U.S. Department of Justice

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June 16, 2011

The Honorable Leslie E. Kobayashi
United States District Court Judge
District of Hawaii
300 Ala Moana Boulevard
Honolulu, HI 96850

Re: *Guam Preservation Trust v. Gregory*, No. 1:10-cv-00677-LEK-RLP

Dear Judge Kobayashi,

Defendants Katherine Gregory, *et al*. ("Defendants"), submit this letter brief in response to the Court's June 14, 2011, Order requesting that the parties clarify their respective positions on the Defendants' Motion for Voluntary Remand and Stay, filed on May 29, 2011 ("Motion"). On June 15, Plaintiffs responded to the Order by restating verbatim the conditions that they would require in order to withdraw their opposition to the Motion, as previously set forth in their Memorandum in Partial Opposition to Defendants' Motion for Voluntary Remand and Stay. Dkt # 68, pp. 4-5.

Although Defendants cannot agree to the precise terms of the conditions requested by Plaintiffs because portions of those conditions are not appropriate, Defendants do plan to take certain actions that would satisfy the spirit of what Plaintiffs have requested. With respect to Plaintiffs' first condition, Defendants are willing to agree to take the following measures, provided that the Navy does not immediately determine that additional review is necessary under the National Environmental Policy Act ("NEPA"): (1) the Navy will provide a 30-day public comment period on the draft Supplemental Information Report ("SIR") that will be

prepared by Defendants as part of the current process described in their Motion; and (2) publish and make available the final SIR, which will address comments received on the draft SIR. In the event the Navy determines, based upon the draft SIR, that additional review is necessary under NEPA via a supplemental environmental impact statement ("SEIS"), Defendants will provide for public participation as required under NEPA. With regard to the second condition, the Department of Defense ("DOD") does not currently have funding to acquire property for a live-fire training range complex, and the President's Fiscal Year 2012 budget does not include a proposal for such funding. Therefore, Defendants do not anticipate that they would undertake any construction-related ground disturbing activities in the Route 15 area during the remainder of Fiscal Year 2011 or in Fiscal Year 2012.[1]

With regard to the first condition requested by Plaintiffs, as outlined in the Motion, Defendants are currently undertaking a process that will enable them to determine whether to prepare additional analysis pursuant to NEPA prior to issuing a Record of Decision ("ROD") selecting a site for the live-fire training range complex. As part of this process, Defendants will prepare a SIR. The SIR will serve as the document that enables Defendants to determine whether additional analysis is necessary under NEPA, or whether Defendants are able to issue a supplemental ROD concerning the live-fire training range complex on the basis of the NEPA work already completed. As explained in the Motion, the ROD issued in September 2010, expressly deferred making any decision on that issue. Upon completion of the draft SIR, Defendants will provide for a 30-day public comment period on that document. Thereafter, Defendants will publish and make available the final SIR, which would address any public comments received on the draft SIR. If, however, based upon review of the draft SIR, Defendants conclude that supplemental NEPA analysis is required, there is no need to make the SIR publicly available because that analysis would include public participation on the SEIS as set out in the NEPA regulations at 40 C.F.R. § 1506.6.

Defendants' representations that DOD will provide a public comment period on the draft SIR and publication of the final SIR, as described in this letter brief, are not a result of obligations arising under NEPA or any other federal law or regulation. Indeed, NEPA does not require a public comment period for a SIR.

[1] The Route 15 area consists of private lands and Government of Guam lands located to the east of Andersen South and Route 15, extending along the eastern coast of Guam north to Andersen Air Force Base. *See* Guam FEIS at 2-80 to 2-81; 2-86 to 2-87 (AR0226842-43; AR0226848-49).

See, e.g., *Forest Conservation Council v. Espy*, 835 F. Supp. 2d 1202, 1212, 1216 (D. Id. 1993), *aff'd*, 42 F.3d 1399 at *2 (9th Cir. 1994) (Table) (finding that "[t]he Forest Service was not required to circulate its supplemental information report for public comment) (unpublished opinion); *see also Northwoods Wilderness Recovery, Inc. v. U.S. Department of Agriculture Forest Service*, 2006 WL 2189118 at *2, 7 (6th Cir. 2006) (finding that NEPA does not require "public comment on the Supplemental Information Report") (unpublished opinion) (citing *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 559-60 (9th Cir. 2000) ("Although NEPA requires agencies to allow the public to participate in the preparation of [a Supplemental Environmental Impact Statement], there is no such requirement for the decision *whether* to prepare [the Supplemental Environmental Impact Statement].") (Emphasis in original)). Further, Defendants wish to note that the Navy already provided for public involvement during the NEPA process that is the subject of this lawsuit, as reflected in the extensive public comments contained in the final environmental impact statement. Finally, Plaintiffs offer no law, regulation, or case law that supports their position regarding a public comment period for "charging documents."

With regard to the second condition, Plaintiffs are incorrect when they suggest that Defendants are under a general prohibition against undertaking any ground disturbing activities, as tied to the original briefing schedule. Defendants have not agreed to any such prohibition, nor has the Court imposed any such restriction. Further, the second condition must be read as only applying to the Route 15 area, and not to other activities related to the relocation of troops from Japan to Guam at any of the locations that Plaintiffs contend, in their Complaint, is a reasonable alternative for citing the training range complex. Otherwise, this second condition would prohibit Defendants from taking any activity on Guam and is especially unwarranted in light of the fact that Plaintiffs have repeatedly and expressly stated they are not challenging the broader relocation.

Further, Plaintiffs' objection to "ground disturbing activities" in the Route 15 area is overly broad. For example, as discussed in the Declaration of Capt. Don R. Chandler, ground disturbing activities such as soil borings could occur to aid in environmental feasibility studies associated with potential acquisition of property. *See* Chandler Declaration, ¶ 25. Such activities, though they are ground disturbing, would neither preclude the Navy from siting the live-fire training range complex at any location Plaintiffs contend in their Complaint is a reasonable alternative, nor otherwise conflict with Defendants' legal obligations. Additionally, because the President's proposed budget for Fiscal Year 2012 does not propose funding for the acquisition of land for the training range complex, *see* Chandler Declaration, ¶ 23,

absent changes in Congressional authorization and appropriation of funds in Fiscal Year 2012, Defendants do not anticipate that they will receive the funds necessary to acquire land for a live-fire training range complex. Therefore, Defendants anticipate that they would be unable to undertake any construction-related ground disturbing activities in the Route 15 area, as contrasted with other preliminary ground disturbing activities, during the remainder of Fiscal Year 2011 or in Fiscal Year 2012.

Defendants have already volunteered to provide Plaintiffs with more notice and lead time for seeking judicial relief than they are presently entitled to as a matter of law. At this point, Plaintiffs have essentially demanded that Defendants consent to a preliminary injunction, and in doing so, seek to take litigation advantage of Defendants because they are undertaking further review of the underlying subject matter of this lawsuit. Defendants simply cannot agree to such an unwarranted restriction, nor can they agree to the self-injunction that Plaintiffs demand.

Defendants wish to reiterate the representations made in their Motion. Specifically, Defendants stated that they did not anticipate that they will undertake any activities related to the Guam relocation for the next 90 days that would preclude siting the live-fire training range complex at any location that Plaintiffs contend, in their Complaint, is a reasonable alternative site for that complex. *See* Chandler Declaration, ¶ 29; Declaration of Joseph D. Ludovici, ¶ 23. As Defendants stated in their Motion, they would agree, as a condition to a stay, to provide the Court and Plaintiffs with 15 days' notice if the situation should change. Motion, Dkt # 60, p. 21. Additionally, in response to the Court's inclination to issue a stay for 120 days, as expressed in the Court's June 14, 2011, Order, Defendants currently do not anticipate undertaking any activities related to the Guam relocation for the next 120 days that would preclude siting the live-fire training range complex at any location Plaintiffs contend, in their Complaint, is a reasonable alternative site for that complex.

In light of the foregoing, Defendants believe that Plaintiffs' objectives have been more than satisfied by the commitments offered by Defendants and respectfully request that the Court grant Defendants' Motion for the reasons articulated therein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2011, I electronically filed the above document with the Clerk of the Court using the ECF system, which automatically will send email notification to the attorneys of record listed below:

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