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Janice E. Castro  
Director, DCRM

Ref No: PLN21-004

February 12, 2021

Mr. Michael Tosatto  
Regional Administrator  
National Marine Fisheries Service, Pacific Islands Regional Office  
1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818

**Re: Objection to Negative Determination for the Proposed Critical Habitat Designation of Endangered Species Act Listed Corals Within the Coastal Zone of the Commonwealth of the Northern Mariana Islands**

Dear Mr. Tosatto,

The Commonwealth of the Northern Mariana Islands (CNMI) Division of Coastal Resources Management (DCRM) has reviewed the National Marine Fisheries Service (NMFS) negative determination received on November 30, 2020 concluding that “the proposed designation of critical habitat for the listed corals will have no reasonably foreseeable effects on the enforceable policies of CNMI’s approved Coastal Zone Management Program.” On January 15, 2021, DCRM requested a fifteen-day extension for review, and NMFS agreed to the extension deadline of February 13, 2021. A public notice was posted in both local newspapers and the DCRM website for a public comment period of fifteen days from December 4-19, 2020 in compliance with 15 CFR § 930.42; no comments were received during the comment period, although concern was expressed by various territorial stakeholders and agencies after the Coastal Zone Management Act (CZMA) federal consistency public notice period had ended.

Pursuant to 15 CFR § 930.35(c), DCRM objects to the negative determination on the grounds that coastal effects are reasonably foreseeable. “Coastal effects” are defined in 15 CFR § 930.11 to include any reasonably foreseeable effect on “any coastal use or resource,” which is in turn defined to include land and water uses, including but not limited to public access, recreation, fishing, development, hazards management, and marinas and floodplain management. It is reasonably foreseeable that the critical habitat designation will create administrative burdens and detrimental economic impacts in the CNMI.

For clarification, this letter is focused on the threshold question of effects, rather than on the proposal’s consistency to the maximum extent practicable with the enforceable policies of the CNMI Coastal Management Program (CMP).

NMFS’s conclusion of no reasonably foreseeable effects on the enforceable policies of CNMI’s approved CMP relies primarily on three factors: (1) that the proposed critical habitat designation will not affect activities that do not have any Federal involvement; (2) that the designation will only impose administrative costs on federal agencies and third parties requiring federal approval or

funding; and (3) that it will be up to the Federal action agency to first determine whether its proposed action may affect a critical habitat or not, based on details about the project and the action area. For the reasons discussed below, DCRM questions NMFS's reliance on these factors to establish a showing of no reasonably foreseeable effects.

While NMFS is correct that the proposed critical habitat designation will not affect activities that do not have any Federal involvement, the designation of critical habitat will expand the scope of the activities that are required to have Federal involvement. Consultation is currently only required when listed species are present. As a result of the proposed designation, consultation will also be required for any coastal uses in the CNMI that occur within the designated critical habitat boundaries when essential features are present, *even where no listed coral species are now present*, including in-water and coastal construction, dredging and disposal, water quality and discharges, fishery management, military activities, shipwreck removal, scientific research and monitoring, aquaculture, protected area management, beach nourishment, and shoreline protection. DCRM suspects that certain action areas may contain the essential features but not the listed corals, due to the breadth of the critical habitat area to include all waters 0-20m depth around Rota and Tinian as well as all waters 0-40m depth around Saipan and Garapan Bank. NMFS's preamble to the proposed rule acknowledges that the critical habitat designation could have a high-end level of economic impact if "the action areas contain the essential feature but not the listed corals, so formal consultation would be required solely because of critical habitat." 85 Fed. Reg. at 76,283.

In addition, NMFS's negative determination recognizes that "The critical habitat designation would impose additional administrative costs on NMFS, the Federal action agency, *and any third party requiring federal approval or funding*, in the consultation process." In many cases, this will be a local management agency of the CNMI itself. The CNMI currently holds a number of federal permits that may trigger future consultation. For example, CNMI agencies operate facilities under federal National Pollutant Discharge Elimination System (NPDES) permits that discharge wastewater into proposed critical habitat areas. These include the wastewater treatment plant on Managaha Island now managed by the Department of Public Lands (DPL); the Department of Public Works (DPW) permit to discharge stormwater runoff from its municipal storm sewer system; and the Commonwealth Utilities Corporation (CUC) permits for wastewater treatment plants at Agingan and Sadog Tasi. The CNMI Department of Lands and Natural Resources (DLNR) also periodically acquires U.S. Army Corps Nationwide Permits to conduct maintenance dredging in areas such as Sugar Dock and Rota West Harbor. It is unclear to what extent this critical habitat designation would expand the consultation requirement and create more administrative burden and delays for local agencies to further engage in the ESA consultation process.

In other cases, the third party requiring federal approval may be members of the public engaging in coastal uses including recreation, fishing, and development, among other uses. Commercial bottom fishers in the CNMI are required to acquire a permit from NOAA Fisheries, and it is unclear to what extent bottom fishing activities may be subjected to further consultation and how this would impact the CNMI fishing community and their livelihoods. In addition, NMFS also acknowledges that, "State and local governments may be prompted to enact laws or rules to complement the critical habitat designations and benefit the listed corals. Those laws would likely result in additional impacts of the designations." 85 Fed. Reg. at 76,280. CNMI management agencies may need to revise their permitting regulations to ensure compliance by the regulated community with consultation requirements and habitat protections. CNMI permitting and enforcement agencies must often assist members of the regulated community in identifying applicable regulatory requirements and/or identifying potential violations for enforcement, so increased consultation requirements for third parties in the regulated community could also increase the CNMI's administrative burden. The

proposed critical habitat area also overlaps with high use areas such as the Saipan lagoon, which is already managed through a CZMA section 309 funded strategy via a special management plan, the Saipan Lagoon Use Management Plan (SLUMP); however, the proposed designation suggests another layer of bureaucracy for “special management considerations or protections.” 85 Fed. Reg. at 76,262.

DCRM therefore disagrees with NMFS’s conclusion that the activities would not affect any coastal resource of the CNMI, and request that NMFS submit a federal consistency determination to the CNMI, including a complete analysis of the proposed habitat designation’s consistency with the enforceable policies of the CNMI CMP, including but not limited to the following federally-approved enforceable policies as stated in CNMI Public Law 3-47 §3(a), 2 CMC §1511(a):

- (3) Promote more efficient resources management through:
  - (C) Improvement of coordination among CNMI agencies,
  - (D) Improvement of coordination between Commonwealth and federal agencies,
- (16) Manage the development of the local subsistence, sport and commercial fisheries, consistent with other policies;
- (20) Encourage the development of recreational facilities which are compatible with the surrounding environment and land-uses;
- (21) Encourage the preservation of traditional rights of public access to and along the shorelines consistent with the rights of private property owners;
- (22) Pursue agreements for the acquisition or use of any lands necessary to guarantee transitional public access to and along the shorelines.

While DCRM recognizes the critical habitat designation of ESA-listed corals within the coastal zone of the CNMI is significant to the protection of the species, we deeply urge NMFS to consider re-scoping the critical habitat boundaries and/or areas not included in critical habitat, working together with CNMI stakeholders and resource agencies for the purposes of reducing future administrative burden and negative economic effects.

Thank you for coordinating with the CNMI CMP. If you have any questions or need additional information, please contact Arthur Charfauros at (670) 664 8324 or fedcon@dcrm.gov.mp.

Sincerely,



JANICE E. CASTRO  
Director  
Division of Coastal Resources Management

- cc: Honorable Ralph DLG. Torres, Governor, CNMI  
Honorable Arnold I. Palacios, Lt. Governor, CNMI  
Mr. Eliceo D. Cabrera, CNMI BECQ  
Mr. Anthony Benavente, CNMI DLNR  
Mr. Steven McKagan, NOAA Fisheries  
Mr. Lance Smith, NOAA NMFS  
Mr. Kerry Kehoe, NOAA OCM  
Mr. Manny Pangelinan, CNMI DLNR-DFW  
Mr. Kodep Ogumoro-Uludong, CNMI OPD