

**AMIGOS DEL RÍO GUAYNABO, INC.
COMITÉ BASURA CERO ARECIBO
SIERRA CLUB DE PUERTO RICO**

March 18, 2016

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Lisa Afua Serwah Mensah, Under Secretary
USDA Rural Development
1400 Independence Ave., S.W.
Washington, D.C. 20250

Brandon McBride, Administrator
Rural Utilities Service
STOP 1510, Rm 5135
1400 Independence Ave., SW
Washington, DC 20250-1510

Jose Otero, State Director
USDA Rural Development
IBM Building - Suite 601
654 Munoz Rivera Avenue
San Juan, PR 00936-6106

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: 60-Day Notice of Intent to Sue: Endangered Species Act Violations Related to Proposed Rural Utilities Service Financial Assistance to Energy Answers Incinerator in Arecibo, Puerto Rico

To all concerned:

On behalf of Amigos del Río Guaynabo, Inc., Comité Basura Cero Arecibo, and Sierra Club de Puerto Rico (collectively, the “Citizen Groups”), we request that you take immediate action to remedy ongoing violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, by Rural Utilities Service (“RUS”). RUS is considering whether to provide financial assistance to a municipal solid waste incinerator proposed by Energy Answers Arecibo, LLC (“Energy Answers”), in Arecibo, Puerto Rico. As is explained below, RUS has failed to engage in consultation to ensure that the action does not jeopardize listed species, as required by Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). This letter constitutes notice required by Section 11(g) of the ESA, *id.* § 1540(g), prior to commencement of legal action.

I. Factual Background

More than half a decade ago, Energy Answers proposed a municipal solid waste incinerator to be sited in Arecibo, Puerto Rico. While billed as a “waste-to-energy” facility, the project is little more than an incinerator. It would burn 2,100 tons of solid waste daily, producing toxic ash and air emissions, including lead and dioxins, in an area that already is in violation of the Clean Air Act’s lead standard. The incinerator is sited in the floodplain of the Río Grande de Arecibo and is adjacent to the karst wetlands of Caño Tiburones Natural Reserve, which is managed by the Department of Natural and Environmental Resources and is Puerto Rico’s largest wetland system. Arecibo is also home to the karst forest of the Río Abajo State Forest. U.S. Fish and Wildlife Service’s IPaC system identifies ten threatened or endangered animal species in Arecibo, including the Puerto Rican parrot, the Puerto Rican Crested Toad, and the Puerto Rican Boa.¹

In 2010, the Puerto Rico Industrial Development Company prepared an Environmental Impact Statement (the “2010 EIS”) for Energy Answers’ proposed project pursuant to Puerto Rico Environmental Public Policy Law, Law No. 416 (Sept. 22, 2004). Appendix D of the 2010 EIS was a “Flora and Fauna Study” conducted by Energy Answers’ consultants, which sought to identify existing flora and fauna present in three areas: (1) the 78.96 acres of the incinerator site, (2) the location of the incinerator’s electrical interconnection to the grid, and (3) along the immediate route of the water pipeline that would transmit the 2.1 million gallons per day of water that Energy Answers proposes to withdraw from Caño Tiburones for use as cooling and process water.² This field work was conducted primarily during January 2010 and did not extend beyond the discrete geographic areas identified above.³ The Flora and Fauna Study identified no federally listed species within these three sites.

Appendix L of the 2010 EIS was a Screening Level Ecological Risk Assessment (“SLERA”) that “focused on evaluating potential adverse effects on ecological receptors (wildlife) within a 6.2-mile (10-kilometer) radius of the proposed Project . . . as a result of the Project’s air emissions.”⁴ The SLERA concluded that “[e]xposure pathways for wildlife to [contaminants of potential ecological concern from the incinerator] are present within the 6.2-mile (10-kilometer) radius,” including “to habitat areas such as the state forests to the southwest and southeast and the conservation areas to the northeast.”⁵

¹ U.S. Fish & Wildlife Serv., Information for Planning and Conservation, <https://ecos.fws.gov/ipac/project/XO55BKDYEVHBTkZ3MH3AILS3CU/overview> (last visited on Mar. 10, 2016).

² Energy Answers, Environmental Impact Statement – Preliminary, Appendix D: Flora and Fauna Study, <http://www.rd.usda.gov/files/PRIDCO-AppDeng.pdf> (the cover page is erroneously labeled “Appendix E”).

³ *Id.* at 10.

⁴ See U.S. Dep’t of Agric., Rural Dev., Arecibo Waste-to-Energy and Resource Recovery Project Draft Environmental Impact Statement 3-55 (July 2015), http://www.rd.usda.gov/files/RUSAreciboDraftEIS_July2015_Eng.pdf (“Draft EIS”).

⁵ *Id.* at 3-56.

A. The proposed FEMA flood map revision

In 2011, Energy Answers sought input from U.S. Fish and Wildlife Service (“FWS”) concerning impacts on protected species as a result of a Federal Emergency Management Agency (“FEMA”) flood map revision that Energy Answers proposed as part of the incinerator project, which would alter the floodplain of the Río Grande de Arecibo.⁶ In its correspondence with FWS, Energy Answers pointed to the Flora and Fauna Study in asking FWS to concur in a “No effect” determination for FEMA’s flood map revision. In response, on May 4, 2011, FWS concluded that “[b]ased on a review of the information provided, the nature of the project, and the site characteristics, suitable habitat for federally listed species is not present within the project site. Thus, adverse effects are not anticipated for species under our jurisdiction.”⁷

Nearly three years later, still without all of the necessary permits and approvals to construct the incinerator, Energy Answers wrote to FWS, referring to FWS’s May 4, 2011 letter and “request[ing] the issuance of an updated letter, through your technical assistance consultation process, concurring that the project has ‘No Effect’ on proposed or listed species or designated critical habitat, in order for FEMA to complete its review of the [flood map revision] application.”⁸ FWS complied in an email dated October 1, 2014, noting that “[s]ince there is no new information on the subject that would modify our previous comments, our May 4, 2011 letter still prevails.”⁹

B. The proposed Army Corps wetlands filling permit

In response to a public notice issued by the U.S. Army Corps of Engineers concerning Energy Answer’s request for a permit pursuant to Section 404 of the Clean Water Act to fill 2.42 acres of wetlands adjacent to the Río Grande de Arecibo for construction of the incinerator, FWS reiterated in a September 22, 2011 letter, referencing its May 4, 2011 letter, that “suitable habitat for federally listed species is not present within the project site. Thus, adverse effects are not anticipated for species under our jurisdiction.”¹⁰ FWS acknowledged that the incinerator would “divert, extract and use waters from the waterbody and wetland area Caño Tiburones,” and that “over utilization of Caño Tiburones waters may harm migratory bird habitat and wildlife resources,”¹¹ but did not identify whether listed species are present in Caño Tiburones and did not assess the potential impact of the proposed water withdrawals on any listed species.

⁶ See Letter from Lillian Mateo Santos, Ferraiuoli LLC, to Edwin Muñoz, Field Supervisor, Caribbean U.S. Fish and Wildlife Service Office (March 28, 2011) (attached hereto as Exhibit 1 without the letter’s original attachments).

⁷ Letter from Edwin Muñoz, Field Supervisor, Caribbean Field Office, to Lillian Mateo Santos, Ferraiuoli LLC 1 (May 4, 2011) (attached hereto as Exhibit 2).

⁸ Letter from José Salguero-Farías, Senior Scientist, CSA Group, to Edwin Muñoz, Field Supervisor, FWS 2 (Sept. 19, 2014) (attached hereto as Exhibit 3).

⁹ Email from Maritza Vargas, FWS, to Jose Salguero, CSA Group (Oct. 1, 2014) (attached hereto as Exhibit 4).

¹⁰ Letter from Edward Muñoz, Field Supervisor, Caribbean Field Office, to Col. Alfred Pantano, Jr., U.S. Army District Commander 1 (Sept. 22, 2011) (attached hereto as Exhibit 5).

¹¹ *Id.* at 2.

C. The proposed RUS financial assistance

RUS became involved in or around 2012 when Energy Answers approached the agency with a request for financial assistance to construct the proposed incinerator. In response to RUS's notice of intent to prepare an EIS for the proposed project, FWS pointed to its earlier September 22, 2011 letter to the Army Corps making a "no effect" determination for the Section 404 wetland filling permit and stated: "Unless new information becomes available, this determination stands for all other federal involvement or actions within this site."¹²

In August 2015, RUS released its Draft EIS for the Arecibo incinerator project. In the Draft EIS, RUS identified federally listed species "found in the general area," including ten animal species:

- threatened Puerto Rican crested toad (*Peltophryne lemur*),
- endangered Puerto Rican broad-winged hawk (*Buteo platypterus brunnescens*),
- endangered Puerto Rican sharp-shinned hawk (*Accipiter striatus venator*),
- endangered Puerto Rican parrot (*Amazona vittata*),
- threatened Roseate tern (*Sterna dougallii dougallii*),
- endangered West Indian manatee (*Trichechus manatus*),
- threatened Green sea turtle (*Chelonia mydas*),
- endangered Hawksbill sea turtle (*Eretmochelys imbricata*),
- endangered Leatherback sea turtle (*Dermochelys coriacea*), and
- endangered Puerto Rican boa (*Epicrates inornatus*)¹³

The Draft EIS cited the 2010 Flora and Fauna Study's finding that federally listed species were not observed within the immediate footprint of the project site.¹⁴ RUS then pointed to FWS's May 4, 2011 letter (Exhibit 2) concurring in a "no effect" determination for FEMA's flood map revision and FWS's 2014 email (Exhibit 5) confirming the 2011 letter,¹⁵ and concluded: "Because USFWS indicated that *suitable habitat for federally listed species is not present within the Project site, Project construction and operation would have no effect on federally listed species.*"¹⁶

The Draft EIS also mentions (although not in its assessment of impacts on protected species) the SLERA attached as an appendix to the 2010 EIS. RUS noted that the SLERA found "a low potential for ecological risk is expected for habitat areas within 6.2 miles (10 kilometers) of the plant."¹⁷

¹² Letter from Edwin Muñiz, Field Supervisor, FWS to Stephanie Strength, Environmental Protection Specialist, RUS 1 (Feb. 11, 2015) (attached hereto as Exhibit 6).

¹³ Draft EIS at 3-62 to 3-63.

¹⁴ *Id.* at 3-62.

¹⁵ *See id.* at 3-62 to 3-63.

¹⁶ *Id.* at 3-69 (emphasis added).

¹⁷ Draft EIS at 3-57.

II. Legal Background

Section 7(a)(2) of the ESA requires each federal agency (“action agency”) to ensure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). “Jeopardize” is defined to mean instances where an action “would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

Section 7 establishes an interagency consultation process to assist federal agencies in complying with their duties to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. As a first step, the action agency must inquire of FWS whether “any listed or proposed species or designated or proposed critical habitat . . . may be present in the action area.” *Id.* § 402.12(c); *see also* 16 U.S.C. § 1536(c)(1). Importantly, “action area” is explicitly defined as “*all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.*” 50 C.F.R. § 402.02 (emphasis added). The “[e]ffects of the action” that must be considered include:

the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.

Id.

An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a). It is well-established that the threshold for triggering ESA consultation is low: “*Any possible effect*, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added); *see also* U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., Endangered Species Consultation Handbook, at xvi (1998) (“May affect [is] the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat.”) (emphasis added); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495-96 (9th Cir. 2011). Pending the completion of the consultation process, agency actions that may affect listed species cannot go forward. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (“If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.”).

III. RUS's Violations of Law

Under Section 7(a)(2) of the ESA, it is incumbent on RUS to engage in consultation to ensure that the proposed incinerator does not jeopardize protected species or critical habitat. “The determination of possible effects is the Federal agency’s responsibility”:

The Federal agency has the ultimate duty to ensure that its actions are not likely to jeopardize listed species or adversely modify critical habitat. The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.

Sierra Forest Legacy v. U.S. Forest Serv., 598 F. Supp. 2d 1058, 1068 (N.D. Cal. 2009) (citing 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)). Here, RUS’s no effect determination was erroneous, arbitrary, and capricious because it focused inappropriately on whether listed species or suitable habitat for listed species were present only within the immediate footprint of the incinerator, the electrical interconnection, and the water pipeline. *Cf.* 50 C.F.R. § 402.02 (defining the action area to be assessed as “*all areas to be affected directly or indirectly* by the Federal action and *not merely the immediate area involved in the action*”) (emphasis added). RUS also failed to consider the environmental baseline in assessing effects of its action. *See* 50 C.F.R. § 402.02.¹⁸

Where FWS has noted that “over utilization of water from Caño Tiburones may harm migratory bird habitat and wildlife resources”¹⁹ and where Energy Answers has concluded in the SLERA that there is some “potential for ecological risk” to habitat within a 10-kilometer radius of the proposed incinerator due to air emissions, the proposed incinerator plainly “may affect” at

¹⁸ The environmental baseline of the Arecibo area is already impacted by various significant pollution sources. As the Citizen Groups noted in their comments on RUS’s Draft EIS, the zip code that covers most of Arecibo contains five facilities that report to the Toxics Release Inventory (“TRI”). These are facilities within specific industry sectors that manufacture or process more than 25,000 pounds of a TRI-listed chemical or use more than 10,000 pounds of a listed chemical in a given year. 40 C.F.R. §§ 372.22, 372.25; *see generally* Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11021-23. TRI-listed chemicals are those that cause cancer or other chronic human health effects, significant adverse acute human health effects, and/or significant adverse environmental effects.” *TRI-Listed Chemicals*, EPA (Nov. 6, 2015), <http://www2.epa.gov/toxics-release-inventory-tri-program/tri-listed-chemicals>. Together, these five facilities dispose or release 31,900 pounds of TRI-listed chemicals, mostly in the form of air emissions. *2014 TRI Factsheet: ZIP Code – 00612*, EPA (October 2015), http://iaspub.epa.gov/triexplorer/tri_factsheet.factsheet?pzip=00612&pyear=2014&pParent=TRI&pDataSet=TRIQ1.

Additionally, there are seven Superfund sites in Arecibo. U.S. EPA’s Enforcement and Compliance (“ECHO”) database identifies a total of 59 EPA-permitted facilities in Arecibo, including nine facilities with current violations, and twelve with violations in the last three years. Among these facilities, is the secondary lead smelter less than a mile south of the proposed incinerator that is the cause of the region’s non-attainment for lead.

¹⁹ Exhibit 3, *supra* note 10, at 2.

least some of the ten protected species identified in the area. The proposed incinerator's water withdrawals and air emissions²⁰ are not the only means by which the project may affect listed species outside of the immediate boundaries of the project. Stormwater runoff from the brownfield site on which the incinerator will be constructed or leakage from the unlined stormwater retention ponds on site could contaminate surface waters, including the adjacent Río Grande de Arecibo. RUS itself acknowledges that "[e]xcavation and land-clearing activities associated with construction of the Project have the potential to contribute to sedimentation and the release of pollutants into nearby surface waters." Draft EIS at 3-30. In a karst system, moreover, runoff or leakage from the incinerator site could potentially travel off-site via underground conduits to contaminate both groundwater and surface water further afield.

On this record, there is evidence of *some* possible effect on federally protected species. Because "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement," 51 Fed. Reg. at 19, 949, RUS is required to undertake consultation to ensure no jeopardy to federally protected species. The agency failed to do so and has thus violated and continues to violate the ESA.

IV. Parties Giving Notice

The full name, address, and telephone number of the parties providing this notice are:

Amigos del Río Guaynabo
Valle Escondido # 9
Guaynabo, Puerto Rico 00971
Telephone: (787) 360-6358

Comité Basura Cero Arecibo
Urb. Las Brisas
C72 Calle 6
Arecibo, Puerto Rico 00612
Telephone: (787)361-1709

Sierra Club de Puerto Rico
P.O. Box 21552
San Juan, Puerto Rico 00931
Telephone: (787) 688-6214

²⁰ The proposed incinerator will be an additional source of lead emissions in an area that is already in nonattainment for the Clean Air Act's national ambient air quality standards for lead. As EPA has observed, ecosystems near industrial sources of lead "have demonstrated a wide variety of adverse effects including decreases in species diversity, loss of vegetation, changes to community composition, decreased growth of vegetation, and increased number of invasive species." National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964 (Nov. 12, 2008); *see also* National Ambient Air Quality Standards for Lead, 80 Fed. Reg. 278, 315 (Jan. 5, 2015) ("The full body of currently available evidence reaffirms conclusions on the array of [ecological] effects recognized for Pb in the last review").

V. Conclusion

For all the reasons stated above, RUS has violated and remains in ongoing violation of the ESA. If these violations of law are not cured within sixty days, Amigos del Río Guaynabo, Inc., Comité Basura Cero Arecibo, and Sierra Club de Puerto Rico intend to file suit for declaratory and injunctive relief, as well as for attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). If you would like to discuss the contents of this letter, or believe that anything contained herein is in error, please contact Hannah Chang at 212-845-7382 or hchang@earthjustice.org.

Sincerely,



Hannah Chang
Staff Attorney
Earthjustice
hchang@earthjustice.org
212-845-7382



Kenneth Rumelt
Assistant Professor of Law
Vermont Law School
Envtl. & Natural Res. Law Clinic
krumelt@vermontlw.edu
802-831-1031

Jonathan Smith
Associate Attorney
Earthjustice

Devika Mitra
Student Clinician
Vermont Law School
Envtl. & Natural Res. Law Clinic

On behalf of:
Amigos del Río Guaynabo, Inc.
Comité Basura Cero Arecibo
Sierra Club de Puerto Rico