Preserving America's Heritage

May 2, 2007

John M. Hill, PE
Base Closure Manager
Department of the Navy
Base Realignment and Closure
Program Management Office West
1455 Frazee Road, Suite 900
San Diego, CA 92108-4310

Ref: ***Recent Discussions of Section 106 and CERCLA for NASA Ames Research Center, Moffett Field, CA***

Dear Mr. Hill:

For the past few months, the Advisory Council on Historic Preservation (ACHP) has been in communication with your office regarding the Navy's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Non-Time Critical Removal Action responsibilities pursuant to section 106 of the National Historic Preservation Act (NHPA) for the potential adverse effects to historic properties at the NASA Ames Research Center, Moffett Field, California. Specifically, we understand this CERCLA action has the potential to adversely affect Hangar 1 at Moffett Field, a property that is individually eligible for listing on the National Register of Historic Places and a contributing element of the U.S. Naval Air Station Sunnyvale Historic District, which is listed on the National Register.

We understand that it is Navy policy to follow the Environmental Protection Agency's (EPA) regulations and guidance for CERCLA actions, which mandate that CERCLA removal actions comply to the extent practicable with the applicable or relevant and appropriate requirements (ARARs) of certain other environmental laws as identified on a case by case basis (40 CFR §300.415(j)). Further, we understand that because of the historic property located at the CERCLA site, one of the location-specific applicable requirements identified in this case is the NHPA. The applicable requirements of the NHPA include those that are substantive, rather than those portions of the law that are procedural or administrative. In your letter to Mr. Milford Wayne Donaldson, State Historic Preservation Officer (dated February 9, 2007), you state that the Navy "has endeavored to closely integrate cultural resource consultation into the CERCLA process by addressing the substantive criteria of the 36 CFR Part 800 regulations, and by involving the OHP and ACHP in development of our CERCLA documentation."

We appreciate the ongoing dialogue that has occurred with your office, the California Office of Historic Preservation (OHP), and the ACHP to address the substantive elements of the NHPA. In our March 29,

2007 conference call with your office, we continued our discussion of the substantive elements of the NHPA. We would like to take this opportunity to reiterate our understanding of that discussion here.

The NHPA, through its implementing regulations, 36 CFR Part 800, *Protection of Historic Properties*, states that the purpose of section 106 is to require "Federal agencies to take into account the effects of their undertakings on historic properties and to afford the Council a reasonable opportunity to comment on such undertakings" (36 CFR §800.1(a)). To this end, the federal agency must first determine whether it has an undertaking, then it must identify and evaluate historic properties, assess any potential effects, and finally, attempt to resolve any potential adverse effects to historic properties that may result from its proposed undertaking or, failing that, request, consider and respond to the formal comments from ACHP members.

We agree that the substantive requirements, as listed in the Navy's Engineering Evaluation/Cost Analysis (May 5, 2006), of 36 CFR Part 800 are the identification of resources on or eligible for listing on the National Register that are located on or near the area under study, the identification and taking into account of the possible effects of proposed removal action alternatives on historic properties, the identification and taking into account of adverse effects of proposed removal action alternatives on historic properties, and the resolution of adverse effects. It is our understanding that the Navy is currently working to continue assessing effects to historic properties for the various removal action alternatives.

We believe a fundamental requirement that accompanies each of these steps is consultation with certain identified parties. We understand from EPA guidance (ARARS Q's & A's: General Policy, RCRA, CWA, SDWA, Post-ROD Information, and Contingent Waivers, Pub. 9234.2-01/FS-A, July 1991) and your letter to Mr. Donaldson (dated February 9, 2007), that consultation under CERCLA removal actions is broadly interpreted to be an administrative requirement, rather than a substantive one. However, we would like to point out that in both the referenced EPA guidance and pages 2-3 of your letter, consultation per the NHPA with the OHP and ACHP is strongly recommended.

Consultation per section 106 of the NHPA is intended to help and inform the federal agency assess its potential effects to historic properties. Distinct from a generic solicitation and response to public comments, section 106 consultation is a negotiated process "of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process" (36 CFR §800.16(f)). It is our belief that consultation with our agency and the OHP, as well as other consulting parties, to seek ways to avoid, minimize, or mitigate potential adverse effects to historic properties is a substantive requirement of the NHPA and must be adhered to in this situation.

We encourage the Navy to continue consulting with the OHP and ACHP regarding the potential effects to historic properties from each removal action alternative. The goal of this consultation is to develop agreement among the parties for resolving adverse effects to historic properties for the selected removal action alternative, which, as was told to us by the Navy during our March 29, 2007 conference call, will be binding on the Navy's action when formalized in the Action Memorandum. Should the Navy, OHP, and ACHP fail to reach an agreement as to how adverse effects will be resolved, consultation will be terminated and the issue must be referred to the Presidentially-appointed ACHP membership for formal comment pursuant to 36 CFR §800.7.

We realize the Navy is working under an expedited schedule, and we will do everything we can to help the Navy meet all applicable deadlines. We fully support the Navy's intent to protect human health and the environment through this CERCLA removal action. We look forward to continuing to work with the Navy and other parties as this process moves forward. If you have any questions or require our further assistance, please contact Kelly Yasaitis Fanizzo at 202-606-8583, or by EMAIL at kfanizzo@achp.gov.

Sincerely,

Reid Nelson
Assistant Director
Federal Property Management Section
Office of Federal Agency Programs