



**VIA Email and Certified Mail with Return Receipt**

August 14, 2014

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**Re: Notice of Violations of the Endangered Species Act Regarding the  
Brown Field Municipal Airport Runway 8L-26R Rehabilitation Project**

Dear Secretaries Foxx and Jewell and Administrators Huerta and Martin:

On behalf of the Center for Biological Diversity, Preserve Wild Santee, and California Chaparral Institute we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. §1540(g)(2)(A)(i), that the Federal Aviation Administration (“FAA”) is in violation of the ESA. The FAA must assure that all actions it funds that may affect endangered species, including those activities at Brown Field Municipal Airport in San Diego, conform with the consultation requirements of the ESA. 16 U.S.C. § 1536(a)(2).

The Center for Biological Diversity (“Center”) is a non-profit, public interest corporation with approximately 775,000 members and supporters throughout the United States, including San Diego. The Center and its members are dedicated to protecting diverse native species and habitats through science, policy, education, and environmental law. Preserve Wild Santee is a volunteer community environmental organization that has worked to protect and enhance the quality of life and natural resources in the City of Santee and surrounding areas since 1994. Preserve Wild Santee has also worked actively to conserve vernal pools throughout San Diego County. Members offer input into regional land use decisions in an effort to produce better development projects with fewer environmental impacts. The California Chaparral Institute is a nonprofit public interest corporation under California law devoted to protecting and preserving

the chaparral native species and habitats in California and the larger ecosystems upon which these species depend for their survival

## **I. LEGAL BACKGROUND**

### **A. The Endangered Species Act**

When a species is listed as threatened or endangered under the ESA, section 7(a)(2) of the ESA requires that all federal agencies “insure” that their actions “are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of” their critical habitat. 16 U.S.C. § 1536(a)(2). The “institutionalized caution” embodied in the ESA requires federal agencies to give the benefit of the doubt to listed species and places the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

The ESA establishes an interagency consultation process to assist federal agencies in complying with their substantive section 7(a)(2) duty to guard against jeopardy to listed species or destruction or adverse modification of critical habitat. Under section 7(a)(2), federal agencies must consult with the appropriate expert fish and wildlife agency to determine whether their actions will jeopardize any listed species’ survival or adversely modify designated critical habitat and, if so, to identify ways to modify the action to avoid that result. See 50 C.F.R. § 402.14. The U.S. Fish and Wildlife Service is the expert agency with respect to terrestrial and freshwater species.

The US Fish and Wildlife Service and National Marine Fisheries Service (collectively the “Services”) have adopted joint regulations governing the section 7(a)(2) consultation process. Under the joint regulations, a federal agency must initiate a section 7(a)(2) consultation with the Services whenever it undertakes an “action” that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). The threshold for a “may affect” determination and the required ESA section 7(a)(2) consultation is low. *See* 51 Fed. Reg. 19926, 19949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.”). *See also* Endangered Species Act section 7 Consultation Handbook at 3-13, 4-26. An agency is relieved of the obligation to consult only if the action will have “no effect” on listed species or designated critical habitat.

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is broadly defined in the ESA’s implementing regulations to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by [f]ederal agencies... grants-in-aid; or [] actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02 (definition of “action”). Similarly, the “action area” is also broadly defined to encompass “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02 (definition of “action area”).

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, ESA regulations permit “informal consultation,” in which there is no requirement for a biological opinion so long as the Services concur in writing with the “not likely to adversely affect” determination. 50 C.F.R. § 402.13. In order to inform that determination a “biological assessment is required if listed species or critical habitat may be present in the action area.” Endangered Species Act section 7 Consultation Handbook at 3-11; *see also* 16 U.S.C. § 1536(a)(2). If the Services do not concur in the “not likely to adversely affect” determination or if the action agency determines that the action is “likely to adversely affect” the listed species, the agencies must engage in “formal consultation.” 50 C.F.R. §§ 402.02, 402.14(a).

Formal consultation “is a process between the Service and the [f]ederal agency that commences with the [f]ederal agency’s written request for consultation under section 7(a)(2) of the Act and concludes with the Service’s issuance of the biological opinion under section 7(b)(3) of the Act.” 50 C.F.R. § 402.02.

In a biological opinion, the Services must determine whether the federal action subject to the consultation will jeopardize the survival and recovery of listed species or will destroy or adversely modify critical habitat. 16 U.S.C. § 1536(b)(4). If the Service determines that the action will jeopardize the species or destroy or adversely modify its critical habitat, the biological opinion must specify any reasonable and prudent alternative (“RPA”) the action agency could take to avoid jeopardy or specify that there is no RPA. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h)(3). The Service and the action agencies must use the best available science in consultations, biological opinions, and jeopardy and adverse modification determinations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). Compliance with the procedural provisions of the ESA—identifying the likely effects of the action through the consultation process—is integral to compliance with the substantive requirements of the Act.

Under the statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency ensures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13. Section 7(d) of the ESA, provides that once a federal agency initiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d). The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

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## II. FACTUAL BACKGROUND

### A. The Brown Field Municipal Airport Runway 8L-26R Rehabilitation Project

The Brown Field Municipal Airport Runway 8L-26R Rehabilitation Project (“Runway Rehabilitation Project”) will rehabilitate a runway at the Brown Field Municipal Airport (“Brown Field”) in San Diego by removing concrete, excavating fill material, grading, and building up asphalt. CITY OF SAN DIEGO, BROWN FIELD MUNICIPAL AIRPORT RUNWAY 8L-26R REHABILITATION PROJECT INITIAL STUDY 1-2 (2013) (“IS”). Despite the disturbed nature of Brown Field the area has been designated by the City as Environmentally Sensitive Lands. See CITY OF SAN DIEGO, METROPOLITAN AIRPARK PROJECT FINAL ENVIRONMENTAL IMPACT REPORT 2-5 (2013) (“Airpark EIR”). The Airpark EIR for the Brown Field Metropolitan Airpark Project at the same location as the Runway Rehabilitation Project documented fourteen special status species with a “High Potential” to occur in or near the Project Area and three special status species with a “Medium Potential” to occur in or near the Project Area. Airpark EIR at Table 5.6-3. ESA listed species known to occur at Brown Field include the San Diego fairy shrimp (*Branchinecta sandiegonensis*), San Diego button-celery (*Eryngium aristulatum* var. *parishii*), and Coastal California gnatcatcher (*Polioptila californica californica*). Airpark EIR at Table 5.6-3.

### B. San Diego Fairy Shrimp, San Diego button-celery, and Vernal Pool Watersheds

San Diego fairy shrimp are known to inhabit areas and at least four vernal pool locations on Brown Field. Airpark EIR at Table 5.6-3. Furthermore, critical habitat for the San Diego Fairy Shrimp is located at the Brown Field Municipal Airport. 72 Fed. Reg. 70,648, 70,674 (Dec. 12, 2007); Fairy Shrimp CH. San Diego button-celery was found at Brown Field and approximately 90 plants were observed in one vernal pool during surveys of the Brown Field. Airpark EIR at Table 5.6-3.

The relatively flat vernal pool habitat of the San Diego fairy shrimp and associated species have been a prime target for development. As a result “97 percent of [San Diego fairy shrimp] vernal pool habitat has been destroyed” and remaining populations “face severe, imminent threats that could result in substantial habitat losses and extirpations in the future.” 62 Fed. Reg. at 4925, 4929 (Feb. 3, 1997). “The loss of vernal pool habitat is now nearly total in Los Angeles and Orange counties.” *Id.* at 4926. The San Diego fairy shrimp has fared no better in its namesake county where the cumulative loss of vernal pool habitat is estimated at 95 to 97 percent. U.S. FISH & WILDLIFE SERV., RECOVERY FOR VERNAL POOLS OF SOUTHERN CALIFORNIA 45 (1998); 62 Fed. Reg. at 4926. San Diego fairy shrimp on Otay Mesa have faced similar threats that “have continually disturbed this area and have destroyed 78 percent of the vernal pools once located on Otay Mesa.” 62 Fed. Reg. at 4932. The pace of vernal pool habitat destruction on Otay Mesa increased in the late twentieth century, “where over 40 percent of vernal pools were destroyed between 1979 to 1990.” 65 Fed. Reg. 12,181, 12,182 (Mar. 8, 2000). Significant portions of Otay Mesa have been designated for development and many of those projects would eliminate San Diego fairy shrimp habitat. 62 Fed. Reg. at 4932-33.

Considering the historical loss of habitat, the U.S. Fish and Wildlife Service (“FWS”) properly determined that all remaining vernal pool habitat, whether occupied or not, must be protected if the species is ever to recover. *See, e.g.*, 72 Fed. Reg. at 70,666 (Recovery “calls for the preservation and enhancement of existing vernal pools that are within the extant range of the San Diego fairy shrimp.”). In 1997 FWS found that “sizeable areas of vernal pool habitat occur[] on the northeastern corner of Otay Mesa” where Brown Field is located. 62 Fed. Reg. at 4932. FWS further noted that Otay Mesa contains “vernal pools known to be inhabited by the San Diego fairy shrimp” that were being adversely impacted by human threats. *Id.* at 4937.

One of the physical or biological features essential to the conservation of the San Diego fairy shrimp and other vernal pool species is the vernal pool watershed. 16 U.S.C. § 1532(5)(A)(i)(I); 72 Fed. Reg. at 70,665. FWS explains the need to protect the watershed as a vital “matrix” essential for the conservation of the San Diego fairy shrimp. 72 Fed. Reg. 70,665 (“The matrix of vernal pools/ephemeral wetlands, upland habitats . . . in combination create ecologically functional units.”). Because of the delicate hydrology of vernal pools and the accompanying sensitivity of San Diego fairy shrimp to the impacts to water quality and temperature, it is necessary to maintain a healthy vernal pool watershed for their conservation. *See, e.g.*, 72 Fed. Reg. 70,648 (vernal pool ecosystems are best described from a watershed perspective because of hydrological needs); *id.* at 70,664 (protection of the upland watershed habitat is important to protect hydrology and to “buffer the vernal pools from edge effects” such as those caused by nearby urbanization); *Sw. Ctr. For Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1127 (S.D. Cal. 2006).

Critical habitat for the San Diego fairy shrimp includes accompanying upland habitats and watersheds that are necessary for the conservation of the species. *See e.g.*, 72 Fed. Reg. at 70,650 (expert comments emphasizing the need to include “upland habitat and functional watersheds” for the conservation of San Diego fairy shrimp), 70,664 (protection of adjacent upland habitat is “important to the vernal pool ecosystem”). “Vernal pool habitats derive most of their nutrients from detritus (decaying matter) washed into pools from adjacent uplands, and these nutrients provide the foundation for a vernal pool aquatic community’s food chain.” *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629 WBS-GGH, 2006 U.S. Dist. LEXIS 80255 at \*52-53 (E.D. Cal. Nov. 2, 2006).

### **C. Coastal California gnatcatcher**

Suitable habitat for this California gnatcatcher exists in the area north of the project site and the gnatcatcher has a high potential to occur at the Brown Field airport. Airpark EIR at Table 5.6-3. The habitat and range of the coastal California gnatcatcher have been greatly reduced in southern California and San Diego County. Published estimates indicate that 85 to 90 percent of coastal sage scrub vegetation that the California gnatcatcher relies upon vegetation in California has been lost as a result of urban and agricultural development. 56 Fed. Reg. 47053, 47055 (Sept. 17, 1991).

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### III. ESA VIOLATIONS

The FAA's failure to consult on potential impacts to ESA listed species at Brown Field violates the law. Consultation under Section 7 of the ESA is required whenever a discretionary agency action "may affect" any listed species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) ("Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required..."). The FAA's funding of the Runway Rehabilitation Project, which will directly or indirectly affect ESA listed species and their habitat, triggers an obligation to consult with FWS.

The City of San Diego has acknowledged that the Runway Rehabilitation Project will be funded by the FAA. IS at 3. The funding and distribution of grants-in-aid by the FAA that directly or indirectly causes modifications to the land qualifies as an action subject to ESA consultation. 50 C.F.R. § 402.02. The FAA must consult with FWS to determine whether the action of funding the Runway Rehabilitation Project may effect ESA listed species, such as the San Diego fairy shrimp, San Diego button-celery, and Coastal California Gnatcatcher.

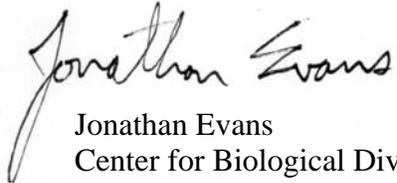
The City of San Diego's Initial Study for the Runway Rehabilitation Project makes it clear that construction such as pavement replacement, shoulder repair, service road replacement, and a contractor staging area would be occurring in areas that are known to be vernal pool watersheds. *Compare* Airpark EIR at figure 5.6-3; IS at Figure 3. The vernal pool watershed is essential for vernal pool species and impacts to upland habitat negatively effect vernal pool species. *See* 72 Fed. Reg. 70,664. The Project will result in direct and indirect impacts from construction to vernal pool watersheds of known vernal pools at Brown Field including BFVP-5 and potentially BFVP-2, which contain San Diego fairy shrimp. *Compare* Airpark EIR at figure 5.6-3; IS at Figure 3.

The action area for considering impacts to ESA listed species includes all areas directly or indirectly affected and not merely the immediate area involved. 50 C.F.R. § 402.02 (definition of "action area"). The FAA must analyze both the direct impacts to the vernal pool watershed and how those impacts may directly and indirectly effect listed species. However, the City's documentation in the environmental analysis under the California Environmental Quality Act makes no mention of any impacts or analysis related to vernal pool species. IS. There is also no discussion of impacts to critical habitat for the San Diego fairy shrimp on the Brown Field airport. 72 Fed. Reg. at 70,674; Fairy Shrimp CH. Similarly, there is no discussion of impacts to the Coastal California gnatcatcher. The FAA must assure that consultation under Section 7 of the ESA is completed before any work proceeds on the Runway Rehabilitation Project. 16 U.S.C. § 1536(a)(2);

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If FAA does not act within 60 days to correct the violations described in this letter, we intend to pursue litigation against the FAA. If you have any questions, or would like to discuss this matter further, please contact me at the information listed above.

Sincerely,



Jonathan Evans  
Center for Biological Diversity

Cc (via email without enclosures):

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**EXHIBITS**  
**(Enclosed on CD)**

CENTER FOR BIOLOGICAL DIVERSITY, SAN DIEGO FAIRY SHRIMP CRITICAL HABITAT (2014).

CITY OF SAN DIEGO, BROWN FIELD MUNICIPAL AIRPORT RUNWAY 8L-26R REHABILITATION PROJECT NOTICE OF A DRAFT MITIGATED NEGATIVE DECLARATION, MITIGATED NEGATIVE DECLARATION AND INITIAL STUDY (July 3, 2014).

CITY OF SAN DIEGO, METROPOLITAN AIRPARK PROJECT, FINAL ENVIRONMENTAL IMPACT REPORT, SCH NO. 2010071054, PROJECT NO. 208889 (May 2013) (*excerpts*).

U.S. FISH AND WILDLIFE SERVICE, RECOVERY PLAN FOR VERNAL POOLS OF SOUTHERN CALIFORNIA (1998) (*excerpts*).