



Preserving America's Heritage

November 19, 2015

Mr. Larry M. Foster
Director, Environmental Readiness
Department of the Navy
United States Pacific Fleet
250 Makalapa Drive
Pearl Harbor, HI 96860-3131

Ref: Completion of National Historic Preservation Act Section 106 Review for Navy Northwest Training and Testing (DAHP Log. No. 021314-41-USN)

Dear Mr. Foster:

The Advisory Council on Historic Preservation (ACHP) was recently made aware of concerns from a number of parties about the manner in which the Department of the Navy (Navy) concluded consultation under Section 106 of the National Historic Preservation Act with the Washington State Historic Preservation Office (SHPO) regarding proposed military readiness training and testing activities, known as Northwest Training and Testing (NWTTC). According to your recent correspondence with the SHPO, the Navy believes Section 106 consultation was properly concluded through a finding of no adverse effect in accordance with the ACHP's regulations implementing Section 106 (36 C.F.R. § 800.5(b)). Specifically, the Navy has indicated that it notified the SHPO of this determination in July 2015 and the SHPO did not respond with a concurrence or non-concurrence within the 30 day comment period defined in the regulations. The Navy subsequently concluded its Section 106 review.

The SHPO has indicated it was actively engaging in consultation with the Navy during this 30 day review period and that it had requested additional information on activities proposed by the Navy along with an explanation of how the Navy determined such activities did not have the potential to adversely affect historic properties. As such, the SHPO believes that the Navy's decision to conclude consultation was premature and that it had not provided sufficient information for it to render a comment on the Navy's finding of effect.

In light of the information provided to us by the Navy and the SHPO's views as expressed in its letter to the Navy dated November 6, 2015, we provide below our assessment of the steps the Navy took to conclude its responsibilities under Section 106 and the ACHP's regulations in accordance with 36 C.F.R. § 800.9(d), Evaluation of Section 106 operations. We also offer our advice on appropriate steps for the Navy to resolve these differences and properly conclude its Section 106 review for this undertaking.

The Undertaking

The Navy proposes to conduct military readiness training and testing activities in the NWTTC Study Area (Study Area), which is made up of air and sea space in the eastern North Pacific Ocean region, located adjacent to the Northwest coast of the United States. This region also includes the Strait of Juan de Fuca,

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

Puget Sound (including Hood Canal), and Western Behm Canal in southeastern Alaska. In order to both achieve and maintain Pacific Fleet readiness, the Navy proposes to:

- (1) Reassess the environmental impacts of Navy at-sea training and testing activities contained in previous environmental planning documents;
- (2) Update environmental analyses with the best available science and most current acoustic analysis methods to evaluate the potential effects of training and testing activities on the marine environment;
- (3) Analyze the potential environmental impacts of training and testing activities in additional areas (areas not covered in previous documents) where training and testing historically occur, including Navy ports and naval shipyards;
- (4) Update the at-sea environmental impact analyses in the previous documents to account for force structure changes for 2015–2020 and the development of supporting weapons, platforms, and systems;
- (5) Adjust baseline training and testing activities from current levels to the level needed to support Navy training and testing requirements beginning October 2015;
- (6) Adjustment will include other activities and sound sources not addressed in the previous analyses, adjusted for future requirements; and
- (7) Support authorization of incidental takes of marine mammals under the Marine Mammal Protection Act and incidental takes of threatened and endangered marine species, including marine birds under the Endangered Species Act.

The purpose of these activities is to ensure that the Navy continues to meet its mission to maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. This is a continuation and enhancement of training and testing activities at sea and in inland water at existing range complexes, military operations areas, and select pier-side locations that have already been occurring in the Study Area for several years.

NWTT Section 106 Consultation

The information provided by the Navy indicates that it notified the SHPO of its intent to prepare an Environmental Impact Statement (EIS)/Overseas EIS (OEIS) in accordance with the National Environmental Policy Act (NEPA) for the NWTT in February, 2012. The Navy later issued a draft EIS and a supplement to the draft EIS in 2014 and then formally initiated Section 106 consultation in March, 2015. The SHPO concurred with the Navy's area of potential effects (APE) for the undertaking in May, 2015. In July, 2015 the Navy notified the SHPO of its finding of no adverse effect and later that same month, within the 30 day review period, SHPO requested additional information via email on the flight patterns of aircraft takeoffs and landings, specifically asking about noise effects to historic properties below those flight patterns. The Navy responded with additional information via email to the SHPO, and this led to a conference call between the Navy and the SHPO.

The SHPO subsequently requested further clarifications on the Navy's determination of no adverse effect via email, and in another conference call requested the development and execution of a Section 106 programmatic agreement for the NWTT due to the potential for the NWTT to have adverse effects to historic properties. In a continuation of this consultative dialogue, the SHPO met with the Commanding Officer of NAS Whidbey Island to discuss NWTT and steps necessary to move consultation forward. Finally, in November 2015, the Commander of the Pacific Fleet directed the Navy to conclude Section

106 consultation in accordance with 36 C.F.R. § 800.5(c), which allows an agency official to proceed with an undertaking after the close of the 30 calendar day review period if the SHPO has not provided a response to the determination of no adverse effect.

Observations

In light of the information provided by the Navy and SHPO, we offer the following observations regarding the undertaking and the Navy's efforts to conclude Section 106 consultation:

- (1) The NWTT is an individual undertaking subject to Section 106 review. The undertaking in this case is not the EIS/OEIS, which is a separate environmental regulatory requirement. We understand that the Navy reviews and approves training and testing for operational areas across the globe, having recently completed an analysis of training and testing within the Mariana Islands this year, and that this is not a unique program to the Pacific Northwest. Confusion over these facts has complicated Section 106 consultation regarding this undertaking.
- (2) The Navy did not initiate Section 106 review until well after it had carried out a number of steps in the NEPA process. Had it initiated Section 106 consultation at the same time it began its review under NEPA, it would have had additional time to address concerns raised by the SHPO and others. Based on information provided to us by the SHPO and members of the public, it is clear that the public remains concerned about the potential for historic properties to be effected by these activities.
- (3) The lead federal agency responsible for completing a Section 106 review must designate an agency official who has jurisdiction over an undertaking and responsibility for Section 106 consultation (36 C.F.R. § 800.2(a)). Identifying the federal agency official to consulting parties is crucial to ensuring that their comments are directed to the appropriate decision maker and that this individual is made aware of the status of consultations. In this case the SHPO believed the agency official for the NWTT to be the Commander of NAS Whidbey Island. However, the decision to conclude the Section 106 process was made by the Commander of the Pacific Fleet at Pearl Harbor, with whom the SHPO has had no previous contact during this consultation. This led to confusion on which part of the "Navy" was leading the Section 106 consultation and raises the question as to whether the Commander of the Pacific Fleet was aware that the SHPO had been responsive to the Navy's request for concurrence on its finding of effect and was participating in ongoing discussions with Navy officials at NAS Whidbey Island.

Next Steps

While the ACHP's regulations provide for a 30 day review period for the SHPO to comment on the agency's determination of effect, the ability of the SHPO to respond within this period is predicated on the agency providing adequate information upon which the SHPO may base its opinions (see 36 C.F.R. § 800.11(e)). Our review of this matter suggests that the Navy has not yet fully addressed the SHPO's request for additional information. If the Navy was of the opinion that it had provided all required information to the SHPO and that it was unable to reach agreement with the SHPO either on the adequacy of this information or the finding itself, the regulations would require it to refer such a dispute to the ACHP in accordance with 36 C.F.R. § 800.5(c)(2) rather than declare the SHPO unresponsive and conclude consultation.

Accordingly, the ACHP recommends that the Navy re-enter Section 106 consultation with the SHPO in order to address any outstanding requests for the information consistent with the requirements of 36 C.F.R. § 800.11(e). We urge both parties to establish a reasonable framework for resolving remaining documentation issues so that the Navy may conclude its review expeditiously. Upon reopening consultation, should the Navy determine that it cannot reach agreement with the SHPO, it should refer the

dispute to the ACHP. In any case, we remind the Navy also of its responsibility to share appropriate information with other consulting parties, including Indian tribes, and the interested public.

Finally, we noted in our review of the material provided by the Navy that some of the activities described as part of the undertaking appear to fall within the State of Alaska. As the Navy works to conclude its responsibilities under Section 106 for this action, we urge it to ensure that it has satisfied any requirements it may have regarding consultation with the Alaska State Historic Preservation Officer.

The ACHP stands ready to assist the parties in concluding this review should our assistance be needed. If you have any questions regarding these recommendations, feel free to contact me at (202) 517-0228 or rmelson@achp.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Reid J. Nelson', with a long horizontal flourish extending to the right.

Reid J. Nelson
Director
Office of Federal Agency Programs