

February 17, 2010

Joint Guam Program Office
c/o Naval Facilities Engineering Command, Pacific
Attn: Guam Program Management Office
258 Makalapa Drive, Suite 100
Pearl Harbor, HI 96860

RE: Draft EIS for Guam and CNMI Military Buildup

To Whom it May Concern:

I am an attorney and a member of the Bar of California, admitted to practice in the courts of California and the Ninth Circuit Court of Appeals. As a practitioner of environmental law in California, I have submitted comments on numerous environmental impact documents since I graduated from Stanford Law School in 1999. I have taught courses in environmental law at UCLA and Loyola Law School, Los Angeles. I am currently an Associate Professor of Law at Loyola Law School. In addition to extensive litigation and administrative proceeding experience in environmental law, I have taught, lectured, and written about the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and climate change. I write in my capacity as an individual with expertise in environmental law, not as a representative of any of the abovementioned institutions.

Based on my experience and review of the Draft Environmental Impact Statement (EIS), the EIS suffers from major defects that warrant a wholesale revision of the document. Because it fails to address entire categories of impacts, the document should be rewritten and made available for public comments in draft form. Simply responding to these lacunae with formal comments in a Final EIS will fail to give the public adequate time to consider types of impacts not addressed in the current EIS. Moreover, because the public will not have the opportunity to fully address impacts, decisionmakers will not be fully informed.

Because of the length and complexity of the document and time constraints, this letter will merely highlight a few areas of inadequate analysis. It will also suggest that

federal agencies have a unique burden to avoid environmental harm when their actions cannot be subject to political accountability.

I. Examples of inadequate Analysis

A. Cumulative Impacts

The cumulative impacts analysis fails to adequately inform the public and decisionmakers for several reasons. First, it fails to consider a broad enough range of projects, most particularly it omits consideration of past actions. For example, how will the project's impacts to biological resources and environmental justice interact with the impact of past military projects that have displaced local land ownership, affected endangered species, or added hazardous materials to the environment? How will the cumulative effect of increased population movements on and off the islands impact endangered species? For example, the invasive Brown Tree Snake has decimated the island's bird population and could easily be transported to nearby islands with the increased number of population that will result from the buildup. The likelihood of introduction of further invasive species increases dramatically with the increase in population movement.

Second, for the projects it does consider the EIS fails to provide any indication of the extent of cumulative impacts. By using a simple matrix approach, it gives no idea of the *extent* of cumulative impacts. Without this information, it is impossible to weigh the merits of various alternatives. The matrix also presumes that impacts can not be cumulatively considerable unless the project creates significant impacts by itself. However, NEPA requires consideration of whether or not impacts that alone are not considerable can nonetheless be cumulatively significant.

In addition, for the projects initially examined, the discussion too readily dismisses numerous projects. Many of the development projects that were dismissed could easily have cumulatively considerable impacts due to their effect on traffic, stormwater runoff, and species displacement.

Finally, the conclusions regarding the degree of additive impact is entirely unsupported. Thus, readers are not informed as to why the additive impact for noise will be low and no additive impact is found for water. It is also unclear why the mitigation is considered sufficient to offset both the project's individual *and* cumulative impacts for

terrestrial biology, socioeconomics and environmental justice. Without a clear disclosure of the degree of additive impacts and the bases for concluding that the extent of impacts fall into various categories, it is impossible to discern whether these assessment are correct.

B. Climate Change

The EIS does not adequately consider how the actions will interact with climate change. For example, how will the increased population on Guam further strain its ability to adapt to rising sea level, increased severity of storms and hurricanes? How will species impacts on both islands be exacerbated by climate change impacts? How will the water supply and wastewater treatment be affected by climate change and will the project unduly strain the small islands' infrastructure in the face of climate change? What is the carbon footprint of the buildup on Guam?

C. Public Health

The analysis of public health impacts fails to consider how the large increase in population on Guam and the limited geographic area could impact the likelihood of a pandemic flu or other highly contagious illness occurring on the island. Particularly considering the transient population during construction and the dramatic increase in air travel to and from Guam that the buildup will entail, such an event should be evaluated.

II. Implications of lack of a vote

A. Eminent Domain

Eminent domain should be entirely off the table as a method for obtaining land necessary for the selected alternative. Because Guam does not have voting representation in the federal government, it is uniquely disadvantaged in the political process. While the federal constitution supplies some limits on the power to take property without just compensation, these are the outer bounds of what is permissible. The vast majority of U.S. citizens also enjoy the ability to exercise the franchise to support their view of appropriate property rights. They can vote out officials who support to broad a definition of an allowable "public use" that forms the basis for a governmental take of private

property. This check on the eminent domain power is entirely missing in the case of Guam and Tinian.

B. NEPA

NEPA has several purposes. In addition to being designed to improve decisionmaking of federal agencies by infusing decisions with environmental considerations, NEPA also aims to fully inform the public of the environmental preferences of its elected representatives. This allows citizens to participate in two ways; first by commenting during the administrative process, citizens can improve the information available to decisionmakers both in terms of environmental impacts and in terms of relating their own environmental preferences. Second, it allows citizens to recognize the environmental implications of choices made by elected representatives and to vote accordingly. Clearly this latter aspect of participation is entirely missing in the case of Guam and other U.S. possessions.

This creates a heightened responsibility on the part of agencies to fully analyze impacts, to fully mitigate impacts, and to avoid environmental harm wherever possible.

C. Environmental Justice

The lack of the right to vote in federal presidential elections and to be represented by a voting member of Congress has major implications for the analysis of environmental justice that the EIS fails to address. The buildup will further impact island resources without effective political accountability. Further, the dramatic increase in military population on Guam means that residents who lack an effective franchise to create political accountability for their environmental concerns will find themselves neighbors with a military population that can vote absentee. This will highlight the general lack of justice in Guam's condition, one that is manifested on environmental issues.

III. Conclusion

Contrary to NEPA's requirements that the decisionmaker refrain from determining what action to take until it has fully considered environmental impacts, the EIS shows that the military has already determined that Guam must serve as the host to the buildup. It states:

[I]n contrast to Guam, which is U.S. sovereign soil that meets the freedom of action operational requirement for permanent basing, no consulted allied countries in the Pacific region were willing to host a large additional contingent of U.S. forces on a permanent basis. In sum, the fundamental requirement to support the treaties and alliances that ensure peace and stability in the region, and the pressing need to reduce friction on Okinawa make Guam the only location for the realignment of forces that meets all criteria.

This violates the fundamental premise that environmental analysis must precede the decision to take a specific action.

All branches of the military deserve great respect for their commitment to protect the Constitution and laws of the United States and to keep its citizens safe. In addition, the professionalism and commitment to public service of members of the military is beyond doubt. The respect due the military, however, in no way diminishes the legal requirement that decisions be based on a full disclosure of environmental impacts and the moral imperative not to impose environmental, social, and other costs on populations that cannot redress their grievance through the political process.

Sincerely yours,

Katherine Trisolini