

MEMORANDUM

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From: Dentons US LLP
Environmental Science Associates

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Subject: Brief Summary of Findings Regarding Legal Adequacy of Draft Environmental Impact Statement for the Commonwealth of the Northern Mariana Islands Joint Military Training Project

This memorandum provides a brief summary of the findings of the Dentons - Environmental Science Associates team regarding the legal adequacy of the Draft Environmental Impact Statement ("DEIS") prepared by the United States Navy for the proposed Commonwealth of the Northern Mariana Islands Joint Military Training Project ("CJMT" or "Project").

We find the DEIS fails to meet even the most basic requirements of the National Environmental Policy Act ("NEPA"):

- The DEIS fails to provide a meaningful, objective evaluation of alternatives to the Navy's proposed Project (see Part 1, below);
- The DEIS fails to identify and analyze the environmental impacts of the Project in an accurate, complete fashion (see Part 2, below);
- The DEIS fails to address mitigation that would avoid or minimize the impacts of the Project, even where such mitigation is obvious, effective, and financially-feasible (see Part 3, below); and
- In preparing the DEIS, the Navy failed to promote meaningful public engagement and proceeded without coordination or compliance with other requirements of federal and CNMI law (see Part 4, below).

Without fundamental revisions in each of these areas, the EIS will not provide a legally-defensible basis for Navy decision-making on the CJMT.

1. Alternatives

Under NEPA, an EIS must rigorously explore and objectively evaluate all reasonable alternatives to the proposed federal action. The Navy has utterly and completely failed to meet this requirement. Rather than engaging in a good-faith analysis of training options throughout the Western Pacific region, the DEIS presents a biased perspective designed to justify the Navy's preferred sites in the CNMI. And rather than evaluating a variety of different training locations, activities, and intensities, the DEIS is strictly limited to a single option — a full suite of unit-level training activities on Tinian and a full suite of combined-level training activities on Pagan.

The DEIS' failure to rigorously explore and objectively evaluate all reasonable training alternatives is arbitrary, capricious, and contrary to NEPA in several respects:

- It is clearly reasonable for the Navy to address unmet training needs — in full or in part — by using facilities outside the CNMI. For example, U.S. forces have recently used ranges in Australia and the Philippines for the same sort of training activities now proposed for the CNMI. Use of such facilities should have been considered in the DEIS.
- The Navy's decision to focus exclusively on the CNMI is premised on the notion of a "training deficiency" in the Marianas. It is not possible to reconcile that premise with the CJMT's proposal to bring hundreds of thousands of personnel from outside the Marianas (many from foreign countries) to train in the CNMI. If personnel from outside the Marianas can feasibly be trained in the CNMI, it must be just as feasible for personnel within the Marianas to obtain training elsewhere.
- The Navy's own *Training Needs Assessment* admits that the DEIS should have evaluated alternatives outside the CNMI: "Although the primary proposed option is to develop new training ranges and increase capabilities at existing ranges in the [Marianas], it is critical that other options are researched in the EIS as required by the [NEPA] process to ensure a complete and justifiable EIS." In refusing to fully evaluate training options outside the CNMI, the preparers of the DEIS failed to follow the Navy's own directions.
- By law, an alternatives analysis must "identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of those actions on the human environment." Here, the Navy has made no effort whatsoever to identify alternatives that could avoid or minimize harm. On the contrary, all three of the "alternatives" evaluated in the DEIS involve the same significant environmental impacts on the same two small islands.

It is also worth noting that the Navy's failure to consider training alternatives outside the CNMI is not an isolated instance of non-compliance. The CJMT is the fifth major military training project proposed for the CNMI in recent years. Each of the five projects has involved the preparation of an EIS. None of the five EISs fully evaluates any alternatives located outside the CNMI. Based on the documents we have reviewed to date, it appears that the Navy has consistently singled out the CNMI for inappropriate treatment under NEPA.

We find the CJMT DEIS' failure to fully evaluate any alternatives located outside the CNMI to be the most egregious of the document's many shortcomings. This fundamental flaw contaminates the remainder of the DEIS, rendering the entire document inadequate.

2. Environmental Impacts

An EIS must include a detailed discussion of all reasonably foreseeable direct, indirect, and cumulative environmental impacts of a proposed project, as well as an assessment of the significance of each one. The DEIS violates this standard in hundreds of different ways, both large and small. In an effort to provide a meaningful summary briefing, we focus on just a few of the most significant errors here:

- The DEIS fails to specify the number of years for which the Navy proposes to train on Tinian and Pagan. Without that information, there is no way to be certain of the Project's long-term environmental impacts.
- The DEIS inaccurately assumes there is no — and will never be any — human use of Pagan. As a result of this assumption, it fails to address the project's significant consequences for those who visit and/or plan to return to Pagan.
- The Project risks permanently fouling Tinian's water supply with contaminants from spent munitions. The Navy promises to study this threat in a future "pre-versus-post-development hydrologic analysis." Under NEPA, vague promises of future analysis are not sufficient. The analysis must be included in the DEIS and circulated for public review and comment.
- The Project would violate numerous CNMI environmental and land use laws, including multiple provisions of the lease agreement governing military training on Tinian. The DEIS arbitrarily and capriciously refuses to address this issue.
- The CJMT would restrict the airspace over and around Tinian (including approaches to Saipan International Airport) for significant periods of time. The DEIS fails to confront the full effect of these restrictions on civilian transportation, tourism, cost of living, and emergency medical care.
- The DEIS fails to take local conditions and experience into account. For example, sonic booms associated with current military training have resulted in broken windows and other property damage on Tinian and Saipan. And training activities on Tinian have resulted in noise impacts so severe that classes must be cancelled and students are sent home from school. The Navy ignores these facts and others like them.
- As noted above, the CJMT is the fifth major military training project proposed for the CNMI in recent years. By law, the DEIS must identify and evaluate the combined, cumulative effects of these five actions. The document fails to do so, resulting in a significant under-estimate of the total impact of military training on the CNMI.

These are just a few of the numerous errors associated with the DEIS' evaluation of environmental impacts. But each one of them is so fundamental as to render the document inadequate as a matter of law.

3. Mitigation

By law, an EIS is required to identify and discuss "means to mitigate adverse environmental impacts." The DEIS fails to satisfy this fundamental requirement in three distinct ways.

- For the vast majority of the CJMT's adverse impacts, the DEIS fails to propose any mitigation whatsoever. For example, the DEIS admits that the CJMT will destroy more than 180 historic and cultural sites on the island of Tinian alone (including numerous *latte* sites), but the document fails to identify any specific measures to mitigate or avoid this damage.
- For certain other adverse impacts, the DEIS identifies potential mitigation but fails to provide any reason to believe the identified mitigation would be effective. For example, the DEIS admits the CJMT will destroy a wildlife conservation area set aside for the Tinian Monarch, a rare bird species found nowhere else in the world. The Navy proposes to mitigate this impact by finding another conservation area elsewhere on Tinian. But the DEIS provides no information about the availability or environmental suitability of any alternative location.
- The DEIS makes vague references to various "mitigation plans" that could be prepared at a later date. But the Navy has not actually committed to preparing the referenced plans, has not identified the contents of the plans, and has not explained whether or how the plans would be funded and implemented. The Navy's reliance on the *possibility* of undefined future "mitigation plans" impermissibly obscures the true impacts of the CJMT and threatens to shift a significant proportion of the Project's mitigation costs from the Navy to the government of the CNMI.

Each of these errors violates NEPA and precludes meaningful analysis of the full environmental impact of the Project. We find that the DEIS does not comply with NEPA's mitigation requirements.

4. Public Involvement and Coordination

By law, federal agencies "*shall* to the fullest extent possible...[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." That has not happened here. For example:

- Chamorro and Carolinian are official languages of the CNMI and are spoken by a significant number of CNMI residents. But the Navy has not provided any portion of the DEIS in either language. There does not appear to be any reason why the Navy could not have done so — after all, it prepared a Chamorro summary of the 2010 EIS for the Guam Buildup project.
- The Navy was required to use the scoping process¹ "for an early identification of what are and what are not the real issues." Instead, the Navy simply ignored the vast majority of the scoping input it received from the CNMI, the public, and other federal stakeholders. Had the Navy followed the advice it received during the scoping period, many of the legal deficiencies identified in parts 1, 2, and 3 of this summary could easily have been avoided.

¹ Scoping is "an early and open process for determining the scope of issues to be addressed [in an EIS] and for identifying the significant issues related to a proposed action."

NEPA also requires that preparation of an EIS must be integrated with "other planning and environmental review procedures required by law." The Navy has failed to comply with this mandate.

The CJMT is subject to a wide range of federal and CNMI laws, including the Clean Water Act, the National Historic Preservation Act, the Endangered Species Act, the Coastal Zone Management Act, the Marine Mammal Protection Act, the Clean Air Act, and CNMI environmental, coastal, and land use regulations. The DEIS does not contain data and information necessary demonstrate compliance with these requirements. On the contrary, the limited evidence presented in the document suggests that the CJMT would violate both federal and CNMI law.

We find that the Navy has failed to follow the coordination and public input requirements of NEPA and, further, that this failure has been so significant that it constitutes an independent basis for requiring a second round of public review and comment on the DEIS.

5. Remedy

For each of the reasons identified in this summary, the current version of the CJMT DEIS is so inadequate as to preclude meaningful analysis of the Project. Accordingly, the document must be thoroughly revised and then recirculated for a second round of public review before the Navy prepares a Final EIS. If the Navy fails to take these steps, the EIS will not provide a legally-defensible basis for approving the CJMT.