DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, HONOLULU DISTRICT
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March 21, 2022

SUBJECT: U.S. Army Corps of Engineers, Honolulu District Comments on the Draft Environmental Impact Statement for the Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility Dry Dock and Waterfront Production Facility Project, JBPHH, Island of Oahu, Hawaii (DA File No. POH-2020-00043)

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Dear Ms. Von Burg Hall:

This letter transmits our comments on the Draft Environmental Impact Statement (DEIS) prepared by the U.S. Department of the Navy (Navy) for the proposed *Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility Dry Dock and Waterfront Production Facility Project* (herein "PHNSY & IMF project") located at Joint Base Pearl Harbor-Hickam, Island of Oahu, Hawaii (DA File No. POH-2020-00043). As a cooperating agency under the National Environmental Policy Act of 1969, as amended ("NEPA"; 42 U.S.C. 4321 et seq.) the U.S. Army Corps of Engineers, Honolulu District (Corps) is providing feedback pursuant to our statutory authorities at Section 404 of the Clean Water Act ("CWA"; 33 U.S.C. 1344), Section 10 of the Rivers and Harbors Act of 1899 ("RHA"; 33 U.S.C. 403), and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA"; (33 U.S.C. 1413).

As you know, the Corps has participated in the development of your DEIS since the issuance of the Navy's Notice of Intent in the Federal Register to prepare an EIS and our acceptance of your invitation to be a cooperating agency. We have provided feedback and guidance throughout the Navy's internal environmental review process to assist the Navy in complying with applicable federal laws and regulations as well as to ensure the Final EIS (FEIS) is sufficient for our adoption in fulfilling the Corps' independent NEPA obligations in accordance with our Regulatory Program NEPA implementing regulations at 33 CFR 325, Appendix B. Many of our earlier comments and suggestions have been incorporated into your DEIS; however, we noted some previously identified concerns pertaining to the U.S. Environmental Protection Agency's (EPA) Section 404(b)(1) Guidelines, specifically the alternatives analysis; disclosure of the environmental consequences related to the transport of dredged sediments for ocean disposal; and preliminary proposals for project-specific compensatory mitigation remain inadequately addressed.

Chapter 3, Sections 3.6 (Water Resources) and 3.11 (Marine Biological Resources) of the DEIS describe the affected environment specific to aquatic resources

and the projected environmental consequences of implementing the proposed build alternatives. Chapter 2 (Section 2.4) of the DEIS provides an accounting of best management practices and measures that would be implemented to avoid and minimize adverse environmental impacts, while Table 4.2-1 summarizes proposed compensatory mitigation options to offset impacts that cannot be avoided. Appendices F, J and M address the alternatives screening analysis, supplemental water resources information, and marine biological resources, respectively. Our review comments focus on these sections and appendices of the DEIS as they relate to the Corps' jurisdiction by law and special expertise. We offer the following comments for your consideration as you move forward in preparing the FEIS and Navy record of decision (ROD).

Comment 1: Alternatives Analysis under EPA's Section 404(b)(1) Guidelines

As noted in the preamble to the President's Council on Environmental Quality (CEQ) NEPA implementing regulations, analysis of alternatives in an EIS may serve purposes other than NEPA compliance, such as evaluation of the least environmentally damaging practicable alternative (LEDPA) for the discharge of dredged or fill material under section 404(b)(1) of the CWA. The CWA prohibits the discharge of dredged or fill material into waters of the U.S. (WOTUS), except as authorized in a permit issued by the Corps pursuant to the Section 404(b)(1) Guidelines. In carrying out this responsibility, the Corps must follow criteria established by EPA, commonly known as the "Guidelines". Although they are called "Guidelines," these criteria are established in regulation (40 C.F.R. 230) and are legally binding. The Section 404(b)(1) Guidelines establish four requirements that must be met for the Corps to issue an individual permit. If any one of these four requirements is not met, then the Department of the Army (DA) permit cannot be issued. The four requirements include:

- *No Practicable Alternative/LEDPA* (40 CFR 230.10(a)). There must be no "practicable[1] alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequence." This means the applicant's selected preferred alternative must be the LEDPA.

- *No Violation of Other Laws* (40 CFR 230.10(b)). The project cannot be permitted if it (1) "causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable state water quality standard", (2) "violates any applicable toxic effluent standard or prohibition under section 307 of the Act"; (3) "jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act ... or results in likelihood of the destruction or adverse modification of ... critical habitat"; or (4)

[1] Practicable is defined as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." (40 CFR § 230.3(q)).

"violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary.."

- *No Significant Degradation* (40 CFR 230.10(c)). The project must not "cause or contribute to significant degradation of the WOTUS." This section lists criteria to be considered in making a determination of significant degradation. It requires this determination to be based on "appropriate factual determinations, evaluations, and tests."

- *Minimizing Adverse Impacts* (40 CFR 230.10(d)). The project must include "appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem."

Looking through the lens of the Section 404(b)(1) Guidelines, the four proposed build alternatives evaluated in the PHNSY & IMF project DEIS are fundamentally the same alternative in terms of impacts to WOTUS. That is, Alternatives 2, 3, 4 (Preferred Alternative) and 5 share the same in-water work footprint of disturbance/impact for the dredging activities, placement of structures and the discharge of dredged and/or fill material into WOTUS – all four build alternatives would result in the same loss of approximately 7.8 acres of navigable waters of the U.S. What differentiates the four proposed build alternatives is the upland project features, such as whether the new Dry Dock 5 (DD5) would be covered or uncovered and whether the new waterfront production facility would be located to the west or to the east of the new DD5. These project features are located wholly on uplands and therefore, occur outside the geographic jurisdiction and scope of the Corps. Without a proposed build alternative that would avoid or minimize impacts to WOTUS, this places a higher burden on the Navy to demonstrate that the other options that were considered but rejected from further analysis are not practicable.

Of primary concern is the elimination of Option 1 that would lengthen, deepen, widen, and reconfigure the existing Dry Dock 3 (DD3). While this alternative would result in fewer permanent impacts to WOTUS, it was eliminated from further consideration in the DEIS on the basis it would not be in service by the mission need date of January 2028 and it would disrupt scheduled availabilities of existing dry docks during its construction, thereby adversely impacting shipyard operations. To substantiate the former claim, the practicability analysis contained in Appendix F (Screening Analysis) should specify the estimated construction duration for each option (i.e., Options 1, 2, 3, and 4) to show how the construction duration would or would not comport with the Navy's Shipyard Infrastructure Optimization Program (SIOP) mission need date of January 2028. In addition, Appendix F should address why it is not practicable to reduce the construction period for Option 1 through engineering design refinements as is being done for the preferred Alternative 4 to decrease its estimated 65-month overall construction period (reference to Section 2.3.2.2.6 – Construction Schedule and Phasing).

Regarding the application of the screening criterion related to the disruption of operations at the existing dry docks during construction, Appendix F, page F-6 states,

> "[F]rom a logistical perspective, this requirement [to add crane tracks and space to accommodate necessary turning radiuses] would be difficult to achieve given space constraints around DD3 and would significantly alter people and material access, transportation, and staging in the vicinity of DD2 and DD3" (emphasis added).

Appendix F, page F-6 also indicates,

> "…Critical facilities would need to be taken out of service and would be unavailable during DD3 construction" (emphasis added).

Based on these foregoing statements, Appendix F, page F-10 concludes that,

> "...Option 1 is not carried forward for analysis in the EIS because it would not meet the mission need date and would introduce risk to the continuity of existing DD2 operations" (emphasis added).

There is introduced risk with all the alternatives being evaluated in the PHNSY & IMF project DEIS. Moreover, without an avoidance and minimization alternative to the Navy's preferred alternative, it becomes imperative that Appendix F provides a robust rationale for rejecting the lesser environmentally damaging alternatives on the basis that their costs, existing technology and/or logistics are constrained to such a degree that they are deemed to be not practicable. The FEIS should disclose and incorporate the preliminary engineering study findings specific to the concluding statements in Appendix F. For example, the statement that "…it would be difficult to achieve given the space constraints…" implies that it is, or might be, possible to accommodate additional crane tracks and space needed for turning radiuses if there were greater engineering design or perhaps innovative construction methods employed. There is also opportunity within Appendix F for the Navy to identify the specific critical facilities that would need to be taken out of service for implementing a build option at DD3 and then expand upon why it would not be practicable to temporarily relocate or reconfigure those critical facilities during construction without interfering with the operations at the other existing dry docks. As well, it would be relevant to explain the practicability of temporarily relocating maintenance operations to another U.S. Naval base location (such as Bremerton, Washington and/or Apra Harbor, Guam) during the PHNSY & IMP construction period, thereby allowing for the temporary disruption at the existing PHNSY dry docks.

As the Navy prepares its FEIS, intentional focus should be placed on Appendix F to ensure the justifications for eliminating less environmentally damaging dry dock alternatives are supported by empirical analyses and are more than speculative or

based on more than inference alone. Appendix F must demonstrate through analysis and documentation that all other less environmentally damaging alternatives, as compared to the Navy's preferred Alternative 4, are not practicable. This practicability analysis and documentation should be commensurate with the level of impacts to WOTUS and be co-equal across the alternatives, meaning the same level of engineering design and breadth of evaluation (e.g., construction methodology, application of avoidance and minimization measures, etc.) should be afforded to each alternative to ensure a balanced and consistent assessment (i.e., allow for an "apples to apples" comparison).

Comment 2: Affected Environment and Environmental Consequences Re: Section 103 of the MSPRA for the Transport of Dredged Material for Ocean Disposal

NEPA requires that the lead agency take a hard look at alternatives and the resultant environmental consequences to enable informed agency decisions. Environmental consequences may be beneficial or adverse, but in all cases, the direct and indirect impacts must be assessed and disclosed within the NEPA document. The CEQ's NEPA implementing regulations are, in part, intended to generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision. In addition, the criteria for scope in (40 CFR 1501.9(e) and 1502.4(a)), provide that the lead agency evaluate in a single EIS proposals or parts of proposals that are related closely enough to be, in effect, a single course of action.

The Navy's disposal options and locations for the dredged sediments, including the intent to transport a portion of the dredged material for ocean disposal, is a relevant aspect of the Navy's proposed action. The DEIS conceptually discusses and contemplates the possibility of ocean disposal but does not provide a detailed description or quantitative evaluation. We found the consideration of environmental consequences associated with the transport of dredged material for ocean disposal to lack sufficient analytical detail and robustness for purposes of public disclosure and agency decision-making.

Furthermore, because the transport of dredged material for ocean disposal at the EPA-designated South Oahu Ocean Dredged Material Disposal Site requires authorization from the Corps pursuant to Section 103 of the MSPRA, it is an integral component of the Corps' overall discretionary federal action (i.e., permit decision). As part of our federal action, the transport of dredged materials for ocean disposal requires evaluation under NEPA. Accordingly, for the Corps to adopt the Navy's FEIS without NEPA supplementation the environmental consequences of the Corps' federal action must be included in the EIS.

Comment 3: Mitigation Sequencing – Avoidance, Minimization and Compensation

The anticipated loss of approximately 7.8 acres of navigable waters of the U.S. and 0.6 acre of wetlands located at Pearl City Peninsula and DD5 is considered a substantial adverse impact from an aquatic ecosystem perspective based on the potential physical, chemical, and biological functions and services provided by these aquatic resources. Consistent with prior comments, one of the fundamental precepts of the Section 404(b)(1) Guidelines is mitigation sequencing that requires the project proponent to first look for ways to avoid impacts to WOTUS followed by identifying measures and design options that minimize impacts. Compensatory mitigation is only considered after all practicable steps have been taken to avoid and minimize adverse impacts.

Guidance for implementing the Section 404(b)(1) Guidelines is provided through the joint Corps-EPA 1990 Mitigation Memorandum of Agreement (MOA) and further clarified by the Corps' 2008 compensatory mitigation rule for aquatic resources[2] that supersedes certain provisions of the 1990 MOA. The following sequence of determinations will be used in evaluating the PHNSY & IMF project and compliance with the Section 404(b)(1) Guidelines:

- A determination that potential impacts have been avoided to the maximum extent practicable;
- A determination that remaining unavoidable impacts will be mitigated to the extent appropriate and practicable by requiring measures to minimize impacts through project modifications and permit conditions; and
- A determination that appropriate and practicable compensatory mitigation has been provided for unavoidable adverse impacts.

At the Pearl City Peninsula, the Navy relocated and redesigned certain ancillary components common to all four proposed build alternatives that reduced the impacts on wetlands. However, we did not find documentation as to how the Navy may have avoided and/or minimized the larger impacts to WOTUS at DD5. The upland project features that distinguish the four proposed build alternatives at DD5 have no material bearing on the extent or intensity of impacts to WOTUS and consequently, do not help in demonstrating that the Navy has taken all practicable steps to evaluate alternatives that would avoid and/or minimize impacts to the aquatic ecosystem. Thus, we encourage the Navy to find ways to reduce the in-water footprint of permanent impacts and/or strengthen the documentation in the EIS as to what specific minimization measures were considered but ultimately deemed to be not practicable. Also germane to minimization measures and mitigation sequencing is ensuring the proposed best management practices (BMPs) are both effective and enforceable. In our review of the

[2] Final Rule, Compensatory Mitigation for Losses of Aquatic Resources (Corps and EPA, 2008; 73 FR 19594; 33 CFR 332).

BMPs contained in Chapter 2, Table 2.4-1 we noted certain measures would be infeasible to monitor from a compliance perspective or would be unenforceable due to ambiguity in how they are written. We recommend the Navy take a closer look at the proposed BMPs to ensure they are written in a manner that makes them enforceable.

For all residual unavoidable impacts to WOTUS, the Navy will need to propose appropriate and practicable compensatory mitigation and prepare a draft compensatory mitigation plan (CMP) in accordance with 33 CFR 332. As part of this process, consideration should be given to what tools or methods will be used to measure and assess the functions[3] and/or condition[4] of the affected WOTUS. Characterizing the physical, chemical and biological integrity of the WOTUS will be foundational to the CMP, including establishing the amount and type of compensatory mitigation that will be appropriate in replacing the lost aquatic resource functions and services. As the Navy works with the Corps, EPA and federal resource agencies (e.g., NOAA-National Marine Fisheries Service-HCD/PRD) to formulate its Permittee-responsible compensatory mitigation options, consideration should be given to the restoration opportunities within the Pearl Harbor area and/or the needs of the contributing watersheds that if addressed could directly or indirectly result in the restoration or enhancement of aquatic resource functions and services. Factors that are likely to influence the Corps' determination of the environmentally preferred compensatory mitigation option(s) include the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and its significance within the watershed, and the costs of the compensatory mitigation project. The Corps requests an interagency meeting with the Navy, EPA and NMFS HCD/PRD to discuss an agency approach to mitigate for unavoidable resource losses.

Comment 4: NEPA, Permitting and Construction Schedules

We recognize the Navy has an accelerated schedule for completing the EIS and obtaining permits required under federal laws and regulations to ensure the SIOP mission need date of January 2028 is met. Towards this end, the Corps is concerned that if certain information gaps are deferred until the Navy's ROD or await resolution until the Navy's submittal of a DA permit application, the Corps' standard review period for evaluating and processing the application will increase in order to render a DA permit decision.

In addition, as you know, the Corps anticipates adopting your FEIS to fulfill our independent NEPA responsibility for our federal action. Should the Navy's FEIS have incomplete or insufficient information and analyses that are germane to supporting the

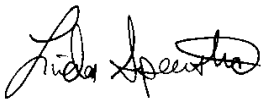
[3] The term "functions" means the physical, chemical, and biological processes that occur in ecosystems (33 CFR 332.2).

[4] The term "condition" means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region (33 CFR 332.2).

Corps decision-making, including compliance with the Section 404(b)(1) Guidelines and the transport of dredged material for ocean disposal, then it may preclude the Corps from adopting your FEIS without first supplementing the NEPA document. Having to request the Navy prepare a supplemental NEPA document will impact review timelines.

Thank you for the opportunity to comment. We look forward to our continued collaboration on this important U.S. Naval readiness infrastructure project. If you have any questions, please contact Susan A. Meyer Gayagas at (808) 835-4599 or via e-mail at susan.a.meyer@usace.army.mil.

Sincerely,



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