

**RESPONSE TO COMMENTS FROM PRUTEHI LITEKYAN - SAVE RITIDIAN ON PA MEMO # 1 NORTH FINEGAYAN FOREST
ENHANCEMENT SITES (FES), NAVAL BASE GUAM TELECOMMUNICATIONS SITE (NBGTS), FINEGAYAN, GUAM (RC2021-0952)**

25, January 2022

Comments	DON Responses
<p>1. NAVFAC (1) failed to adequately assess impacts of herbicide related activities; (2) failed to identify ESA-listed species as historic properties; and (3) failed to properly determine the effects of its undertaking on historic properties.</p>	<p>1. Endangered Species Act (ESA)-listed species are addressed under separate consultations with the U.S. Fish and Wildlife Service (FWS); the project described in this PA Memo is a direct result of these consultations. Regulation of ESA-listed species are outside the scope of this PA Memo and the Section 106 process.</p>
<p>2. PLSR raises concerns that the undertaking's herbicide-related activities did not undergo adequate environmental review.</p>	<p>2. There will be no impacts on cultural resources. The DON is in compliance with the National Environmental Policy Act planning requirements and Endangered Species Act consultation on effects on natural resources within the FES, which are processes separate from the 2011 Programmatic Agreement.</p> <p>Invasive plant removal is specifically stated in the Biological Opinion (BO) and the common forms of invasive plant control are mechanical and chemical. Herbicide use is a routine process used in weed control/invasive plant management. Active herbicide use (with no ground disturbance that triggers SHPO involvement) has been ongoing in FES for approximately one year. The scope of the FES was developed in consultation with FWS.</p> <p>The University of Guam's (UOG) Plant Extinction Prevention Program (GPEPP) is helping the DON plan the FES work through a cooperative agreement. GPEPP is developing the herbicide methodology for several species in the FES that do not currently have established protocols. The DON's Natural Resources staff communicates regularly with Guam Department of Agriculture's (DPA) Forestry Division on the FES work and have had informal conversations with the US Forest Service on the project as well. USFWS, Guam Division of Aquatic and Wildlife Resources, and other resource agencies are familiar with these projects through the annual Integrated Natural Resource Management Plan (INRMP) reporting meetings. Herbicide methods have been discussed during these meetings for at least the last three years.</p>
<p>3. PLSR raises the issue that effects of applying herbicides, and its potential effects on historic properties that have not been fully analyzed pursuant to NEPA, the NHPA, and the 2011 PA. Specifically, PLSR is concerned about the herbicide's potential impacts to ESA-listed species, host plants, artifacts, and ancient human burials and remains within the FES Project APE.</p>	<p>3. Control of invasive plants can be accomplished by mechanical, chemical, or biological means: direct cutting of trees/plants; herbicides; or biological controls such as species-specific insect pests or pathogens, respectively.</p>

There are no specific biological means currently known for the species that the DON is required (by the FWS BO) to control within the FES. Mechanical control is difficult due to the great number of large invasive trees, which provide canopy to an understory that includes native and in some cases ESA-listed species. Direct felling would dramatically alter the environment and threaten the plants that we are dedicated to protecting. Furthermore, simply cutting large Vitex trees will not kill them, as they will regrow from the stumps. Moreover, stump removal is disruptive, expensive, and damaging to the rest of the forest. Therefore, herbicidal control is the best means of mitigation.

Herbicide use has been tested in other DoD plots and is also the subject of ongoing work (funded through the DPRI program) at UOG. Herbicides can be an extremely targeted method that allow trees to expire and decay slowly, preserving some cover for understory species while new native canopy can be re-established. This process leads to slower decay and thus creates less potential for facilitating a coconut rhinoceros beetle larval habitat. In addition, this method leaves old dead trees that may be an important habitat for native species such as cavity nesters.

Although herbicide regulation is outside the scope of the Section 106 process, the Navy will fully comply with applicable statutes and regulations regarding herbicide use.

Some of these regulations include:

- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
- DOD directives on pesticide use, including documentation of all uses within the NOPRS system
- DON requirements for pesticide/herbicide use are more stringent than Guam EPA requirements

4. PLSR raises three concerns over the PA Memo's identification efforts: (1) the PA Memo does not adequately identify historic properties; (2) the PA Memo is unclear if DoD completed surveys to identify properties within the project-specific APEs; and (3) the PA Memo is unclear if DoD evaluated the inadvertent discoveries and ESA-listed species for listing on the National Register of Historic Places.

4. Previous archaeological surveys and applicable historical records were consulted on with SHPO in identifying historic properties within the FES Area of Potential Effect (APE), as described in the PA Memo. In addition, an archaeological monitor will be present for ground-disturbing activities, such as outplanting and vegetation clearing of access paths, to ensure known archaeological sites are avoided and post-survey archaeological discoveries are reported to Marine Corps Base Camp Blaz (MCBCB) and coordinated with SHPO.

	Surveys for ESA species are outside the purview of the National Historic Preservation Act (NHPA) of 1966. While not relevant to Section 106, the APE will be fully surveyed for all ESA species. A contract has been awarded and field work is expected to start in early 2022.
5. PLSR raises concerns that (1) the PA Memo's determination of "no effect" is arbitrary and capricious; and (2) DoD did not adequately take into account the effects of its undertaking, and herbicide-related activities.	5. Herbicide use is regulated separately, it involves no ground disturbance, and it is not expected to have any effect on historic properties.
6. PLSR raises concerns regarding the lack of information available on the CRI Website necessary to support the DoD's PA Memo.	6. We wish to clarify that the release of redacted references was being coordinated with a PLSR attorney. Attempts were made by the Navy to engage with a PLSR attorney, however, no response was received. Additionally, the requested resources can be accessed at the SHPO office for research or other lawful purposes. Their office is located at the Department of Parks and Recreation, 940 Chalan Palasyo, Agaña Heights, 96910, across from the U.S. Naval Hospital. The DON has permitted the access of these resources for academic and research purposes, but is prohibited by law in allowing recording/reproduction for general public distribution. Individuals seeking access to these reports are advised to inquire with SHPO.
7. Conduct supplementary consultation on herbicide-related activities, consistent with Stipulations I.D.5., IV.F of the 2011 PA, and 2015 ROD.	7. Please see response to comment 3.
8. Adequately identify historic properties to include ESA-listed species and habitats, including relevant host plants, consistent with the NHPA, its implementing regulations, and 2011 PA Stipulation IV;	8. Please see response to comment 4.
9. Reconsider its determination that herbicide-related activities, and other ground disturbing activities will have "no effect" on historic properties, including ancient human remains.	9. Herbicide use does not involve ground disturbance. Given the limited environmental persistence and non-corrosive nature of commercial herbicide after application, the archaeological integrity of subsurface deposits will not be affected by the controlled use of herbicides on above-ground parts of plants in accordance with labeling instructions.
10. Complete survey of historic properties to include ESA-listed species their respective habitats, including relevant host plants.	10. Please see response to comment 4.
11. 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, DoD Instructions on Cultural Resources Management.	11. Please see response to comment 6.
12. Revise the PA Memo's findings and determinations in compliance with the NHPA, and its implementing regulations.	12. The DON's current finding and determinations are in compliance with the NHPA.

13. Not to proceed with the proposal in light of the 2021 United Nations Letter to the U.S. President and Commander-in-Chief Biden.

13. This comment is acknowledged and taken under advisement.



**Prutehi Litekyan - Save Ritidian
A Direct-Action Group**

August 23, 2021

Via Email – criwebcomment@navy.mil

Naval Facilities Engineering Command Pacific
ATTN: CRI Web Comments, Code EV23
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PROJECT: North Finegayan and Finegayan Forest Enhancement Sites at Naval Base Guam Telecommunications Site (NBGTS) and Andersen Air Force Base

SUBJECT: Military Relocation to Guam and CNMI Programmatic Agreement (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 Pacific’s (“NAVFAC”) ¹ Programmatic Agreement (“PA”) Memo, entitled “North Finegayan and Finegayan Forest Enhancement Sites PA Memo # 1 (Public),” dated July 9, 2021, regarding the above-captioned project. ² 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 For brevity, PLSR collectively refers to DoD, NAVFAC, and Marine Corps Base Camp Blaz, Public Works Dep’t (“MCBCB PWD”) as “NAVFAC”.

² NAVAL FACILITIES ENGINEERING SYSTEMS COMMAND (“NAVFAC”) PACIFIC; MARINE CORPS BASE CAMP BLAZ, PUBLIC WORKS DEP’T (“MCBCB PWD”), North Finegayan and Finegayan Forest Enhancement Sites PA Memo # 1 (Public), July 9, 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_1213508169/file.res/PAM%20%231%20North%20Finegayan%20and%20Finegayan%20Forest%20Enhancement%20Sites_PUBLIC.pdf.

I. INTERESTS OF PLSR

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.³ 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.⁴ More specifically, PLSR's members comprise of Yo'ámte, 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."⁵ 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.⁶

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.

³ PA Memo at 1.

⁴ 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-inifresi/> (last visited April 10, 2021).

⁵ 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>.

⁶ 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?gld=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 provide⁷ the public opportunities to comment.”⁶

II. BACKGROUND

III. Historical Background

The indigenous CHamoru people settled in Guam, the southernmost and largest island in the Marianas archipelago, over 3,500 years ago.⁸ The CHamoru people of Guam were an organized cultural and linguistic society marked by advanced seafaring, horticulture, hunting, and fishing.⁹ 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.¹⁰ As indigenous Pacific Islanders, the historic CHamoru people developed a unique culture with a legacy of historical sites throughout Guam.¹¹ The prehistoric and historic sites include the historic CHamoru villages of Ritidian, Fafalog, Caignat, Måguak (Magua), Sabanan Fadang, Haputo, Pugua Point, Taguac, and Machanao.

IV. Guam’s ESA-Listed Species and Habitats

The undertaking associated with the proposed relocation of U.S. Marines from Okinawa to Guam implicates numerous species listed under the Endangered Species Act (“ESA”) and its habitats.¹² The ESA-listed species to be impacted by the undertaking are represented in the table below:

Common Name	CHamoru Name	Scientific Name	Source
Guam rail	Ko'ko'	<i>Gallirallus owstoni</i>	2015 BiOp at 60.
Mariana Crow	Aga	<i>Corvus kubaryi</i>	2015 BiOp at 54.

⁷ 2011 PA Stipulation IV.E.2. at 9.

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

⁹ 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/>.

¹⁰ Anthony (T.J.) F. Quan, “*Respetá 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).

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

¹² Record of Decision (2015) (“2015 ROD”) at 2, <http://guammarines.s3.amazonaws.com/static/20150828%20-%20ROD%20with%20Signature%20-%20FINAL.pdf>.

Guam Micronesian Kingfisher	Sihek	<i>Todiramphus cinnamominus cinnamominus</i>	2015 BiOp at 49.
Mariana Fruit bat	Fanihi	<i>Pteropus mariannus mariannus</i>	2017 BiOp at 3.
Mariana eight spot butterfly	Ababbang	<i>Hypolimnas octocula marianensis</i>	2017 BiOp at 3.
Humped tree snail	Akaleha	<i>Partula gibba</i>	2017 BiOp at 3.
Guam tree snail	Akaleha	<i>Partula radiolata</i>	2017 BiOp at 3.
Fragile tree snail	Akaleha Dogas	<i>Samoana fragilis</i>	2017 BiOp at 3.
wild onion siboyas*	Halumtanu	<i>Bulbophyllum guamense</i>	2017 BiOp at 3.
N/A	Fadang	<i>Cycas micronesica</i>	2017 BiOp at 3.
N/A	N/A	<i>Dendrobium guamense</i>	2017 BiOp at 3.
N/A	Ufa Halumtanu	<i>Heritiera longipetiolata</i>	2017 BiOp at 3.
N/A	N/A	<i>Tabernaemontana rotensis</i>	2017 BiOp at 3.
N/A	N/A	<i>Tuberolabium guamense</i>	2017 BiOp at 3.
N/A	N/A	<i>Eugenia bryanii</i>	2017 BiOp at 3.
N/A	N/A	<i>Maesa walkeri</i>	2017 BiOp at 3.
N/A	N/A	<i>Nervilia jacksoniae</i>	2017 BiOp at 3.
N/A	Hayun Lågu	<i>Serianthes nelsonii</i>	2015 BiOp at 70

Several of the ESA-listed species and their habitats are of cultural significance to the indigenous CHamoru people.

The Navy is required to implement several conservation measures to minimize an ESA “take,” and mitigate impacts on the ESA-listed species and its habitats.¹³ Pertinent to this PA Memo, the Navy is required to implement a “Forest Enhancement” project to contribute to the recovery of the ESA-listed species.¹⁴

V. Project Summary: Finegayan Forest Restoration

According to the PA Memo, this proposal seeks to undertake a “forest enhancement activities” (“FES”) project within the North Finegayan and Finegayan Enhancement Sites.¹⁵ The total area of potential effects (“APE”) is 1,155 acres for removing invasive species and outplanting.¹⁶ The villages of Ritidian, Haputo, Fafalog, Finaguayac, and Ukudu are within or close to the APE.¹⁷

The proposed activities for the FES Project include:

¹³ 2015 ROD at 17-18.

¹⁴ 2015 Biological Opinion at 37, <https://www.mcbblaz.marines.mil/Portals/222/Documents/2015%20Biological%20Opinion.pdf?ver=Xobovtv3k-0-AsB7L7Rasg%3d%3d>.

¹⁵ PA Memo at 1.

¹⁶ PA Memo at 2.

¹⁷ PA Memo at 1.

- Using herbicides to remove invasive plants, and treating root balls with herbicides;
- Controlling weeds with herbicides, which may continue for more than a year;
- Outplanting native plants;
- Clearing paths for access, installing irrigation lines; and
- Removal of invasive animal species.¹⁸

The PA Memo suggests that the abovementioned activities, such as the herbicide-related activities, are required in the [2015 Biological Opinion](#) and the [2017 Biological Opinion](#).¹⁹ The 2015 and 2017 Biological Opinions require the Navy to implement various conservation measures (e.g., Forest Enhancement, conservation measures to minimize the effects of fire, etc.) to minimize the “take” of a species listed under the Endangered Species Act.²⁰

However, neither of the Biological Opinions discuss herbicide-related activities as an approved conservation measure. In fact, herbicide-related activities, its associated environmental and health risks, appear to have not been assessed through the NEPA process.

According to the PA Memo, the FES project is supposedly “identified” in Appendix E of the 2011 PA.²¹ Under Stipulation IV of the 2011 PA, DoD is required to annually update Appendix E “to reflect the review of such additional information on identification and evaluation of historic properties.”²² Moreover, “Appendix E summarizes the results of DoD’s recommendations and status of SHPO review.”²³ The annual Appendix E update typically identifies projects with eight types of information: (1) a project number, (2) a project title, (3) Fiscal Year (FY) execution, (4) DoD Effect Determination, (5) Historic Properties Directly Affected, (6) Historic Properties Indirectly Affected, (7) FEIS/Original Survey Reference, and (8) Status.²⁴ However, none of this information is provided for the FES Project in the most recent annual Appendix E update: [2021 Appendix E](#), dated March 31, 2021, (“2021 Table E-2 of Appendix E”).

Despite a lack of discussion on herbicide-related activities, NAVFAC reaches the conclusion that the undertaking will have “no effect” on the present historic properties.²⁵

¹⁸ PA Memo at 2.

¹⁹ See PA Memo at 1.

²⁰ See [2015 BiOp](#) at 1, 157-58.

²¹ PA Memo at 1.

²² 2011 PA Stipulation IV.E., at 8.

²³ 2011 PA Stipulation IV.D., at 8.

²⁴ See [2021 Table E-2 of Appendix E](#)

²⁵ PA Memo at 5.

VI. LEGAL STANDARDS

A. National Historic Preservation Act of 1966

In response to federal projects destroying natural and historic properties, Congress enacted the National Historic Preservation Act (NHPA) in 1966.²⁶ The House Report notes that Congress enacted the NHPA²⁷ with a purpose to protect “natural and historical properties,” including “[m]any others which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level[.]”²⁸

A stated purpose of the National Historic Preservation Act of 1966, as amended through 2016, (“NHPA”)²⁹ is to “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations[.]”³⁰ The NHPA states that the Federal government’s policy is to cooperate with organizations and individuals to “provide leadership in the *preservation of the historic property* of the United States and of the international community of nations[.]”³¹

To serve its purpose, the NHPA imposes requirements on federal agencies to “take into account” the effect of a proposed Federal or federally assisted “undertaking” on historic properties (i.e., the “Section 106” process).³² “Undertaking” means “a project, activity . . . funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those carried out by or on behalf of the Federal agency[.]”³³

B. NHPA Regulations

The “take into account” requirement is often referred to as the “Section 106” process³⁴ and is implemented through the “Protection of Historic Properties” regulations.³⁵ Generally, the NHPA

²⁶ [H.R. Rep. No. 89-1916](#) (1966), reprinted in 1966 U.S. Code Cong. & Admin. News 3307, 3309 (observing that “the construction of federal projects . . . may lead to the[] destruction” of historical properties);

54 U.S.C. §§ 300101-307108 (formerly cited as 16 U.S.C. § 470 *et seq.*)

²⁷ 54 U.S.C. §§ 300101-307108 (formerly cited as 16 U.S.C. § 470 *et seq.*)

²⁸ [H.R. Rep. No. 89-1916](#) (1966), reprinted in 1966 U.S. Code Cong. & Admin. News 3307, 3309.

²⁹ 54 U.S.C. §§ 300101 to 307108.

³⁰ 54 U.S.C. § 300101(1).

³¹ *Id.* at § 300101(2) (emphasis added).

³² 54 U.S.C. § 306108; *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)).

³³ 54 U.S.C. § 300320(1).

³⁴ *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).

³⁵ 36 C.F.R. Part 800.

regulations require federal agencies to take into account the effect of their undertaking by complying with the following steps:

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

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.”³⁷

C. 2011 Programmatic Agreement

In the alternative, the NHPA regulations allow Federal agencies to develop other “Program Alternatives” to fulfill their Section 106 compliance responsibilities, such as a Programmatic Agreement (“PA”).³⁸ “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[.]”³⁹ Accordingly, Section 106 compliance is dependent on compliance with the PA terms.

Courts analyze PAs to determine whether an agency’s action is compliant with its terms.⁴⁰ “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

³⁶ *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)).

³⁷ 36 C.F.R. § 800.16(d).

³⁸ *Id.* § 800.14.

³⁹ *Id.* § 800.14(b)(2)(iii) (emphasis added).

⁴⁰ 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).

NHPA.”⁴¹ In this case, the [2011 PA](#) governs the Section 106 responsibilities. The 2011 PA applies to “all individual projects[.]”⁴²

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.”⁴³ The 2011 PA expressly requires DoD to “utilize a publicly accessible CRI website to *make information available to the public*[.]”⁴⁴ Specifically, Stipulation IV.E.2. of the 2011 PA requires the DoD to include the following on its website:⁴⁵

- “[1] information and [2] appropriate supporting documentation” regarding DoD’s identification and evaluation efforts and findings;⁴⁶
- supporting information on “study areas;”⁴⁷
- supporting information on “the scope of DoD identification efforts;”⁴⁸ and
- supporting information on “DoD’s determinations of eligibility[.]”⁴⁹

DoD stipulates that disclosing information is necessary to “provide the public opportunities to comment.”⁵⁰ 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.”⁵¹

⁴¹ *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)).

⁴² 2011 PA Stipulation I.A., at 4.

⁴³ 2011 PA Stipulation IV.E.2., at 9.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 2011 PA Stipulation IV.E.2.a. at 9.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 2011 PA Stipulation IV.E.2. at 9.

⁵¹ 2011 PA Stipulation V. B.1.a.

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.⁵² The DoD directives impose several requirements for “All DoD operations [and] activities,”⁵³ including consultation requirements and making information publicly 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.”⁵⁴

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[.]

. . .

q. Maintain complete and current information on cultural items . . . *including those uncovered through inadvertent discovery or intentional excavation.*⁵⁵

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[.]”⁵⁶ 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[.]”⁵⁷

⁵² 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>.

⁵³ [DoDI 4715.16](#) at 1.

⁵⁴ *Id.* Encl. 3 at 12.

⁵⁵ *Id.* Encl. 2 at 8-10.

⁵⁶ *Id.* Encl. 6 at 26.

⁵⁷ [SECNAVINST 5090.8B](#) at 3.

VII. COMMENTS OPPOSING THE PA MEMO'S IDENTIFICATION OF HISTORIC PROPERTIES AND DETERMINATION OF EFFECT

PLSR raises concerns that the “identification of historic properties” and determination of “no effect” provided in the PA Memo are arbitrary and capricious, not in accordance with law, and are not rationally or factually supported. “Cultural resources are not renewable--once lost, they are lost forever.”⁵⁸ And protecting “cultural resources is essential for tribes [and indigenous people] to continue their cultural identity, beliefs, ways of life, and to maintain their sovereignty.”⁵⁹ Accordingly, it is in the interest of PLSR to protect and preserve cultural resources from federal actions and decisions that are not in compliance with federal laws and regulations, including the 2011 PA.

VIII. NAVFAC's PA Memo is Arbitrary and Capricious

Specifically, PLSR raises concerns that NAVFAC (1) failed to adequately assess the impacts of herbicide-related activities; (2) failed to identify ESA-listed species as historic properties; and (3) failed to properly determine the effects of its undertaking on such historic properties.

IX. Herbicide-related Activities Triggers Adequate Environment Assessment

PLSR raises concerns that the undertaking's herbicide-related activities did not undergo adequate environmental review. The first step to the Section 106 process is determining “whether the proposed Federal action is an undertaking as defined in [§800.16\(y\)](#).”⁶⁰ As noted above, the term “undertaking” is defined as an “activity . . . funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”⁶¹ The Section 106 regulations provide that after determining an activity as an “undertaking,” the next step is to determine whether the action “is a type of activity that has the potential to cause effects on historic properties.”⁶²

Here, the proposed FES Project and the associated herbicide-related activities were not properly identified as an “undertaking” in prior NHPA documents. Although NAVFAC claims that

⁵⁸ Wesley James Furlong, *The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Future*, 42 PUB. LAND & RESOURCES L. REV. 1, 13-14 n.3 (2020) (discussing the importance of consulting with “Indigenous people and communities in the states and territories” so that federal agencies take into account the effects of their actions on cultural resources).

⁵⁹ *Id.*

⁶⁰ See 36 C.F.R. § 800.3(a); See also CEQ AND ADVISORY COUNCIL ON HISTORIC PRESERVATION, NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106 (Mar. 2013) (“NEPA AND NHPA HANDBOOK”) at 8, https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

⁶¹ 36 C.F.R. § 800.3(a);

⁶² See [NEPA AND NHPA HANDBOOK](#) at 8.

the “subject proposed project is identified in Appendix E of the 2011 [PA],”⁶³ NAVFAC’s claim is unsupported by the record. The annual Appendix E “identifies” projects with eight types of information: (1) a project number, (2) a project title, (3) Fiscal Year (FY) execution, (4) DoD Effect Determination, (5) Historic Properties Directly Affected, (6) Historic Properties Indirectly Affected, (7) FEIS/Original Survey Reference, and (8) Status.⁶⁴

However, 2021 Appendix E is completely devoid of individual project information for the FES Project and herbicide-related activities. The most recent iteration of [2021 Appendix E](#) omits identifying the FES project. [2021 Appendix E](#) does not provide information on the FES Project’s project number, project title, FY execution. More importantly, [2021 Appendix E](#) lacks any information on the DoD Effect of Determination, Historic Properties Directly Affected, Historic Properties Indirectly Affected, FEIS/Original Survey Reference, and Status.⁶⁵ The lack of individual project information indicates that NAVFAC did not to properly review the FES Project consistent with the NHPA, its implementing regulations, and Stipulation IV of the 2011 PA.

Strikingly, applying herbicides for the FES Project appears to have neither undergone environmental review, nor been identified as an “undertaking” in previous NEPA environmental review documents.⁶⁶ Previous environmental review documents such as the [2015 Biological Opinion](#), and [2017 Biological Opinion](#), do not mention the application of herbicides as a proposed action associated with the FES Project.

X. Herbicide-related activities Are Not “Required” in the Biological Opinions.

NAVFAC claims that the “requirement for this action” is provided in the “2015 Biological Opinion . . . and subsequent amendments to this document.”⁶⁷ Under the PA Memo’s Project Description, NAVFAC proposes to remove invasive species with a variety of removal methods, “including *herbicides*, girdling with herbicides, and direct cutting of some large trees. Root balls will not be removed but will be treated with herbicide to prevent regrowth.”⁶⁸ NAVFAC further proposes to continue using “herbicides” for more than a year as conditions warrant.⁶⁹

However, NAVFAC oversimplifies requirements in the [2015 Biological Opinion](#) and the [2017 Biological Opinion](#). Concerningly, NAVFAC misrepresents the requirements because neither the [2015 Biological Opinion](#) nor [2017 Biological Opinion](#) require or contemplate the application of herbicides for the FES Project. The “Forest Enhancement” project is among the many

⁶³ PA Memo at 1.

⁶⁴ See [2021 Table E-2 of Appendix E](#)

⁶⁵ [Table E-2 of Appendix E](#).

⁶⁶ See 2015 ROD, and 2015 Final SEIS; See also PA Memo at 1.

⁶⁷ PA Memo at 1.

⁶⁸ PA Memo at 2.

⁶⁹ PA Memo at 2.

conservation measures with its own unique set of requirements.⁷⁰ As part of the project, the Navy must complete the following four activities in the following order:

- Installation of ungulate exclusion fences around approximately 1,000 acres;
- Active removal of ungulates with the goal of eradication within the fenced areas;
- Invasive plant removal;
- Propagation, planting, and establishment of dominant and rare species characteristic of native limestone forest habitats (e.g., *A. mariannensis*, *B. guamense*, *D. guamense*, *E. calcareum*, *G. mariannae*, *F. prolixa*, *M. citrifolia*, *C. micronesica*, *W. elliptica*, *S. nelsonii*, *H. longipetiolata*, *P. pedunculata*, *T. rotensis*, and *T. guamense*).⁷¹

The Biological Opinions state the project’s “sequence” will be: (1) ungulate exclusion fence, (2) ungulate removal, (3) invasive plant control, and (4) native plant establishment[.]”⁷²

For “invasive plant removal” activities, the Navy is required to develop a plan before removing invasive species.⁷³ The 2017 Biological Opinion requires the Navy to “[d]evelop an invasive plant removal and native plant species outplanting and establishment plan based on the forest inventory.”⁷⁴ Only after the plan for removing invasive plants is developed may the invasive species removal begin.⁷⁵

To date, the Navy has neither developed nor prepared a plan to remove invasive plant species. In 2020, the Navy’s annual report for conservation measures notes the forest enhancement activities that have been conducted by the Navy.⁷⁶ The 2020 annual report provides that the development of an invasive species removal plan has not yet been conducted.⁷⁷ The 2020 annual report is devoid of any discussion regarding the use of herbicides to remove plants, or a

⁷⁰ [2015 BiOp](#) at 157 (“DON shall implement the Conservation Measures in the Project Description of this Biological Opinion”; [2017 BiOp](#) at 147 (“The DON shall implement the Conservation Measures in the Project Description of this BO”).

⁷¹ [2015 BiOp](#) at 37; [2017 BiOp](#) at 37-38.

⁷² [2015 BiOp](#) at 37; [2017 BiOp](#) at 38.

⁷³ 2017 BiOp at 38.

⁷⁴ 2017 BiOp at 38.

⁷⁵ See 2017 BiOp at 38.

⁷⁶ Annual Report for the Biological Opinion for the Department of the Navy’s Relocation of the U.S. Marine Corps from Okinawa to Guam and Associated Activities on Guam Reporting Period: October 1, 2019 to September 30, 2020 (Fiscal Year 2020), at 12; <https://www.mcbblaz.marines.mil/Portals/222/Documents/FY20%20Annual%20Report%20for%20Biological%20Opinion.pdf?ver=U-qxpcSwwoxiTIDxJw7N9w%3d%3d>.

⁷⁷ See [Annual Report for the Biological Opinion for the Department of the Navy’s Relocation of the U.S. Marine Corps from Okinawa to Guam and Associated Activities on Guam Reporting Period: October 1, 2019 to September 30, 2020 \(Fiscal Year 2020\)](#), at 12.

plan to use herbicides.⁷⁸ Thus, contrary to NAVFAC’s claim, applying herbicides for the FES Project is not a “requirement” stated in the 2015 and 2017 Biological Opinions.⁷⁹

The record does not support that USFWS has been consulted on NAVFAC’s proposal to conduct herbicide-related activities. Accordingly, NAVFAC’s failure to properly identify its proposal to apply herbicides as a federal action/undertaking indicates an evasion of proper environmental review. NAVFAC failed to consider the effects of applying herbicides and its effects on the environment, including the effects on historic and cultural properties.⁸⁰

XI. Herbicide-related Activities Have Not Been Fully Analyzed and Evaluated

PLSR raises the issue that effects of applying herbicides, and its potential effects on historic properties that have not been fully analyzed pursuant to NEPA, the NHPA, and the 2011 PA. Specifically, PLSR is concerned about the herbicide’s potential impacts to ESA-listed species, host plants, artifacts, and ancient human burials and remains within the FES Project APE. To address changes in an undertaking,⁸¹ the 2011 PA stipulates the following:

WHEREAS, should there be changes to the projects included within the Undertaking, or new actions or projects proposed that support the Undertaking, *that have potential effects on historic properties that have not been fully analyzed*, DoD will conduct supplementary consultations pursuant to the terms of this PA[.]⁸²

Under the National Environmental Policy Act (NEPA), an agency proposing “[a] major Federal action[] significantly affecting the quality of the human environment” is required to prepare an environmental impact statement (“EIS”) giving thorough consideration to the impacts of the action and any available alternatives to the proposal. 42 U.S.C. § 4332(C). In considering the context of an action, an agency must address its impact upon “society as a whole (human, national), the affected region, the affected interests, and the locality.” *Id.* § 1508.27(a). NEPA regulations require that an agency consider cumulative impacts. 40 C.F.R. § 1508.27(b)(7).

NEPA and Section 106 reviews may be triggered by a Federal or Federally funded, licensed, or permitted action and apply whether that action is on Federal land.⁸³ NEPA and Section 106 share the goal of more informed agency decisions with respect to environmental

⁷⁸ See [Annual Report for the Biological Opinion for the Department of the Navy’s Relocation of the U.S. Marine Corps from Okinawa to Guam and Associated Activities on Guam Reporting Period: October 1, 2019 to September 30, 2020 \(Fiscal Year 2020\)](#).

⁷⁹ See PA Memo at 1.

⁸⁰ See [NEPA AND NHPA HANDBOOK](#) at 10.

⁸¹ [2015 SEIS](#) at 283.

⁸² 2011 PA at 2.

⁸³ [NEPA AND NHPA HANDBOOK](#) at 10.

consequences, including the effects on historic and cultural properties.⁸⁴ Both encourage coordination with other environmental reviews.⁸⁵ Environmental review under NEPA includes a description of the affected human environment and the environmental consequences of the proposed action on that environment.⁸⁶

Here, PLSR raises concerns that applying herbicides and its potential effects have not been evaluated pursuant to NEPA. The Navy's 2015 [Final Supplemental Environmental Impact Statement](#) (SEIS), and [Record of Decision](#) (ROD) decline to discuss the impacts of herbicide application activities. In *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994), the Ninth Circuit held that a federal agency complied with NEPA in issuing environmental impact statement allowing use of herbicides in national forests. There, the FEIS included a risk analysis examining "the risk of six of the herbicides causing cancer on the basis of a cumulative lifetime dose assuming a certain number of lifetime exposures for workers and the public." *Id.* at 1357. But unlike the facts in *Salmon River Concerned Citizens*, the 2015 SEIS and ROD does not include an analysis on herbicides, its risks (e.g., risks of causing cancer), and its potential effects on historic properties.

In *Ctr. For Food Safety v. S.M.R. Jewell*, 83 F. Supp. 3d 126, 140 (D.D.C. 2015), adhered to sub nom. *Ctr. for Food Safety v. Jewell*, CV 14-360 (CKK), 2015 WL 1823702 (D.D.C. Apr. 22, 2015), the D.C. circuit concluded that USFWS "did not adequately consider the impact of pesticide use on the refuge when the environmental assessment failed to discuss the use of pesticides and only "references the use of herbicides after land is restored to natural habitat[.]" Similar to *Ctr. for Food Safety*, the Navy's 2015 [Final Supplemental Environmental Impact Statement](#) (SEIS), and [Record of Decision](#) (ROD) do not discuss the use of herbicides nor references its use to restore natural habitat. Here, herbicide-related activities for the forest enhancement project were not contemplated, approved, nor assessed through the NEPA Process.

Moreover, PLSR is specifically concerned that the active ingredients for the herbicides have not been properly reviewed under NEPA. In *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 597–98 (9th Cir.1988), the Ninth Circuit approved an impact statement in which not all the ingredients of the proposed herbicide formulations were known by the Government. The Government reasoned that identified active ingredients . . . should be its focus in evaluating herbicide formulations. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d at 1358 (citing *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d at 598). To account for any uncertainty regarding the toxicity of the inert ingredients, the EIS overstated the risk of harm posed by the active ingredients. *Id.* However, in this case, the PA Memo and the associated NEPA documents (e.g., 2015 Final SEIS and ROD) do not identify the active

⁸⁴ [NEPA AND NHPA HANDBOOK](#) at 10.

⁸⁵ [NEPA AND NHPA HANDBOOK](#) at 10.

⁸⁶ [NEPA AND NHPA HANDBOOK](#) at 10.

ingredients for the herbicides. Thus, any proposed herbicidal active ingredients have not been “fully analyzed” pursuant to the terms of the 2011 PA and NEPA.⁸⁷

XII. NAVFAC’s Identification of Historic Properties is Incomplete

PLSR raises concerns that the PA Memo’s “identification of historic properties” was not conducted in a reasonable and good faith effort. NHPA regulations provide that an agency “shall make a reasonable and good faith effort to carry out appropriate identification efforts[.]”⁸⁸ To that end, the agency must consult with the SHPO and the public to determine whether identified properties are eligible for listing on the National Register; and assess the effects of the undertaking on any eligible historic properties found.⁸⁹

PLSR raises three concerns over the PA Memo’s identification efforts: (1) the PA Memo does not adequately identify historic properties; (2) the PA Memo is unclear if DoD completed surveys to identify properties within the project-specific APEs;⁹⁰ and (3) the PA Memo is unclear if DoD evaluated the inadvertent discoveries and ESA-listed species for listing on the National Register of Historic Places.

Previous NEPA documents note that the following types of data are used to identify traditional cultural properties in Guam:⁹¹

- **Legendary association** – myths, legends, or stories from the written record.
- **Archaeological association** – sites or other resources documented by archaeological investigations such as surveys, testing or excavations, or mitigation.
- **Ethnographic association** – information from the oral histories, as well as contemporary accounts from readily accessible sources, and current inventories of resources (marine or terrestrial) deemed important to traditional practices (Griffin et al. 2009a, b, c).

XIII. ESA-listed Species and Habitats are Eligible as Historic Properties

NAVFAC did not make reasonable and good faith efforts to identify the ESA-listed species and its habitats as historic properties—such as, the Mariana eight spot butterfly and its habitat host plants. A historic property is defined in 36 CFR § 800.16 as “*any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of*

⁸⁷ See 2011 PA at 2 (requiring supplementary consultation for new actions proposed to support the undertaking).

⁸⁸ 36 C.F.R. § 800.4(b)(1).

⁸⁹ *WildEarth Guardians v. Provencio*, 923 F.3d 655, 676 (9th Cir. 2019); See *Montana Wilderness Ass’n v. Connell*, 725 F.3d 988, 1008 (9th Cir. 2013) (holding that a federal agency failed to make a reasonable and good faith effort to identify historical and cultural resources under the NHPA).

⁹⁰ [Table E-2 of Appendix E](#) at 5.

⁹¹ 2010 Final EIS, Volume 2, Chapter 4, at 4, https://www.guambuildupeis.us/documents/final/volume_2/Vol_02_Ch12_Cultural_Resources.pdf.

Historic Places.”⁹² (emphasis added). An “object” may include an endangered species that is of cultural significance.⁹³ The term “eligible for inclusion in” refers to properties that are not listed in the National Register, but do meet the criteria for listing in the National Register. ·

Courts in the Ninth Circuit have observed that ESA-listed plants and animals may be “historic property” eligible for NHPA protection. In *Dugong v. Rumsfeld*, 2005 WL 522106 (N.D. Cal. 2005), the court concluded that a wild marine mammal with special cultural significance was an “object,” and thus could qualify as “property” for purposes of a provision of the NHPA, 54 U.S.C.A. § 307101. In *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 909 (9th Cir. 2020), the Ninth circuit observed and applied the district’s conclusion that the dugong is an “object” because “it was a ‘material thing’ that was ‘movable, yet related to a specific setting or environment.’” 958 F.3d at 901. In support of its protection, the Ninth Circuit observed the district court’s conclusion that the dugong qualified as “property” when Japanese Law for the Protection of Cultural Properties was equivalent to the National Register. *Id.*

Although the PA Memo identifies various culturally important natural resources and medicinal plants (e.g., *Cycas micronesica*/Fadang, cycad⁹⁴),⁹⁵ neither the PA Memo nor Appendix E identify the Mariana eight spot butterfly and its host plants, *P. pedunculata* and *E. calcareum*, as historic properties. Similar to *Esper*, the Mariana eight spot butterfly and its host plants are a historic “object” that is “movable, yet related to a specific setting or environment.” *Esper*, 958 F.3d at 901 (citing 36 C.F.R. § 60.3(j) (defining “object” as “a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment”). Here, the Mariana eight spot butterfly and its host plants are proposed for relocation between limestone forests. The Navy proposes to move the ESA-listed species from its primary limestone forest home and into the forest restoration site. There is nothing in the record that suggests NAVFAC made an effort to identify the Mariana eight spot butterfly and its host plants as a historic property.

XIV. NAVFAC’s Determination of “No Effect” is Arbitrary and Capricious When Effects of Herbicides-related Activities Were Not Adequately Taken “Into Account”

PLSR raises concerns that (1) the PA Memo’s determination of “no effect” is arbitrary and capricious, and (2) DoD did not adequately take into account the effects of its undertaking, and herbicide-related activities. An “adverse effect” occurs when “an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property

⁹² See also 54 U.S.C. § 300308.

⁹³ *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 901 (9th Cir. 2020) (“the Okinawa dugong fulfilled each element of the definition of an ‘object’ under 36 C.F.R. § 60.3(j), which is sufficient to qualify as ‘property’ under the NHPA”) (citing *Dugong v. Rumsfeld*, C 03-4350 MHP, 2005 WL 522106, at *9 (N.D. Cal. Mar. 2, 2005)).

⁹⁴ GUAM RANGE MITIGATION PLAN, SEPTEMBER 2015, at 7, <https://www.mcbblaz.marines.mil/Portals/222/Documents/2015%20Range%20Mitigation%20Plan.pdf?ver=9gkE6wuL1Gn731KTSvhUYw%3d%3d>.

⁹⁵ PA Memo at 2-4.

for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, . . . feeling, or association.”⁹⁶ To reach a determination, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁹⁷

Courts are cautious of projects with “stops, starts, and modifications throughout its history.”⁹⁸ “In a project with many moving pieces, as well as several stops and starts, the details of the base’s construction and operation are susceptible to potential alteration and modification by the *take-into-account process*.”⁹⁹ Accordingly, courts seek to avoid “shortcutting the process which has been committed in the first instance to the responsible federal agency.”¹⁰⁰

Here, the NEPA and NHPA records do not reflect that herbicide-related activities and its impacts to ESA-listed species, limestone forests, human burials, human remains, and artifacts were taken into account.

Next, under the 2011 PA, “All projects on Table E-2 of Appendix E will be subject to further review to provide . . . the public with *sufficient information* to allow DoD and the respective SHPO to consult on the *determinations of effect*.”¹⁰¹ “All projects” require individual review as the 2011 PA does not authorize other projects to satisfy the review of the FES Project. Despite the requirement that “all projects” are subject to review, NAVFAC, in a fragmented fashion, [2021 Table E-2 of Appendix E](#) scantily mentions effects of installing ungulate “fencing” as part of the forest enhancement through project number(s) P-715,¹⁰² J-001B,¹⁰³ and J-017.¹⁰⁴ This review is inadequate because the FES Project includes more activities than installing a fence: the FES Project proposes to apply herbicides, among others.¹⁰⁵

NAVFAC fails to review or provide information the activity of applying herbicides. Strikingly, [2021 Table E-2 of Appendix E](#) omits the DoD’s proposal to apply “herbicides” as a “forest

⁹⁶ 36 C.F.R. § 800.5(a)(1).

⁹⁷ *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1011 (9th Cir. 2013) (citing to *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983)).

⁹⁸ *Ctr. for Biological Diversity*, 868 F.3d at 820.

⁹⁹ *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803 (9th Cir. 2017) (holding that group had standing to pursue declaratory relief as to whether the DoD violated the NHPA by approving the construction of a military base in Okinawa, Japan) (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ 2011 PA Stipulation V.B., at 13 (emphasis added).

¹⁰² [Table E-2 of Appendix E](#) at 5.

¹⁰³ [Table E-2 of Appendix E](#) at 9.

¹⁰⁴ [Table E-2 of Appendix E](#) at 10.

¹⁰⁵ PA Memo at 2.

enhancement” activity.¹⁰⁶ The lack of information is indicative that NAVFAC did not properly review the FES Project consistent with Stipulation IV of the 2011 PA. [2021 Appendix E](#) lacks any information on the FES Project’s DoD Effect of Determination, Historic Properties Directly Affected, Historic Properties Indirectly Affected, FEIS/Original Survey Reference, and Status.¹⁰⁷ Accordingly, the information provided in [2021 Table E-2 of Appendix E](#) is insufficient for the public to review all activities—such as the application of herbicides¹⁰⁸—associated with the FES.

Despite this lack of information, the PA Memo somehow reaches the conclusion that the “undertaking will have no effect” on the present historic properties.¹⁰⁹ NAVFAC’s conclusion must be “founded on a rational connection between the facts found and the choices made ... and whether [the agency] has committed a clear error of judgment.”¹¹⁰ Here, there is a gap of information as to how NAVFAC reached its conclusion with respect to herbicide-related activities. Accordingly, NAVFAC’s conclusion is arbitrary and capricious.

XV. The Lack of Publicly Accessible Information Necessary for Public Comment is Contrary to the 2011 PA

PLSR raises concerns regarding 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.”¹¹¹ The 2011 PA expressly requires DoD to “utilize a publicly accessible Cultural Resources Information (CRI) website to *make information available to the public*[.]”¹¹² Specifically, Stipulation IV.E.2. of the 2011 PA requires the DoD to include the following on its website:¹¹³

- “[1] information and [2] appropriate supporting documentation” regarding DoD’s identification and evaluation efforts and findings;¹¹⁴
- supporting information on “study areas;”¹¹⁵

¹⁰⁶ See March 2021 [Table E-2 of Appendix E](#).

¹⁰⁷ [Table E-2 of Appendix E](#).

¹⁰⁸ PA Memo at 2 (discussing the application of herbicides as a “forest enhancement” activity).

¹⁰⁹ 2011 PA Memo at 5.

¹¹⁰ *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 907 (9th Cir. 2020).

¹¹¹ 2011 PA Stipulation IV.E.2. at 9.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 2011 PA Stipulation IV.E.2.a. at 9.

- supporting information on “the scope of DoD identification efforts;”¹¹⁶ and
- supporting information on “DoD’s determinations of eligibility[.]”¹¹⁷

DoD stipulates that disclosing information is necessary to “provide the public opportunities to comment.”¹¹⁸ However, the DoD’s CRI Website does make the supporting materials cited in the PA Memo publicly accessible. Thus, PLSR raises concerns over that the lack of requisite information on the CRI Website, which consequently undermines the principles of public participation.

To better prepare for public comments, PLSR has submitted in the past requests to NAVFAC for the literature and studies referenced in the PA Memos. Specifically, PLSR requested all the PA Memo’s references.¹¹⁹ To date, PLSR has not received from DoD the requested information. Thus, PLSR raises concerns that NAVFAC is preventing meaningful comments and public participation.

XVI. CONCLUSION

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

- Conduct supplementary consultation on herbicide-related activities, consistent with Stipulations I.D.5., IV.F of the 2011 PA, and 2015 ROD;
- Adequately identify historic properties to include ESA-listed species and habitats, including relevant host plants, consistent with the NHPA, its implementing regulations, and 2011 PA Stipulation IV;
- Reconsider its determination that herbicide-related activities, and other ground-disturbing activities will have “no effect” on historic properties, including ancient human remains;
- Complete survey of historic properties to include ESA-listed species their respective habitats, including relevant host plants;

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 2011 PA Stipulation IV.E.2. at 9.

¹¹⁹ PA Memo at 4-5.

- 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, DoD Instructions on Cultural Resources Management;
- Revise the PA Memo’s findings and determinations in compliance with the 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.¹²⁰

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

Sincerely,

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

Attachment: Dave Lotz, *The Saga of Magua Village*, 2020

¹²⁰ 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>.