

GUAM PRESERVATION TRUST
and
NATIONAL TRUST FOR HISTORIC PRESERVATION
COMMENTS ON THE FINAL ENVIRONMENTAL
IMPACT STATEMENT (FEIS), GUAM AND CNMI
MILITARY LOCATION, RELOCATING MARINES FROM
OKINAWA, VISITING AIRPORT CARRIER BERTHING,
AND ARMY AIR AND MISSILE DEFENSE TASK FORCE

INTRODUCTION

The FEIS on Guam and CNMI Military Relocation is a legally inadequate document, which, unless supplemented, will not support a Record of Decision (ROD). The issues of highest concern to the Guam Preservation Trust (GPT) and the National Trust for Historic Preservation (National Trust) -- those dealing with adverse impacts to recognized significant cultural resources, most specifically to Pãgat Village -- represent a particularly egregious set of shortcomings in both the Draft EIS and the FEIS. This village and its surrounds have been selected by the U.S. Marine Corps as its "preferred alternative" for siting a complex of five firing ranges encompassing 1090 acres.

As you are aware, Pãgat Village is listed on the National Register of Historic Places. In fact, it was the first historic site listed on the National Register on Guam, on 13 March 1974¹. It has been named by the National Trust as one of the 11-Most Endangered Historic Places in America.² We intend to do what is necessary to preserve that site and its traditional cultural use - hopefully collegially in cooperation with the Department of Defense (DOD) and the Department of the Navy (DoN or Navy), but if that is not forthcoming, by turning to the federal courts to enforce compliance with the laws of the United States.

I. THE IMPORTANCE OF PRESERVING PÃGAT VILLAGE AND ITS SURROUNDS AS A CULTURAL SITE, SACRED TO THE CHAMORRO PEOPLE

Why is Pãgat Village important? Archaeological investigations have dated Pãgat 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 northeast coastline in modern-day Yigo, 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

¹ *Na' Nina'' etnunen Linahyan Ni' Manmaaloffan: Connecting the Community to the Past: A Comprehensive Historic Preservation Plan for Guam, 2007-2011* (Guam: Department of Parks and Recreation, 2007): p. D-8. The Plan is one of the documents submitted under separate cover for inclusion in the administrative record.

² FEIS Vol. 2 at 16-56.

to have been part of a larger exchange network. *See* FEIS Vol. 2 at 16-56. More research and analysis need to be completed on both Pãgat and the village network as further information will provide a fuller understanding of the traditional lifeways and culture production there; for instance, cultural resource surveys indicate that apparent depositional and preservation characteristics of Pãgat Cave may be best opportunity to find older archeological deposits. *Id.* The significance of Pãgat Village and its surrounds sacred to the Chamorro people is further described below.

The larger Pãgat village landscape includes a related site immediately to the north, Pãgat Point, which is a likely agricultural farming area for the prehistoric Pãgat Village settlement. *Id.* It also includes the historic to 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. *Id.* *Suruhano* are “spirit counselors” or “medicine men” of the Chamorro culture, whose knowledge was passed from previous generations. *Id.* at 16-54.

The *suruhano* possess the ability to communicate with *tatoam 'na* (ancestral spirits), as well as traditional knowledge of *tinanom* (plants) and *amot* (medicine). FEIS Vol. 2 at 16-54 and 16-55. *Suruhano* continue to exist to the present day gathering medicinal plants and administering *amot* to the Chamorro community. *Id.* at 16-55. The land not only provides the resources for the preservation of health, but of a traditional Chamorro knowledge based on the ecosystem. *Id.*

Marbo Cave is situated immediately south of Pãgat Village and is “regularly visited by members of Chamorro culture and resident community.” *Id.* It is filled with fresh water to depths of 50 feet. *Id.* at 16-57. Visitors swim in the freshwater pool inside the cave and visit the archeological remains recorded on the slopes below. *Id.*

Pãgat Village was the first site listed on the National Register of Historic Places in the territory of Guam, as noted above. Physical and tangible remains from the village itself include up to 20 *latte* sets and more than 50 mounds of artifacts and middens. *Id.* at 12-23. There are also remnants of trails, more than 30 mortars and grinding areas, and an “unknown number of caves and rock shelters.” *Id.* 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. *Id.* To date only about 60% of the Route 15 area (the highway that would have to be rerouted to proceed with the preferred development of the firing range complex) has been surveyed. *Id.* (Stated elsewhere as 70%. *Id.* at 12-47). Pãgat is the most accessible (to the public) of all such ancient sites on the island of Guam 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 as appearing in the “medium probability” archeological resource area. *Id.* at 12-46. The FEIS concludes that operation of the firing ranges at the preferred site “would have an indirect effect on the historic properties on the coastal plain at Pãgat . . .” *Id.* at 12-49.

The training range would operate 7 days a week, 24 hours per day. FEIS Vol. 2 at 11-90. Access to property associated with either [Pãgat] alternative would be limited to authorized personnel through much of the year.” *Id.* at 8-66.

The FEIS admits that selection of the preferred alternative “would cause the cessation of the present activities on all the [Pãgat recreation] resources mentioned because the Known Distance (KD) Range Complex is proposed in that location.” *Id.* at 19-22. Pãgat Trail would be

closed to the public. *Id.* at 19-16. There would be an “adverse socioeconomic impact to the community.” *Id.* at 16-145. There would be “significant adverse impact on GovGuam due to land acquisition.” *Id.* at 16-141. Significant noise impacts would occur. *Id.* at 6-35 to 6-36.

Equally important as the physical manifestations of the Chamorro heritage is the Chamorro peoples’ relationships to their ancestors, whose spirits are believed to be present in Pãgat Village and the surrounding forest. While, as described below, the Alternatives sections of the DEIS and the FEIS fail miserably in totally excluding the cultural resource values of Pãgat Village from their analyses and comparison of alternatives, another section of DoN’s 20,000 page FEIS (seemingly written by different authors) describes with some accuracy the relationship of the Chamorro people to their land, and specifically to Pãgat, where the Marines plan to construct their live-ammunition firing range complex. Unfortunately, these few sentences, buried in the 24,000 page FEIS, did not make their way into the Alternatives comparison and, hence, into the decision-making matrix and process.) To quote the FEIS:

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.

Id. at 16-55.

Specifically, the cultural and traditional significance of the historic Pãgat Village has been summarized by Joe Quinata of 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.

As well as being listed on the National Register of Historic Places for over 36 years, and as well as being one of the 11-Most Endangered Historic Places in America, Pãgat Village "is of special note because of the intensity of academic research which has been conducted there over the past half century." *Id.* at 16-56. Few sites have received that level of attention on Guam. *Id.* The Governor of Guam has commented that putting firing ranges at Pãgat will preclude school field trips (FEIS Vol. 10 at K-055-072), significantly impact traditional fishing (K-055-073),

and significantly impact recreational resources (K-055-345). The Vice Speaker of the 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.” *Id.* at K-110-001.

It is this site whose significance was so eloquently stated by Joe Quinata and whose importance was reflected in portions of the FEIS (other than the “heart” of the FEIS -- the meaningful comparison of alternatives), which DoN has selected as its “preferred” site for multiple firing ranges. DoN’s alternatives comparison is startling for its obliviousness to what other portions of the 24,000 page EIS show the Navy knew. To reiterate -- for DoN to proceed with this selection without further study of reasonable alternatives would be illegal. We discuss why below.

II. THE FEIS’ DISCUSSION OF ALTERNATIVES IS LEGALLY FLAWED FOR FOUR SEPARATE REASONS

There are four legal deficiencies associated with DoN’s treatment of alternatives under NEPA, any one of which must necessarily lead to rejection of the current section of the NEPA FEIS dealing with alternatives, 40 CFR § 1502.14³. Essentially, (1) DOD 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, for Pãgat); (2) DoN improperly dismissed from full comparison multiple reasonable alternative sites which it had identified but then declined to carry forward for study; and (3) DoN failed adequately to examine the two action sites (both at Pãgat), which it did carry forward, most specifically ignoring the cultural resource values, discussed above, associated with Pãgat and the surrounding forest and caves; all the while (4)

³ 40 CFR § 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

Nicholas C. Yost, one of the signatories of these comments, was as General Counsel of the President’s Council on Environmental Quality, the principal draftsman of the CEQ NEPA Regulations, which bind all Federal agencies. 40 CFR Parts 1500-1508.

failing to include in its alternatives comparison information contained in other portions of the 24,000-page FEIS.

We elaborate:

1. Under NEPA DoN must evaluate and compare “all reasonable alternatives.” 40 CFR § 1502.14. DoN failed to evaluate -- or even to advance in the alternatives comparison -- at least the following reasonable alternatives:
 - 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.” As the FEIS states with respect to Tinian, “The land . . . could be developed to accommodate live-fire ranges.” FEIS Vol. 2 at ES-5. Indeed, a whole volume of the FEIS, Vol. 3, is devoted to the “proposed development of live-fire ranges” on Tinian. *See* FEIS Vol. 3 at 2-10 to 2-23 (describing proposed actions 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.
 - b. 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 official⁴, excluded from consideration reasonable alternative sites without ever examining them in direct violation of 40 CFR § 1502.14 (c), which requires agencies to “examine reasonable alternatives not within the jurisdiction of the lead agency.” The EIS then proceeds to prefer the Pãgat sites, which are the only firing range sites not on DOD land that were considered. *See* FEIS Vol. 2 at 2-86 to 2-87; 2-140 to 142. No other alternative sites not on governmental land were considered. *Id.* 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.

⁴ Statement by Maj. Gen. David Bice, USMC, Executive Director of the Joint Guam Program Office(JGPO), in a nationwide conference call convened by the Council on Environmental Quality (CEQ) (July 12, 2010).

- 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 are set out with more particularity in Attachment 1 (map showing Other Alternate Sites for Firing Ranges) to these comments, which is incorporated in them.

- c. Use of increased virtual training instead of building actual ranges on Guam. We 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.
- d. 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. Attachment 2.

Throughout, the Navy appears to have made up its mind before the NEPA process. In July, 2008, a Draft Guam Joint Military Master Plan was issued, indicating the arcs of firing ranges in the Pãgat area. Attachment 2. That does violence to NEPA.

- 2. Under NEPA the agency must "rigorously explore and objectively evaluate all reasonable alternatives" but may eliminate ones that are not reasonable. 40 CFR 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).⁵
 - 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 critical screening enabled DoN to avoid that detailed scrutiny of all the alternatives examined (except the 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:

⁵ FEIS, Vol. 10 at comment K-150-001. DOD holds 40,000 acres of the 147,000 acres 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 know cultural resources.” FEIS Vol. 3 at 2-8 to 2-9.
 - 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. FEIS Vol. 2 at 2-18. Why the disparity between Tinian and Guam? The Navy should know better.
- 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).
- 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 we understand the Marines may wish to have their own rather than Air Force or Navy land (and that the Air Force and the Navy would just as soon not have the Marines on their bases (see Attachment 2)), we are after all one country with one Department of Defense, whose duty it is to tell the various warring services to do what it best for the people of Guam and of the rest of America and to follow the law created for this sort of analysis by Congress -- the National Environmental Policy Act. These sites include:
- Navy Munitions Site (NMS). General David Bice, Executive Director of JGPO, has said that “the Naval Munitions Area is suitable for the live firing range proposed for Guam.” Attachment 2;⁶
 - NCTS Finegayan (alternative supported by the Governor of Guam (FEIS Vol. 10 at comment K-055-010));

⁶ Declaration of Richard Wytttenbach-Santos, PhD, attached to these comments as Attachment 2 and incorporated herein. Dr. Wytttenbach-Santos is the Director of the Guam Legislature’s Committee on the Guam Buildup and Homeland Security. He is also a retired Captain in the United States Navy who served as Chief of Staff to the Commander, U.S. Naval Forces, Marianas.

- 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. Attachment 2;
- 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 document, not in some extrinsic briefing paper.) 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 . . ." FEIS Vol. 2 at 2-81. Again, by way of illustration, it is worth noting that one alternative is dismissed in part because of an impact to an overlay refuge (FEIS Vol. 2 at 2-75), but no comparison is made to Pãgat, which is itself a recovery habitat for multiple species (FEIS Vol. 2 at 10-13, 10-8). 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. FEIS Vol. 10 at comment J-014-023.

- e. As in Ilio'ulaokalani Coalition v Rumsfeld, 464 F.3d 1083 (9th Cir. 2006) (the "Stryker" brigade case) and Not 1 More Acre v. U.S. Department of the Army, 2009 U.S. Dist. Lexis 81000 (D. Colo. 2009), the agency willfully disregarded its obligation under NEPA and did not examine reasonable alternatives. In the Stryker case the Army proposed to convert an infantry brigade to a "Stryker" (light, wheeled armored vehicle) brigade and then proceeded to limit its consideration of alternatives to sites on Hawaii. The Ninth Circuit reversed, holding that the Army should have carried forward and considered alternative sites in the states of Alaska and Washington. Here DoN proposes to limit consideration of the range sites to Pãgat, and is failing to consider alternative (other than at Pãgat) sites. The Army's failure in Hawaii appears on its way to being repeated by the Navy in Guam.

In the Not 1 More Acre case the Army evaluated only two alternatives for training troops, the Preferred Alternative and the No Action Alternative. The Army determined that other alternatives, "such as

training troops at other locales” were not reasonable because such alternatives would unduly restrict the Army’s ability to implement “transformation.” This was determined to be arbitrary and capricious.

3. NEPA requires that an agency “[r]igorously explore and objectively evaluate all reasonable alternatives” 40 CFR § 1502.14 (a). This the DoN did not heed. Instead it managed not ever to look at certain reasonable alternatives (*see* para. 1 above) and dismissed without adequate analysis further reasonable alternatives (*see* para. 2 above). Then, when it had eliminated these sites from the rigorous comparisons demanded by NEPA § 102 (2)(C), 42 USC § 4332 (2)(C), and by the CEQ NEPA Regulations, 40 CFR § 1502.14, DoN then proceeded to do a legally inadequate job of examining the impacts on the only two action alternatives it did carry forward -- the two Rt. 15/Pågat sites.

Just by way of example of the FEIS’ total failure to examine the Pågat alternatives’ impacts, thereby impermissibly skewing the comparison of alternatives:

- a. Cultural resources -- impact on sacred site. The cultural resource values associated with Pågat Village and its surrounds, are described in paragraph I above. Amazingly, while aware of those values, the Navy chose to exclude them from the comparison of alternatives.⁷ Nowhere does the FEIS accurately map the Pågat 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 fall⁸); (2) the cultural sites in and near Pågat Village, including *latte* sites, Pågat Cave, Pågat Point, Pågat trail, and surrounding forest including the sites of the medicinal herbs used by the *suruhanu*; and (3) the ownership of the land⁹ -- the 2nd and 3rd of these do not appear in the FEIS, and nowhere do the three elements appear on one map. (*See* 40 CFR 1502.8. CEQ encourages the “use

⁷ Indeed, the FEIS admits that in discussions leading to the choice of a preferred alternative “the Pågat cultural area and associated native trails could be considered more relevant for their recreational use than their cultural significance.” FEIS Vol. 2 at 2-80 to 2-81.

⁸ Annually 10,134,750 rounds are anticipated to be fired at the 5 Pågat firing ranges. FEIS Vol. 2 at 2-57. The FEIS estimates that 1013 rounds or fragments could fall outside the target area but within the SDZ. *Id.* at 2-56. The SDZ encompasses essentially the whole of the Pågat Village and its surrounds. That works out to approximately three rounds or fragments falling within Pågat each day. (The Navy’s map of the SDZ appears at FEIS Vol. 2 at 2-83.)

⁹ The FEIS does not map the ownership. Instead it summarizes it as follows: “25% GovGuam; 42% GALC, 25% CLTC . . . ; 8% Private owners.” FEIS Vol. 2 at 8-16. It does not even dignify the significance of the ownership by stating that GALC means “Guam Ancestral Lands Commission” and CLTC means “Chamorro Land Trust Commission.” (*See* FEIS Vol. 1 at 5-2, 5-4). Surely the identities of both are important to a realization of cultural significance of the lands these agencies administer. (Indeed, and revealingly, in the DEIS the Navy mixed up the two agencies. FEIS Vol. 10 at comment K-057-009.)

of appropriate graphics” so that decisionmakers and the public can readily understand them.)

b. Condemnation.

- We note that the FEIS fails altogether to grapple with the realities of condemnation -- essential at Pãgat 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” *See* FEIS Vol. 10 at comment K-170-001 (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”). 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”). *See* FEIS Vol. 2 at 12-23 to 24; “A Study of Potential Traditional Cultural Properties in Guam” at 23-26.¹⁰
- One of the most important feature 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. *Id.* at 26 (noting “fresh water source in sinkhole formation”). This was the sole source of fresh water for the ancient inhabitants of Pãgat, and has been identified as a contributing element to the site’s current status as a Traditional Cultural Property. *Id.*; *see also* “Preliminary Report on the Pãgat Site.”¹¹ 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 Pãgat. This is a major failure. There is considerable evidence in the EIS that the groundwater at Pãgat might be especially vulnerable to contamination and/or diminution as a result of the firing ranges.
 - > At Pãgat, karst features “are present throughout the area” (FEIS Vol. 2 at 3-22);

¹⁰ This Study is submitted under separate cover for inclusion in the administrative record.

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- > “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” (*Id.* at 3-5);
- > “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” (*Id.* at 4-82);
- > “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” (*Id.* at 4-82);
- > Firing range operations would involve approximately 640 pounds of hazardous materials per year¹² (*Id.* at 17-51);
- > “Range operations have the potential to leach ammunition and pyrotechnic contaminants to the water” (*Id.* at 4-98);
- > 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 (*Id.* at 12-49, Figure 12.2-5);
- > Groundwater flows from the site of the proposed firing ranges toward the Pãgat Site Complex. (*Id.* at 4-99).
- > Several of the potential mitigation measures identified for the central part of the island could have significant impacts on the soils/geology of the R-15 area. The impacts of these measures are not addressed.

¹² We note, for the record, that 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.” FEIS Vol. 2 at 17-51. But there is no substantiation for that assumption. *Id.* 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.” *Id.* at 17-1 to 17-7). 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. FEIS Vol. 3 at 17-14 to 17-15 (4,480 lbs of hazardous materials per year and 90,160 lbs of hazardous waste per year).

Under these circumstances, it is reasonably foreseeable that the firing ranges could affect the amount and/or quality of the water in Pågat's freshwater caves. Therefore, DoD's failure to evaluate that potential impact was arbitrary and capricious. 40 CFR §§ 1502.16, 1508.8.

- Nor is it acceptable for the Navy to escape its responsibility to identify, evaluate, disclose to the public, and mitigate the potential impacts of the firing ranges on groundwater at Pågat by invoking Best Management Practices (BMPs) and/or Low Impact Development Measures (LID).
 - > 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. FEIS Vol. 2 at 12-49. 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. *Id.* at 3-31. 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. FEIS Vol. 10, comment A-009-014.
 - > 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. FEIS Vol. 2 at 4-80. Similarly, some of the BMPs identified in the analysis appear to be acknowledged to be inappropriate for the karst environment in which the firing ranges are proposed to be sited. *Id.* (infiltration practices).
 - > 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. FEIS Vol. 9, Appendix N.

- > Fourth, there are numerous documented instances of soil and groundwater at military firing ranges.
- > Our concerns on these topics are not new, and they should not be surprising to the Navy. The United States Environmental Protection Agency's comments on the Draft EIS identified many of the same deficiencies identified above. FEIS Vol. 10 at comment A-009. 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 provides yet another reason to doubt the Navy's mitigation claims. It also suggests a willful disregard for environmental protection, and is a violation of NEPA in and of itself. 42 USC § 4331; 40 CFR § 1503.4.

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. *See* Executive Order 12898. For purposes of the Executive Order, “minority populations” include “Pacific Islanders” like the Chamorro. “Environmental Justice Guidance Under the National Environmental Policy Act” at 25.¹³
 - > 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. *See* FEIS Vol. 2 at 19-3, 19-8.
 - > 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. *Id.* at 19-1. 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.

¹³ This document is submitted under separate cover for inclusion in the administrative record.

Id. The environmental justice analysis in an EIS must focus on whether an impact will disproportionately affect a *minority community*. See Executive Order 12898. 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.

- Put simply, DoN has lost sight of the forest for the proverbial trees. 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%). FEIS Vol 2 at 19-6. 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.

4. How could DoN have failed so badly? We respectfully suggest it is by ignoring yet another requirement of NEPA, set out in 40 CFR § 1502.14:

“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 valuable information concerning Pãgat (FEIS Vol. 2 at 16-53 to 16-55 (militating against the selection of the Pãgat sites)) that simply does not appear in the Alternative analysis (FEIS Vol. 12 at 2-71 to 2-

83; *see also id.* at 2-55 to 2-59, 2-86 to 2-87)-- the “sharp defini[tion] of issues and present[ation] of a clear basis for choice” *See* discussion under I. above.¹⁴

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. *See* discussion under II.1.a above.

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.

III. OTHER LEGAL DEFICIENCIES -- NEPA

1. Project Description

- a. The 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, and which areas will retain their existing vegetation/appearance. *See* FEIS Vol. 2 at 2-41 to 2-87. 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.
- b. The definition of the proposed training action is improperly and inaccurately restricted to Guam. *Id.* The Marine relocation includes increased training on Tinian. *See* FEIS Vol. 3. There is no evidence

¹⁴ The FEIS does contain brief “mitigation” for the impact on the cultural resources (FEIS Vol. 1 at ES-49), 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 best to clean up spilled milk rather than how to avoid spilling the milk in the first place.

The centerpiece of the Navy’s mitigation proposal is a vague promise to prepare an “access plan.” FEIS Vol. 2 at 12-56. But no such plan will be prepared until well after the Navy issues a Record of Decision. Moreover, the EIS contains neither (1) information about the provisions that will be included in the “access plan” nor (2) measurable performance standards for evaluating the success of the proposed mitigation. And, as explained above, the significance of the firing ranges’ impact on cultural resources goes well beyond the narrow issue of public access.

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. FEIS Vol. 2 at 12-56. But that is not mitigation. *See* 40 CFR § 1508.20. That is an EIS. 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 this NEPA process. *Id.*

in the EIS suggesting that this increased training would occur in the absence of the Marine relocation. But DoD considers the proposed activities on Tinian and the proposed activities on Guam separately. As a result, the EIS (as a whole) does not (1) identify and disclose the full impacts of the Marine relocation and (2) improperly segments the alternatives analysis.

2. Environmental Baseline

- a. The EIS does not use existing conditions as an environmental baseline. Instead, it improperly assumes that the MIRC action will be fully implemented before implementation of the Marine Relocation project begins.

3. Environmental Analysis

- 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.” FEIS Vol. 2 at 12-47. 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) impacts on air quality.
 - iii. The EIS appears to significantly underestimate air emissions. *See, e.g.*, FEIS Vol. 2 at 5-19 to 5-24 (.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 Pãgat. 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. *See, e.g.*, FEIS Vol. 2 at 6-31 to 6-36. On the other hand, other portions of the EIS (for example, the environmental justice analysis) assume that noise impacts will be less than significant. *Id.* at 19-1.

- 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 Pãgat/Marbo. FEIS Vol. 2 at 9-34. Another section comes to the opposite conclusion. *Id.* at 9-21 to 9-22. In the end, no mitigation is proposed.
- e. The EIS' analysis of terrestrial biological resources at Pãgat is fundamentally flawed because:
 - i. It ignores the National Marine Fisheries Service's comments indicating that the Pãgat area may be habitat for sensitive turtle species. *See* FEIS Vol. 10 at comment A-012-028;
 - ii. DoN has not completed a survey of *Hertiera* plants at Pãgat. *See* FEIS Vol. 2 at 10-127 to 10-129;
 - 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) 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. FEIS Vol. 2 at 13-30, 13-68.
- 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." FEIS Vol 2 at 12-47. 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. FEIS Vol. 2 at 12-50. 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 the Navy has proposed no mitigation for access-related impacts to Pãgat during construction. *See* FEIS Vol. 2 at 12-55 to 12-56. 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." FEIS Vol. 2 at 12-47. 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 harvested *from Pãgat*.
- 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 Pãgat into a large construction site will significantly affect the cultural resources there. Unfortunately, the EIS fails to identify or evaluate any of these impacts.

4. Improper Reliance on Proposed "Mitigation" Measures

- 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 Pãgat has not yet been prepared and there is no date by which it is promised. FEIS Vol. 2 at 12-70 to 12-71. 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. Returning, again, to the access plan for Pagat--because the FEIS says nothing about what the plan will actually provide, there is no reason to believe that impacts will be mitigated. *Id.*

5. Improper Incorporation by Reference

- a. To the extent that the FEIS relies on the MIRC EIS, 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.

IV. LEGAL DEFICIENCIES -- OTHER THAN NEPA

To the fullest extent possible EISs are to be integrated with other environmental review laws. 40 CFR § 1502.25. Such laws include:

1. Section 4(f) of the Transportation Act

Sec. 4(f) prohibits approval of a federal transportation project “requiring the use of land of an historic site” unless “(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the...historic site resulting from the use.” 49 USC § 303(a). Since a project funded by the Federal Highway Administration [FHWA] will use resources associated with the Pãgat site and no planning has been undertaken to avoid or minimize that use, the requirements of Section 4(f) have not been satisfied.

a. The FHWA has failed to fully survey, identify, and evaluate impacts to historic properties:

i. While Section 106 allows a phased approach for identifying historic resources, 4(f) requires a “complete identification prior to the issuance of an ROD” (*N. Idaho Cmty Action Network v. U.S. DOT*, 545 F. 3d 1147, 1158-59 (9th Cir. 2008)(even though court interpreted the pre-2008 regulations, the Court noted that 23 CFR § 774.9(a) and (b) mandate the same interpretation). See also *Corridor H Alternatives v. Slater*, 166 F.3d 368 (D.C. Cir. 1999).

ii. FHWA has not demonstrated why the archaeological site that would be damaged or destroyed by the Route 15 realignment does not constitute a Section 4(f) “use.”

- There is evidence that the site identified in the proposed new alignment for the Route 15 corridor (Guam SHPO site # 66-04-2324) does not qualify for the 49 CFR § 774.13(b)(1) exemption as a site that is “important chiefly because of what can be learned by data recovery and has minimal value for preservation in place.”

- The site warrants preservation in place because its topographical relationship to the archaeological sites at Pãgat is critical for understanding the historical record in the Pãgat site area.

- More research must be done to determine whether artifacts from the site have contemporaneity with other sites in its vicinity, including the sites on the lower shelf.

- More research must be done to determine whether the site is part of a wider archaeological district.
 - Since the site is likely related to the Págat TCP data recovery is insufficient mitigation to avoid a Section 4(f) use: “Under 36 C.F.R. § 800.9(c)(1), research is appropriate mitigation where the historic property is of value *only* for ‘its potential contribution to archeological, historical, or architectural research.’ In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 808 (9th Cir 1999)(emphasis in original), the court agreed with the tribe that the resource at issue was an important cultural property, valuable for more than simply its research potential.
- b. Even if site # 66-04-2324 does not warrant “preservation in place,” the 4(f) exemption in 49 CFR § 774.13(b)(1) is facially invalid because it is inconsistent with the express language of Section 4(f).
- i. The Section 106 regulations recognize that excavation of an archaeological site is an adverse effect. See 65 Fed. Reg. 77,697, 77,720 (Dec. 12, 2000).
 - ii. The 4(f) regulations fail to make any provision for consultation with indigenous peoples, like the Chamorro. A site that may be viewed as strictly “archaeological” by a highway department may in fact have broader religious or cultural significance to native peoples. See 16 USC § 470a(d)(6)(B).¹⁵
 - iii. Thus the exemption in 49 CFR § 774.13(b)(1) is inconsistent with 36 CFR Part 800, in violation of 16 USC § 470h-2(a)(2)(E)(i).
- c. FHWA failed to effectively coordinate with the Department of the Interior (DOI) regarding the Section 4(f) evaluation, as required by 23 CFR § 774.5(a) and FHWA’s Section 4(f) Policy Paper (p.8).
- i. In a June 10, 2010, letter, DOI indicated that it had received a copy of the draft Section 4(f) evaluation from another party, notwithstanding the FHWA’s failure to comply with the statutorily required coordination.
 - ii. DOI stated on June 10, 2010 that the draft 4(f) Evaluation “does not provide enough information to enable the Department to either

¹⁵ See also Executive Order 13084 stating that [e]ach agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely effect their communities.

agree or disagree with the Section (f) analysis and conclusions” and referred to it as “deficient.”

- iii. No response was provided to DOI’s concerns in the final 4(f) Evaluation.
- iv. The FHWA 4(f) Policy Paper requires that “If any issues are raised by [DOI] resulting from the circulation of the draft Section 4(f) evaluation, follow up coordination must be undertaken to resolve the issues.” Section 4(f) Policy Paper at 8 (emphasis added).
- v. The Final 4(f) Evaluation does not indicate that FHWA met its responsibility to provide the evaluation for “coordination and comment” by DOI pursuant to 23 CFR § 774.5(a).

2. Section 106 of the National Historic Preservation Act

Issues relating to the inadequacies of the consultation process under Section 106 of the NHPA will be addressed in a separate comment letter to be submitted by the comment deadline of August 29, 2010, which has been established for comments on the draft Programmatic Agreement under Section 106.

3. Coastal Zone Management Act

- 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 USC § 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 USC § 1456; 15 CFR §§ 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 16 USC § 1456; 15 CFR § 930.43.
- The Navy’s proposed “Guam and CNMI Military Relocation” project will affect resources in the coastal zone. *See, e.g.*, FEIS Vol. 10 at comment A-012 (comments of United States Fish & Wildlife Service). Therefore, the Navy was required to submit a consistency determination to the Guam Bureau of Statistics and Plans (the Guam agency charged with oversight of the Guam Coastal Management Program.

¹⁶ There are certain specific, statutorily-enumerated exceptions to this rule. But none applies here.

- 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.” *See* FEIS Vol 9, Appendix H, Document 1. 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.” *Id.* 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.” *Id.* This “status report” is so incomplete that we can only assume the Navy’s intent was to mislead the public.
- It appears that the Navy did, in fact, submit an initial consistency determination. But the Guam Bureau of Statistics and Plans did not simply “recommend” a phased approach to consistency determinations. Rather, the Bureau reviewed the Navy’s submission and found it woefully inadequate.¹⁷ 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.*
- 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.
- 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 a consistency determination addressing Pãgat. *See* FEIS Vol 9, Appendix H, Document 1. Such a determination must be submitted at least 90 days before the Navy takes final agency action on the firing ranges. 16 USC § 1456.
- Finally, we note that the Guam Coastal Management Program contains several provisions that require the Navy to site the proposed firing ranges

¹⁷ The Bureau’s response to the Navy is submitted under separate cover for inclusion in the administrative record.

somewhere other than Pågat. For example, Resource Policy 2 requires protection of aquatic recreation sites and fresh water aquifers. Pågat is both. Likewise, Resource Policy 3 mandates protection of significant cultural areas, including both archaeological sites and limestone forest. Pågat qualifies for these protections as well.

V. RELIEF

In light of the deficiencies described above, we respectfully request that:

1. The site for the firing ranges be moved to an alternate site or sites already under DOD control and not placed at Pågat Village.
2. Should the DoN be unable at this stage to comply with our request in paragraph 1 above, we request that DoN act as required by 40 CFR § 1502.9 (a), which provides in pertinent part:

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.

Note that in its review of the draft EIS conducted pursuant to § 309 of the Clean Air Act, the U.S. Environmental Protection Agency rated the entire DEIS as “Environmentally Unsatisfactory,” the lowest possible rating, and as “Inadequate Information (E4-3)”, also the lowest possible rating. FEIS Vol. 10 A-009-001.¹⁸ This evaluation by EPA effectively triggers the above quoted provision of § 1502.9.

The discussion of alternatives to the Pågat sites is legally flawed, as set out in the discussion above. We ask that either the entire FEIS be treated as a draft (after appropriate revision) or, at minimum, that a new draft be prepared concerning the alternative sites for the firing ranges, a draft which remedies the deficiencies set out above, and that it be circulated as a draft, to be followed by a final EIS, both subject to public comments (as required by the NEPA Regulations). In the meantime, of course, no ROD may issue (unless it excludes the firing range sites).

3. Alternatively, DoN can and must remedy the deficiencies in a Supplemental EIS as provided in 40 CFR § 1502.9 (c). While § 1502.9 (a) is the usual remedy for a grossly inadequate DEIS (the case here), § 1502.9 (c) could provide a means for accomplishing the same end with fewer admissions of error on the part of DoN. Again -- no ROD may issue in the interim. Under § 1502.9 (c) the agency

¹⁸ While EPA’s ratings were based on its evaluation of the DEIS as a whole rather than on its treatment of Pågat Village (which it did not discuss), the “unsatisfactory” and “inadequate” ratings must necessarily trigger § 1502.9’s lack of “meaningful analysis” standard, requiring recirculation.

“[s]hall prepare, circulate and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement”

We understand that of the Navy, Army, and Marine components of the FEIS, the Army’s ROD has always been on a separate track and is not expected on Sept. 10, 2010. We now understand that the Navy too has decided to defer a decision on a specific site for a transient aircraft carrier berth pending further NEPA analysis. FEIS Vol. 1, Notice at 2. Each component has been found to have “an independent need for and independent utility from each other.” *Id.* at ES-1.

We ask that either the Marine ROD be deferred pending the study and revisions discussed in this comment or that the decision concerning alternative sites for the firing ranges be separated from the other decisions to be made with respect to the Marines’ relocation and that the further NEPA compliance discussed in this comment be completed before any ROD deals with this issue.

Whether by abandoning the Pågat sites as a proposed location for the firing range complex or by recirculating a revised FEIS as a draft EIS or by undertaking a supplemental EIS process, the law requires that DoN take steps to remedy the legal deficiencies set out above.

Attachments:

1. Other Alternate Sites for Firing Ranges
2. Declaration of Richard Wytttenbach-Santos, Ph.D.

Dated August 25, 2010

Respectfully submitted,



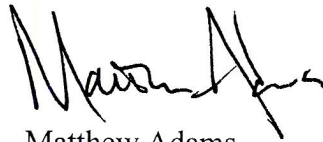
Joe Quinata
Chief Program Officer
Guam Preservation Trust



Nicholas C. Yost
Sonnenschein Nath & Rosenthal LLP
Counsel for Guam Preservation Trust
and National Trust for Historic Preservation



Anthea Hartig, PhD
Director, Western Office
National Trust for Historic Preservation



Matthew Adams
Sonnenschein Nath & Rosenthal LLP
Counsel for Guam Preservation Trust
And National Trust for Historic Preservation



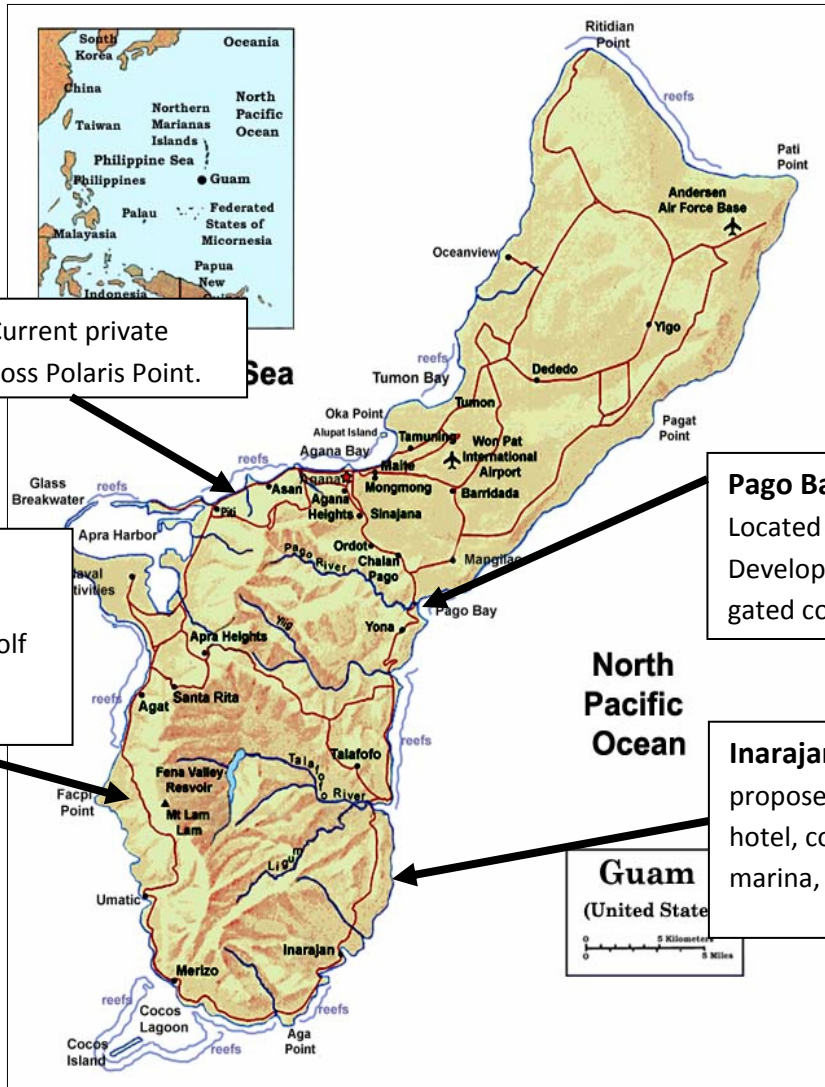
Elizabeth Merritt
Deputy General Counsel
National Trust for Historic Preservation



Brian Turner
Regional Attorney, Western Office
National Trust for Historic Preservation

ATTACHMENT 1

OTHER ALTERNATE SITES FOR FIRING RANGES



Piti West Coast: Current private Shooting Range across Polaris Point.

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

Pago Bay Post WWII Firing Range: Located in the current development. Developer is selling parcel lands for gated community.

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

Guam
(United States)

ATTACHMENT 2

1 **DECLARATION OF RICHARD WYTENBACH-SANTOS, Ph.D.**

2 I, Richard Wytenbach-Santos, Ph.D., make the following declaration:

3 1. I am the Chief of Staff for Senator Judith P. Guthertz of the Guam Legislature. I
4 also serve as the Director of the Legislature's Committee on the Guam Military Buildup and
5 Homeland Security. Senator Guthertz is the Chair of that Committee.

6 2. Previously, I served in the United States Navy. I retired from the Navy as a
7 Captain. I served in 1974-1975 as the Special Assistant for Guam to Commander, U.S. Naval
8 Forces, Marianas and from 1989-1990 I served as Chief of Staff for that commander. My
9 doctorate in political science dissertation was on Micronesian political status. From 1975-1977 I
10 served as the Military Advisor to the President's Personal Representative for Micronesian Status
11 Negotiations in the National Security Council.

12 3. Upon retirement in 1991 I commenced working at the University of Guam,
13 administering its courses throughout Micronesia and teaching the History of Guam course.
14 From 1997 to 2002, I also served as the Vice President for Student Affairs at the University of
15 Guam, and was a tenured Associate Professor at the University. I also taught public
16 administration and political science courses as well as a military history class.

17 4. In connection with my role as Chief of Staff for Senator Guthertz and Director of
18 the Guam Legislature's Committee on the Guam Military Buildup and Homeland Security, I
19 have been closely involved in the "Guam and CNMI Military Relocation" project (the "Project")
20 proposed by the Joint Guam Program Office ("JGPO") and the Department of the Navy.

21 5. Part of my involvement in the Project has included communication with JGPO and
22 the Navy regarding (1) the design of the Project, including proposed live-fire training ranges and
23 (2) project alternatives, including alternative locations for the proposed live-fire training ranges.

24 That communication includes, but has not been limited to, the following:

25 A. In a conversation at the University of Guam field house, at the JGPO hosted public
26 hearing last Winter on the Draft Environmental Impact Statement (DEIS), Major General
27 David Bice, Executive Director of JGPO, informed me that "the Naval Munitions Area is
28 suitable for the live firing ranges proposed for Guam." However, he told me, it was

Richard Wytenbach-Santos

1 rejected because back in 2007, at the time of the scoping sessions, the mayors had told him
2 that "they did not want a lot of military trucks on the roads." Captain Peter Lynch, C.O. of
3 NAVFAC Marianas was present throughout that conversation. This alternative was not
4 evaluated in the DEIS.

5 B. Two separate Marine Corps personnel, one in 2008 and one just a month ago informed
6 me, on a confidential basis, that the Marine Corps has determined that Tarague Beach, on
7 Anderson Air Force Base, is a suitable site for the live-fire training ranges. I cannot reveal
8 their names for fear of retribution for them. They made me understand that this alternative
9 was not evaluated in detail in the Environmental Impact Statement for the Project because
10 the Air Force does not want the Marines to use an Air Force base for Marine training.

11 C. In 2006 and 2007, JGPO and the Navy represented to the Government of Guam that the
12 Project could be implemented within the Department of Defense's existing land-holdings;
13 that is to say, that no land acquisition would be required for the proposed live-fire training
14 ranges (or any other project component). I cannot provide detailed quotes or dates for this
15 assertion, but JGPO has mentioned it in the local media several times. JGPO goes on to
16 place the blame for their changing their plan to need acquisition of additional land on the
17 local government for opposing locating the firing ranges at NCTS over-looking Double
18 Reef on the northwest coast because of recreational and fishing activity in those waters.
19 My senator submitted testimony on the scoping session against that location. That was in
20 April of 2007. In July of 2008 a Draft Guam Joint Military Master Plan was issued,
21 classified For Official Use Only (FOUO). It indicates firing arcs from the Andy South
22 Route 15 on a map on page 47. This is the first indication the Legislature had received
23 about any military desire for a firing range in the Pagat area. It also indicated the
24 acquisition of 680 acres of the Former FAA Housing Area, located between the South
25 Finagayan Housing Area and the main NCTS base. This has nothing to do with any firing
26 ranges and puts the lie to any claim that the military had to look outside its current
27 boundaries because of local opposition to the Double Reef location. It also looked outside
28

Richard L. J. ...

1 its current footprint to acquire the connecting plot of land to bridge between two currently
2 held areas – a matter of convenience and “neatness.”

3 6. Beginning in 2007, my involvement in the Project has also included review of
4 several development proposals for the live-fire training ranges. In the course of reviewing those
5 proposals, I have noticed that JGPO and the Navy are currently requesting approximately five
6 times as much land for the Pagat – Route 15 firing ranges as was originally called for in their
7 development proposal for the Double Reef NCTS location. The 1,090 acres desired along Route
8 15 would provide a Cadillac “bells and whistles” spread-out luxury layout for firing ranges.

9 I declare under penalty of perjury under the laws of the United States that the foregoing is
10 true and correct to the best of my knowledge and recollection.

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12 

13 Richard Wyttenbach-Santos, Ph.D.

14 Executed this 25th day of August at Hagåtña, Guam.
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