



February 5, 2016

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ashton Carter
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301

Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Ray Mabus
Secretary of the Navy
1000 Navy Pentagon
Washington, DC 20350

Daniel M. Ashe
Director, U.S. Fish & Wildlife Service
1849 C Street NW, Room 3331
Washington, D.C. 20240

Re: Sixty-Day Notice of Intent to Sue the U.S. Navy and U.S. Fish and Wildlife Service Pursuant to the Endangered Species Act Regarding the Implementation of the Mariana Islands Training and Testing Program

Dear Secretary Carter, Secretary Jewell, Secretary Mabus and Director Ashe,

The U.S. Navy (“Navy”) and U.S. Fish and Wildlife Service (“Service”) are hereby notified that the Alternative Zero Coalition, Center for Biological Diversity, Fanacho Marianas, Guardians of Gani, Oceania Resistance, PaganWatch, Tinian Premier Football Club and Tinian Women’s Association intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), to challenge: (1) the failure of the Navy and the Service to timely reinitiate and complete ESA Section 7 consultation concerning the Navy’s ongoing implementation of the Mariana Island Training and Testing (“MITT”) program following the designation by the Service of 23 plant and animal species in the Mariana Islands as threatened or endangered (80 Fed. Reg. 59,424 (Oct. 1, 2015)); (2) the Navy’s failure to insure that implementation of the MITT program is not likely to jeopardize the continued existence of any of the newly listed threatened or endangered species; (3) the Navy’s continued authorization and approval, prior to the reinitiation and completion of consultation on the MITT program, of MITT projects and activities that may affect one or more of the newly listed threatened or endangered species; and (4) the Navy’s continued authorization and approval, prior to the completion of reinitiated consultation, of MITT projects and activities that may irreversibly and irretrievably commit resources which may foreclose the formulation or implementation of reasonable and prudent alternatives.

I. Identity of the Organizations Giving Notice: The names, addresses, and phone numbers of the organizations giving notice of intent to sue under the ESA are:

Alternative Zero Coalition
PMB 326 Box 10001
Saipan, MP 96950
Tel: 670-322-4268

Center for Biological Diversity
P.O. Box 710
Tucson, Arizona 85702-0710
Tel: 520-623-5252

Fanacho Marianas
P.O. Box 180
Tinian, MP 96950
Tel: 670-483-0174

Guardians of Gani
P.O. Box 500370
Saipan, MP 96950
Tel: 670-287-5567

Oceania Resistance
144 Apsidal Avenue, Suite 201
Hagåtña GU 96910
Tel: 671-789-4747

PaganWatch
PMB 326 Box 10001
Saipan, MP 96950
Tel: 670-322-4268

Tinian Premier Football Club
P.O. Box 520800
Tinian, MP 96952
Tel: 670-433-2664

Tinian Women's Association
P.O. Box 400
San Jose, Tinian, MP 96952
Tel. 670-285-5459

II. Counsel for the Parties Giving Notice:¹

David Henkin
Staff Attorney
Earthjustice Mid-Pacific Office
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Tel: 808-599-2436, ext. 6614
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Marc Fink
Senior Attorney
Center for Biological Diversity
209 East 7th Street
Duluth, Minnesota 55805
Tel: 218-464-0539
mfink@biologicaldiversity.org

III. The ESA's Requirements

Section 7 of the ESA requires the Navy, in consultation with the Service, to insure that any action authorized, funded, or carried out by the Navy is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). "Action" is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. § 402.02.

For each proposed federal action, the Navy must request from the Service information whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the Navy must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action. *Id.*

If the Navy determines that its proposed action may affect any listed species or critical habitat, the agency generally must engage in formal consultation with the Service. 50 C.F.R. § 402.14. To complete formal consultation, the Service must provide the Navy with a "biological

¹ Please note that the organizations giving notice are represented by the undersigned counsel in this matter. You are hereby requested to contact David Henkin of Earthjustice or Marc Fink of the Center for Biological Diversity if you would like to discuss the contents of this letter.

opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

If the Service concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, the Service must provide an “incidental take statement” (“ITS”) specifying the impact (*i.e.*, the amount or extent) of any incidental taking on the listed species, any “reasonable and prudent measures” that the Service considers necessary or appropriate to minimize such impact, and the “terms and conditions” that must be complied with by the Navy to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

In order to monitor the impacts of incidental take, the Navy must monitor and report the impact of its action on the listed species to the Service as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the Navy must reinitiate consultation with the Service immediately. 50 C.F.R. § 401.14(i)(4).

The reinitiation of formal consultation is required and must be requested by the Navy or the Service if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

After the initiation or reinitiation of consultation, the Navy is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.21, 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19); *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1127 n. 7 (N.D. Cal. 2006). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9. 16 U.S.C. § 1536(o)(2).

IV. The February 20, 2015 Biological Opinion

On February 20, 2015, the Service issued a Biological Opinion concerning implementation of the Navy’s MITT program. According to the Biological Opinion, the MITT program “involves strike warfare and use of [Farallon de Medinilla (“FDM”)], amphibious warfare on Guam and Tinian, Naval special warfare on Guam, Rota, Tinian, Saipan, and FDM, and other activities.” 2015 Biological Opinion, p. 3. In its Biological Opinion, the Service assessed the impacts of the MITT program on only two species listed under the ESA: the threatened Mariana fruit bat and the endangered Micronesian megapode.

The Biological Opinion includes a “reinitiation notice,” stating that, as provided in 50 C.F.R. § 402.16, “re-initiation of consultation is required where discretionary Federal agency involvement or control over the action has been maintained (or is authorized by law) and if: (1) the amount or extent of exempted incidental take is exceeded; (2) new information reveals effects of the agencies’ action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this Opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.” 2015 Biological Opinion, p. 35. The Biological Opinion further provides that, “[w]hen consultation is reinitiated, the provisions of section 7(d) of the ESA apply.” *Id.*

V. New Listings of Plant and Animal Species that May be Affected by the MITT Program

On October 1, 2015, the Service published a final rule designating 23 plant and animal species in the Mariana Islands as threatened or endangered under the ESA. 80 Fed. Reg. 59,424 (Oct. 1, 2015). The following seven plant species were listed as endangered: *Eugenia bryanii*, *Hedyotis megalantha*, *Heritiera longipetiolata*, *Phyllanthus saffordii*, *Psychotria malaspinae*, *Solanum guamense*, and *Tinospora homosepala*. *Id.* The following nine animal species were listed as endangered: Pacific sheath-tailed bat, Slevin’s skink, Mariana eight-spot butterfly, Mariana wandering butterfly, Rota blue damselfly, fragile tree snail, Guam tree snail, humped tree snail, and Langford’s tree snail. *Id.* And the following seven plant species were listed as threatened: *Bulbophyllum guamense*, *Dendrobium guamense*, *Cycas micronesica*, *Maesa walkeri*, *Nervilia jacksoniae*, *Tabernaemontana rotensis*, and *Tuberolabium guamense*. *Id.* The listing rule took effect on November 2, 2015. *Id.*

According to the Service’s final rule, “the entire Mariana archipelago is located within the Mariana Islands Training and Testing (MITT) Study Area, which comprises air, land, and sea space, and includes the existing Mariana Islands Range Complex (MIRC), its surrounding seas, and a transit corridor between the MIRC and the Navy’s Hawaii Range Complex, where training and testing activities may occur.” 80 Fed. Reg. at 59,430. As explained by the Service:

The MITT Study Area opens up every island within the Mariana Archipelago as a potential training site..., which subsequently may result in negative impacts to any number of the 23 species addressed in this final rule. Proposed actions include increases in training activities on Guam, Rota, Saipan, Tinian, Farallon de Medinilla (increase in bombing), and Pagan. Likely negative impacts include, but are not limited to, direct damage to individuals from live-fire training and ordnance, wildlife resulting from live-fire and ordnance, direct physical damage (e.g., trampling by humans, helicopter landing, etc.) to individuals, and spread of nonnative species. Additionally, water purification training is proposed for all of these islands, except Farallon de Medinilla, which may be particularly damaging to the Rota blue damselfly

Id.

The Service’s final listing decision, which is based on “the best scientific and commercial data available,” makes clear that the Navy’s ongoing implementation of the MITT program may affect the newly listed species, triggering the obligation to reinstate consultation. 16 U.S.C. § 1533(b)(1)(A).

VI. Navy and Service Violations of ESA Section 7

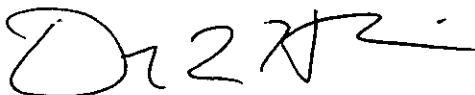
The Navy and the Service have failed to timely reinstate and complete the reinstated consultation regarding the continued implementation and impacts of the MITT program on the 23 newly listed plant and animal species, in violation of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16. The Navy is therefore also in violation of its duty under ESA Section 7 to insure that no action is likely to jeopardize the continued existence of the any of these newly listed species. 16 U.S.C. § 1536(a)(2).

Moreover, by allowing, authorizing, and approving projects and activities to proceed as part of the MITT program that may affect any of the newly listed species, prior to the reinstatement and completion of consultation with the Service, the Navy is violating the ESA. 16 U.S.C. § 1536(a)(2); see *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (holding that Section 7(d) of the ESA “does not serve as a basis for any governmental action unless and until consultation has been initiated”). Additionally, by allowing, authorizing, and approving projects and activities to proceed as part of the MITT program that may affect any of the newly listed species, prior to the completion of reinstated consultation with the Service, the Navy is violating ESA Section 7(d)’s prohibition on irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(d).

VII. Conclusion

For the above stated reasons, the Navy and the Service have violated and remain in ongoing violation of the ESA. If these violations of law are not cured within sixty days, the Alternative Zero Coalition, Center for Biological Diversity, Fanacho Marianas, Guardians of Gani, Oceania Resistance, PaganWatch, Tinian Premier Football Club and Tinian Women's Association intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). This notice letter was prepared in good faith, after reasonably diligent investigation. If you believe that any of the foregoing is factually inaccurate or erroneous, please notify us promptly.

Sincerely,

A handwritten signature in black ink, appearing to read 'DLH', with a stylized flourish extending to the right.

David L. Henkin
Staff Attorney, Earthjustice

DLH/tt