

Response to Public Comments Received on PA Memo #1 for P-305 Marine 4th Regiment Facilities; P-306 Combat Logistics Battalion – 4 Facilities; P-307 Consolidated Armory Facility; P-310 Infantry Battalion Company Headquarters; P-314 Marine Expeditionary Brigade; P-326 Primary End Item Warehouse; P-802 General Support Base Warehouse; P-803 Individual Combat Skill Training Area, Naval Base Guam Telecommunications Site (NBGTS),

Supplemental Reviews and Project-Specific Areas of Potential Effects (APEs)

The 2011 PA applies to all individual projects associated with the Guam and CNMI Military Relocation, as identified in the FEIS and listed in Appendix A and as added or modified pursuant to Stipulation I.E. These projects are collectively referred to as the “Undertaking,” per the definition of that term in 36 CFR §800.16(y). While supplemental review is required for these supporting projects, the 2011 PA does not require individual PA Memos on each project. The 2011 PA states that in the course of supplemental reviews pursuant to Stipulations IV and V, the Signatories and Invited Signatories may request that additional project-specific APEs be defined consistent with 36 CFR §800.16(d) to address potential direct and indirect effects of individual projects. Consistent with the PA, project-specific APEs are represented in PA Memos.

Timing of Reviews

The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit the agency official from conducting or authorizing nondestructive project planning activities before completing compliance with Section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

Identification and Evaluation of Historic Properties

Regulations do not require survey of an entire APE or identification of all historic properties, and 36 CFR Part 800.4(b)(1) states that a reasonable good faith effort to carry out appropriate identification efforts shall be made. The 2011 PA describes the overall efforts taken to identify historic properties for the undertaking in Stipulation IV, including archival research, oral studies, and interviews. Archaeological survey has been conducted for the subject APEs. Surveys completed are identical to those of the J-001B Utilities and Site Improvements project, since that APE is underlying each of the subject APEs. Additionally, ongoing investigations of sites that were obscured prior to J-001B clearing activities are being identified and evaluated through stipulated processes of the 2011 PA. The agreed upon process includes archaeological investigations that remove data from the sites, which essentially alter the characteristics that qualify historic properties for inclusion in the National Register of Historic Places. Thus, ongoing identification efforts in the underlying APE effectively results in historic properties no longer being present. Information regarding ongoing studies can be found in semi-annual reports posted on the Cultural Resources Information website: https://www.navfac.navy.mil/navfac_worldwide/pacific/about_us/cultural_resources/semi-annual-reports.html

The 2011 PA directs the PA Memo process to allow for members of the public to provide input on the identification and evaluation of historic properties. The input sought by the process is knowledge on specific historic properties that may not yet be identified, and assistance in identifying issues relating to effects of the project on historic properties.

Information Included in Programmatic Agreement Memoranda (PA Memos)

As a federal agency the Navy is required to uphold historic preservation laws, including confidentiality provisions that protect information on the nature and location of historic properties, including archaeological resources. To ensure confidentiality provisions are adhered to, historic property information in the public PA Memos is presented in general terms. The Guam SHPO has a consultative role in the Section 106 process that reflects the interests of the citizens of Guam, and SHPO staff provide expertise on historic properties during consultation. SHPO versions do include detailed information regarding the nature and location of properties. In accordance with federal regulations, the SHPO is responsible for working with the DoD in taking into consideration historic properties at all level of planning and development.

Archaeological reports are maintained at the Department of Parks and Recreation – Guam Historic Resources Division. Access to reports are determined on a case by case basis, as public disclosure on the nature and location of historic properties still apply. The U.S. Department of Interior, National Park Service’s National Register Bulletin 29 provides more information about confidentiality restrictions.



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July 1, 2021

In reply refer to:
RC 2021-0850

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PSC 455 Box 195
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Subject: Review of: Military Relocation to Guam and CNMI Programmatic Agreement
(PA) Memo #1

Håfa Adai Mr. Laitila,

Thank you for submitting your PA Memo regarding the multiple J-series vertical projects. Upon review, we have a few comments regarding the structure and content of the Memo, which you can find below.

1. In general, the PA Memo for the public provided is jargon-heavy, which may negatively impact public comprehension and engagement with the notification and consultation process. For example, it may be useful to define terms like "CFR", "vertical construction", "mitigation", "qualifying characteristics", and "site integrity", as these terms may not be immediately understood by individuals outside the field of cultural resources management. This would directly improve transparency and public comprehension, and help to combat any misinformation that may surround the projects. More information regarding the importance and benefits of using plain, jargon-free language in public release documents can be found in the Plain Writing Act of 2010 and the OMB's Guidance on Implementing the Plain Writing Act (<https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf>).
2. Pg. 4-7, Identification of Historic Properties: As it is currently structured, this section is not easily digestible. We have two suggestions to improve readability for the general public, and remove possible confusion that individuals may encounter upon first reading:
 - a. We recommend removing the list of published archaeological inventories to a separate table, to be attached as an appendix. As it is currently formatted, the readers must scroll through two entire pages of bibliographic references to continue reading the prose description of identification efforts. Removing the bibliographic references into a separate table streamlines the reading experience and improves comprehension of this section.

July 16, 2021

Transmitted Via Email:

criwebcomment@navy.mil

SUBJECT: P-305 Marine 4th Regiment Facilities; P-306 Combat Logistics Battalion – 4 Facilities; P-307 Consolidated Armory Facility; P-310 Infantry Battalion Company Headquarters; P- 314 Marine Expeditionary Brigade; P-326 Primary End Item Warehouse; P-802 General Support Base Warehouse; P-803 Individual Combat Skill Training Area – PA Memo #1 (Public)

Buenas yan Håfa Adai! Thank you for the opportunity to comment on the Department of Defense’s (DoD) Programmatic Agreement (PA) Memo #1 regarding Projects P-305, P-306, P-307, P-310, P-314, P-326, P-802, and P-803.

I object to the Department of Defense’s (DoD) assertion that the cultural artifacts discovered during the construction of Camp Blaz are not affected as stated in this memo. The document states “The DoD finds that this project will have no historic properties affected because while historic properties have been identified in the APE, adverse effects are being mitigated by the J-001B U&SI project and once completed, the properties will no longer retain integrity and will have had qualifying characteristics altered.” The mitigation of the historic properties found does not undo the injustice that the construction’s impact has on the people of Guam.

In this memo and previous memos, there is a lack of identification of what the discoveries were. This memo acts as a source for the public to access for further information on what have been found, but the sole phrase of “historic properties” does not inform the public of Guam exactly of what have been found during the construction of the Marine base. In fact, the bibliography provided in the memo contain titles of archeologists’ surveys and findings, but they are not easily accessible for the public. How will they be able to read these findings?

My office held a Community Roundtable Hearing on April 22, 2021, that discussed the importance of these cultural discoveries, and the consensus was that these residents of Guam value our island’s culture and are in opposition of the lack of transparency from DoD in regard to their findings. There is a great lack of knowledge of the CHamoru people prior to Spanish contact, and for the military to continue to build upon lands that contain these priceless pieces of cultural significance is a grievance to the people of Guam who are the ones most affected by this loss of cultural history.

“There are so few details of how our ancestors lived and used the land and its resources, that any new information must be considered precious and invaluable. This is information treasure that can become part of our curriculum and consciousness, it is what makes us CHamorus unique and special.”

“I am also concerned that the DoD made a mistake in determining the projects will have no historic properties affected. The DoD’s analysis is unclear. Although the PA Memo has a bibliography of materials and studies, the DoD does not make those publicly available to help the public understand the basis of its determination.”

“Despite the Programmatic Agreement outlining DoD’s obligation to provide meaningful

information about any culturally and historically significant findings, our community waited for weeks before we received any information about our ancestors' burials.”

In conclusion, I reiterate my objection to the DoD's assertion of the inadvertent discoveries of CHamoru artifacts and burials to not be affected by the projects stated in this memo due to the mitigation of the discoveries in a prior project. The mitigation of these CHamoru discoveries does not fully preserve the cultural significance of them. For the findings to be disturbed and built upon before even allowing the public to see is an injustice to the CHamoru people who are the direct descendants of the former inhabitants of these sacred and indigenous areas. *Un Dangkulu na Si Yu'os Ma'ase'* for your time and attention in reviewing this comment and hearing the voices of the people of Guam, to whom these projects significantly affect.



Prutehi Litekyan - Save Ritidian
A Direct-Action Group

July 22, 2021

Via Email – criwebcomment@navy.mil

Naval Facilities Engineering Command Pacific
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 Pearl Harbor, Hawaii 96860-3134

PROJECT: P-305 Marine 4th Regiment Facilities; P-306 Combat Logistics Battalion – 4 Facilities; P-307 Consolidated Armory Facility; P-310 Infantry Battalion Company Headquarters; P-314 Marine Expeditionary Brigade; P-326 Primary End Item Warehouse; P-802 General Support Base Warehouse; P-803 Individual Combat Skill Training Area, Naval Base Guam Telecommunications Site, Finegayan, Guam.

SUBJECT: PA Memo #1

Hafa adai:

Thank you for the opportunity to comment on the Department of Defense’s (“DoD”) and Naval Facilities Engineering Systems Command (“NAVFAC”) Pacific’s Programmatic Agreement (“PA”) Memo, entitled “P-305, P-306, P-307, P-310, P-314, P-326, P-802, P-803 PA Memo # 1 (PUBLIC)” dated June 8, 2021, (“PA Memo”) regarding the above-captioned project(s).¹ Pursuant to Stipulations IV.E. and V.B. of the *Programmatic Agreement Among the Department of Defense, the Advisory Council on Historic Preservation, the Guam State Historic Preservation Officer, and the Commonwealth of the Northern Mariana Islands State Historic Preservation Officer Regarding the Military Relocation to the Islands of Guam and Tinian*, dated March 9, 2011 (“2011 PA”), Prutehi Litekyan: Save Ritidian (“PLSR”) respectfully submits these comments opposing the PA Memo’s “Identification of Historic Properties;” and “Determination of Effect” for the reasons provided below.

¹ NAVAL FACILITIES ENGINEERING SYSTEMS COMMAND (“NAVFAC”) PACIFIC, P-305, P-306, P-307, P-310, P-314, P-326, P-802, P-803 PA Memo # 1 (PUBLIC), June 8, 2021, https://www.navfac.navy.mil/content/navfac/en/navfac_worldwide/pacific/about_us/cultural_resources/programmatic-agreement-memos-open-for-public-review/jcr_content/par1/pdfdownload_1134246716/file.res/P305_P306_P307_P310_P314_P326_P802_P803_Multiple%20Verticals_PUBLIC.pdf.

I. Interests of Prutehi Litekyan: Save Ritidian

Established in 2017, PLSR is a community-based organization dedicated to protecting and preserving the natural and cultural resources of Guam. This includes the areas proposed to be used for relocating U.S. Marine Corps forces currently located in Okinawa, Japan to Guam, and for military live-fire training.² PLSR's members and network (collectively referred to as "members") comprise of the indigenous CHamoru, the residents of Guam, allies, and concerned citizens with the interest of protecting the beliefs, the culture, the language, the air, the water, and the land of the CHamoru.³ More specifically, PLSR's members comprise of Yo'ãmtë, fishermen, business people, college students, farmers, teachers, social workers, cultural practitioners, and environmentalists.

PLSR represents its members, in addition to 25,000 petition signatories, by actively engaging in the legislative, administrative processes and has consistently demonstrated a special interest in the areas of controversy. "Since its inception, PLSR has organized more than 450 different actions, including letter-writing campaigns, meetings with lawmakers, school visits, rallies, comment drives, protests, tours, press conferences, legislative roundtables, meetings with military officials, public hearings, election surveys, media interviews, podcasts, webinars, and other efforts to raise public awareness."⁴ Most recently, PLSR's advocacy efforts were recognized internationally: on March 30, 2021, the United Nations Human Rights Council acknowledged human rights violations by the U.S. military against the CHamoru people, as provided in PLSR's petition to United Nations.⁵

Accordingly, PLSR and its members have a direct interest in ensuring that federal actions and decisions do not harm or have a potential to harm cultural resources and historical properties of the indigenous CHamoru people. These interests extend to environmental resources that could constitute as a historic property, including sources of water and water bodies. DoD's environmental review in connection with actions and decisions that inadequately take into account the effect of an undertaking on cultural resources would impair PLSR's interests. As part of its environmental review, DoD's PA Memos—if deemed procedurally or substantively flawed—may further injure PLSR's interests.

² PA Memo at 1.

³ See Guam Exec. Order No. 98-28, Relative to Adopting "Inifresi", the Chamorro "Pledge of Allegiance" (1998), <http://governor.guam.gov/governor-content/uploads/2017/07/E.O.-98-28-Relative-to-AdoptingInifresi-the-Chamorro-P.pdf>; *Guam Pledge: Inifresi*, GUAMPEDIA, <https://www.guampedia.com/guampledge-chamorro-inefresi/> (last visited April 10, 2021).

⁴ See Prutehi Litekyan: Save Ritidian's *Submission to Mr. Francisco Calí Tzay, Special Rapporteur on the rights of indigenous peoples, regarding ongoing human rights violations of the indigenous Chamorro people of Guam under U.S. colonization and militarization*, dated August 2020, at 20, <https://unpo.org/downloads/2694.pdf>.

⁵ See United Nations Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes Letter, dated March 30, 2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25885>.

Thus, PLSR and its members have a significant interest in ensuring that (1) DoD fulfills its mandates under applicable federal laws and regulations to prevent the destruction or loss of cultural resources and historic properties; and (2) PLSR and its members have public “access to information and appropriate supporting documentation regarding DoD’s identification and evaluation efforts and findings, in order to provide the public opportunities to comment.”⁶

II. Background of Historic CHamoru Villages

The indigenous CHamoru people settled in Guam, the southernmost and largest island in the Marianas archipelago, over 3,500 years ago.⁷ The CHamoru people of Guam were an organized cultural and linguistic society marked by advanced seafaring, horticulture, hunting, and fishing.⁸ By 800 A.D., CHamoru villages were characterized by unique latte structures, one-story houses resting on sizable limestone, basalt, or sandstone pillars and capstones.⁹ As indigenous Pacific Islanders, the historic CHamoru people developed a unique culture with a legacy of historical sites throughout Guam.¹⁰ These prehistoric and historic sites include the historic CHamoru villages of Fafalog, Caiguat, Måguak (Magua), Sabanan Fadang, Haputo, Pugua Point, Taguac, and Machanao.

III. Legal Standards

A. National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA), 54 U.S.C. §§ 300101 to 300321, requires federal agencies to “take into account the effect” of an undertaking on any historic property for proposed projects that are “federally assisted[.]” 54 U.S.C. § 306108 provides in pertinent part:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, *prior to* the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

(Emphasis added).

⁶ PA Stipulation IV.E.2. at 9.

⁷ Taboroši, D., and J. W. Jenson. "[World War II artefacts and wartime use of caves in Guam, Mariana Islands.](#)" *Capra* 4 (2002): 1-8.

⁸ ROBERT F. ROGERS, DESTINY’S LANDFALL: A HISTORY OF GUAM 6-7, note 2 at 24 (1995). *See also* Doug Herman, *A Brief, 500-Year History of Guam*, SMITHSONIANMAG.COM (Aug. 15, 2017), <https://www.smithsonianmag.com/smithsonian-institution/brief-500-year-history-guam-180964508/>.

⁹ Anthony (T.J.) F. Quan, “*Respeta I Taotao Tano*”: *The Recognition and Establishment of the Self Determination and Sovereign Rights of the Indigenous Chamorros of Guam under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL’Y J. 56, 63 (2002).

¹⁰ Attached is a true and correct copy of an article by Dave Lotz, *The Saga of Magua Village*, 2020, at 1. 11 *Id.* at 4.

“Historic property” means “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object. 54 U.S.C. § 300308. Consistent with the regulatory definition, this may include Traditional Cultural Properties, sacred sites, and culturally important natural resources determined to meet the National Register Criteria of Eligibility. 36 C.F.R. § 60.4. “Undertaking” means “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including-- (1) those carried out by or on behalf of the Federal agency[.]” 54 U.S.C. § 300320(1).

The requirement for federal agencies to “take into account the effect of an undertaking” is often referred to as the “Section 106” process.¹¹ And compliance with the Section 106 procedural obligations applies solely to federal agencies “prior to” receipt of federal funding.¹² The “prior to” language in Section 106 “establishes the time during which the agency is required to conduct an NHPA review[.]”¹³ As noted by the Ninth Circuit, Section 106 review must occur “prior to” the disbursement of federal funds.¹⁴ In short, before the approval of the expenditure of any Federal funds on the “undertaking,” Section 106 of the NHPA provides that the federal agency “shall take into account the effect of the undertaking on any historic property.”¹⁵

B. NHPA Regulations

This “take into account” requirement is often referred to as the “Section 106” process¹⁶ and is typically implemented through the “Protection of Historic Properties” regulations.¹⁷ Generally, NHPA requires federal agencies to take into account the effect of their undertaking by complying with the following steps provided in the regulations:

- consult with the SHPO to determine the area of potential effects, 36 C.F.R. § 800.4(a);
- make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b);
- determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4;
- determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and

¹¹ *Narragansett Indian Tribe by & Through Narragansett Indian Tribal Historic Pres. Office v. Nason*, CV 20-576 (RC), 2020 WL 4201633, at *1 (D.D.C. July 22, 2020) (citing 36 C.F.R. § 800.2(b)).

¹² *Shanks v. Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008).

¹³ *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998) (noting that the natural reading of Section 106 establishes the time during which the federal agency is required to conduct NHPA review).

¹⁴ *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998).

¹⁵ *Id.* at § 306108.

¹⁶ *Narragansett Indian Tribe by & Through Narragansett Indian Tribal Historic Pres. Office v. Nason*, CV 20-576 (RC), 2020 WL 4201633, at *1 (D.D.C. July 22, 2020).

¹⁷ 36 C.F.R. Part 800.

- avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9(c).¹⁸

Area of potential effects (“APE”) is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.”¹⁹

C. 2011 Programmatic Agreement

In the alternative, the regulations allow Federal agencies to develop other “Program Alternatives” to fulfill their Section 106 compliance responsibilities, such as a Programmatic Agreement (“PA”).²⁰ “Compliance with the procedures established by an approved programmatic agreement satisfies the agency’s section 106 responsibilities *for all individual undertakings* of the program covered by the agreement[.]”²¹

Courts analyze PAs to determine whether an agency’s action is compliant with its terms.²² “Where an agency or a party violates a provision of an agreement substituting for Section 106, like the project PA in this case, the violation of the agreement can constitute a violation of the NHPA.”²³ In this case, the [2011 PA](#) governs the Section 106 responsibilities. The 2011 PA applies to “all individual projects[.]”²⁴

Under the 2011 PA, the DoD expressly agrees to use a Cultural Resources Information (CRI) website so that supporting information can properly provide the public with “opportunities to comment.”²⁵ The 2011 PA expressly requires DoD to “utilize a publicly accessible CRI website to *make information available to the public*[.]”²⁶ Specifically, Stipulation IV.E.2. of the 2011 PA requires the DoD to include the following on its website:²⁷

- “[1] information and [2] appropriate supporting documentation” regarding DoD’s identification and evaluation efforts and findings;²⁸

¹⁸ *Wishtoyo Found. v. United States Fish & Wildlife Serv.*, CV 19-03322-CJC(ASX), 2020 WL 8409661, at *3 (C.D. Cal. Dec. 4, 2020) (citing *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)).

¹⁹ 36 C.F.R. § 800.16(d).

²⁰ *Id.* § 800.14.

²¹ *Id.* § 800.14(b)(2)(iii) (emphasis added).

²² See *Dine Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 847 (10th Cir. 2019) (stating that the issue to resolve is whether agency violated requirements of a programmatic agreement); *Colo. River Indian Tribes v. Dep’t of Interior*, No. ED CV-1402504 JAK (SPx), 2015 WL 12661945, at *13 (C.D. Cal. June 11, 2015) (explaining that obligations under a programmatic agreement serve as a substitute to compliance with Section 106).

²³ *Battle Mountain Band of Te-Moak Tribe of W. Shoshone Indians v. United States Bureau of Land Mgmt.*, 302 F. Supp. 3d 1226, 1240 (D. Nev. 2018) (citing *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999)).

²⁴ 2011 PA Stipulation I.A., at 4.

²⁵ 2011 PA Stipulation IV.E.2., at 9.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

- supporting information on “study areas;”²⁹
- supporting information on “the scope of DoD identification efforts;”³⁰ and
- supporting information on “DoD’s determinations of eligibility[.]”³¹

DoD stipulates that disclosing information is necessary to “provide the public opportunities to comment.”³² However, the DoD’s CRI Website does not make the supporting materials cited in the PA Memo publicly accessible. Additionally, the PA Memo is required to “contain concise summaries of project information with a map showing the project footprint and results of cultural resources review, subject to the limitations defined under Stipulation IV.E.2.b.”³³

D. DoD and Navy Directives on Cultural Resources Management

The DoD and the Department of Navy (Navy) have respective directives on the maintenance and management of cultural resources.³⁴ The DoD directives impose several requirements for “All DoD operations [and] activities,”³⁵ including consultation requirements and making information publically available. For example, the directives state that the DoD “shall start consultation to explain the undertaking and work with stakeholders to define the area of potential effects, identify cultural resources, and determine potential effects to those resources.”³⁶

The DoD’s directive echoes the requirement for “Public Access” to Cultural Resource Information. For example, the DoD Directives require that the Head of the DoD Components:

- f. Ensure that current information on known cultural resources is collected . . . to support informed decisions about the management of cultural resources. The Department of Defense *will ensure that this information is also available* (subject to the appropriate confidentiality and security considerations) to consulting parties, as well as residents, visitors, scholars, and the general public, to increase awareness of the significance of archaeological resources on DoD lands[.]
- . . .

²⁹ 2011 PA Stipulation IV.E.2.a. at 9.

³⁰ *Id.*

³¹ *Id.*

³² 2011 PA Stipulation IV.E.2. at 9.

³³ 2011 PA Stipulation V. B.1.a.

³⁴ DoDI 4715.15, Cultural Resources Management (Aug. 31, 2018) (“DoDI 4715.15”)

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471516p.pdf?ver=2017-11-21-114100-670>;

and SECNAV INSTRUCTION 5090.8B (Oct. 18, 2018),

<https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-00%20General%20Admin%20and%20Management%20Support/5090.8B.pdf>.

³⁵ [DoDI 4715.16](#) at 1.

³⁶ *Id.* Encl. 3 at 12.

q. Maintain complete and current information on cultural items . . . *including those uncovered through inadvertent discovery or intentional excavation.*³⁷

In another example, the DoD must have a management plan that includes “Provisions for *sharing appropriate cultural resources information* with . . . nongovernmental organizations . . . and the general public[.]”³⁸ Making information available supports the Navy’s policy to “[e]ncourage effective and practical public participation in environmental decision-making that may affect public interests[.]”³⁹

IV. Comments in Opposition to the PA Memo, and the Identification and Evaluation of Historic Properties

For four reasons, PLSR opposes NAVFAC and DoD’s (collectively referred to as “NAVFAC”) PA Memo on the eight proposed “vertical” construction. First, NAVFAC is violating the NHPA and 2011 PA by commingling eight individual projects into a single PA memo. Second, NAVFAC fails to complete the PA Memo process for each individual project “prior to” the approval of the expenditure of federal funds. Third, NAVFAC’s improperly relies on the J-001B U&SI project to identify and evaluate historic properties within the APE for each of the unique individual projects. Fourth, NAVFAC is withholding information from the public and is preventing the public from meaningfully engaging in the public comment process.

A. NAVFAC Violates the NHPA and 2011 PA by Commingling Eight (8) Individual Projects into a Single PA Memo.

The plain text of the NHPA regulations and the 2011 PA is clear: each “individual project” must undergo the PA Memo process. The NHPA regulations provide that “[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency’s section 106 responsibilities *for all individual undertakings* of the program covered by the agreement[.]”⁴⁰ The 2011 PA, which applies to “all individual projects,”⁴¹ requires the federal agency to take into account the effects of their undertaking for each individual project through the PA Memo Process.

In 2015, DoD echoed its process that each “individual project” must go through the PA Memo process. The DoD’s 2015 supplemental environmental impact statement provides that “[i]ndividual project reviews are conducted via a PA Memo process[.]”⁴² Then on August 28, 2015, DoD restated in its Record of Decision that “Individual project reviews are conducted via a PA memo process for the purpose of soliciting additional comments regarding the DoD’s determination of effect.”⁴³ There are no exceptions in the 2011 PA—each individual project must undergo the PA Memo process.

³⁷ *Id.* Encl. 2 at 8-10.

³⁸ *Id.* Encl. 6 at 26.

³⁹ [SECNAVINST 5090.8B](#) at 3.

⁴⁰ *Id.* § 800.14(b)(2)(iii) (emphasis added).

⁴¹ 2011 PA Stipulation I.A., at 4.

⁴² [2015 SEIS](#) at page 3-76, 286.

⁴³ [2015 Record of Decision](#) at 26.

NAVFAC failed to prepare a PA Memo for each “individual project” when it commingled eight (8) individual project proposals into one PA Memo. On December 9, 2014, NAVFAC released a [PA Memo on J-001B U&SI](#). The 2014 PA Memo assessed potential effects to historic properties resulting from construction activity and “design studies to support future vertical construction within the bounds of the J-001B APE[.]”⁴⁴ The PA Memo placed an emphasis that additional PA Memos will be initiated for future “individual projects.”⁴⁵ Specifically, the 2014 PA Memo provided that “consultation for *future individual . . . projects* will be initiated once Congress has approved funding for each project[.]”

The 2014 PA Memo for J-001B U&SI noted that the future individual projects still required individual PA Memos, regardless of the fact that Project J-001B U&SI would support future individual projects. Prior PA memos analyzing the historic properties within the J-001B U&SI project echoes NAVFAC’s duty to prepare a PA Memo for each “individual project.” The text of the NHPA, its implementing regulations, and the 2011 PA does not authorize NAVFAC to bypass its duty.

Accordingly, PLSR raises concerns that NAVFAC’s potential final determination to authorize activities associated with the eight individual projects subject to the PA Memo will not be in accordance with the NHPA, its implementing regulations, or the 2011 PA. Thus, PLSR raises concerns that the PA Memo associated with the eight P projects is neither valid nor authorized by the NHPA, its implementing regulations, and 2011 PA.

B. NAVFAC Fails to Complete NHPA Duties “Prior To” the Approval of Spending Federal Funds

NAVFAC and DoD failed did not complete NHPA duties “prior to” the approval of spending federal funds. Under 54 U.S.C. § 306108, the federal agency with jurisdiction over the undertaking, “*prior to* the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.” (Emphasis added). As mentioned above, the “take into account” process for the individual projects are satisfied through the PA Memo Process provided in the 2011 PA.⁴⁶

Here, NAVFAC did not “take into account” the effects of the individual projects via the PA Memo Process prior to the approval of spending federal funding. On January 29, 2021, the DoD released its 12th annual report of the Interagency Coordination Group of Inspectors General for

⁴⁴NAVFAC PACIFIC, J-001B PA Memo #2 (Public) (Dec. 9, 2014), https://www.navfac.navy.mil/content/dam/navfac/NAVFAC%20Pacific/PDFs/cultural_resources_info/FY2015_FY2016%20Projects/PAC_J_001B%20PA%20Memo_2%20PUBLIC%2012%209%2014.pdf.

⁴⁵ PA Memo at 2.

⁴⁶ [2015 Record of Decision](#) at 26 (“Individual project reviews are conducted via a PA memo process...”).

Guam Realignment (“2021 Guam Realignment Report”).⁴⁷ There, the report indicates that federal funding has already been spent on the proposed projects. Specifically, the report indicates that several millions of dollars in federal funding have been spent on the projects from the project inception through September 30, 2020. As illustrated in the table below, NAVFAC has begun spending federal funds without taking into account the effects of nearly every individual project.

⁴⁷ Interagency Coordination Group, Interagency Coordination Group of Inspectors General for Guam Realignment Annual Report, Jan. 29, 2021, <https://media.defense.gov/2021/Feb/02/2002574078/-1/-1/1/INTERAGENCY%20COORDINATION%20GROUP%20OF%20INSPECTORS%20GENERAL%20FOR%20GUAM%20REALIGNMENT%20ANNUAL%20REPORT%20-%202021.PDF>.

	Project Number and Title	Description or Scope	Start Date	Total Budgeted Cost	Cost Incurred from Project Inception Through September 30, 2020 (U.S. or GOJ Funds)	Cost Incurred October 1, 2019 – September 30, 2020
1	305—4th Marines Regiment Facilities ⁴⁸	4th Marine Regiment Facilities	10/30/2015	\$ 1,500,000	\$ 1,079,445	\$ 1,079,445
2	306—Combat Logistics Battalion-4 Facilities ⁴⁹	Combat Logistics Battalion-4 Facilities	10/19/2015	\$ 259,234	\$ 259,234	\$ 0
	306—Combat Logistics Battalion-4 Facilities ⁵⁰	Combat Logistics Battalion-4 Facilities	10/19/2015	\$ 3,800,000	\$ 3,535,373	\$ 3,535,373
3	307—Consolidated Armory ⁵¹	Consolidated Armory	10/19/2015	\$ 199,544	\$ 199,544	\$ 0
	307—Consolidated Armory ⁵²	Consolidated Armory	10/19/2015	\$ 1,700,000	\$ 1,353,605	\$ 1,353,605
4	310—Infantry Battalion Company Headquarters ⁵³	Infantry Battalion Company Headquarters	10/21/2017	\$ 1,300,000	\$ 938,837	\$ 932,302
5	314—Marine Expeditionary Brigade Enablers ⁵⁴	Marine Expeditionary Brigade Enablers	2/14/2020	\$ 1,200,000	\$ 626,042	\$ 626,042
6	326—Principal End Item Warehouse ⁵⁵	Principal End Item Warehouse	9/25/2019	\$ 1,500,000	\$ 881,270	\$ 881,270
7	802—Base Warehouse ⁵⁶	DPRI-Base Warehouse	9/11/2018	\$ 600,000	\$ 413,644	\$ 86,738
8	803—Individual Combat Skills Training	DPRI-Individual Combat Skills Training	9/11/2019	\$ 500,000	\$ 282,165	(373)

⁴⁸ [2021 Guam Realignment Report](#) at 31.

⁴⁹ [2021 Guam Realignment Report](#) at 31.

⁵⁰ [2021 Guam Realignment Report](#) at 31.

⁵¹ [2021 Guam Realignment Report](#) at 31.

⁵² [2021 Guam Realignment Report](#) at 31.

⁵³ [2021 Guam Realignment Report](#) at 31.

⁵⁴ [2021 Guam Realignment Report](#) at 31.

⁵⁵ [2021 Guam Realignment Report](#) at 36.

⁵⁶ [2021 Guam Realignment Report](#) at 33.

	803—Individual Combat Skills Training	DPRI-Individual Combat Skills Training	9/11/2019	\$ 130,000	\$ 73,550	\$ 73,550
	J001B—Utilities and Site Improvements - Phase 1 (Finegayan)	Utilities and Site Improvements - Phase 1 (Finegayan)	6/9/2016	\$ 309,000,000	\$ 190,487,370	\$ 78,754,134

Table 1 - Identifies the DoD projects and programs and their associated costs as provided by the 2021 Guam Realignment Report. The column with numeric values in bold red font shows the costs of federal funding already spent.

NAVFAC’s failure to complete the PA Memo process prior to the approval of spending federal funding is a violation of federal law—for all individual P projects proposed in this PA Memo. In *Tyler v. Cisneros*, the Ninth Circuit concluded that the NHPA’s language of “prior to the approval of any Federal funds” means “the timing of agency compliance.” 136 F.3d 603, 608 (9th Cir. 1998) (citations omitted). There, the case concerned the NHPA’s applicability to properties where federal funding had already been released for housing projects. *Id.* at 607. In reaching its holding that the NHPA did not contain an implicit statute of limitations, the court noted that Section 106’s language, “prior to the approval of any Federal funds,” establishes the time for NHPA compliance. *See id.* at 607 (citing 54 U.S.C. § 306108 (formerly cited as 16 U.S.C. § 470f)).

The plain text of the Section 106 requires NHPA compliance for an undertaking “prior to the approval of the expenditure of any Federal funds[.]” 54 U.S.C. § 306108; *Karst Env’tl. Educ. & Prot., Inc. v. U.S. Env’tl. Prot. Agency*, 403 F. Supp. 2d 74, 78 (D.D.C. 2005) (observing that “federal authority to fund or to license a project can render the project an undertaking . . . thereby requiring compliance with the NHPA[.]”). In *Pit River Tribe v. U.S. Forest Serv.*, the Ninth Circuit held that “agencies violated NHPA by failing to complete the necessary review” before taking agency action determined to be an undertaking. 469 F.3d 768, 787 (9th Cir. 2006).

Accordingly, NAVFAC’s spending of federal funding—in excess of \$9M—prior to the completion of the PA Memo process for each individual project violates the NHPA. Here, it appears that NAVFAC is initiating the PA Memo process several years after the fact federal costs had been incurred. For example, October 30, 2015, was the “start date”⁵⁷ for the 4th Marine Regiment Facilities (Project P-305), but this PA Memo for the facilities was only initiated six years after the fact.

In another example, October 21, 2017, was the “start date”⁵⁸ for the Infantry Battalion Company Headquarters (Project P-310), but this PA Memo for the headquarters project was only initiated four years after the fact. In a final example, September 11, 2018, was the “start date”⁵⁹ for the Base Warehouse (Project P-802), but this PA Memo was initiated over two years

⁵⁷ [2021 Guam Realignment Report](#) at 31.
⁵⁸ [2021 Guam Realignment Report](#) at 31.
⁵⁹ [2021 Guam Realignment Report](#) at 33.

after the fact. Consequently, PLSR raises the issue that NAVFAC's failure to comply with its Section 106 duties and obligations triggers numerous federal violations associated with federal funding.

C. NAVFAC Reliance on the J-001B U&SI Project is an Invalid Process of Identifying and Evaluating Historic Properties for the "Individual Projects" Subject to this PA Memo

Assuming *arguendo* that NAVFAC prepared a PA Memo for each individual project, the PA Memo's content fails to make a reasonable and good faith effort to identify historic properties.⁶⁰ Specifically, the PA Memo relies entirely on the identification efforts done for a different project: J-001B.⁶¹ With respect to identifying historic properties for specific projects, the 2015 SEIS provides that the "2011 PA includes procedures for consulting on the identification of historic properties as specific projects are developed."⁶² Among the procedures provided under the 2011 PA is the requirement to identify and evaluate "historic properties within project-specific APEs for direct and indirect effects."⁶³ Area of potential effects ("APE") is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced *by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.*"⁶⁴

Here, NAVFAC's reliance on the identification and evaluation for historic properties within the J-001B U&SI APE is an improper attempt to comply with Section 106. The regulations note that the geographic area within each undertaking may be unique, and consequently, "may be different for different kinds of effects caused by the undertaking[.]"⁶⁵ As articulated in 2015 SEIS, to meet the "reasonable and good faith identification" requirements under Section 106, "agencies are to take into account past planning, research and studies; the magnitude and nature of the undertaking and the degree of federal involvement; the nature and extent of potential effects on historic properties; and the likely nature and location of historic properties within areas that may be affected (ACHP 2007)."⁶⁶ While the proposed projects, e.g., various facilities, headquarters, and warehouse, etc., may be supported by J-001B's utilities, the scale and nature of each individual non-utility project may have a different effect on the historic properties that may be present on the site—specifically as it concerns the human remains and artifacts located within the APE.

⁶⁰ 36 C.F.R. § 800.4(b).

⁶¹ See PA Memo at 6-7.

⁶² 2015 [SEIS](#) at 3-75, at 286.

⁶³ 2011 PA Stipulation IV.E.2. at 9.

⁶⁴ 36 C.F.R. § 800.16(d) (emphasis added).

⁶⁵ See 36 C.F.R. § 800.16(d).

⁶⁶ 2015 [SEIS](#) at 3-73 to 3-74, at 283-84.

Recently, NAVFAC unearthed numerous human remains in order to identify their respective ages and ethnicity; and artifacts.⁶⁷ For example, in 2020, NAVFAC identified at least nine human remains within J-001B. Specifically, NAVFAC unearthed teeth, cranial fragments, ulna, radius, and femurs.⁶⁸ However, NAVFAC’s PA Memo fails to acknowledge the existence of the human remains and ancient burials found on the site.

Map of Inadvertent Discoveries in J-001B

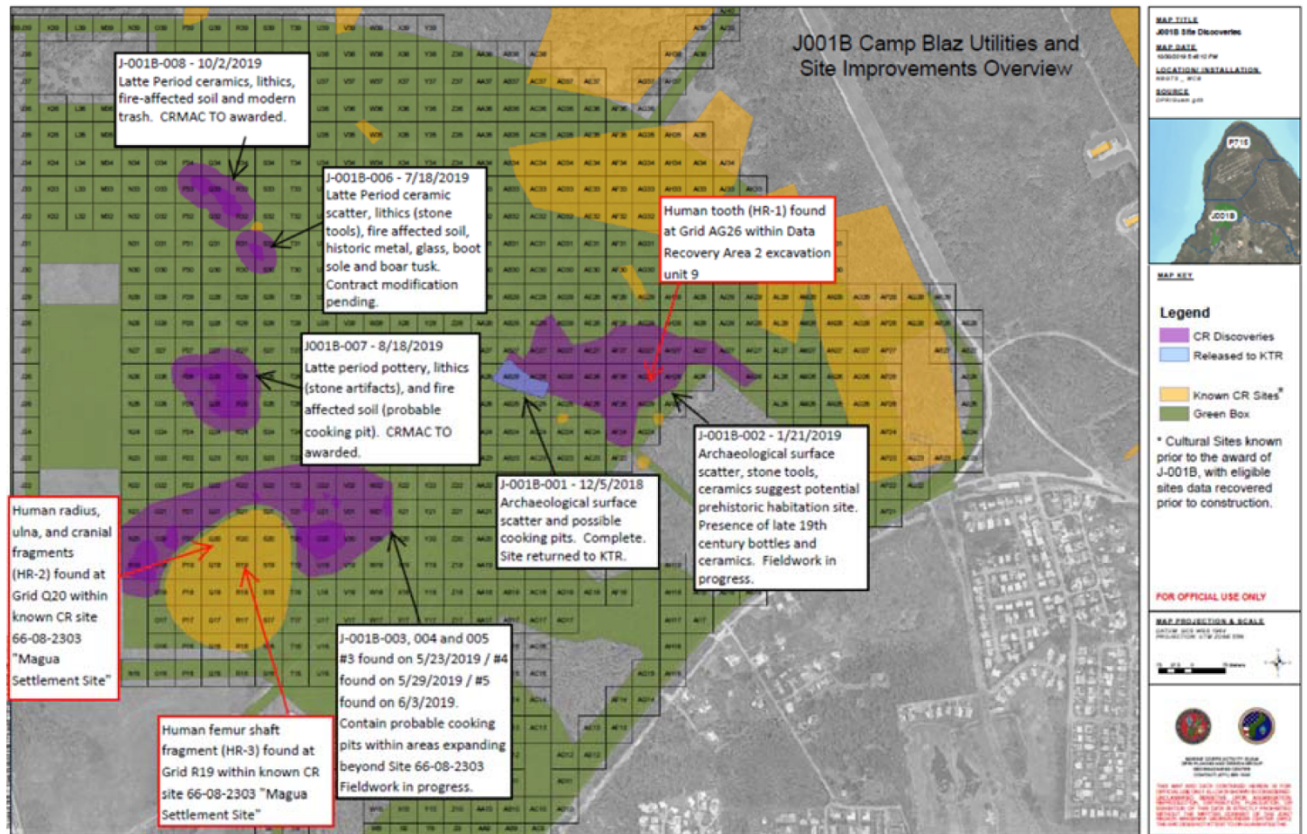


Figure 1 – Map of Inadvertent Discoveries in J-001B is provided in NAVFAC’s 2019 [Semi-Annual Report](#) at 30.

Two months after the releasing the preliminary report on the 12 ancestral burials located at Camp Blaz, NAVFAC hastily releases a PA Memo for eight project proposals. Although NAVFAC’s Semi-Annual Reports in 2019 and 2020 identifies the location of the unearthed human remains, NAVFAC fails to do so in its PA Memos. According to the PA Memo, the analysis for eight of its project proposals’ “identification and evaluation” efforts relies on information from a project entitled “J-001B Utilities and Site Improvements (U&SI).”⁶⁹ However, NAVFAC’s reliance on J-001B U&SI is improper. As noted above, historic properties must be identified and evaluated for each individual project’s APE prior to the approval of spending federal funds.

⁶⁷ See 2011 PA Appendix G (“Standard Operating Procedures”).

⁶⁸ [Military Relocation Programmatic Agreement Semi-Annual Report January 1, 2020 – June 30, 2020](#) at 26.

⁶⁹ PA Memo at 1.

Moreover, buried under a list of references and a reliance on the J-001B U&SI activities, the PA Memo consists of a conclusory determination that the eight individual projects will have no effect on historic properties.⁷⁰ In one paragraph, the PA Memo merely echoes statements made in the analysis intended for J-001B U&SI activities, which NAVFAC accepted as its finding of effect without further discussion. NAVFAC's omissions to identify and evaluate the human remains as part of the PA Memo process raises concerns that NAVFAC is failing to make a reasonable and good faith effort to identify historic properties.

D. NAVFAC is Withholding Information in Contravene to the NHPA, and the 2011 PA

PLSR repeats its concerns over the lack of information available on the CRI Website necessary to support the DoD's PA Memo. Under the 2011 PA, the DoD expressly agreed to use the CRI website so that supporting information can properly provide the public with "opportunities to comment."⁷¹ However, the DoD's CRI Website does not make the supporting materials cited in the PA Memo publicly accessible.

On July 14, 2021, PLSR emailed a request to NAVFAC for the following information as referenced in the PA Memo:

Athens, J.S.

2009 Archaeological Surveys and Cultural Resources Studies on Guam and the Commonwealth of the Northern Mariana Islands in Support of the Joint Guam Build-Up Environmental Impact Statement Volume I: Guam. Prepared for Naval Facilities Engineering Command, Pacific Division, Pearl Harbor, Hawaii. International Archaeological Research Institute, Inc. Honolulu, Hawaii.

Church, M., J. Hokanson, J. Gallison, and M. Jennings

2009 Cultural Resources Survey of 297 Acres at Andersen Air Force Base, Guam. Prepared for Andersen Air Force Base, Guam. Engineering-Environmental Management, Inc., Englewood, Colorado.

Dixon, Boyd, S. Walker and R. Schaefer

2011 Cultural Resource Investigations Conducted in the Territory of Guam Supporting the Joint Guam Build-Up Environmental Impact Statement: Final Archaeological Surveys on Guam 2008-2009 at Air Force Barrigada, Proposed Live Fire Training Range, Andersen South, and Naval Base Guam. Prepared for Naval Facilities Engineering Command, Pacific Division, Pearl Harbor, Hawaii. TEC Inc., Honolulu, Hawaii.

Dixon, B. and S. Walker

2011 Cultural Resource Investigations Conducted in the Territory of Guam Supporting the Joint Guam Build-Up Environmental Impact Statement: Final Archaeological Surveys on Guam 2009 at Proposed Utility Sites, Harmon Property, and Andersen AFB. Prepared for Naval Facilities Engineering Command, Pacific Division, Pearl Harbor, Hawaii. TEC Inc.,

⁷⁰ PA Memo at 6.

⁷¹ 2011 PA Stipulation IV.E.2. at 9.

Honolulu, Hawaii.

Dixon, B., T. Rudolph, A. Jalandoni, I. Nelson, M. Hroncich-Conner, S. Leary, R. Schaefer, E. Lash, M. Todd
2015 Proposed Guam and CNMI Military Relocation 2012 Roadmap Adjustments SEIS Live-Fire Training Range Complex Footprints, Main Cantonment, Utilities, Communications, Well Field Alternatives and Access Route Options Volume I: Potential Direct Impact Area In-Fill Cultural Resources Study Narrative. Prepared for Naval Facilities Engineering Command Pacific, Pearl Harbor, Hawaii. Cardno TEC, Inc., Honolulu, Hawaii.

Dixon, B., T. McCurdy, R. Shaefer, R. Jones, I. Nelson
2016 Andersen Air Force Base, Guam, National Historic Preservation Act Section 110 Cultural Resources Identification and Evaluation Studies. Prepared for Naval Facilities Engineering Command Pacific, Pearl Harbor, Hawaii. Cardno TEC, Inc., Honolulu, Hawaii.

Dixon, B., D. Welch, T. Rudolph, R. Jones, and I. Nelson
2018 Final Technical Report: Archaeological Data Recovery in Support of the J-0001B Utilities and Site Improvements at Naval Base, Guam Telecommunications Site, Guam. Prepared for Naval Facilities Engineering Command, Pacific Division, Pearl Harbor, Hawaii. TEC Inc. and the University of Guam. (GIS data labeled 2017)

Eakin, J., K. Higelmire and D. DeFant
2012 Archaeological Data Recovery Report Guam Military Relocation MILCON Projects P-100 (North Ramp Utilities) and P-101 (North Ramp Parking), Andersen Air Force Base, Territory of Guam. Prepared for Department of the Navy, Naval Facilities Engineering Command, Pacific, Pearl Harbor, Hawaii. Southeastern Archaeological Research, Inc. (SEARCH).

Haun, A.E.
1988 Archaeological Reconnaissance Survey and Field Inspections of Relocatable Over-the-Horizon Radar Sites on Guam, Mariana Islands, Micronesia. Prepared for Wilson Okimoto and Associates, Inc., Honolulu, Hawaii. Paul H. Rosendahl, PhD, Inc., Hilo, Hawaii.

Highness, D. and A. Haun
1990 Archaeological Inventory Survey DTS Facility: Barrigada and Finegayan Sites, Dededo and Barrigada Municipalities, Territory of Guam. Prepared for Belt, Collins, & Associates, Inc., Honolulu, Hawaii. Paul H. Rosendahl, PhD, Inc., Hilo, Hawaii.

Hokanson, Jeffrey H., J. David Kilby, Michael Church and Mary R. McCurdy
2008 Cultural Resources Survey for a Perimeter Fence and Portions of the Munitions Storage Area, Andersen Air Force Base, Guam. Prepared for Andersen Air Force Base. Engineering-environmental Management, Inc., Englewood, Colorado.

Kurashina, H., T. McGrath, and H. Manner
1987 Archaeological Survey of Areas 1, 2, 1-A and 2-A at Northwest Field, Andersen Air Force Base and Naval Communication Area Master Station Western Pacific, Finegayan, Guam, Marianas Islands. Prepared for Naval Facilities Engineering Command, Pacific, Pearl Harbor, Hawaii. Micronesian Area Research Center, University of Guam, Mangilao,

Guam.

Pacheco, T., T. Rieth, and R. DiNapoli

2020 Archaeological Monitoring in Support of Finegayan Utilities and Site Improvements Phase I, Naval Computer and Telecommunications Station, Guam. 4 Volumes. Prepared for Department of the Navy, Pacific Division, Naval Facilities Engineering Command, Pearl Harbor, Hawaii. International Archaeological Research Institute, Inc., Honolulu, Hawaii.

Welch, D.

2010 Archaeological Survey and Cultural Resource Studies Conducted in 2007 on the Island of Guam in Support of the Joint Guam Build-Up Environmental Impact Statement. 2 volumes. Prepared for Department of the Navy, Pacific Division, Naval Facilities Engineering Command, Pearl Harbor, Hawaii. International Archaeological Research Institute, Inc., Honolulu, Hawaii.

As of the date of this comment letter, NAVFAC has not provided the referenced materials for public review. Accordingly, PLSR raises concerns over that the lack of supporting materials on the CRI Website, which consequently undermines the principles of public participation. Furthermore, PLSR is concerned that it could not provide meaningful comments due to NAVFAC's inaction to make the information accessible for inspection and public review. Put simply, PLSR is concerned that NAVFAC's ongoing withholding of access to information on historic properties is contrary to the 2011 PA, NHPA requirements, and DoD directives.

V. Conclusion

For the reasons provided above, PLSR submits these comments for DoD to take into account before engaging in ground-disturbing activities or actions that may adversely impact additional historic properties in the project area. Accordingly, we respectfully urge DoD to:

- Prepare a PA Memo for each individual project, in compliance with the NHPA, its implementing regulations, and the 2011 PA;
- Provide all supporting information regarding the "scope of DoD identification efforts, and DoD's determinations of eligibility," consistent with Stipulations IV.E.2.a. of the 2011 PA;
- Revise the PA Memo's findings and determinations in compliance with the 2011 PA, NHPA, and its implementing regulations; and
- Not to proceed with the proposal in light of the 2021 United Nations Letter to the U.S. President and Commander-in-Chief Biden.⁷²

⁷² The United Nations letter to U.S. President Biden requests that "**all necessary interim measures be taken to halt the alleged violations** and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations," (Mar. 31, 2021) (emphasis added), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25885>.

For the reasons above, we respectfully **oppose** the PA Memo's "Identification of Historic Properties;" and "Determination of Effect."

Sincerely,
Monaeka Flores, PLSR Core Member
Maria Hernandez, PLSR Core Member
Jessica Nangauta, PLSR Core Member

Attachments: Dave Lotz, *The Saga of Magua Village*, 2020
PLSR Email Request to NAVFAC, dated July 14, 2021