

October 4, 2010

Mr. Donald R. Schregardus
Deputy Assistant Secretary of the Navy/Environment
1000 Navy Pentagon
Washington, DC 20350-1000

**Re: Section 106 Programmatic Agreement for the Joint Guam
and CNMI Military Relocation and Buildup**

Dear Mr. Schregardus:

On behalf of the National Trust for Historic Preservation, we are writing to follow up on the letters you received earlier this week from the Guam State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP), in order to provide our thoughts on what changes should be made to the draft Programmatic Agreement (PA) under Section 106 for the Guam Buildup.

As you know, the National Trust opposed the Draft PA that was circulated prior to issuance of the Record of Decision (ROD), and we strongly supported the decisions by the SHPO and the ACHP not to sign it. In addition, we have a broader concern that the portions of the draft PA promising “supplementary” consultation have been rendered meaningless by the language in the ROD, which limits the consideration of alternative sites for the firing ranges to those over Pãgat Village, i.e., in the “Route 15 area.” (See Attachment A.) As a result, revisions to the PA that would be sufficient to resolve the concerns of the SHPO, ACHP, and consulting parties would be inconsistent with the language of the ROD. The DoD will also need to prepare a supplemental NEPA document to examine alternative sites for the firing range complex (except perhaps the Tinian alternative, which would arguably be supported by the existing FEIS), and will then need to amend the ROD.

In Attachment B we offer specific comments about what revisions to the PA we believe would be needed in order to avoid foreclosing the consideration of alternative locations for the firing ranges and the ACHP’s ability to comment on the undertaking. We note that the ACHP has also expressed concern about the ROD, and we ask that you include us in your response to the Council’s September 29, 2010 letter.

We hope you will find our comments constructive, and we would welcome the opportunity to discuss any of these recommendations in greater detail. At the same time, we wish to be clear that in our view the DoD has failed to comply with Section 106 “prior to” approving the ROD, and our good faith effort to share our suggestions on how the PA could be improved should not be construed as a waiver of our right to challenge the ROD on that or any other basis. We look forward to your response.

Sincerely,



Elizabeth S. Merritt
Deputy General Counsel



Brian R. Turner
Regional Attorney, Western Office

Attachment A

Record of Decision on Guam Relocation and Buildup Excerpts Relating to Deferral of Final Decision on Firing Range Complex

Summary

The Department of Defense (DoD) released its record of decision (ROD) for the Guam and CNMI Military Relocation on September 21, 2010. Prior to the public release of the 185-page ROD, encouraging news reports indicated that DoD's final decision on the location of a Marine Corps firing range complex would be "deferred" pending further consultation under the National Historic Preservation Act (NHPA). Many inferred that the purpose of the deferral was to afford DoD time to consider alternative locations for the firing ranges, in light of the overwhelming opposition by the public, the Guam SHPO, and the consulting parties to the proposed selection of the Pãgat Village site, a National Register-listed cultural and historic resource on Guam. However, the language of the ROD clearly states that future consultation will be limited to discussing specific range footprints within the "Route 15 area," which will result in unavoidable adverse impacts to Pãgat. Notwithstanding DoD's public statements, the language of the ROD itself precludes meaningful consultation of alternative sites under the NHPA.

This memo outlines the relevant portions of the ROD that indicate DoD's final decision has foreclosed alternative locations for the firing ranges.

The Record of Decision

The language of the ROD clearly suggests that the only decision being deferred by DoD is the choice between the two alternatives carried forward in the Draft and Final EIS—Alternative A (the preferred alternative), which would have adverse effects on the Pãgat Village site, and Alternative B, whose adverse effects on Pãgat would be even worse.

To illustrate:

- "Relative to construction and operation of a live fire training range complex on Guam DoN has elected to defer selection of a specific site in the Route 15 area pending completion of the Section 106 consultation process Alternative A remains DoN's preferred alternative." ROD at 4-5; see *id.* at 2 (emphasis added).
- "There are two alternatives for the location of live fire training ranges, both located on the Route 15 area." *Id.* at 17 (emphasis added).
- "Upon completion of the Section 106 consultation process and selection of a specific site in the Route 15 are[a] for the construction and operation of a live

fire training range complex, access to Pãgat site will be reduced” *Id.* at 55 (emphasis added).

- “Upon completion of the Section 106 consultation process under the NHPA and selection of a specific site for the construction and operation of a live firing range complex in the Route 15 area, stakeholder representatives . . . will be invited to consult on an access plan” *Id.* at 76 (emphasis added).
- “As noted earlier, DoN has elected to defer selection of a specific site for the construction and operation of a live fire training range complex in the Route 15 area on Guam pending completion of the Section 106 consultation process under the National Historic Preservation Act (NHPA). Likewise, a selection regarding implementation of a roadway improvement project calling for a realignment of Route 15 is hereby deferred pending selection of a specific site for the construction.” *Id.* at 88 (emphasis added).
- Attachment 2 of the ROD is the most direct evidence that DoD believes it has already completed its responsibility to analyze alternative range sites, and has no intention to evaluate additional alternatives. This section extensively discusses the process that Navy planners went through in settling on Route 15 as the preferred range site.

Ironically, in contrast to all of these statements that the DoD intends to consider only the two Route 15 sites in future consultation, the ROD also states that “[t]he DoD will continue to consult on the Pãgat Site to consider additional avoidance, minimization, or mitigation measures.” *Id.* at 55. This statement fails to recognize that a meaningful consideration of “avoidance” measures would necessarily require alternative firing range sites, because adverse effects on Pãgat *cannot* be avoided at either of the Route 15 sites.

Finally, it is useful to compare and contrast the language in the ROD regarding the firing range complex with the ROD language used to describe the much more extensive additional discussion that will occur with respect to the dredging of Apra Harbor. With respect to that project, the ROD states “[f]inal site selection will occur only after completion of project (site specific) level [NEPA] analysis” *Id.* at 90. The ROD suggests that additional data on the environmental impacts of the dredging “will be used by the Navy as provided in the CEQ regulations governing supplemental and tiered environmental impact analysis.” There is no comparable reference in the ROD of any additional NEPA analysis with respect to the firing ranges, which strongly corroborates the interpretation that DoD has no intention to consider any site other than the two alternatives that would harm Pãgat.

ATTACHMENT B

Proposed Changes to Draft PA (dated Sept. 15, 2010) for Military Relocation to Guam and CNMI

- **Consideration of Alternative Locations for the Firing Range Complex**

Although the DoD announced that the final decision on the firing range complex would be “deferred” pending completion of Section 106 review, the language of the ROD strongly indicates that the DoD has no intention of considering alternative sites for the firing ranges. In order for Section 106 consultation to be meaningful, it must include consideration of alternative locations for the firing ranges. Based on the unanimous resolution of the Guam legislature and the strongly held convictions of the SHPO and the consulting parties, alternative sites for the firing ranges must be vigorously pursued. *Specifically, we urge the DoD to consider alternatives that would locate the machine gun range independently from the other proposed firing ranges, in order to allow construction of all firing ranges on existing DoD land away from Pãgat Village.*

- ***Stipulation V.D.1., “Proposed New Training Ranges,” page 14:***

In order to confirm that DoD will indeed engage in meaningful consultation regarding alternatives for the firing ranges we suggest the following revised language:

DoD will conduct supplementary consultations under this PA with the Signatories, Invited Signatories, and Consulting Parties to address the effects on historic properties of **site selection**, construction and operation of new firing ranges. The results of these supplementary consultations, including determination of effects, and **consideration of alternative locations for the firing ranges**, will be incorporated into a separate memorandum of agreement. Development of a memorandum of agreement would include public involvement, as well as consultation with Signatories, Invited Signatories and Consulting Parties, consistent with 36 CFR § 800.6. **The supplementary consultation will include the Guam legislature, and will give meaningful consideration to the perspectives of the indigenous Chamorro community. In addition, the supplementary consultation will include consideration of alternatives that would locate the machine gun range independently from the other proposed firing ranges in order to allow more flexibility to construct all firing ranges on existing DoD land away from Pãgat Village.** If agreement cannot be reached **on the resolution of effects through this supplementary consultation**, the dispute will be resolved in accordance with **36 C.F.R. § 800.7.**

- ***Area of Potential Effects, Appendix A2:***

Including the APE for the firing range complex at Pãgat (Appendix A2) only serves to reinforce the impression that the DoD does not intend to engage in meaningful consultation regarding alternative locations for the firing range complex.

- **Inadequate Public Involvement and Consultation.**

- ***Fifth Whereas Clause, page 3:***

“DoD held 10 public meetings to seek public comment and input under NHPA.”

According to our understanding, not one of these 10 meetings specifically mentioned NHPA or the rights of the public to be involved in Section 106 consultation. Even groups like the Guam Preservation Trust and We Are Guahan, whose missions specifically include the protection of Guam’s cultural heritage, were never informed of the opportunity to participate as consulting parties to the PA. The local consulting parties, the Guam SHPO, and the National Trust have particularly objected to the attempted use of the PA to rewrite history by bootstrapping NEPA meetings into Section 106 meetings. Changing the NHPA reference to NEPA would seem to be a compromise approach that would allow the DoD to recite information about the public meetings, but without falsely characterizing them as “NHPA” meetings. We recommend that the language of this Whereas Clause be revised as follows:

“DoD held 10 public meetings to seek public comment and input **under the National Environmental Policy Act.**”

- ***Final “Execution and Implementation” Clause, page 31:***

Similarly, the unconventional language at the end of the PA has the effect of rubbing salt in the wound on the issue of public involvement by unilaterally pronouncing that DoD has afforded the public an adequate opportunity to comment under Section 106. The local consulting parties, the Guam SHPO, and the National Trust have vehemently disagreed. For example, despite the magnitude of the impacts, no consulting parties were invited to participate in the PA process until early 2010, and only three Section 106 consultation meetings were convened during the seven months leading up to the ROD. Perhaps a less controversial approach would be to use more traditional language for this final clause that simply tracks the statute:

“EXECUTION AND IMPLEMENTATION of this Programmatic Agreement satisfies DoD Section 106 responsibilities for the undertaking, affords the **ACHP a reasonable** opportunity to comment, and takes into account the effects to historic properties on Guam and Tinian.”

Alternatively, the language of the Execution clause in the 2008 PA could be used (which does not mention public involvement):

“EXECUTION AND IMPLEMENTATION of this Programmatic Agreement evidences that CNRM has taken into account the effects of the undertakings under its scope on historic properties and afforded the ACHP an opportunity to comment on them.”

- ***Appendix B – Public Involvement Summary***

For the same reasons, Appendix B is problematic because the public meetings did not inform the public of the ongoing development of a PA under Section 106. We

recommend this Appendix be removed from the PA.

- **Access to Historic Properties**

- ***VI.B.2. "Cultural Access to Historic Properties on DoD Lands," pg. 16:***

The fundamental problem with the "access plan" concept as mitigation is that it includes no specific requirement that DoD provide a quantitative commitment to access. For example, DoD officials may be assuming that an adequate access plan would allow public access approximately one day per year, or perhaps one day per month. By contrast, local practitioners and members of the public who currently use and visit the traditional cultural sites may be of the view that access must be allowed at least once a day, or at a bare minimum, on weekends. Deferring all consultation about how to quantify the frequency of access has increased the level of distrust, which is likely to be greatly exacerbated in the future once the truth is revealed about how rarely or unreliably access will actually be allowed. We strongly recommend that the DoD include a specific *quantitative* commitment to access in this stipulation, as a good faith gesture to the public.

Furthermore, the PA includes a number of "qualifier" clauses that would authorize DoD to override or avoid specific access commitments, and strongly suggest that access would be even more limited and unreliable than feared. These limitation clauses include, for example:

- Access plans and special requests for access would only be approved if "consistent with current DoD and installation security instructions and (other safety related) guidelines" (VI.B.2.a.1.; VI.B.3., pp. 16-17).
- Special requests for traditional artisans to gather plant materials "will be considered in light of military operational requirements, [and] anti-terrorist/force protection security conditions" (VI.B.2.a.iv., p.17)
- Special requirements for traditional cultural activities will be integrated into the access plan only "to the maximum extent practicable" as determined by DoD (VI.B.2.a.ii., p.16).

We recommend removing this language, as it creates the appearance that DoD could unilaterally override the vast majority of access requests and opportunities.

For this reason, any access plans must include a dispute resolution provision. More specific recourse must be included for parties who are denied access, to assure the public that DoD's commitment is sincere.

- **Cumulative Effects Mitigation**

In general, the mitigation for cumulative effects on Guam (Stipulation VII.C.) is wholly inadequate, given the enormous scope of the prospective impacts of the Buildup on historic properties. We have repeatedly emphasized that cumulative impacts must be addressed in a meaningful manner, and we support the Guam SHPO comments regarding cumulative impacts. In comments dated March 3, 2010 we suggested that the DoD endow a historic preservation fund that would be available for historic

properties affected by Buildup activities. Our attachment cited provisions in seven separate Section 106 agreement documents that have included such a commitment. At a minimum, DoD could commit to making a specific request to Congress to provide authorization for such funding.

➤ ***Guam Museum***

Stipulation VII.C.5., “Guam Museum Measures,” should include specific guarantees of funding pursuant to its authority under Section 110(g) of NHPA. We concur with the views of the Advisory Council and the Guam SHPO that DoD has the legal authority to provide such funding.