



4310-K6

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property.

AGENCY: Advisory Council on Historic Preservation

ACTION: Program Comment Issued to Tailor the Section 106 Review Process for Communications Projects on Federal Lands and Property.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) issued a Program Comment for Communications Projects on Federal Lands and Property at the request of the U.S. Department of Homeland Security (DHS) to accelerate the review of these projects, particularly broadband deployment, under Section 106 of the National Historic Preservation Act. The Program Comment can be used by federal land and property managing agencies who must comply with the requirements of Section 106 when deploying communications activities on public lands and property. Federal agencies using the Program Comment may fulfill their Section 106 responsibilities for the relevant undertakings by implementing the terms of this comment, which include processes for the identification of historic properties and consideration of effects to these

properties. The Program Comment also identifies certain undertakings that require no further Section 106 review under specified conditions.

DATES: The Program Comment was issued by the ACHP on May 8, 2017 and went into effect that day.

ADDRESSES: Address all questions concerning the Program Comment to Charlene Dwin Vaughn, AICP, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 401 F Street NW, Suite 308, Washington DC 20001-2637. You may submit questions through electronic mail to:

cvaughn@achp.gov.

FOR FURTHER INFORMATION CONTACT: Charlene Vaughn, (202) 517-0207, cvaughn@achp.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act (NHPA), as amended, 54 U.S.C. 306108 ("Section 106"), requires federal agencies to take into account the effects of undertakings they carry out, license, permit, or fund to historic properties and provide the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which federal agencies comply with these responsibilities. Those regulations are codified under 36 CFR part 800 ("Section 106 regulations").

Under Section 800.14(e) of those regulations, federal agencies can request the ACHP to issue a "Program Comment" on a particular category of undertakings in lieu of conducting reviews for each individual undertaking in the category. An agency can meet its Section 106 responsibilities with regard to the effects of those undertakings by implementing an applicable Program Comment that has been issued by the ACHP.

I. Background

At the request of the DHS, the ACHP has issued a Program Comment that provides a new efficiency in the Section 106 review for the deployment of communications projects. A program alternative was initially proposed by the White House Office of Science and Technology and an interagency Working Group comprised of representatives from the U.S. Department of the Interior's Bureau of Land Management, National Park Service (NPS), Fish and Wildlife Service; Department of Defense; the U.S. Department of Agriculture's Forest Service and Rural Utilities Service (RUS); and the Federal Communications Commission (FCC). The purpose of this Working Group was to explore how best to accelerate the deployment of communications projects, particularly broadband activities, on federal lands and properties by evaluating the Section 106 program

alternatives outlined in 36 CFR § 800.14. Many members of the Working Group had previously participated in another Interagency Working Group for Accelerating Broadband Infrastructure Deployment, established in 2012. This Interagency Working Group published a report with recommendations to expedite reviews and implement efficiencies for the deployment of broadband infrastructure on federal lands. Since this effort had not directly resulted in revisions based on the existing Section 106 regulations, in 2016 the Broadband Interagency Working Group, formerly known as the Broadband Opportunity Council, was established. This group reaffirmed the need to tailor the Section 106 review process so it could expedite broadband deployment, especially in rural and underserved communities.

The Working Group initially pursued a Standard Treatment in accordance with 36 CFR § 800.14(d) consisting of a series of "best practices" in the deployment of broadband. If followed, these practices were likely to result in determinations of "no historic properties affected" or "no adverse effect" on historic properties. However, the Working Group was particularly interested in incorporating select provisions of the two FCC Nationwide Programmatic Agreements (NPAs) executed in 2001 and 2005,

respectively, among FCC, the National Conference of State Historic Preservation Officers (NCSHPO), and the ACHP for tower siting and collocation activities on existing towers. The NPAs have been successfully used by applicants for more than a decade for streamlining the Section 106 review of tower siting and collocation activities. Use of the Standard Treatment alone would not have allowed federal land and property managing agencies to implement the efficiencies in the NPAs. Further, by their own terms, the NPAs state that they do not apply on federal lands and tribal lands.

II. Conversion of the Standard Treatment to a Program

Comment

After meeting several times and receiving feedback on the draft Standard Treatment, it was recognized that the best practices proposed in the Standard Treatment would not achieve the review efficiencies that were being sought by the federal agencies. The Working Group, therefore, agreed to convert the Standard Treatment into a Program Comment under 36 CFR § 800.14(e). The Program Comment would enable Property Managing Agencies (PMAS) and Land Managing Agencies (LMAs) to alter the standard Section 106 review process to achieve the desired process efficiencies, such as establishing limits to areas of potential effects

(APEs), limiting the level of effort needed to identify historic properties in certain areas, and utilizing FCC's NPAs' exemptions, as appropriate.

While the Program Comment presents a change in the type of program alternative initially sought by the LMAs and PMAs, the structure and provisions are substantively similar to those included in the draft Standard Treatment. The Program Comment includes new administrative clauses such as reporting, amendment, and duration. Nonetheless, the overall purpose of the program alternative remains the same: assist LMAs and PMAs in expediting project delivery of broadband infrastructure to underserved communities, rural areas, and tribal communities. Further, the Program Comment is structured to cover the effects of all types of communication deployment undertakings, including constructing and placing antennae, towers, and associated equipment and facilities on federal property, and running buried and aerial fiber optic lines across federal lands. In order to expedite the review of broadband activities, the Program Comment defines the APE for certain undertakings to establish more consistent reviews by LMAs and PMAs on federal lands; specifies the process for collocation on federal buildings and federal lands; and

clarifies review and installation procedures for buried and aerial fiber optic lines.

By utilizing the Program Comment, LMAs/PMAs can allow project proponents to coordinate the review of broadband deployment on both private and federal lands without experiencing unanticipated delays in the Section 106 process. Assistance agencies, such as FirstNet (Commerce), the Appalachian Regional Commission, and RUS, can use the Program Comment when they fund broadband activities that may involve the use of federal lands and properties. Other LMAs/PMAs and federal agencies not specifically identified in the Program Comment who wish to use the Program Comment to satisfy their Section 106 responsibilities must first notify the ACHP in writing of their interest and clarify the nature of their communications program. The ACHP will be responsible for acknowledging these notifications and posting them on the ACHP website.

The Program Comment is not applicable to undertakings that would occur on or affect the following federal lands: National Historic Landmarks (or the portion thereof that is located on federal land), National Monuments, National Memorials, National Historical Parks, National Historic Trails, National Historic Sites, National Military Parks, and National Battlefields. Should federal agencies or

applicants propose communication deployment undertakings that may affect these properties, the responsible federal agency must follow the standard Section 106 process or another applicable program alternative. The LMAs/PMAS also must consult with State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO), Indian tribes, Native Hawaiian organizations (NHOs), and other consulting parties when coordinating the standard Section 106 process.

Public Participation

In accordance with the 36 CFR §800.14(e), in developing the Program Comment the ACHP, in coordination with DHS and the Working Group, arranged for public participation appropriate to the scope of the category of undertakings it would cover and in accordance with the standards outlined in the Section 106 regulations. Due to the breadth and scale of the communications activities related to the Next Generation programs, ACHP, DHS, and the Working Group agreed that all stakeholders should be afforded an opportunity to review the draft Program Comment. It was posted on the ACHP's website with an explanation of the changes that were made to modify it from the proposed Standard Treatment.

On January 13, 2017, the draft Program Comment was distributed to SHPOs, THPOs, Indian tribes, NHOs, federal agencies, and broadband industry representatives for a three-week review period. The ACHP received 16 comments during this initial period. Because of the limited response, the comment period was extended for an additional two weeks until February 24, 2017. The ACHP hosted a webinar specifically for tribes, from which an additional three comments were received.

In response to the publication of the draft Program Comment on January 13, 2017, comments were received from a total of 24 organizations and federal agencies. None of the commenters opposed the issuance of the Program Comment. However, all of the commenters shared their observations regarding changes needed to make it less ambiguous or offered revisions to meet their program needs. SHPOs and THPOs both recommended revisions to clarify the procedures for conducting records checks, completing the identification and evaluation of properties, exempting activities from Section 106 reviews, as well as the use of the defined terms in the Program Comment.

Responses from nine SHPOs were received on the draft Program Comment, with most expressing concern about the continued applicability of Section 110(a) of the NHPA to

federal LMAs/PMAs. SHPOs also questioned how the Program Comment would relate to the FCC NPAs, which they thought was not clear in the document. Many SHPOs were concerned about the identification and evaluation of historic properties under the Program Comment and wanted the following issues addressed: 1) the degree of flexibility given to federal land and property managing agencies to identify historic properties; 2) clarity regarding when or if field surveys would be needed; 3) clarity regarding how a "records check would be conducted;" 4) the level of SHPO review required for exemptions; and 5) clarity regarding the definition of the term "low probability." SHPOs also could not determine the difference between "rights of-way" and "previously disturbed right-of-way" based on the language in the draft.

One SHPO recommended that the ACHP clarify whether new tower construction would be exempted and distinguish between a replacement tower and an additional tower. Further, the effect thresholds in the Program Comment elicited several SHPO comments. Concerns were expressed that the draft did not consider a situation in which the scale and nature of the previous undertaking could be significantly different from that created by a large cellular tower, that the draft erroneously concluded that

new telecommunications towers would typically not result in an "adverse effect," and that it did not adequately consider other types of adverse effects such as noise, visual, and cumulative effects. Finally, SHPOs believed it was important to take into account the passage of time when assessing effects on properties previously considered ineligible. SHPOs indicated that LMAs/PMAs should not only consult with the SHPO/THPO to confirm the APE, but should also reveal to the SHPO/THPO and Indian tribes the sources (records) and methods used to identify historic properties. Finally, a concern was raised that the draft narrowed the definition of "historic properties" and was inconsistent with the definition in the NHPA.

Five THPOs and Indian tribes responded to the draft Program Comment during the period it was available for review. Comments regarding the applicability of the Program Comment on tribal lands were noted, and several THPOs and Indian tribes expressed concern about the Program Comment applying off tribal lands, preferring that LMAs/PMAs adhere to the standard Section 106 process instead. Further, one THPO indicated that it was unclear if or when it would be possible to develop an agreement with the LMA/PMA to utilize the Program Comment on tribal lands. THPOs and Indian tribes recommended that the list of properties to

which the Program Comment would not apply be expanded to include National Historic Landmarks, National Natural Landmarks, areas of critical environmental concern, and other federally owned localities and lands that have earned official recognition for their significance. With regard to the definitions, THPOs and Indian tribes recommended that the list of defined terms include other terms they believed were vague or inconsistently used throughout the document.

THPOs and Indian tribes recommended that activities exempt from Section 106 review be limited to those that would not affect "undisturbed areas." They also suggested that the radius for the "presumed APE for visual effects" in cases where the undertaking may affect properties or landscapes of significance to tribes should be expanded. The THPOs and Indian tribes believed that the identification process is the most important step of the Section 106 process and therefore, recommended that "... great care is taken when limiting this step in order to establish efficiencies." One THPO took exception to the use of blanket "no adverse effects" determinations for the construction of lines from the road or utility right-of-way to a facility if there are no known historic properties within the APE. The THPO said this would work only when there are sufficient identification efforts completed such

as survey or testing to support any previous "no historic properties affected" findings.

THPOs and Indian tribes also questioned the concept of "records check" as an adequate identification tool if it did not include consultation with the THPOs and Indian tribes as it did with the SHPOs. Likewise, they said that Federal LMAs/PMAs must involve the tribes in consultation regarding avoidance plans for historic properties. The THPOs and Indian tribes asserted that the Program Comment did not address the importance of ancestral homelands or areas through which a tribe has migrated or on which tribes have participated in past or present activities. The THPOs and Indian tribes stressed the importance of being clear on these issues. Regarding collocation on non-tower structures, the THPOs commented that the LMA/PMA must take into account historic properties of religious and cultural significance to tribes, and therefore consultation with tribes should occur prior to making a finding of "no adverse effect." THPOs and Indian tribes also recommended including further consideration of the cumulative effects of telecommunication facilities on sites and landscapes eligible for listing in the National Register. In addition, the THPOs and Indian tribes suggested that the Program comment should acknowledge that many telecommunications

facilities can have auditory and olfactory effects as well as mechanical and visual effects on historic properties.

The THPOs and tribes commented that annual reports from LMAs/PMAs should be submitted directly to affected THPOs and Indian tribes. Further, they suggested that the ACHP and LMAs/PMAs should consult with THPOs and Indian tribes before amending the Program Comment. They reiterated that the Program Comment should clearly state that it does not alter the roles or responsibilities of THPOs and Indian tribes in the Section 106 review process. For example, they commented that the Program Comment does not negate the right of THPOs and Indian tribes to request government-to-government consultation with LMAs/PMAs and other federal agencies. Finally, THPOs and tribes stated that the sole purpose of the Program Comment was to expedite and limit the scope of Section 106 review and asserted that this was problematical because it violated both the spirit and language of the NHPA.

The American Cultural Resources Association (ACRA) was concerned that the Program Comment would limit consultation on APEs to SHPOs and THPOs only. They recommended that it include other parties since they said that towers have large APEs and could impact traditional cultural properties, view sheds, etc. ACRA also objected to the

exemption for previous surveyed areas, arguing it presupposes that earlier surveys were adequate. To that end, they noted that the term "adequate was frequently used in throughout the Program Comment" and asked the ACHP to clarify why.

Federal agencies were notified that a draft Program Comment had been developed to assist with the review of broadband deployment. Five agencies submitted comments during the review period, including some that were members of the Working Group, such as FCC. FCC indicated that it would be helpful if the Program Comment absolved the agency from complying with Section 106 when a LMA/PMA with related authority for the same undertaking already utilized the Program Comment on Federal lands and property for its Section 106 review. If this efficiency were not possible, FCC asked to be removed from participation in the Program Comment.

The US Postal Service (USPS) asked why agencies interested in using the Program Comment would be required to inform the ACHP and other government agencies. The agency wanted to know if notice to just the ACHP would be sufficient. Also, they expressed concerns about the definitions in the Program Comment and suggested that USPS would want to verify the references. USPS requested the

Program Comment include a "more detailed" definition of "undisturbed soils." USPS also clarified that it has its own policy that defines terms used in the Program Comment which can be found at 39 U.S.C. 401, "General Powers of the Postal Service." With regard to the reference to "delegation of authority" the Program Comment should specify that it would be to the "Applicant" to avoid confusion. On a similar note, USPS requested that the "responsibilities of applicants" section include the following language at the end, "the federal LMA/PMA shall be deemed to be in compliance under this PC if such compliance is carried out by an Applicant on behalf of such Federal LMA/PMA." USPS recommended that the APEs for new communication towers be increased by 0.5 to 1 mile given what it perceived to be the potential to construct stealth towers without appropriate review.

NPS requested that the ACHP include a definition of "agency official" to the general definitions section to explain who represents the agency. In addition, NPS indicated that the ACHP should clarify how undertakings occurring on or affecting National Parks would be handled under the exemptions outlined in Sections VI to XI of the Program Comment.

The telecommunications industry shared its views on the potential effectiveness of the Program Comment in the review of deployment of telecommunications activities. Many of their comments had previously been shared with FCC and Federal LMAs/PMAs over the years. However, industry representatives stated that they have not seen a number of efficiencies for deployment of telecommunication activities, particularly broadband, on federal lands and properties. Industry noted that although the Program Comment addressed a number of the comments previously shared with FCC, the NPAs were not helpful as they did not apply on federal lands and properties. As such, FCC was unable to establish procedures for applicants.

Industry recommended that the ACHP require all LMAs/PMAs to use the Program Comment to satisfy their Section 106 responsibilities, and avoid leaving it to the discretion of agencies. While many applicants have had success in working with the Federal LMAs/PMAs, they expressed concern that the agencies did not operate in a consistent and predictable manner when conducting Section 106 reviews. They also wanted a lead federal agency for Section 106 purposes whenever multiple federal agencies are involved in reviewing deployment activities.

In addition, industry took exception to the Program Comment not being applicable to activities on all federal lands. They did not support the Program Comment excluding the review of undertakings occurring on or affecting National Parks, National Monuments, Trails, Battlefields, etc. It was recommended that the Program Comment consider effects to all historic properties.

Industry also asked for clarification regarding how the Program Comment would apply to the FCC's Collocation NPA. As drafted, industry believed that the Program Comment was ambiguous and used undefined terms about the actions agencies and applicants would take. Industry concluded that the term "records check" as a strategy for applicants to identify potentially affected historic properties was unnecessarily broad and ambiguous. They recommended that a "records check" be limited to: searching available records for information about: properties listed on or formally determined eligible for the National Register; properties the SHPO/THPO certifies are in the process of being nominated to the National Register; and properties previously determined eligible as part of a consensus determination of eligibility. Since the Program Comment did not say how a site is determined eligible, industry suggested that the language should be revised to cross

reference the definition of "records check" when determinations of eligibility are made. Another comment about existing records stated that if carriers (applicants) had access to these records, they could avoid historic properties all together and streamline the review even further.

Industry indicated that the Program Comment applied to a far broader range of collocations than those referenced in the definition for "collocation of antennas on existing wireless towers." As such, they asserted that the title of Section I should be revised to align with the actual scope of the Program Comment. It also was recommended that two types of projects be deleted from the review process section of the Program Comment: the removal of towers or other structures housing wireless facilities and tower construction that occurs in conjunction with road maintenance projects that do not extend the area of previous ground disturbance. Industry stated that these projects would typically be considered to have "no adverse effect" to historic properties and thus should be categorically exempted. Likewise, it was recommended that tower replacement and new towers will not adversely affect historic properties and should be categorically exempted as well.

Industry recommended that if project applications were not approved or rejected in 180 days, or 90 days for collocations, they should be deemed approved. Industry also recommended that the Program Comment include rules governing application denials. Concerns about timing were expressed with a recommendation that the Program Comment needed strict time limits for consulting parties' review. Further, industry suggested that federal LMAs/PMAs should be required to provide review status updates to applicants. Additionally, they recommend that any fees charged for implementing the Program Comment should be public information and standardized.

Industry stated that the Program Comment did not explain why facilities under streamlined review are limited to those located in rights-of-way. They asserted that there was no basis to limit this efficiency, particularly in remote areas where coverage and rights-of-way may be farther apart and where providing broadband service may require deployment of facilities outside of the rights-of-way.

III. Response to Public Comments from Stakeholders

The comments and recommendations submitted by commenters were comprehensive. In order to adjudicate the comments, the ACHP reviewed and organized them into the

following categories: applicability of the Program Comment; relationship to the FCC NPAs; Federal LMA/PMA Section 110 responsibilities; definitions; roles and responsibilities; identification and eligibility of historic properties; effect findings; and time limits and transparency.

Concerns were expressed by representatives from each of the stakeholders that the applicability of the Program Comment was not clear and that its scope did not go far enough. In response, the Program Comment now clarifies that it can apply to communications undertakings located on federal lands and properties, or funded through loans and grants to private parties whose undertakings will involve public lands or properties. The Program Comment also clarifies that other federal agencies can use the Program Comment if they notify the ACHP of their intent to do so and upon receipt of ACHP's acknowledgment in response. Section XVIII was revised to clarify that the ACHP will acknowledge such notifications within 30-days and post them on its website. Other federal agencies do not need to be notified. The Program Comment was revised to exclude National Historic Landmarks or the portion thereof that is located on federal land. Because of the national significance of these historic properties, they would benefit from undertakings going through the standard

Section 106 review process in consultation with diverse consulting parties. Furthermore, the exemptions outlined in Sections VI to XI would not apply to undertakings affecting these federally owned historic properties. Expansion of this list of excluded properties would require further identification and evaluation of other types of nationally significant properties by the Federal LMAs/PMAs.

Some commenters were unclear about how the Program Comment will use the efficiencies set forth in the FCC's NPAs. This is now clarified in the Introduction Section of the Program Comment. The NPAs have expedited tower siting and collocations on private properties due in large measure to the exemptions they include and other review efficiencies. Should FCC pursue future amendments to the NPAs similar to the 2016 amendment to the collocation NPA, which addresses small telecommunications towers and the distributed antennae system, the Program Comment may need to be amended. Any potential amendment to the Program Comment would be discussed with the Federal LMAs/PMAs and other consulting parties under the Section XVII, Reporting, and Section XVIII, Amendment.

Some commenters noted that the Program Comment deviated from the process set forth in the Section 106 regulations. This is true, because the purpose of a Program

Comment is to provide an alternative method for complying with Section 106 in lieu of the standard process. It does not alter the statutory requirements of Section 106 (to "take into account" and "afford the ACHP a reasonable opportunity to comment"), nor does it modify federal agency stewardship responsibilities as set out in Section 110(a) of the NHPA. It does not relieve the Federal LMAs/PMAs and other agencies of the responsibility to complete Section 110(a) surveys, as appropriate. Likewise, the records check requirement in Section IV of the Program Comment does not alter any Section 110 responsibilities as they relate to identification and evaluation of historic properties. As to the comment that this Program Comment violates the letter and spirit of the NHPA, the ACHP disagrees. The purpose of a Program Comment is to provide an alternate method for complying with Section 106, in lieu of the standard process.

The definitions in Section III prompted widespread concerns among the commenters and numerous recommendations for revisions. Many of the stakeholders found the definitions to be vague and ambiguous, and too narrowly focused. All of the definitions have been fact checked again. Since many reference or are found in the ACHP's regulations, they cannot be modified. Minor revisions to

the language have been made to other definitions as appropriate for clarity. For example, the term "undisturbed soils" is now defined to make it clear how this concept should be applied, and the definition of "right-of-way" has been clarified to include the types of rights-of-way that are specifically addressed in the Program Comment.

The majority of comments regarding the identification and evaluation of historic properties were submitted by SHPOs, THPOs, and Indian tribes. Serious concerns were expressed about the use of the term "records check." The concept was revised to clarify what should be searched and how to determine if historic properties were known to exist within the APE. In those instances where the records check reveals no information on the presence of properties within the APE, the Federal LMA/PMA shall have a qualified professional consult further with the SHPO, THPO, Indian tribes, or NHO to determine if there are areas within the APE with a high probability of containing National Register eligible properties. If so, the area will be avoided. If it cannot be avoided, the Federal LMA/PMA will determine whether a survey or monitoring program is appropriate. Thus, the process has now been further detailed to address the concerns received. The Program Comment includes other criteria that can be applied by the Federal LMA/PMA to

proposed undertakings to exempt them from further Section 106 review when clearly articulated circumstances exist. Applicants would follow these procedures and document for the Federal LMA/PMA the proposed determination of effect for their approval. Section II was added to require the Federal LMA/PMA to consider using the standard Section 106 process for an undertaking should a dispute arise over the use of the Program Comment for that undertaking, and notify all consulting parties of its decision.

Comments submitted about the roles and responsibilities described in Section IV suggested that the activities carried out by Federal LMAs/PMAs should also involve consultation with THPOs and Indian tribes, as appropriate. This Program Comment does not modify the federal trust responsibilities of any agency in regard to Indian tribes. The ACHP believes the Program Comment finds the right balance of consultation and streamlining for review of this category of undertakings. This section was also revised to clarify that when FCC and a Federal LMA/PMA have Section 106 responsibility for a communications undertaking involving private lands and federal lands and property, the Federal LMA/PMA shall be responsible for compliance with Section 106 and FCC shall have no further Section 106 responsibility for that undertaking.

Several SHPOs questioned the appropriateness of relying on previous determinations of eligibility without considering the passage of time. The Program Comment was revised to clarify a time limit for previous determinations of non-eligibility in order to utilize the stated efficiency. Several commenters expressed concerns that the Program Comment focused exclusively on visual effects. Section XIV, Unanticipated Discoveries, was revised to include language clarifying that unanticipated effects include cumulative, atmospheric, and audible effects. This allows consulting parties to notify the Federal LMAs/PMAs of activities that should not be exempted or conditionally exempted under Sections VI to XI.

Concerns were expressed that the Program Comment did not specify timelines or the rules governing denial of applications for communications deployment. It was also suggested that time limits be attached to approving or rejecting applications. Section IV was revised to clarify that Federal LMAs/PMAs, SHPOs, THPOs, Indian tribes, and NHOs should carry out their Section 106 responsibilities consistent with the Section 106 regulations and the FCC NPAs. Section II explains that Federal LMAs/PMAs will review disputes and consider the feasibility of adhering to the standard Section 106 process in lieu of applying the

Program Comment for a particular undertaking. The issue of fees is not addressed in the Program Comment as this is a question that will be decided by Federal LMAs/PMAs and FCC, as appropriate.

The Program Comment will be monitored by consulting parties on a regular basis, and the ACHP will evaluate the effectiveness of the Program Comment in consultation with the Federal LMAs/PMAs and other consulting parties as part of the annual reporting process. Likewise, the ACHP will convene a follow up meeting in December 2018 to reexamine the Program Comment's use and implementation to determine whether any amendments are necessary to continue deploying communications projects without procedural delays.

IV. Final Text of the Program Comment

The following is the text of the Program Comment as issued by the ACHP:

Program Comment for Communications Projects on Federal Lands and Property

Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. 306108 (Section 106), requires federal agencies to "take into account" the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such

undertakings. The ACHP has issued regulations that set forth the process through which federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 (Section 106 regulations).

Under section 800.14(e) of those regulations, agencies can request the ACHP to provide a "Program Comment" on a particular category of undertakings in lieu of conducting separate reviews of each individual undertaking under such category, as set forth in 36 CFR §§ 800.3 through 800.7. Federal Land Managing Agencies (LMAs) and Federal Property Managing Agencies (PMAs) can meet their Section 106 responsibilities with regard to the effects of particular undertakings by taking into account this Program Comment and following the steps set forth therein.

I. Introduction

The purpose of issuing this Program Comment is to assist Federal LMAs/PMAs in permitting and approving the deployment of next generation technologies of communications infrastructure, e.g. 5G, more efficiently. This Program Comment establishes uniform procedures for addressing Section 106 compliance for the collocation of antennae on existing communications towers, including the mounting or installation of an antenna on an existing

tower, building, or structure; installation of aerial communications cable; burying communications cable in existing road, railroad, and utility rights-of-way (ROW); construction of new communication towers (facilities), and removal of obsolete communications equipment and towers (hereinafter, communication deployment undertakings). These undertakings would typically not result in adverse effects to historic properties. Federal LMAs/PMAs may elect to follow the efficiencies set forth in this Program Comment in lieu of the procedures in 36 CFR §§ 800.3 through 800.7 for individual undertakings falling within its scope. Public involvement remains a critical aspect of the Section 106 process; therefore, it is the responsibility of the Federal LMAs/PMAs to determine their method for public engagement based on the agency's established protocols for their communications programs. In addition, for the purpose of this Program Comment, Federal LMAs/PMAs are encouraged to identify a single point of contact and a Lead Federal Agency for the purpose of carrying out Section 106 reviews when communications projects involve multiple federal agencies.

This Program Comment builds upon the precedent of two Nationwide Programmatic Agreements (NPAs) for wireless communications projects executed in 2001 and 2004,

respectively, among the Federal Communications Commission (FCC), the ACHP, and the National Conference of State Historic Preservation Officers (NCSHPO). These NPAs have been successful in establishing efficiencies in the Section 106 review of tower construction and collocations, approaches which the Federal LMAs/PMAs are interested in following for their communications activities, including broadband deployment. The FCC NPAs apply on private lands where an applicant must obtain licenses or registrations. However, when an applicant deploys communications projects that involve private and federal lands, FCC and the applicant or licensee may coordinate with the Federal LMAs/PMAs to apply the terms of the NPAs as well as the provisions in this Program Comment.

Many State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), Indian tribes, and Native Hawaiian organizations (NHOs) have been accustomed to reviewing applications for wireless communications facilities under the terms of the NPAs. As such, the NPAs were expanded to cover communications activities funded under the American Recovery and Reinvestment Act of 2009, through the ACHP's issuance of a Program Comment for the Broadband Initiatives Program and the Broadband Technology Opportunities Program. The 2009

Program Comment allows the U.S. Department of Agriculture, Rural Utilities Service; the U.S. Department of Commerce, National Telecommunications and Information Administration; and the U.S. Department of Homeland Security, Federal Emergency Management Agency, to rely on the FCC's review of tower and collocation undertakings under the NPAs, thereby eliminating duplicative reviews for undertakings subject to FCC licensing or registration. In 2015, the ACHP extended the Broadband Program Comment for an additional 20 years and expanded it to allow additional agencies that fund communication facilities, including the Department of Homeland Security (DHS) and its components, Federal Railroad Administration (FRA), Federal Transit Administration (FTA), and FirstNet, to utilize its terms to comply with Section 106 for those undertakings.

Since the FCC NPAs do not apply on federal lands, Federal LMAs/PMAs can benefit from the use of this Program Comment for the deployment of communications infrastructure and facilities. The recommendation for developing such a program alternative on federal lands derived from the implementation of Executive Order 13616, Accelerating Broadband Infrastructure Deployment (77 FR 36903, June 20, 2012). Once Executive Order 13616 was issued, a Federal Property Working Group (Working Group) was established to

expedite reviews and implement efficiencies for the deployment of broadband infrastructure on federal property. Subsequently the Broadband Opportunity Council (BOC) was established to produce specific recommendations to increase broadband deployment, competition, and adoption through actions within the scope of existing agency programs, missions, and budgets. The efforts of the BOC aligned with those of the Working Group, reaffirming the commitment to implement activities and policies that support increased broadband deployment, particularly in rural and underserved communities. Finally, the importance of broadband infrastructure deployment was reaffirmed with the issuance of Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects (82 FR 8657, January 30, 2017). This Executive Order requires infrastructure decisions to be accomplished with maximum efficiency and effectiveness, while also respecting property rights and protecting public safety. Further, all infrastructure projects, especially projects that are high priority for the nation, such as improving U.S. electric grids and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways are the focus of this executive order.

This Program Comment provides an alternate method for the Federal LMAs/PMAs to meet their Section 106 responsibilities in a flexible manner for communications undertakings. It does not modify the responsibilities of Federal LMAs/PMAs to comply with Section 110(a) of the NHPA. Nor does it relieve Federal LMAs/PMAs and other federal agencies who utilize the Program Comment from completing Section 110(a) surveys when they are appropriate on federal lands.

II. Applicability

This Program Comment applies to communication deployment undertakings that are carried out, permitted, licensed, funded, or assisted by the following LMAs: the U.S. Department of Agriculture's (USDA) U.S. Forest Service (USFS); the Department of the Interior's (DOI) National Park Service (NPS), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), and Bureau of Indian Affairs (BIA); and the following PMAs: the Department of Homeland Security and its components, Department of Commerce; Department of Veterans Affairs; and the General Services Administration. Other federal agencies responsible for carrying out, permitting, licensing, funding, or assisting in the deployment of communications activities, such as FCC and the USDA Rural Utilities Service (RUS), may utilize

this Program Comment to satisfy their Section 106 responsibilities on federal lands after completing the process set forth in Section XVIII.B. below.

Federal LMAs/PMAs may have existing procedures in place, such as a Memorandum of Understanding with a SHPO, THPO, Indian tribe, or NHO to coordinate consultation or to expedite Section 106 reviews, or a program alternative developed pursuant to 36 CFR § 800.14 that addresses agency compliance with Section 106 for certain types of undertakings. If such procedures exist, the Federal LMAs/PMAs may coordinate with the signatories of those agreements or program alternatives to determine whether applying the terms of this Program Comment can substitute for those procedures.

This Program Comment is not applicable to undertakings proposed to be carried out, permitted, licensed, funded, or assisted by any federal agency that would occur on or affect the following federally owned lands: National Historic Landmarks (or the portion thereof that is located on federal land), National Monuments, National Memorials, National Historical Parks, National Historic Trails, National Historic Sites, National Military Parks, and National Battlefields. Should federal agencies or applicants want to deploy communications facilities that

will affect these properties, the responsible federal agency must follow the standard Section 106 process under 36 CFR §§ 800.3 through 800.7 (or another applicable Program Alternative under 36 CFR § 800.14) for the review of such undertakings in consultation with the applicant, SHPO/THPO, Indian tribes, NHOs, and other consulting parties.

This Program Comment is not applicable to undertakings proposed to be carried out, licensed, permitted, or assisted by any federal agency that would occur on or affect historic properties located on tribal lands without the prior, written agreement between that Indian tribe and the federal agency, and notification by the relevant Federal LMA/PMA to the ACHP, NCSHPO, and NATHPO.

Should a dispute arise over applicability of this Program Comment, or its use for any particular undertaking, the Federal LMA/PMA will resolve the dispute and should consider following the standard Section 106 process under 36 CFR §§ 800.3-800.7. The Federal LMA/PMA shall notify all consulting parties regarding its preferred approach to complying with Section 106 for a communications undertaking that is the subject of a dispute.

III. Definition of terms

A. Agency official - It is the statutory obligation of the federal agency to fulfill the requirements of Section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for Section 106 compliance in accordance with 36 CFR part 800. The agency official has approval authority for the undertaking and can commit the federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance. The agency official may be a state, local, or tribal government official who has been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

B. Antenna - An apparatus designed for the purpose of emitting radio frequency radiation, to be operated or operating from a fixed location, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a tower, structure, or building as part of the original installation of the antenna.

- C. Applicant - The party submitting an application for communications permitting, licensing, or lease on federally managed lands or federally managed property.
- D. Area of Potential Effects (APE) - The geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking (source: 36 CFR § 800.16(d)). For purposes of this Program Comment the APE includes the ROW, access routes, and staging areas as defined below.
- E. Collocation - The communications industry's term for the construction of a new antenna or tower, or the mounting or installation of an antenna on an existing tower, building, or structure, for the purpose of transmitting and/or receiving radio frequency signals for communications purposes. It includes any fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that antenna or tower.
- F. Consulting Parties - The parties with whom federal agencies consult in the Section 106 process.

Consulting parties "by right" are those parties a federal agency must invite to consult and include the ACHP, and the relevant SHPO; THPO; Indian tribes, including Alaskan Native villages, Regional Corporations, or Village Corporations; and NHOs; representatives of local governments; and applicants for federal assistance, permits, license and other approvals. "Certain individuals and organizations with a demonstrated interest in the undertaking" may, at the discretion of the relevant agency, also participate as consulting parties "due to their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties" (source: 36 CFR § 800.2(c)).

G. Effect and Adverse Effect - "Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places" (source: 36 CFR § 800.16(i)). "An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity

of the property's location, design, setting, materials, workmanship, feeling, or association" (source: 36 CFR § 800.5(a)(1)).

- H. Facility - Means the secured area including the building, tower, and related incidental structures or improvements, located on federal land.
- I. Ground Disturbance - Any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils. "Undisturbed soils" refers to soils that possess significant intact and distinct natural soil horizons. Previously undisturbed soils may occur below the depth of disturbed soils.
- J. Historic Property - Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes traditional cultural properties (TCPs) and properties of traditional religious and cultural significance to an Indian tribe, Alaskan Native village, Regional Corporation or

Village Corporation, or NHO that meet the National Register criteria (source: 36 CFR § 800.16(1)(1)).

- K. Indian tribe - An Indian tribe, band, nation, or other organized group or community, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. It includes a Native village, Regional Corporation, or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602).
- L. Property Managing Agency - Executive branch agencies and independent agencies that have authority to hold smaller swaths of land to support facilities that are necessary to the agency's mission and vision.
- M. Land Managing Agency - Executive branch agencies that have the authority to hold broad swaths of land for the agency's mission and other particular purposes such as management and administration of activities undertaken to support the agency.
- N. Tribal lands - Defined in 36 CFR § 800.16(x) as including "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities."

- O. Pole - A pole is a non-tower structure that can hold utility, communications, and related transmission lines.
- P. Right of Way - An easement, lease, permit, or license to occupy, use, or traverse public lands (source: Federal Land Policy and Management Act of 1976, As Amended 2001, Title V). For the purposes of this Program Comment, ROW includes a construction, maintenance, road, railroad, or utility ROW.
- Q. Records Check - For the purpose of this Program Comment, a "Records Check" means searching SHPO/THPO, tribal, and relevant federal agency files, records, inventories and databases, or other sources identified by the SHPO/THPO, for any information about whether the following kinds of properties are known to exist within the APE: Properties listed on or formally determined eligible for the National Register; Properties that the SHPO/THPO certifies are in the process of being nominated to the National Register; Properties previously determined eligible as part of a consensus determination of eligibility between the SHPO/THPO and a federal agency or local government representing the Department of Housing and Urban Development; Properties listed and identified in the

SHPO/THPO Inventory that the SHPO/THPO has previously evaluated and found to meet the National Register criteria; and Properties in their files that the SHPO/THPO considers eligible.

R. Staging Area - For the purpose of this Program Comment, a staging area is an area designated for short term use, not to exceed the duration of the project, and is often used for storing and assembling building materials equipment, and machinery, and for parking vehicles, temporary mobile offices, and staging area entrance/exit.

S. Substantial Increase in Size - This occurs when there is an existing antenna on a tower and:

1. Mounting of the proposed additional or replacement antenna would result in an increase of the existing height of the tower by more than 10 percent, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph, if necessary to avoid interference with existing antennae; or

2. Mounting of the proposed additional or replacement antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved (not to exceed four), or more than one new equipment shelter; or

3. Mounting of the proposed additional or replacement antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than 20 feet, or more than the width of the tower structure at the level of the appurtenance (whichever is greater), except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.

T. Native Hawaiian organizations – Defined as “any organization which serves or represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians” (source: 36 CFR § 800.16(s)(1)). “Native Hawaiian”

means any "individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawaii" (source: 36 CFR § 800.16(s)(2)).

U. State Historic Preservation Officer – The state official appointed or designated pursuant to Section 101(b)(1) of the NHPA to administer the state historic preservation program or a designated representative.

V. Tribal Historic Preservation Officer – The tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance who has assumed the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands in accordance with Section 101(d)(2) of the NHPA.

W. Tower – Any structure built for the sole or primary purpose of supporting antennae, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower, but not installed as part of an antenna as defined herein (source: Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, September 2004).

IV. Roles and responsibilities for Section 106 review of communication deployment undertakings

A. For each proposed undertaking subject to this Program Comment, the Federal LMAs/PMAs shall:

1. Consult with the SHPO/THPO, Indian tribes, or NHO to confirm the APE for each individual undertaking and provide notification to the appropriate SHPO/THPO, Indian tribes, or NHO of intent to follow this Program Comment. See Sections IX, X, and XI of this Program Comment regarding the determination of APEs for installation of buried communications cable, communications tower replacement, and new communications tower construction.
2. Identify known eligible or listed historic properties within the relevant APE that may be affected by the proposed communications undertaking by completing a Records Check. If a Records Check reveals no information on the presence of historic properties within the APE, the qualified professional (see Section XIII below) will consult with the SHPO/THPO, Indian tribes, or NHO to determine whether, based on professional expertise, familiarity with the

area, and similar geomorphology elsewhere, the APE includes areas that have a high probability of containing National Register-eligible properties. If so, those areas within the APE will be avoided and the Federal LMA/PMA shall have no further Section 106 responsibility for the undertaking. If they cannot be avoided, the Federal LMA/PMA and applicant will consult with the SHPO/THPO, Indian tribes, or NHO to determine whether a survey or monitoring program should be carried out to identify historic properties, and to determine if any of the conditional exemptions listed in Sections VI-XI apply.

3. Consider whether any of the below criteria apply to a proposed undertaking and if so, notify consulting parties that no further Section 106 review will be required for any undertaking subject to this Program Comment that is proposed to occur within an APE:

- a. that has been previously field surveyed (acceptable to current state standards or within the past 10 years) and there are no known historic properties located within the APE whose National Register qualifying

characteristics would be adversely affected;

or

b. that has been previously disturbed to the extent and depth where the probability of finding intact historic properties is low; or

c. that is not considered to have a high probability for historic properties by qualified professionals and based on professional expertise, familiarity with the area, and similar geomorphology elsewhere.

If none of these criteria apply to the undertaking, proceed to consider whether the conditional exemptions listed in Sections VI-XI are applicable.

4. Use existing agency procedures for implementation of this Program Comment which may include procedures for delegation of authority to the applicant, as appropriate.

5. Use qualified professionals for the disciplines under review in accordance with Section 110 of the NHPA and Section XIII of this Program Comment.

6. Document use of this Program Comment in the Section 106 review, and how it reached its

decisions about the scope and level of effort for any historic property identification, for the undertaking's administrative record.

7. Where a Lead Federal Agency has been designated, and the Lead Federal Agency is in compliance with its responsibilities under this Program Comment, the other non-lead Federal LMAs/PMA's responsible for the subject undertaking shall also be deemed to be in compliance with Section 106 under this Program Comment.

B. The Applicant, on behalf of the Federal LMA/PMA, shall:

1. Notify the Federal LMA/PMA of its proposed application or request for assistance at the earliest possible opportunity in project planning.
2. Carry out and comply with the procedures for any delegation of authority to the applicant if established by the Federal LMA/PMA.
3. Assist the Federal LMA/PMA to determine the APE in consultation with the SHPO/THPO, Indian tribes, and NHO.

4. Conduct a Records Check to identify known historic properties within the APE, when requested by the Federal LMA/PMA.
5. Notify the Federal LMA/PMA if the undertaking is not proposed to be located within or immediately adjacent to a known historic property.
6. Document the recommended determination of effect to historic properties for and subject to the Federal LMA/PMA's approval when requested by the Federal LMA/PMA.
7. Where appropriate to avoid adverse effects to historic properties, ensure the site avoidance plan has been approved by the Federal LMA/PMA and SHPO/THPO, Indian tribes, and NHO. In addition avoidance areas should be clearly marked during staging and construction activities, so construction crews are properly notified.

C. The Federal LMAs/PMAs, SHPOs, THPOs, Indian tribes, and NHOs shall carry out their Section 106 responsibilities in a timely manner and adhere to the timeframes outlined in the FCC NPAs or 36 CFR §§ 800.3 to 800.7. This will avoid delays in the deployment of communications undertakings on federal lands and property.

D. Where FCC has Section 106 responsibility over a proposed communication deployment undertaking that also requires a license, permit, approval, or assistance from a Federal LMA/PMA, the Federal LMA/PMA shall be responsible for the Section 106 compliance for that undertaking and may utilize the terms of this Program Comment, including any applicable exemptions. FCC shall have no further Section 106 responsibilities for that undertaking.

V. Project planning considerations

A. The Applicant shall coordinate early with the Federal LMA/PMA regarding project planning activities. In the event the Applicant proposes a public-private project, the carrier, tower company, or others who may be recognized as the Applicant shall involve the Federal LMA/PMA in pre-application meetings to 1) decide whether this Program Comment will be used; 2) consider the scope of work for the identification of historic properties; 3) discuss protocols for consulting with Indian tribes or NHOs; and 4) discuss alternatives and alternative routes for the undertaking.

B. Noninvasive techniques are encouraged for identification and evaluation of all property types, if feasible, and for testing, including geotechnical

testing, at archaeological sites, TCPs, and other sites important to Indian tribes.

C. Siting projects in previously disturbed areas is encouraged.

VI. Collocation of communications antennae

A. A Federal LMA/PMA may elect to use applicable exclusions established in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended August 2016.

B. A tower collocation requires no further Section 106 review so long as:

1. It will not result in a substantial increase¹ in size of the existing tower; and
2. There are no Section 106 requirements in an existing special use permit, easement, or communications use lease for that site.

C. Collocations on non-tower structures on federal land require no further Section 106 review so long as one of the following conditions apply to the undertaking:

1. The structure is less than 45 years old; or
2. If more than 45 years old, the structure has been previously evaluated and determined not eligible for listing on the National Register; and

¹ Refer to Definition of Terms for substantial increase in size for the purposes of this Program Comment.

- a. The structure is not adjacent to or within the boundary of a National Register-listed or previously determined eligible historic district; and
- b. The structure is not designated as a National Historic Landmark or State Historic Landmark; and
- c. Indian tribes or NHOs have not indicated there are known historic properties of traditional religious and cultural significance within the APE and there will be no cumulative effects to such historic properties.

VI. Above-ground communications connections to and collocations on federal buildings and buildings located on federal land

- A. A Federal LMA/PMA may elect to use applicable exclusions established in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended August 2016, for collocations on federal buildings and non-federal buildings located on federal lands.

B. Communications connections to buildings that have been determined not eligible for listing on the National Register via a previous Section 106 consultation completed in the past 15 years require no further Section 106 review.

C. Communications connections to and collocations on buildings listed in or eligible for listing in the National Register require no further Section 106 review, so long as:

1. All construction complies with the Secretary of the Interior's Standards for Rehabilitation; for example, when a new building entry is required because no entry points exist; and

- a. Communications connections and collocations are placed on buildings behind parapets or the roof's edge in such a manner so that the connections and collocations are not visible from ground level; and existing communications or utility entry points and infrastructure are used to the greatest extent feasible, in and on the historic building; or

- b. If existing communications or utility entry points and infrastructure cannot be

used for the subject collocation, any additional entry points and infrastructure required in or on the historic building are installed in such a way as to minimize adverse effects to historic materials.

VIII. Placement of above-ground communications and cable lines on existing poles or structures

A. The placement of above-ground communications and cable lines on existing poles or structures requires no further Section 106 review, as long as:

1. No new structures or poles need to be added to accommodate the new lines; and
2. The structure or pole is not a historic property and does not contribute to the significance of a historic district.

B. When replacement of structures or poles is planned, the undertaking requires no further Section 106 review, as long as:

1. The replacement structures or poles can be located within the same hole as the original structure and there is no new ground disturbance outside of previously disturbed areas associated with temporary support of the lines; and

2. The replacement structures or poles are within an existing ROW or easement which has been surveyed; and
3. The replacement structures or poles are consistent with the quality and appearance of the originals; and
4. Any proposed height increase of the replacement structures or poles is no more than 10 percent of the height of the originals; and
5. The original pole or structure is not a historic property and does not contribute to a historic district.

C. When infill structures or poles need to be added along an extant line, the undertaking requires no further Section 106 review, as long as:

1. The addition of new structures or poles within existing ROWs or corridors is not proposed within the boundary of a known historic property as identified by the Federal LMA/PMA; and
2. The additional structures or pole(s) are 100 feet or more beyond the boundary of any National Register listed or previously determined eligible historic districts significant for their visual setting; and

3. The additions are of generally consistent quality and appearance with the originals; and
4. The height of any added structure or pole is no greater than 10 percent taller than the height of the originals.

IX. Installation of buried communications cable on federally managed lands

- A. The APE for installation of buried cable will be the width of the construction ROW plus any additional areas for staging or access.
- B. The installation and maintenance of new or replacement communications cable and new or replacement associated vaults for cable access along or solely in previously disturbed areas or in existing communications or utilities trenches within existing road, railroad, and utility ROWs requires no further Section 106 review.
- C. The installation of new or replacement vaults for cable access that are outside of existing road, railroad, and utility ROWs but located solely in previously disturbed soils requires no further Section 106 review so long as there are no known historic properties within the APE for the vaults.
- D. The installation of new or replacement buried communication connections from road, railroad, and

utility ROWs or vaults to a facility requires no further Section 106 review, so long as:

1. There are no known historic properties within the APE for the connection; or
2. The new or replacement communication connections are solely buried in previously disturbed existing rights-of-way up to the existing facility or building or to an overhead line that connects to the facility or building.

E. If the road, railroad, and/or utility ROW, or nearby previously disturbed area, or the area from the ROW to the individual user includes a known archaeological site(s), the undertaking requires no further Section 106 review so long as the depth and extent of the property's intact and undisturbed deposits within the APE can be predicted with relative certainty such that the cable can be directionally bored below the site(s).

X. Communications tower replacement

A. For the purpose of this section, the APE for direct effects for a tower, compound, and associated construction is the area of potential ground disturbance, any areas for staging or access, and any property, or any portion thereof that will be

physically altered or destroyed by the undertaking.

(source: 2004 NPA, as amended)

B. For the purpose of this section, the APE for indirect visual effects is the geographic area in which the undertaking has the potential to introduce visual elements that diminish or alter the integrity.

(source: 2004 NPA, as amended)

1. Unless otherwise established, or previously established through consultation and agreement between the Federal LMA/PMA and SHPO/THPO, Indian tribes, and NHO the APE for visual effects for construction of new facilities or structures is the area from which the tower will be visible:

- a. Within a 0.5 mile radius from the tower site if the proposed tower is 200 feet or less in overall height;
- b. Within a 0.75 mile radius from the tower site if the proposed tower is more than 200 but no more than 400 feet in overall height; or
- c. Within a 1.5 mile radius from the proposed tower site if the proposed tower is more than 400 feet in overall height.

2. These distances are a guideline that can be altered based on an otherwise established agreement and on individual circumstances addressed during consultation with the SHPO/THPO, Indian tribes, and NHO and consulting parties.

C. Replacement of a tower within an existing facility boundary that was previously reviewed pursuant to Section 106, and mitigated as necessary, requires no further Section 106 review so long as:

1. The proposed replacement tower does not represent a substantial increase² in size relative to the existing tower; and
2. The installation of the proposed replacement tower does not involve ground disturbance outside the facility's boundary; and
3. No new mitigation is required to address reasonably foreseeable cumulative effects.

XI. New communications tower construction

A. For the purpose of this section, the direct APE for a tower, compound, and associated construction (staging area, access roads, utility lines, etc.) is the area of potential ground disturbance and any property, or

² Refer to Definition of Terms for substantial increase in size for the purposes of this Program Comment.

any portion thereof, which would be physically altered or destroyed by the undertaking.

B. For the purpose of this section, the indirect APE for visual effects is the geographic area in which the undertaking has the potential to introduce visual elements that diminish or alter the integrity of a historic property, including the landscape.

1. Unless otherwise established, or previously established through consultation and agreement between the Federal LMA/PMA and SHPO/THPO, Indian tribes, and NHO the APE for visual effects for the construction of a new tower is the area from which the tower will be visible:

a. Within a 0.5 mile radius from the tower site if the proposed tower is 200 feet or less in overall height;

b. Within a 0.75 mile radius from the tower site if the proposed tower is more than 200 but no more than 400 feet in overall height; or

c. Within a 1.5 mile radius from the proposed tower site if the proposed tower is more than 400 feet in overall height.

2. These distances are a guideline that can be altered based on an otherwise established agreement or following consultation with SHPO/THPO, Indian tribes, and NHO and consulting parties.

C. For the purpose of this section, new construction of up to three towers within an existing communications compound that has previously been reviewed pursuant to Section 106, and will not adversely affect any identified historic properties within the compound, requires no further Section 106 review so long as the proposed new tower is not substantially larger in size³ than the largest preexisting tower within the existing communications compound boundary.

XII. Removal of obsolete communications equipment and towers

A. Federal LMAs/ PMAs may authorize the removal of obsolete existing communications equipment and towers (the undertaking) and may remove the existing communications equipment or tower with no further Section 106 review as long as the removal undertaking would not create an adverse effect to known historic properties.

³ Refer to Definition of Terms for substantial increase in size for the purposes of this Program Comment.

B. Should a SHPO, THPO, Indian tribe, or NHO object within 30 days after receiving notification that the Federal LMA/PMA proposes to authorize removal of obsolete communications equipment and towers, the Federal LMA/PMA shall comply with the requirements of 36 CFR §§ 800.3 to 800.7 for the proposed removal undertaking.

XIII. Professional qualifications

- A. All tasks implemented pursuant to this Program Comment shall be carried out by, or under the direct supervision of, a person or person(s) meeting, at a minimum, the Secretary of the Interior's Professional Qualifications Standards (48 FR 44716, 44738-39, September 29, 1983) in the appropriate disciplines. However, nothing in this section may be interpreted to preclude Federal LMAs/PMA's from using the properly supervised services of persons who do not meet the qualifications standards.
- B. These qualification requirements do not apply to individuals recognized by THPOs, Indian tribes and NHOs to have expertise in the identification, evaluation, assessment of effects, and treatment of

effects to historic properties of religious and cultural significance to their tribes.

XIV. Unanticipated discoveries

- A. If previously unidentified historic properties or unanticipated effects, including audible, atmospheric, and cumulative effects, to historic properties are discovered during project implementation, the contractor shall immediately halt all activity within a 50 foot radius of the discovery and implement interim measures to protect the discovery from looting and vandalism. Within 48 hours, the Federal LMA/PMA shall notify the relevant SHPO, THPO, Indian tribe, or NHO of the inadvertent discovery, and determine whether a Discovery Plan is necessary.
- B. Native American human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or tribal land will be handled according to Section 3 of the Native American Graves Protection and Repatriation Act and its implementing regulations (43 CFR part 10), and consistent with the Discovery Plan.
- C. The Federal LMA/PMA shall ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during

implementation of an undertaking, all work within 50 feet of the discovery will cease, the area will be secured, and the Federal LMA/PMA's authorized official will be immediately contacted.

D. The Discovery Plan for inadvertent discoveries will include the following provisions.

1. Immediately halting all construction work involving subsurface disturbance in the area of the find and in the surrounding area where further subsurface finds can be reasonably expected to occur, and immediately notify SHPO, THPO, Indian tribes (as appropriate), and NHO of the find;
2. A qualified professional will immediately inspect the site and determine the area and nature of the affected find. Construction work may then continue in the area outside the find as defined by Federal LMA/PMA;
3. Within five working days of the original notification, the Federal LMA/PMA, in consultation with SHPO, THPO, Indian tribes, as appropriate, and NHO, will determine whether the find is eligible for the National Register;

4. If the find is determined eligible for listing in the National Register, the Federal LMA/PMA will prepare a plan for its avoidance, protection, or recovery of information in consultation with the SHPO, THPO, Indian tribes, as appropriate, and NHO. Any dispute concerning the proposed treatment plan will be resolved by the Federal LMA/PMA.
5. Work in the affected area will not proceed until either:
 - a. The plan is implemented; or
 - b. The determination is made that the unanticipated find is not eligible for inclusion in the National Register. Any disputes over the evaluation of unanticipated finds will be resolved in accordance with the requirements of 36 CFR § 800.4(c)(2) as appropriate.

XV. Emergencies

Should the Federal LMAs/PMAs determine that an emergency or natural disaster has occurred during the implementation of any communications deployment activities covered under this Program Comment, the Federal LMAs/PMAs

shall notify the appropriate SHPO, THPO(s), Indian tribes, and NHO(s) within seven days as to how they intend to repair or replace the communications equipment or facilities, or undertake other relevant actions in response to the emergency or natural disaster. Federal LMAs/PMAs shall ensure that any approvals, licenses, or permits issued for these emergency response activities refer to compliance with the terms of this Program Comment.

XVI. Effective date

This Program Comment shall go into effect on May 8, 2017.

XVII. Reporting

A. Federal LMAs/PMAs individually will submit an annual report to the ACHP, NCSHPO, and NATHPO that summarizes the number of projects reviewed under the Program Comment within a calendar year as well as the number of activities that resulted in adverse effects to historic properties. The annual report also will indicate whether any agreements regarding the applicability of this Program Comment on tribal lands have been developed in the past calendar year, and which Indian tribe(s) is a signatory. Annual reports will be submitted December 1 of each year, commencing in 2018.

B. The ACHP shall reexamine the Program Comment's effectiveness based on the information provided in the annual reports submitted by the Federal LMAs/PMA, and by convening an annual meeting with the Federal LMAs/PMAs, NCSHPO, NATHPO, tribal representatives, NHOs, and industry representatives. In reexamining the Program Comment's effectiveness, the ACHP shall consider any written recommendations for improvement submitted by stakeholders prior to the annual meeting.

XVIII. Amendment

- A. The Chairman of the ACHP may amend this Program Comment after consulting with the Federal LMAs/ PMAs and other relevant federal agencies, NCSHPO, NATHPO, tribal representatives, the National Trust for Historic Preservation, and industry representatives, as appropriate. The ACHP will publish a notice in the *Federal Register* informing the public of any amendments that are made to the Program Comment.
- B. Should other federal agencies that propose to carry out, permit, license, fund, or assist in communications activities intend to utilize this Program Comment to satisfy their Section 106 responsibilities on federal lands, they must first

notify the ACHP in writing of their intention. The ACHP will acknowledge in writing the agency's notification within 30 days following receipt of a request, and will put an announcement on its website when it receives such a notification. Upon receipt of the ACHP's acknowledgement, and without requiring an amendment to this Program Comment, the federal agency may utilize the Program Comment.

XIX. Sunset clause

This Program Comment will expire December 31, 2027, unless it is amended prior to that date to extend the period in which it is in effect.

XX. Withdrawal

The Chairman of the ACHP may withdraw this Program Comment, pursuant to 36 CFR 800.14(e)(6), by publication of a notice in the *Federal Register* 30 days before the withdrawal will take effect.

Authority: 36 CFR 800.14(e)

Dated: May 19, 2017

Javier Marques,
General Counsel.

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