

March 5, 2009

RE: Request for Investigation of Environmental/Natural Resource Violations, Abuses of Authority and Health and Safety Violations at Andersen Air Force Base, Guam

On behalf of Public Employees for Environmental Responsibility (PEER) and our client, Nancy Mitton, the Natural Resources Specialist at Andersen Air Force Base on Guam since September 2006, I am submitting the following request for investigation into severe problems within the environmental and natural resource program on that Base, including violations of law, regulations and guidance, abuses of authority, serious public health and safety risks and gross dereliction of duty by the Base command.

In essence, the program at Andersen AFB to protect and conserve Guam's natural resources is doing the opposite. Ms. Mitton has repeatedly raised all of the issues outlined below with her chain of command to no effect and is seeking the correction of improper practices outlined below:

I. Poaching and Wildlife Depredation

There is an on-base Hunting/Depredation Volunteer Conservation Officer (VCO) Program, consisting mainly of local area residents, that was created with the goal of performing conservation projects and removing feral pigs and exotic deer. These two species cause great damage to the limestone forest on the base. Unfortunately, the goals of the program have been lost in an onslaught of malfeasance and reckless behavior, including:

A. Poaching. The VCOs hunt seven days a week without any supervision because they are their own supervisors. This program is not operated to serve its established purpose of controlling invasive or exotic species but rather for the recreation and profit of the volunteers. As a result, there is poaching of deer in areas that are off-limits to hunting.

Instead of limiting the pig population, a key goal of the program, the hunters target trophy deer which they then sell for a profit off-base (bringing as much as \$400 per deer). Since the deer are not tagged, the Guam Dept of Agriculture loses tag fee revenue for its programs. Despite repeated elevations of concerns about poaching concerns and other hunting program problems, the program continues without any changes.

This information shows a substantial likelihood of:

- Violation of Rule – Signed “no hunting” areas

B. Hunting Violations. In early January 2007, while serving as Chief Conservation Officer (CCO) of the Hunting Program, Ms. Mitton issued Letters of Suspension from hunting privileges for four VCOs and a Removal from Program letter for one VCO for hostile workplace violence toward a federal employee. These letters were issued for violating Guam hunting regulations, Base Instructions and program depredation policies. [Guam Code Annotated, Title 5, Div. 6, Chap. 63: Fish, Game, Forestry & Conservation; Air Force Instruction 32-7064 (Integrated Natural Resources Management); 36 Wing Instruction 32-7003 (Conservation and Management of Natural Resources, 12 Dec 2000); Sikes Act].

On April 20, 2007, Ms. Mitton was relieved of her duties as CCO of the Hunting VCO Program and was first replaced by an officer and then by another federal employee, both with no background in biology in violation of Air Force guidance. It is currently being managed by the Flight Chief and a contractor, both lacking formal biological training.

This information discloses a substantial likelihood of:

- Violation of Rule – Air Force, AFI 32-7064, Section 6.2.1 & Attachment 1, Terms
- Abuse of Authority

C. Unsafe Conditions. The lack of signage in Tarague Basin informing public hikers when hunting is in progress during the week creates a hazardous condition. For example, in April 2008, a VCO shot and killed a Base resident’s dog during a depredation.

This information discloses a substantial likelihood of:

- Substantial and Specific Danger to Public Health or Safety

D. Base Security Compromised. The VCOs who come onto the Base for hunting purposes do not have security clearances yet they are allowed to bring weapons anywhere on the base, even at night. They are not searched at the gate when they come onto the Base or when they leave to substantiate their legal hunting success. Nor are they screened by background checks to determine whether any have criminal records.

This information discloses a substantial likelihood of:

- Violation of Rule – Air Force, 36th Wing Instruction (36WGI 31-101)
- Substantial and Specific Danger to Public Health or Safety

II. Endangered Species Violations

The federal Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and its implementing regulations charge federal agencies with, among other things, the duty of consulting with the Fish and Wildlife Service and/or National Marine Fisheries Service to determine whether any action may affect threatened or endangered species or their habitats. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) (2008). The ESA also prohibits the “taking” of listed species. 16 U.S.C. § 1538(a). The term “take” is defined as an act that serves to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” listed species, even encompassing attempts to perform such acts regardless of success. 16 U.S.C. § 1532(19).

A. Fruit Bat Colony In September 2007 the Base began construction and clearing of native limestone forest vegetation on new approach lighting for the Base runway. Formal consultation for this project as required under Section 7 of the Endangered Species Act (ESA) was not initiated until October 2007 after U.S. Fish & Wildlife Service (USFWS) personnel discovered the ongoing project during a Base field visit.

There is a Mariana fruit bat colony (federally-listed threatened species) below the cliff adjacent to the construction area.¹ There are reports that the construction workers are shooting the bats with bow and arrow. Fruit bat is a local delicacy served at weddings and other events.

The fruit bat population has declined from 55 bats (summer 2007) to currently 21 bats (December 4, 2008 survey) as a possible result of the poaching. Ms. Mitton’s request for fencing around the construction area to prevent easy access to and poaching of the colony was delayed for eight months because it was not considered a priority. This affected a taking in violation of ESA Section 9.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 7, 16 U.S.C. Section 1536(a)(2)
- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Abuse of Authority

B. Mariana Crows Mariana crows (federally-listed endangered species) are extremely rare on Guam.² In the summer of 2007 there were 10 crows in the Andersen AFB Munitions Storage Area (MSA1). The MSA1 is a prime hunting location, but after the crows were introduced to the MSA1 hunting was limited to only bow hunting by military VCO personnel. Beginning about one year ago, the Base has allowed depredation by VCO personnel using shotguns.

¹ See <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A07W>

² See <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=B05X>.

Perhaps not surprisingly, over the ensuing months the crows mysteriously disappeared, and now no crows have been located or heard for several weeks. Even as it became clear the population was declining, the Base rebuffed Ms. Mitton's requests to investigate or ensure the crows' survival.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Abuse of Authority

C. Uranao Cleanup, Dumpsite 1 & 2 and Other Cleanup Sites There is a multi-million dollar, federally-funded cleanup project of World War II debris and munitions located on a hillside just off military property of Andersen AFB. When the project was drafted, a previous Chief of Conservation at Andersen AFB determined there would be no impacts to natural resources, so there was no consultation with USFWS. There were no surveys for Mariana bats or Mariana crows at the cleanup site. Similarly, there is no re-vegetation plan in the contract or any other mitigation measures.

The cleanup project has resulted in the complete de-vegetation of the property (see Attachment 3, Photos 1 & 2). There were intense impacts to natural resources. This is not limited to the Uranao Dumpsites. In addition to the lack of consultation required under ESA Section 7, until Ms. Mitton addressed the issue, other Installation Restoration Program (IRP) projects were not reviewed as required under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*³ Projects such as the Uranao cleanup are, as the attached photos demonstrate, major federal actions that significantly affect the environment. *See* 42 U.S.C. ¶ 4332(C). The IRP still does not request NEPA review for projects.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 7, 16 U.S.C. § 1536(a)(2)
- Violation of Law – NEPA, 42 U.S.C. ¶ 4332(C)
- Abuse of Authority

D. Training Exercises at Andersen South Beginning in June 2008 Ms. Mitton questioned the justification for NEPA Categorical Exclusions issued for training exercises in Andersen South without any biological surveys performed for Threatened & Endangered species. Her supervisors ignored her determinations that surveys were required and they approved all training requests for the location. The training areas are located in close proximity to a previously proposed Federal critical habitat designation for the Mariana fruit bat and Guam Micronesian kingfisher (federally-listed endangered species). This lack of USFWS consultation is a violation of the ESA.

³ NEPA requires review of environmental impacts for all major federal actions that significantly affect the human environment. 42 U.S.C. ¶ 4332(C).

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 7, 16 U.S.C. § 1536(a)(2)
- Abuse of Authority

III. Sea Turtles and Beach Destruction

In February 2007, Ms. Mitton re-initiated the Marine Patrol Volunteer Conservation Officer (MPVCO) Program and also served as its CCO. In that program, nineteen volunteers walked the 2.5 miles of beaches and collected federally-listed sea turtle nesting information on the Andersen beaches. In addition, they collected fish catch data, and informed fishermen about Andersen AFB Marine Resources Preserve, Guam National Wildlife Refuge Overlay and Pati Point Marine Preserve rules and regulations.

There are two species of federally-listed sea turtles found in Guam waters which use Andersen beaches for nesting. Both the hawksbill turtle (endangered) and green sea turtle (threatened) require protection under the ESA.⁴

Among the violations/problems she encountered were the following:

A. Paving Over Turtle Beaches In March 2007, Brigadier General Douglas H. Owens, Base Commander, decided to clear all vegetation except for several coconut trees from Tarague Beach, a historical sea turtle nesting area, to “beautify” the area (see Attachment 3, Email 1). Despite being informed that 1) the beach was federally listed sea turtle habitat and that the vegetation removal plan would violate the ESA; 2) consultation with the U.S. Fish & Wildlife Service (USFWS) was legally required under 16 U.S.C. § 1536; 3) the scope of work would need an Environmental Assessment under NEPA and 4) the project created a strong potential for erosion of soil/sand into the coral reef environment, the project went ahead – relying on improper/inapplicable Categorical Exclusions (“Cat Ex”) from NEPA – and took place throughout the rest of 2007. In addition to clearing of the vegetation, Base command also permitted the grinding up of beach coral and paving of a soil/sand beach road (see Section B below).

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 7, 16 U.S.C. § 1536(a)(2)
- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Violation of Law – NEPA, 42 U.S.C. § 4321 *et seq.*
- Abuse of Authority

B. Ocean Run-Off In Fall 2007, Ms. Mitton complained to her supervisors and the Base NEPA coordinator about Base command’s plan to pave the existing compacted soil/sand beach road adjacent to Tarague Beach with asphalt, thereby directing the storm-

⁴ See <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=C00E>, and <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=C00S>.

water runoff toward the shoreline and into the ocean. In addition, her concerns about the effects of this poorly designed project on sea turtle nesting habitat and the rest of the natural environment, in violation of both the ESA and NEPA, were ignored.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 7, 16 U.S.C. § 1536(a)(2)
- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Violation of Law – NEPA, 42 U.S.C. § 4321 *et seq.*
- Abuse of Authority

C. Fishing Violations On four different occasions during summer 2007, the Marine Patrol contacted Security Forces about incidents of illegal fishing activity, resulting in the apprehensions of Air Force personnel in the Pati Point Marine Preserve. Her supervisors informed Ms. Mitton that the Base command did not want to encourage these apprehensions because it did not want to acknowledge Air Force personnel were violating regulations. In early August 2007, Ms. Mitton was removed as CCO for the Marine Patrol VCO Program.

This information discloses a substantial likelihood of:

- Violation of Rules – Guam, 5 GCA, Div. 5, Ch. 63, Guam Public Law 24-21; Air Force, 36th Wing Instruction, 36WGI 32-7003
- Abuse of Authority

D. Beach Monitoring Ended and Rise in Illegal Vehicle Traffic In September 2007, the Marine Patrol VCO Program was merged into the Hunting/Depredation VCO Program. On November 1, 2007 the Marine Patrol was disbanded entirely. From that point forward, beach patrols ended and resource “management” ceased altogether in the beach areas.

Since beach monitoring stopped in November 2007, there has been increased illegal vehicle traffic that has damaged sea turtle nesting vegetation. Sadly, much of the damage was inflicted by Base personnel. Ms. Mitton’s suggestions for barriers at the entrance of trails to the beaches and appropriate signage to minimize damage were delayed for months as continued damage due to illegal beach traffic occurred.

The Base Fire Department is responsible for much of the damage (see Attachment 3, Photos 3 & 4). The Fire Department is required to be trained and available for water rescue for swimmers and boating situations. They must launch their jet-skis from the Tarague Channel several hundred feet north of Sirena Beach. In performing this action they drive a truck with a trailer to the launch site on the sand. Ms. Mitton’s repeated suggestions that the Base should consult with both USFWS and NOAA for possible impacts to beach nesting vegetation, the coral reef and marine plants and animals were

rebuffed. Instead, the Base issued two NEPA Categorical Exclusions for training sessions with several agencies under contract (March 19 and May 8, 2008) under the rubric of “routine procurement of goods and services” and “continuation or resumption of pre-existing actions, where there is no substantial change in existing conditions or existing land uses and where the actions were originally evaluated in accordance with applicable law and regulations, and surrounding circumstances have not changed.”

This lack of USFWS consultation is a violation of the ESA. The Fire Department damaged beach nesting vegetation before and after the inappropriate NEPA document was issued.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 7, 16 U.S.C. § 1536(a)(2)
- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Violation of Law – NEPA, 42 U.S.C. § 4321 *et seq.*
- Abuse of Authority

E. Coconut Crab Trapping Although Guam law prohibits trapping of coconut crabs within 30 feet of the shoreline, after the VCO programs merged in September 2007 the number of illegal coconut crab traps on the beaches significantly increased. The secretary of the nonprofit VCO hunting program even distributed an email stating that as VCOs they were allowed to trap crabs on the beach. When Ms. Mitton complained nothing was done to address the issue.

This information discloses a substantial likelihood of:

- Violation of Law – Guam Law, 5 GCA, Div. 5, Ch. 63, Guam Public Law 24-21
- Abuse of Authority

F. Dog Trail Approved for Marine Preserve & Guam National Wildlife Refuge Overlay Against the recommendations of the USFWS during consultation, the Base approved a dog trail on the beach in the designated marine preserve area refuge overlay. The preserve and the overlay were designated to “protect marine habitats and species.” The trail runs through historical nesting habitat for federally threatened green sea turtles. The area provides access for crabs, shorebirds and other marine animals to forage and nest. In the case of coconut crabs, they release their eggs into the shoreline waters.

There are many other areas on Base available for dogs to be walked. The Base has even constructed an enclosed dog area near housing. As part of a later USFWS recommendation re: enhanced recreation projects, one person was to monitor the proposed dog trail during daylight hours, Friday through Monday with no monitoring the remaining three days. Despite this recommendation, no monitor is in place although

unleashed dogs had been known to be allowed by their owners to enter the preserve. The presence of dogs on the beach greatly impacts wildlife, especially sea turtles, and could be considered harassment under the ESA.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Abuse of Authority

G. Additional USFWS Recommendations Not Initiated During Section 7 consultation from February to August 2008 for the Enhancement of Passive Recreational Opportunities at Tarague Beach project (consult initiated after paving and beachside vegetation removal had been completed the prior year, as detailed above in Sections A & B), USFWS recommended several conservation measures to protect sea turtles and their habitat, including: installation of sea turtle lighting, prohibition of free movement of pets in beach habitats, restriction of beaches each night, beach patrol to monitor the area all year, and incorporation of conservation measures into the operating instructions (see Attachment 3, Letter 1). These recommendations have not been adopted, at great risk to the sea turtles and also at risk of liability to the Air Force under the ESA.

This information discloses a substantial likelihood of:

- Violation of Law – ESA Section 9, 16 U.S.C. § 1538(a)
- Abuse of Authority

H. Ordnance Dangers On August 1, 2007, Ms. Mitton reported military personnel fishing in an Explosive Ordnance Disposal (EOD) area, which is not permitted due to safety concerns [36WGI 34-102; 36WGI 32-7003], to base Security Forces. Her supervisors subsequently instructed her that the base commanders did not want to receive reports from Security Forces that military personnel were violating base instructions.

In addition, Ms. Mitton has repeatedly complained that notifications of munitions detonations are inadequate. The Base routinely detonates munitions at certain locations for both removal and training purposes. Per Air Force rules, the units performing detonations are supposed to notify other Flights that may have personnel and contractors working in proximity of the blasting.

Despite these rules, the required prior warnings several days before scheduled explosions have not been occurring. In some instances, notice is issued only one hour before blasts. In other instances, there is no notice.

In one recent incident, notice received by officers was not relayed to remaining Flight personnel (see Attachment 3, Email 2). In other words, notice is not making it in a timely fashion to the people in the field who really need it. As recently as July 24, 2008, EOD

notified the Environmental Flight only 19 minutes before a detonation, insufficient time to contact contractors in the field.

This information discloses a substantial likelihood of:

- Substantial and Specific Danger to Public Health or Safety
- Violation of Rules – Air Force, 36WGI 34-102; 36WGI 32-7003 (no fishing in EOD area); AFMAN 91-201, Air Force Manual, Explosive Safety Standards; 36th Wing Explosive Safety Program Management (36WGI 91-201) (notification guidelines)
- Abuse of Authority

Additional information about all of these actions/incidents/omissions is available upon request. To aid understanding of these disclosures, Ms. Mitton has supplied photographs of several of the sites depicting the nature and extent of the problems described.

The immediate review of this situation is merited. Malfeasance at Andersen AFB has already resulted in one endangered species being effectively extirpated while another's population has been cut in half. It is also likely only a matter of time before sea turtles stop visiting Andersen's beaches entirely as illegal and poorly planned projects take their toll on a formerly idyllic nesting habitat.

Ms. Mitton does not take this step lightly. She has exhausted her options within the Andersen chain-of command. Action must be taken before even more irreversible damage occurs.

Sincerely,

Paula Dinerstein
Senior Counsel

Attachments