898 necessarily implies respect for and acknowledgment of the customs and sacred places of minority communities. Both were ignored in the environmental justice section of the EIS.

- The proposed action includes a large, indisputably noxious land use — namely, a complex of five live-fire training ranges for the USMC and others. The firing ranges will be built on a small island with a significant minority population rather than elsewhere in the United States. By DoN’s own admission, the area of the island chosen for the firing ranges has an extremely high percentage of racial and ethnic minorities (96%). And, most importantly, the specific site chosen for the 1000-plus acre firing range complex significantly impacts a minority group’s Traditional Cultural Property. On its face, this is a significant environmental justice impact that demands (1) a good-faith effort to find another site for the firing ranges and (2) if (and only if) avoidance is truly impossible, a meaningful attempt to disclose and mitigate impacts. To conclude otherwise — as DoD has done here

— is plainly arbitrary and capricious.

## COUNT V

Violation of National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. § 1502.14 (failure to base alternatives comparison on information and analysis which actually appears elsewhere in the EIS)

78. Plaintiffs repeat and incorporate all the allegations contained in paragraphs 1 through 77 above and 80 through 112 below.

79. 40 C.F.R. § 1502.14 provides in pertinent part:

“This section [Alternatives Including the Proposed Action] is the heart of the environmental impact statement. Based on the information and analyses presented in the sections on the Affected Environment (sec. 1502.15) and the Environmental Consequences (sec 1502.16), it should present the environmental impacts of the proposed and the alternatives in comparative form, thus sharply defining the issues and presenting a clear basis for choice by the decisionmaker and the public.”  
(Emphasis added.)

This was not done. The discussions of the Affected Environment and the Environmental Consequences presented information concerning Pågat (militating against the selection of the Pågat sites)) that simply does not appear in the Alternative analysis -- the “sharp defini[tion] of issues and present[ation] of a clear basis for choice . . . .” Far from being “based on” information elsewhere in the 20,000-plus page EIS, the Alternatives discussion is oblivious to it, seemingly written by different people who

failed to communicate with one another.

- a. The FEIS does purport to identify “mitigation” for the impact on the cultural resources, but that mitigation is to be imposed on the selected Pãgat site -- it comes after the deficient alternatives analysis and assumes a site at Pãgat is chosen. It deals with how to take a stab at cleaning up spilt milk rather than how to avoid spilling the milk in the first place, the purpose of NEPA.
- b. The centerpiece of the Navy’s mitigation proposal is a vague promise to prepare an “access plan.” But no such plan will be prepared until some time in the future. Other mitigation proposals in the FEIS are even less reasonable. For example, the Navy proposes to mitigate impacts on cultural resources by preparing a “synthesis” of all cultural resources data gathered during the NEPA process. But preparation of a synthesis is not mitigation. Nor does the Navy’s proposed “Cultural Landscape Report for the Northern Limestone Plateau” constitute mitigation; rather, it is a study that should have been prepared as part of the NEPA process.
- c. Similarly, the FEIS discusses the impact of firing ranges on Tinian (FEIS Vol. 3), but then fails to relate that to the discussion of alternative sites for the firing ranges on Guam.

d. In short, DoN has flaunted the command of § 1502.14 requiring that the alternatives analysis be based on the Affected Environment and Environmental Consequences discussions in the FEIS. In its alternatives analysis and its selection of the preferred alternative the Navy has ignored what the Navy knows.

**NEPA VIOLATIONS  
(OTHER THAN ALTERNATIVES)**

**COUNT VI**

Violation of the National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. § 1502.14 (failure to devote “substantial treatment” to the proposal (and alternatives to it) and “rigorously explore” each of them)

80. Plaintiffs repeat and incorporate all the allegations contained in paragraphs 1 through 79 above and 84 through 112 below.

81. 40 C.F.R. §§ 1502.14(a) and (b) require that the proposed action and the alternatives to it shall each receive “substantial treatment” and that each shall be “rigorously explore[d].”

82. DoN’s description of its proposed action (project description) is insufficiently detailed to allow an evaluation of reasonably foreseeable environmental consequences of the live-fire training ranges. For example, there is insufficient detail about the layout of the ranges to determine

which areas will be paved, which areas will be graded, where the various berms will be located, what the impacts of development on the surface will have on groundwater (and hence on Pâgat Cave, the freshwater supply for Pâgat Village), and which areas will retain their existing vegetation/appearance. As a result, it is not possible to determine (for example) what sort of environmental impacts might result from the new drainage pattern, how the appearance of the area will be changed, and how much native vegetation will be lost.

83. The EIS does not use existing conditions as an environmental baseline. Instead, it improperly assumes that the Mariana Islands Range Complex (MIRC) action will be fully implemented before implementation of the Marine Relocation project begins.

## COUNT VII

Violation of the National Environmental  
Policy Act, § 102(2)(C), 42 U.S.C. §  
4332(2)(C), and 40 C.F.R. § 1502.16  
(Environmental Consequences)

84. Plaintiffs repeat and incorporate by reference all the allegations contained in paragraphs 1 through 83 above and 87 through 109 below.

85. 40 C.F.R. § 1502.16 states (in full):

Environmental Consequences.

This section forms the scientific and analytic basis for the comparisons under Sec. 1502.14 [dealing with alternatives]. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in Sec. 1502.14. It shall include discussions of:

(a) Direct effects and their significance (Sec. 1508.8).

(b) Indirect effects and their significance (Sec. 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See Sec. 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under Sec. 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under Sec. 1502.14(f)).

(Emphasis added.)

86. The EIS' analysis of the environmental impacts of Defendants' proposed action is inadequate in at least the following particulars:

- a. The EIS improperly assumes that impacts on Pãgat will be negligible. For example, the EIS concludes that “[c]onstruction [of the ranges] would not have a direct or indirect impact on the Pãgat Site Complex or Marbo Cave.” (Another statement elsewhere in the FEIS, quoted at paragraph 42 above, directly conflicts with this assertion in the FEIS.) This conclusion is indefensible, and arbitrary on its face, because DOD has not yet completed the process of assessing the effects of the firing range on historic properties pursuant to Section 106 of the National Historic Preservation Act. Without the concurrence of the historic preservation agencies, the DOD’s assumption of no direct or indirect impact cannot be substantiated.
- b. The EIS’ assessment of air quality impacts is inadequate:
  - i. The EIS uses an improper threshold of significance.
  - ii. The EIS does not consider total project emissions (all functions, all parts of the island) and impacts on air quality.
  - iii. The EIS appears to significantly underestimate air emissions. (*e.g.*, .1 tpy PM10 for the construction of the firing ranges).

- iv. The EIS does not address all indirect impacts of the proposed firing ranges (including, for example, waste and transportation). *Id.*
- c. The EIS contains conflicting data and conclusions with respect to noise impacts at Pågat. On one hand, the data presented in the noise analysis clearly shows that noise impacts at the site would be well above the identified threshold of significance. On the other hand, other portions of the EIS (for example, the environmental justice analysis) assume that noise impacts will be less than significant.
- d. The EIS' treatment of recreational resources is arbitrary and capricious. One portion of the analysis of recreational resources acknowledges that the ranges would have a significant impact on Pågat/Marbo. Another section comes to the opposite conclusion. In the end, no mitigation is proposed.
- e. The EIS' analysis of terrestrial biological resources at Pågat is fundamentally flawed because:
  - i. It ignores the National Marine Fisheries Service's comments indicating that the Pågat area may be habitat for sensitive turtle species.

- ii. DoN has not completed a survey of *Hertiera* plants at Pãgat.
- iii. The evaluation of the significance of impacts on recovery habitat concludes that once species are re-introduced, they should be monitored to ensure that the ranges do not create a significant impact. This analytical approach turns the purpose of recovery habitat upside down. The impact analysis should have determined whether the use of this land for firing ranges would prevent reintroduction in the first place; and
- iv. Proposed mitigation (creation of a limestone forest preserve in southern Guam (while Pãgat Village is in northern Guam)) seems inconsistent with environmental conclusions elsewhere in the FEIS (for example, preserving limestone forest in southern Guam, where there is little limestone forest).
- f. The EIS lists Pãgat Point as a scenic/visual resource, but does not evaluate the impact of the proposed project on that resource.
- g. The FEIS improperly concludes that construction impacts of the firing ranges “would not have a direct or indirect impact on the Pãgat Site Complex” because “the ranges would be located on

the limestone plateau west and more than 300 ft in altitude above the Pãgat site.” That conclusion is arbitrary and capricious in several respects:

- i. The EIS states that restrictions on access to Pãgat constitute a significant impact on cultural resources. The only current access to Pãgat is from Route 15. The EIS does not explain how anyone will be able to access Pãgat during the reconstruction of Route 15. And DoN has proposed no mitigation for access-related impacts to Pãgat during construction. Under these circumstances it is arbitrary and capricious to conclude that there will be no significant impact on Pãgat during the construction period.
- ii. The EIS briefly touches on the Navy’s planned destruction of “natural resources of cultural significance” during the construction process, ultimately concluding that any environmental impacts associated with such removal would be less than significant because “other areas of limestone forest on Guam also contain these resources.” But this brief “analysis” fails to consider that the “natural resources” in question derive a portion of

their “cultural significance” from the fact that they are *from Pågat*.

- iii. Even if (1) access and (2) “natural resources of cultural significance” remain unaffected by the construction process, the noise, dust, and visual changes associated with transforming Pågat into a large construction site will significantly affect the cultural resources there. The EIS fails to identify or evaluate any of these impacts.
- iv. The conclusion that construction would not have a direct or indirect impact on the Pågat Site Complex is inherently arbitrary and capricious on its face, because this conclusion was reached without being informed by the consultation and review process under Section 106 of the NHPA, 16 U.S.C. § 470f, and its implementing regulations, 36 C.F.R. Part 800. Although Section 106 review was initiated, it was not completed prior to issuance of the ROD, as required by law. In fact, Defendants did not even complete the process of assessing adverse effects on Pågat pursuant to 36 C.F.R. § 800.5 prior to issuing the ROD. Defendants’ unilateral conclusion in the FEIS that construction of the firing

ranges would have no direct or indirect impact on Pãgat, without being informed by the Section 106 process, or the expert views of the SHPO or ACHP, is inherently arbitrary and capricious.

- h. The FEIS fails adequately to discuss the cultural resource impacts of DoN's proposed actions as more particularly set out in paragraph 77(a) above.
- i. The FEIS fails adequately to discuss the condemnation impacts of DoN's proposed actions as more particularly set out at paragraph 77(b) above.
- j. The FEIS fails adequately to discuss the groundwater impacts of DoN's proposed actions as more particularly set out in paragraph 77(c) above.
- k. The FEIS fails adequately to discuss the Environmental Justice impacts of the DoN's proposed actions as more particularly set out in paragraph 77(d) above.

### **COUNT VIII**

Violation of the National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. §§ 1502.14(f), 1502.16(g), 1505.2(c), and 1508.20 (Mitigation)

- 87. Plaintiffs repeat and incorporate by reference all the

allegations contained in paragraphs 1 through 86 above and 90 through 112 below.

88. NEPA § 102(2)(C)(i), 42 U.S.C. § 4332(2)(i) requires the EIS to examine the environmental impact of the proposed action, while § 102(2)(ii), 42 U.S.C. § 4332(2)(ii) requires examination of the adverse impacts which cannot be avoided should the proposal be implemented. Measures to deal with the difference between the two -- with the impacts which can be avoided -- are termed “mitigation.” 40 C.F.R. §§ 1502.14(f) and 1502.16(h) require inclusion in the EIS of “mitigation” which is then defined in § 1508.20 (to include avoidance). 40 C.F.R. § 1505.2 (c) then requires the ROD to state whether “all practicable means to avoid or minimize environmental harm for the alternative selected have been adopted, and if not, why they were not.”

89. The EIS improperly relies on so-called “mitigation” measures, which certainly do not avoid and which do nothing in advance of the harm to mitigate the harmful impacts.

- a. The FEIS proposes several “mitigation measures” that will not be implemented until well after impacts are felt. For example, the “access plan” proposed as mitigation for loss of access to Pågat has not yet been prepared and there is no date by which it is promised. This leaves open the possibility that

significant impacts will remain unaddressed for significant periods of time.

- b. Similarly, the EIS fails to identify any performance standards/criteria or other evidence confirming that as-yet-undefined mitigation plans will be effective in reducing impacts. For example, the FEIS says nothing about what the proposed access plan for Pãgat will actually provide. There is no reason, therefore, to believe that impacts will be mitigated (even assuming that the provision of occasional access to a despoiled site constitutes mitigation).

### **COUNT IX**

Violation of the National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. § 1502.21 (incorporation by reference)

90. Plaintiffs repeat and incorporate by reference all the allegations contained in paragraphs 1 through 89 above and 92 through 112 below.

91. The EIS appears to rely upon another EIS, the Mariana Islands Range Complex (MIRC) EIS, but that reliance is improper because the MIRC EIS was not properly incorporated by reference. There is no evidence that the MIRC EIS was available for inspection and review

by the public during the review period on the relocation EIS. *See* 40 C.F.R § 1502.21. And, in any event, the relocation EIS does not identify the specific portions of the MIRC EIS purportedly incorporated.

### **COUNT X**

Violation of the National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. § 1502.9 (a) (duty to recirculate inadequate Draft EIS)

92. Plaintiffs repeat and incorporate by reference all the allegations contained in paragraphs 1 through 91 above and 94 through 112 below.

93. 40 C.F.R. § 1502.9 (a) provides “If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.” For the reasons stated in this complaint and because the U.S. Environmental Protection Agency, acting under its specific duties pursuant to 42 U.S.C. § 7609 (as described in paragraphs 36 and 50 above), found the DEIS to be both unsatisfactory and as providing inadequate information, the DEIS, as appropriately amended, or the appropriate portion of it, as similarly amended, must be recirculated and the FEIS and ROD set aside. DoN failed to do so.

## COUNT XI

Violation of the National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C), and 40 C.F.R. §§ 1505.2 and 1505.3 (Record of Decision)

94. Plaintiffs repeat and incorporate by reference all the allegations contained in paragraphs 1 through 93 above and 97 through 112 below.

95. 40 C.F.R. § 1505.2(a) provides that the Record of Decision shall “State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.”

96. Defendants in their Record of Decision failed to state whether all practical means to avoid or minimize environmental harm from the selected alternative have been adopted or to state why they were not adopted.

## COUNT XII

Violation of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f  
Failure to Complete Section 106 Consultation “Prior to” Project Approval

97. Plaintiffs repeat and incorporate by reference all the allegations contained in paragraphs 1 through 96 above and 105 through

112 below.

98. Section 106 of the NHPA prohibits federal agencies from approving any federal undertaking unless the agency first (1) takes into account the effects of the undertaking on historic properties; and (2) affords the Advisory Council a reasonable opportunity to comment on the undertaking. 16 U.S.C. § 470f. This provision unequivocally requires federal agencies to complete the Section 106 review process “prior to the approval” of the federal undertaking. *Id.*; *see also* 36 C.F.R. § 800.1(c).

99. The Advisory Council’s Section 106 regulations permit federal agencies to “negotiate a programmatic agreement to govern . . . the resolution of adverse effects from certain complex project situations . . . .” 36 C.F.R. § 800.14(b). “Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects . . . shall follow § 800.6.” 36 C.F.R. § 800.14(b)(3).

100. The Defendants elected to develop a programmatic agreement, in an effort to resolve the adverse effects associated with the large and complex undertaking related to the relocation of troops from Okinawa to Guam, including the impacts associated with the construction of a Marine Corps firing range complex. However, that agreement was not concluded “prior to” approval of the undertaking, and has still not been concluded.

101. On September 20, 2010 the Defendants issued the ROD that approved a firing range complex at the Pãgat Village site. Prior to the issuance of the ROD, the Defendants had not executed an agreement with the Guam (State) Historic Preservation Office or the Advisory Council on ways to avoid, minimize, or mitigate adverse effects to historic properties. Nor did the Defendants terminate consultation and receive and respond to the final comments of the Advisory Council “prior to” issuing a final decision approving the undertaking. In fact, nearly two months after issuing the final Record of Decision, the Defendants still have not complied with Section 106.

102. Plaintiffs and others advised the Navy of the consequences of issuing the ROD before it had completed the Section 106 consultation process. The Defendants disregarded these timely objections in approving the firing range complex prior to the completion of Section 106 review.

103. The Defendants’ decision to sign and release the ROD, which constitutes the final agency action, before it had completed the procedural requirements of Section 106 of the NHPA, through the completion and approval of a negotiated programmatic agreement or otherwise, represents a violation of the explicit statutory requirement clearly spelled out in Section 106.

104. In addition, the Defendants have unlawfully “restrict[ed] the

subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties," in violation of 36 C.F.R. § 800.1(c).

### **COUNT XIII**

#### Violation of the Coastal Zone Management Act, 16 U.S.C. § 1451, et seq.

105. Plaintiffs repeat and incorporate by reference all the allegations contained in paragraphs 1 through 104 above.

106. The Coastal Zone Management Act ("CZMA") requires that "[e]ach Federal agency activity...that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved States management programs." 16 U.S.C. § 1456. To implement this mandate, the CZMA requires that any Federal agency proposing a project impacting the coastal zone (1) certify that such project is consistent with applicable coastal management programs and (2) submit that consistency determination for review by relevant state or local agencies at least 90 days prior to project approval. 16 U.S.C. § 1456; 15 C.F.R. §§ 930.31, 930.36. If the state or local agency objects to the Federal agency's consistency determination, the Federal agency cannot proceed with the project. 16 U.S.C. § 1456; 15 C.F.R. § 930.43.

107. The Navy's proposed "Guam and CNMI Military Relocation" project will affect resources in the coastal zone. Therefore, the Navy was required to submit a consistency determination to the Guam Bureau of Statistics and Plans (the Guam Government agency charged with oversight of the Guam Coastal Management Program).

108. The FEIS contains a brief statement (less than one-half of one page) purporting to explain the "Status of Federal Agency Coastal Zone Management Act Consistency Determination for Proposed Actions In The Territory of Guam." That statement reports that "[a] coastal zone consistency determination assessment was submitted" and that the Bureau of Statistics "recommended that [consistency determinations] be prepared for each phase of the project." The "status report" then notes that "the first phase [consistency determination] is being prepared and is limited to construction projects proposed for fiscal year 2010 and 2011" but is "not available for inclusion in the Final EIS." This "status report" is both incomplete and inaccurate.

109. The Navy did, in fact, submit what purported to be an initial consistency determination. But the relevant Guam Government agency, the Bureau of Statistics and Plans, did not simply "recommend" a phased approach to consistency determinations. Rather, the Bureau reviewed the Navy's submission and objected that it was woefully inadequate.

Specifically, the Bureau determined that (1) the Navy’s proposed project “is not consistent with the enforceable policies of the Guam Coastal Management program,” (2) the consistency determination itself did not comply with applicable regulatory requirements, and (3) the Navy did not provide sufficient information about the project to permit a CZMA consistency determination. “Given this lack of reliable information,” the Bureau concluded, the Navy should consider submitting separate consistency determinations for specific projects *as they are approved each year*.

110. Nothing in the Bureau’s suggested approach allows the Navy to approve any part of the “Guam and CNMI Military Relocation” until such time as the CZMA is satisfied with respect to that portion of the project. That means the Navy must comply with the CZMA (both substantively and procedurally) *before* approving the firing ranges proposed to be sited at Pãgat.

111. The language of the FEIS (“the first phase...is being prepared” but is “not available for inclusion in the Final EIS”) clearly indicates that the Navy has not yet prepared and re-submitted to the Bureau of Statistics and Plans an adequate consistency determination addressing Pãgat. Such a determination was required to have been submitted at least 90 days before the Navy took final agency action on the

firing ranges. 16 U.S.C. § 1456.

112. Finally, the Guam Coastal Management Program contains several provisions that require the Navy to site the proposed firing ranges somewhere other than Pãgat. For example, Resource Policy 2 requires protection of aquatic recreation sites and fresh water aquifers. Pãgat is both. Likewise, Resource Policy 3 mandates protection of significant cultural areas, including both archaeological sites and limestone forest. Pãgat qualifies for these protections as well. DoN has for the reasons set out above failed to comply with the CZMA before taking its final agency action.

WHEREFORE Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that:
  - (a) Defendants' FEIS is inadequate for the reasons set out in this complaint.
  - (b) Defendants' DEIS was so inadequate as to preclude meaningful review.
2. Issue a declaratory judgment that Defendants' failures described above constitute violations of the NEPA and the APA.

Specifically:

- (a) DoN did not ever look at certain reasonable alternative sites because, *ab initio*, it refused to consider land not

under DOD jurisdiction (except Pãgat), despite the explicit requirement under NEPA to examine alternatives not within the agency's jurisdiction;

(b) DoN improperly dismissed from full comparison multiple reasonable alternative sites which it had identified but then declined to carry forward for study as alternatives;

(c) DoN failed to examine the reasonable alternative of placing the firing ranges planned for Pãgat Village on the Island of Tinian, even though the same EIS envisions placing other firing ranges on that island;

(d) DoN failed adequately to examine the impacts of the two sites it did carry forward through the FEIS and ROD (both at Pãgat), most specifically ignoring the cultural resource values associated with Pãgat and the surrounding forests and caves;

(e) DoN failed to include in the alternatives comparison information contained elsewhere in the 24,000 page EIS, despite the requirement that the alternatives comparison be "based on" the information and analysis presented in the sections of the EIS dealing with the Affected Environment and the Environmental Consequences, DoN

failed to include in its alternatives comparison information contained elsewhere in the 24,000 page EIS.

- (f) DoN failed adequately to devote “substantial treatment” to the proposal (and alternatives to it) and “rigorously explore” each of them.
- (g) DoN failed adequately to describe the environment of the area to be affected.
- (h) DoN failed adequately to examine the environmental consequences of its proposed action at Pågat Village, including but not limited to cultural impacts, air quality, noise, recreational activities, biological resources, visual resources, condemnation, natural resources, groundwater impacts, and Environmental Justice.
- (i) DoN failed adequately to examine potential mitigation, including avoidance.
- (j) DoN failed to recirculate its DEIS as a new draft (which must be preceded by remedying its defects) despite the failure of the DEIS to enable “meaningful analysis.”
- (k) DoN failed to state in its ROD why it did not act to use all

- (l) practicable measures to avoid or otherwise mitigate impacts on Pãgat Village.
- (m) DoN failed to follow the provision required for incorporation by reference in attempting to rely upon the Mariana Islands Range Complex EIS.

3. Adjudge and declare that Defendants have violated Section 106 of the National Historic Preservation Act. Specifically, the Defendants failed to comply with NHPA “prior to” authorizing the construction of a firing range complex at the Pãgat site, on September 20, 2010.

4. Issue a declaratory judgment that Defendants violated the CZMA and the APA.

5. Issue a mandatory injunction requiring Defendants to comply with NEPA by doing the following:

- 1. Requiring recirculation of the DEIS (after remedying the defects) or, at a minimum, the portions of it relevant to Pãgat, as a new DEIS to be followed by an FEIS and ROD.

2. In the alternative, requiring the preparation of a Supplemental EIS remedying the deficiencies of the FEIS and circulating it for public comment in both draft and final form, to be followed by an amended ROD.

6. Issue a preliminary injunction preventing Defendants, their officers, administrators, agents, employees, and those in active concert or participation with them from undertaking any actions or preparations for actions to locate any or all of the firing ranges in, near, or about Pågat Village (the “Route 15 area”).

7. Award Plaintiffs their costs, including attorneys’ fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and NHPA, 16 U.S.C. § 470w-4.

8. Grant such other and further relief as the Court deems just and proper.

Dated: November 12, 2010


Respectfully submitted,

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## ATTACHMENT A

### ACRONYM AND ABBREVIATIONS

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ACHP	Advisory Council for Historic Preservation
AFB	Air Force Base
APE	Area of Potential Effect
ARPA	Archeological Resource Protection Act
BSP	Bureau of Statistics and Plans
CAA	Clean Air Act
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
CLTC	Chamorro Land Trust Commission
CMP	Coastal Management Program
CNMI	Commonwealth of the Northern Mariana Islands
CRMP	Coastal Resources Management Program
CY	cubic yard(s)
CZMA	Coastal Zone Management Act
DEIS	Draft Environmental Impact Statement
DOD	Department of Defense
DoN	Department of the Navy
EIS	Environmental Impact Statement
EJ	Environmental Justice
EO	Executive Order
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
Fed Reg	Federal Register
GALC	Guam Ancestral Lands Commission
GCMP	Guam Coastal Management Plan
GHPO	Guam Historic Preservation Office or Officer
GovGuam	Government of Guam
GRHP	Guam Register of Historic Places
JGPO	Joint Guam Program Office
KD	known distance
Marine Corps	United States Marine Corps
MIRC	Mariana Islands Range Complex
NAVFAC	Naval Facilities Engineering Command
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NMS	Naval Munitions Site
NRHP	National Register of Historic Places
ROD	Record of Decision
SDZ	Surface Danger Zone
SEIS	Supplemental Environmental Impact Statement
SHPO	State Historic Preservation Office or Officer
USEPA	U.S. Environmental Protection Agency

- Blue lines represent Surface Danger Zones associated with firing ranges.
- Green areas represent known historic and cultural resources.
- Not to scale.
- Locations of NRHP sites and TCP boundaries are approximate.
- To the best of our knowledge, no comprehensive archaeological survey of this area has been conducted. Therefore this map does not contain an exhaustive list of the significant cultural properties at the Págat village site.

