



**National Trust for
Historic Preservation**
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March 21, 2022

Naval Facilities Engineering Systems Command
ATTN: PHNSY & IMF DD/WPF EIS Project Manager
258 Makalapa Drive, Suite 100
Joint Base Pearl Harbor Hickam, HI 96860-3134

Via project website: www.PearlHarborDryDockEIS.org

Re: Draft Environmental Impact Statement
Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility
Dry Dock and Waterfront Production Facility
Joint Base Pearl Harbor-Hickam, O'ahu, Hawai'i

To Whom It May Concern:

These comments are submitted on behalf of the National Trust for Historic Preservation,¹ in response to the Draft Environmental Impact Statement (DEIS) for the Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility, Dry Dock and Waterfront Production Facility, at Joint Base Pearl Harbor-Hickam. The purpose of the project is to construct a new Dry Dock (DD5) for submarine maintenance, as well as constructing a new Waterfront Production Facility, and to cease the use of Dry Dock 3. The entire project will take place within the Pearl Harbor National Historic Landmark District, and will have a significant adverse effect on the historic district.

We strongly support and echo the comments submitted by the Historic Hawaii Foundation, and we offer the following additional comments.

¹ The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to “facilitate public participation” in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. § 312102(a). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition, the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation (ACHP), which is responsible for working with federal agencies to implement compliance with Section 106 of the National Historic Preservation Act. *Id.* §§ 304101(8), 304108(a). The National Trust has been actively involved for more than twenty years in ongoing Section 106 consultation with the Navy regarding a wide variety of projects.

Failure to Comply with the National Environmental Policy Act (NEPA)

The Navy has obviously worked to structure the timing and scope of the review process in an effort to evade meaningful consideration of impacts and alternatives. For example, although the Navy has been planning this project for some time, the Notice of Intent to prepare an Environmental Impact Statement was strategically published *one day after* the effective date of the Trump NEPA regulations, which attempted to substantially weaken the requirements applicable to federal agencies. 85 Fed. Reg. 57,194 (Sept. 15, 2020) (Navy Notice of Intent); 85 Fed. Reg. 43,304 (July 14, 2020) (final Trump NEPA regulations, with effective date of Sept. 14, 2020).

The National Trust is a co-plaintiff in a lawsuit challenging the Trump NEPA regulations as being inconsistent with the statutory requirements of NEPA. *Wild Virginia, et al. v. Council on Environmental Quality, et al.*, No. 21-1839 (4th Cir.). While the pending lawsuit represents a facial challenge to the NEPA regulations, we have specifically cited this Pearl Harbor Drydock project in our briefing to the U.S. Court of Appeals as an example of a current project that would warrant an as-applied legal challenge, based on its reliance on the Trump regulations.

And of course, the Council on Environmental Quality has now initiated the process of reconsidering and reversing many of the features of the Trump NEPA regulations, starting with the revival of the requirement to consider cumulative impacts, which the Navy's DEIS fails to address. 86 Fed. Reg. 55,757 (Oct. 7, 2021). This first phase of the current regulatory is expected to become final very soon. In our view, the Navy is putting the project at risk by a deliberate strategy of evading compliance with the higher standard of the traditional NEPA regulations.

Failure to Comply with the National Historic Preservation Act (NHPA)

• Failure to Evaluate Cumulative Impacts

Although the Trump NEPA regulations do not require evaluation of cumulative impacts, the Section 106 regulations *do* explicitly require consideration of cumulative impacts:

Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be *cumulative*.

36 C.F.R. § 800.5(a)(1) (emphasis added). Yet the Navy has done no analysis whatsoever to address this requirement.

In our view, the cumulative impacts of the proposed project would be substantial. The Navy has acknowledged that its proposal would destroy seven contributing structures to the National Historic Landmark District, and the comments submitted by the Historic Hawaii Foundation discuss in detail a number of additional historic properties that would be adversely affected, including the adjacent Hospital Point historic management zone.

- **Failure to Comply with Section 110(f)**

The proposed new dry dock and Waterfront Production Facility will not only destroy a number of historic structures, but will also “directly and adversely affect” the National Historic Landmark District itself. Section 110(f) of the NHPA requires the Navy to minimize that adverse effect “to the maximum extent possible”:

Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall *to the maximum extent possible* undertake such planning and actions as may be necessary to *minimize harm* to the landmark.

54 U.S.C. § 306107 (emphasis added). The Navy has failed to comply with this requirement. Instead, it has chosen as its preferred alternative a scheme that would *not* minimize harm to historic properties. By contrast, Alternative 5 is the option in the DEIS that would minimize harm to historic properties by locating the Waterfront Production Facility on the west side of the new dry dock, rather than on the east side.

- **Failure to Initiate Consultation on a Timely Basis**

The Navy first began discussing this project with the ACHP more than two years ago, in the context of an effort to develop a nationwide programmatic agreement for shipyard modernization. That nationwide approach was later aborted, and instead, the Navy focused on the Pearl Harbor Shipyard as the first project to address specifically. However, the Navy never “initiated” consultation under Section 106, and to this day, has not done so. Ironically, the Navy could have completed its Section 106 compliance by this time.

Instead, the Navy is attempting to avoid meaningful consultation by belated development of a Programmatic Agreement for the Shipyard as a whole that would minimize any consultation for individual projects such as this one. The most recent draft of the PA shared with consulting parties would avoid ACHP involvement, would avoid consultation, would avoid development of any binding Section 106 agreement, but instead, would have the Navy propose a take-it-or-leave-it mitigation package with a 15-30 day window for comments that could then be disregarded by the Navy. In our view, this fails to comply with the requirements of the NHPA.

- **Failure to Request Participation by the ACHP**

Both the statute and the regulations applicable to National Historic Landmarks explicitly require the Navy to request the participation of the ACHP in the Section 106 consultation process. Here, the Navy has failed to comply with that requirement. Section 110(f) specifically requires:

The head of the Federal agency shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306107. The Section 106 regulations are even more specific:

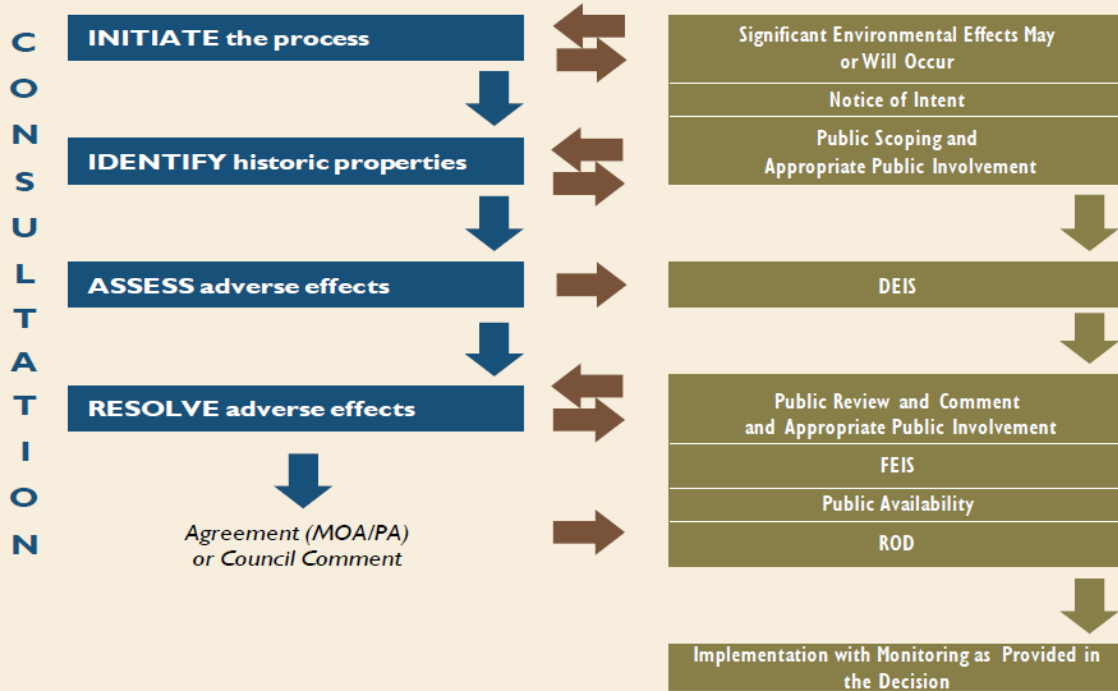
The agency official shall request the [ACHP] to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

36 C.F.R. § 800.10(b). In this case, by contrast, the Navy is attempting to evade compliance with this requirement by proposing a master programmatic agreement for the Shipyard that would avoid notifying the ACHP of individual projects such as the current Dry Dock project, and would exclude them from consultation. (See attached comments on the proposed PA.)

Failure to Coordinate NEPA and NHPA Compliance

The *Handbook for Integrating NEPA and Section 106*, issued jointly by the Council on Environmental Quality and the ACHP, includes a specific diagram illustrating how the timing of NEPA review and Section 106 review should be integrated when the agency is preparing an EIS (see below). The Navy's approach in this case does not even come close to compliance with this inter-agency guidance. For example, the chart shows that Section 106 consultation should be initiated prior to the issuance of the Notice of Intent to prepare and EIS. Here, the Notice of Intent was issued 18 months ago, but Section 106 consultation has not yet been initiated. As another example, the Section 106 review should be at the stage of assessing and resolving adverse effects when the DEIS is issued and the public review and comment process is taking place (i.e., now). But again, since the Section 106 review has not even been initiated yet, the Navy's timing is grossly out of sync.

TIMING AND COMMUNICATION SECTION 106 AND EIS



Note these graphics present generic depictions of the two review processes.

NEPA and NHPA: A Handbook for Integrating NEPA and Section 106, at p.26 (available at [NEPA-106 26feb13.pub \(achp.gov\)](http://www.achp.gov/NEPA-106%20feb13.pub)).

The Proposed Mitigation is Grossly Inadequate.

The adverse effects of the project on historic resources will be severe. Yet the DEIS includes only the most cursory discussion of mitigation, and completely kicks the can down the road with respect to mitigation for cultural resource impacts. (DEIS at 4-1 to 4-4.) In contrast to this approach, the standard federal policy is to include one to two percent of the project budget for mitigation. *See* 54 U.S.C. §§ 312507-312508. The Navy fails to come close to meeting that standard.

Since the NHL District itself will be adversely affected, one way of minimizing harm to the NHL District would be to include mitigation commitments that would require physical preservation of other contributing historic properties within the NHL District (e.g., maintenance, repair, rehabilitation, reuse). In our view, the belated Section 106 consultation process (once the Navy initiates it) should focus on developing ideas for these kinds of creative mitigation commitments.

Thank you for considering these comments, and we urge the Navy to come into compliance with both Section 106 and NEPA, to avoid putting this project at risk.

Sincerely,

A handwritten signature in black ink, reading "Elizabeth Merritt". The signature is written in a cursive, flowing style.

Elizabeth S. Merritt
Deputy General Counsel

Enclosure:

National Trust comments on Draft PA for Shipyard Modernization (Mar. 5, 2022)