Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
NATIONWIDE PROGRAMMATIC	)	
AGREEMENT REGARDING THE	)	WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC	)	
PRESERVATION ACT REVIEW PROCESS	)	
	)	
	)	
	)	

REPORT AND ORDER

Adopted: September 9, 2004 **Released:** October 5, 2004

By the Commission: Chairman Powell and Commissioner Adelstein issuing a joint statement; Commissioner Copps issuing a statement; Commissioners Abernathy and Martin approving in part, dissenting in part and issuing separate statements.

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I. INTRODUCTION AND SUMMARY

1. In this *Report and Order*, we adopt revisions to the Federal Communications Commission's ("Commission") rules to implement a Nationwide Programmatic Agreement ("Nationwide Agreement") that will tailor and streamline procedures for review of certain Commission undertakings for communications facilities under Section 106 of the National Historic Preservation Act of 1966 ("NHPA").[1] On June 9, 2003, we released a Notice of Proposed Rulemaking ("Notice") seeking comment on a draft Nationwide Agreement among the Commission, the Advisory Council on Historic Preservation ("Council") and the National Conference of State Historic Preservation Officers ("Conference").[2] As discussed below, upon consideration of the record, we have determined that, with certain revisions, the Nationwide Agreement will tailor the Section 106 review in the communications

[1] *See* 16 U.S.C. § 470f. "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking."

[2] *See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, Notice of Proposed Rulemaking, 18 FCC Rcd 11,664 (2003) ("Notice"); Errata, 18 FCC Rcd 12,854 (2003). *See also* 68 Fed. Reg. 40,876 (July 9, 2003).

context in order to improve compliance and streamline the review process for construction of towers and other Commission undertakings, while at the same time advancing and preserving the goal of the NHPA to protect historic properties, including historic properties to which federally recognized Indian tribes, including Alaska Native Villages[3], and Native Hawaiian Organizations ("NHOs") attach religious and cultural significance. The Council and Conference have agreed with this determination, and the parties executed the Nationwide Agreement on October 4, 2004. Accordingly, upon the effective date of the rule changes adopted in this *Report and Order*, the provisions of the attached Nationwide Agreement will become binding on affected licensees and applicants of the Commission.[4]

2. Specifically, in this *Report and Order* we:

- Determine that it is appropriate for the Commission to enter into a Nationwide Programmatic Agreement with the Council and Conference pursuant to Section 214 of the NHPA and Section 800.14(b) of the Council's rules;

- Decline to revisit the Commission's existing interpretation of tower constructions as federal undertakings under the NHPA;

- Conclude that the Commission has consulted with federally recognized Indian tribes consistent with the NHPA and the Commission's Policy Statement regarding government-to-government consultation with tribes;

- Adopt categories of undertakings that are excluded from the Section 106 process because they are unlikely by their nature to have an impact upon historic properties. Such undertakings include enhancements to towers; replacement and temporary facilities; certain construction on industrial and commercial properties; certain construction in utility rights-of-way; and construction in SHPO/THPO designated areas;

- Reject proposals for SHPO/THPO opt-out and tribal notice of exclusions;

- Adopt procedures for participation of federally recognized Indian tribes and Native Hawaiian Organizations;

- Outline procedures regarding public participation;

- Adopt procedures regarding the identification and evaluation of historic properties and the assessment of effects, including: (1) Guidelines for establishing the area of potential effects, (2) Streamlined procedures for identifying potentially eligible properties for purposes of the Nationwide Agreement, (3) Standards governing the conduct of archeological surveys, (4) A definition of visual adverse effects, and (5) Standards for the use of qualified experts;

- Establish procedures for SHPO/THPO and Commission review;

[3] As used herein, the term "Indian tribes" encompasses those Indian tribes, including Alaska Native Villages, recognized by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a *et seq*.

[4] The Nationwide Agreement is attached to this order as Appendix B.

- Adopt FCC Forms 620 and 621 for use in submitting Section 106 reviews to SHPOs/THPOs; and

- Amend the language of Section 1.1307(a)(4) to incorporate the Nationwide Agreement into the Commission's rules.

II. BACKGROUND

3. Section 106 of the NHPA requires that a federal agency "prior to the approval of the expenditure of any Federal funds on an undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." Such Federal agency must "afford the [Council] . . . a reasonable opportunity to comment with regard to such undertaking."[5] An "undertaking," in turn, is defined as:

> a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –
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> (A) those carried out by or on behalf of the agency;
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> (B) those carried out with Federal financial assistance;
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> (C) those requiring a Federal permit, license, or approval; and
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> (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.[6]

4. The Council's rules provide that, in performing Section 106 reviews, a Federal agency must, among other things, consult with the appropriate State Historic Preservation Officer ("SHPO") or Tribal Historic Preservation Officer ("THPO").[7] The Council's procedural rules further specify the process under which federal agencies shall perform their historic preservation reviews, including requirements for public and local government participation and for participation of and consultation with federally recognized Indian tribes and NHOs, and the extent to which portions of the review process may be performed by an agency's licensees and applicants.[8]

5. In 1974 and again in 1986, the Commission amended its rules[9] to require, consistent with the NHPA, that its licensees and applicants file an Environmental Assessment when a proposed

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[5] 16 U.S.C. § 470f.

[6] 16 U.S.C. § 470w(7).

[7] 36 C.F.R. § 800.4(a).

[8] 36 C.F.R. §§ 800.2, 800.3. *See also National Mining Association v. Slater*, 167 F.Supp.2d 265 (D.D.C. 2001) (*National Mining Association*), *rev'd in part*, 324 F.3d 752 (2003) (upholding most of the Council's rules as within its statutory authority).

[9] *See Implementation of the National Environmental Policy Act of 1969*, General Docket No. 19555, FCC 74-1042, *Report and Order*, 49 FCC.2d 1313 (1974); *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, General Docket No. 79-163, *Report and Order*, 60 Rad. Reg. 2d (P&F) 13 (1986). *See also Amendment of the Commission's Environmental Rules*, Order, 3 FCC Rcd 4986, 4986, ¶¶ 5-7 (1988) ("1988 Order").

undertaking "may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 C.F.R. Parts 60 and 800.)"[10] The Commission's rules thus require licensees and applicants to initiate the Section 106 process in order to determine whether pre-construction environmental processing by the Commission will be necessary. The Commission, however, remains ultimately responsible for complying with Section 106 of the NHPA.[11]

6. During the late 1990s, coincident with the explosion in tower constructions necessitated by the deployment of wireless mobile service across the country, delays in completing traditional Section 106 reviews began to occur. Applicants, SHPOs and Commission staff began experiencing ever-growing caseloads and backlogs that, it soon became clear, were posing a threat to the timely deployment of wireless service to customers.

7. Faced with the prospect of even larger numbers of towers to be constructed, the Council formed a working group, consisting of representatives of the Council and Commission, SHPOs, Indian tribes, the communications industry, and historic preservation consultants. In August 2000, members of the Working Group began meeting on a regular basis, seeking ways of tailoring the Section 106 process to the unique situation posed by tower constructions (and the collocation of antennas on towers and other structures). While striving to preserve the goal of the NHPA to protect historic properties (including historic properties of cultural and religious importance to Indian tribes and NHOs), the group explored alternatives for streamlining the Section 106 process, when feasible.

8. On September 21, 2000, the Council issued a memorandum clarifying the authority of Commission licensees and applicants to contact SHPOs/THPOs on behalf of the Commission and to take certain other steps in the Section 106 process, while at the same time emphasizing that the ultimate responsibility for complying with Section 106 of the NHPA remains with the Commission.[12] On March 16, 2001, the Commission, Council, and Conference signed an agreement excluding from the Section 106 process most collocations of antennas on existing towers or other structures.[13] The Collocation Agreement recognizes that, with certain exceptions specified in the Collocation Agreement, most collocations are unlikely to affect historic properties, and therefore that it is consistent with the interest of historic preservation to exempt such collocations from routine review.

9. In November 2001, the Working Group began discussing a Nationwide Agreement, consistent with Section 800.14(b) of the Council's rules,[14] to modify the historic preservation review process for communications towers and for antenna collocations that were not covered by the Collocation Agreement. The Working Group sought to tailor the NHPA review process to the communications context in several ways that were reflected in the draft Nationwide Agreement. Commission staff also consulted on a government-to-government basis with representatives of federally recognized Indian tribes

[10] 47 C.F.R. § 1.1307(a)(4). In a note to this provision, the rules cross-reference the NHPA and the Council's rules.

[11] *See* Memorandum from John Fowler, Advisory Council on Historic Preservation, to Federal Communications Commission, State Historic Preservation Officers and Tribal Historic Preservation Officers, dated September 21, 2000, regarding *Delegation of Authority for the Section 106 Review of Telecommunications Projects*.

[12] *Id.*

[13] *See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 16 FCC Rcd 5574, 5575-5581 (Wireless Tel. Bur. 2001) (*Collocation Agreement*), *petition for reconsideration pending*.

[14] 36 C.F.R. § 800.14(b) ("The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings").

regarding the potential for provisions of the draft Agreement to significantly and uniquely affect their historic and cultural interests.

10. On June 9, 2003, the Commission released the Notice, announcing completion of the draft Nationwide Agreement and seeking public comment on a number of issues. Specifically, the Commission sought comment on several issues raised by Working Group members through footnotes to the draft Nationwide Agreement.[15] The Commission also specifically requested comment on several questions relating to how the Nationwide Agreement should be crafted, consistent with the Commission's government-to-government relationship with, and trust responsibility to, federally recognized Indian tribes, and statutory and regulatory provisions governing the Commission's relationship with such Indian tribes and NHOs.[16] Next, the Commission requested comment on procedures for treating Section 106 reviews that are being processed at the time the Nationwide Agreement becomes effective.[17] The Commission also requested comment on a proposed amendment to Section 1.1307(a)(4) of its rules.[18]

11. The Commission received 55 comments and 15 reply comments in response to the Notice. A list of the comments and reply comments, along with short forms by which they are cited, is included with this Order in Appendix A.

III. DISCUSSION

12. For the reasons discussed below, we adopt the proposed amendment to the Commission's rules to implement the proposed Nationwide Agreement, with certain revisions. First, we outline the legal framework, address certain threshold issues, and conclude that we should adopt the Nationwide Agreement as revised. Next, we discuss the record regarding specific provisions of the Nationwide Agreement, and make certain revisions to the Nationwide Agreement reflecting our consideration of the comments. Finally, we discuss the transition to the Nationwide Agreement and the related amendment to Section 1.1307(a) of the Commission's rules.

A. Legal Framework

13. Section 106 of the NHPA requires that a federal agency (in this case the Commission) take into account the effects of its undertakings on historic properties and provide the Council a reasonable opportunity to comment on such undertakings. The Council is statutorily charged with promulgating rules to govern the Section 106 process,[19] and specific procedures implementing that process are set forth in Subpart B of the Council's rules.[20] The Council's rules also permit the Council and the agency, in consultation with the Conference, Indian tribes and NHOs, the public, and other

[15] *Notice*, 18 FCC Rcd at 11665, ¶ 2.

[16] *Id* at 11665-11666, ¶ 3. *See also In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, *Policy Statement*, 16 FCC Rcd 4078, 4080 (2000) (*Tribal Policy Statement)*.

[17] *Notice*, 18 FCC Rcd at 11666, ¶ 4.

[18] *Id* at 11666, ¶ 5. *See also* Errata, 18 FCC Rcd 12,854 (2003).

[19] 16 U.S.C. § 470s ("The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety.")

[20] 36 C.F.R. §§ 800.3-800.13. The Subpart B rules set forth specific procedures for initiating the Section 106 process, identifying historic properties, assessing adverse effects on historic properties, and resolving adverse effects.

consulting parties, to negotiate a specially tailored programmatic agreement to govern implementation of the Section 106 process for a particular federal program.[21] Compliance with the procedures set forth in a programmatic agreement satisfies the federal agency's Section 106 responsibilities for individual undertakings covered by the program.[22] Upon execution by the Council, the federal agency and, in the case of a nationwide program, the president of the Conference, the programmatic agreement takes effect and replaces the procedures set forth in the Council's implementing rules. A programmatic agreement, however, does not affect an agency official's authority under the Council's rules to authorize applicants to initiate consultation with the SHPO/THPO and others, provided that the federal official remains legally responsible for all findings and determinations charged to the official.[23]

14. As noted above, applicants' responsibilities under the NHPA are addressed generally in the Commission's environmental rules (47 C.F.R. §§ 1.1301-1.1319). These rules, consistent with the NHPA, the Council's rules, and advice given by the Council, authorize applicants to initiate the consultation required by the Section 106 process. Specifically, an applicant must submit an environmental assessment to the Commission for facilities that may affect districts, sites, buildings, structures or objects listed or eligible to be listed on the National Register of Historic Properties.[24] Various provisions of the rules refer applicants to Section 106 and to implementing Council rules that govern the Section 106 process in connection with this requirement.[25]

15. The intent of the Nationwide Agreement is to develop streamlined Section 106 procedures that, upon execution of the agreement, will replace those prescribed by the Council's rules. These streamlined procedures are simpler than those prescribed in the Council's rules, but still prescribe an initiating role in the Section 106 process for applicants. The Nationwide Agreement itself was negotiated in accordance with the procedures set forth in Section 800.14(b)(2) of the Council's rules. In addition, because the Nationwide Agreement as proposed and as adopted would impose new, affirmative obligations on applicants, the Commission initiated a rulemaking proceeding proposing amendments to Section 1.1307(a)(4).[26] We have considered the comments filed in response to the notice of proposed rulemaking in adopting the Nationwide Agreement and in amending section 1.1307(a)(4) to specify that applicants must follow the procedures prescribed therein for any covered undertaking.

B. Threshold Issues

16. Although most commenters generally support adoption of a Nationwide Agreement, several parties raise various threshold concerns. As discussed below, we conclude that adoption of the Nationwide Agreement substantially as proposed is appropriate and consistent with the requirements and intent of the NHPA. We decline to revisit, as beyond the scope of this proceeding, the Commission's existing interpretation that the construction of antennas and support facilities is a federal undertaking under the NHPA, and we briefly review the basis for that interpretation. Finally, we conclude that the negotiation and adoption of the Nationwide Agreement and related amendment to our rules complies with

[21] *Id.,* § 800.14(b). Section 800.14(b)(2)(i) sets forth the consultation requirements in developing programmatic agreements for agency programs.

[22] *Id.*, § 800.14(b)(2)(iii).

[23] *Id*., § 800.2(c)(4).

[24] 47 C.F.R. § 1.1307(a)(4).

[25] *Id*., §§ 1.1307(a), 1.1308(b) Note.

[26] *See* 5 U.S.C. § 553; 47 C.F.R. § 1.411.

the Commission's government-to-government relationship with and trust responsibility to federally recognized Indian tribes.

1. The Appropriateness of a Nationwide Agreement

17. Most commenters, including representatives of the communications service and infrastructure industries[27] and historic preservation interests,[28] support adoption of a Nationwide Agreement with only certain changes. These commenters state that the Nationwide Agreement will promote important goals, such as developing clear, concise, and streamlined procedures for consulting with SHPOs/THPOs and excluding undertakings that are unlikely to impact historic properties.[29] While commenters caution that the Nationwide Agreement must be drafted in a manner that reduces regulatory burdens and unnecessary paperwork,[30] overall they believe the draft agreement achieves these goals in a manner that protects historic properties and is consistent with the NHPA.

18. Several commenters, however, oppose either the Nationwide Agreement as written or the concept of a Nationwide Agreement. For example, Nextel argues that the Nationwide Agreement would add layers of regulatory burdens and inhibit tower construction, and that it therefore would be inconsistent with consumers' interest in ubiquitous service and adversely impact public safety.[31] Nextel further contends that the Nationwide Agreement is inconsistent with the Commission's deregulatory policies, and in particular with the policy of eliminating local regulation of radiofrequency emissions.[32] Certain other commenters argue, in contrast, that the Nationwide Agreement insufficiently protects historic properties, and that the Commission should instead rely upon and improve its administration of the Council's current rules.[33] Two SHPOs oppose the principle of a Nationwide Agreement, arguing instead that the Commission should enter into state-by-state agreements tailored to local conditions.[34] A third SHPO contends that tower constructions are not as frequent as they were in the past, and thus the Nationwide Agreement is not necessary at this time.[35]

19. Although we agree, as discussed below, that certain changes to the document are appropriate, we conclude that signing the Nationwide Agreement advances the public interest. Section 800.14(b) of the Council's rules, promulgated pursuant to the Council's authority under Section 214 of the NHPA,[36] anticipates that, after due deliberation among affected parties, a federal agency, the Council

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[27] AWS Comments at 2; Crown Comments at 2; PCIA Comments at 7-8; WCA Comments at 1-2; SBC Reply Comments at 1-2.

[28] Maryland SHPO Comments at 1-2; National Trust Comments at 1.

[29] PCIA Comments at 8; Western/T-Mobile Comments at 3.

[30] Verizon Comments at 3; Western/T-Mobile Comments at 3; AWS *et al.* Reply Comments at 1; US Cellular Reply Comments at 1-2.

[31] Nextel Comments at 2-14; Nextel Reply Comments at 2-5.

[32] Nextel Comments at 8-10 (citing Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, *Memorandum Opinion and Order*, WT Docket No. 02-100, 18 FCC Rcd 13,126 (Wireless Tel. Bur. 2003), *application for review pending*).

[33] *See* Maine SHPO Comments at 1-2; Rotenstein Comments at 1-2, 4-5.

[34] Georgia SHPO Comments at 2-3; Wyoming SHPO Comments at 2.

[35] Idaho SHPO Comments at 1.

[36] 16 U.S.C. § 470v.

and the Conference may enter into a nationwide programmatic agreement that streamlines the Section 106 review process and tailors it to the particular context of the subject matter to which it is applied.[37] Consistent with this provision, the Nationwide Agreement streamlines and tailors the NHPA review process for tower constructions in a variety of ways, including:

- Identifying classes of undertakings that, due to the small likelihood that they will impact historic properties, are excluded from routine Section 106 review;
- Developing clear and concise principles governing the initiation of contact with Indian tribes and NHOs as part of the Section 106 process;
- Clarifying methods for involving the public in the process;
- Providing definitional and procedural guidance for the identification and evaluation of historic properties, and the assessment of effects on those properties;
- Establishing procedures, including timelines, for SHPO/THPO and Commission review;
- Providing procedural guidance for situations where construction occurs prior to compliance with Section 106; and
- Prescribing uniform filing documentation.

20. Accordingly, we disagree with arguments that the Nationwide Agreement will obstruct deployment and impede public safety by adding regulatory complexity to the Section 106 review process. To the contrary, we find, on balance, that the measures described herein will relieve unnecessary regulatory burdens, and therefore will promote public safety and consumer interests, consistent with our deregulatory initiatives. We note that numerous commenters support this evaluation. While the procedures prescribed in the Nationwide Agreement are not free of complexity, on the whole they are less burdensome than the current process under the Council's rules, and neither we nor any commenters have identified substantially simpler solutions that would be consistent with our responsibilities under Section 106 of the NHPA.

21. At the same time, we conclude that the Nationwide Agreement will sufficiently protect historic properties. In this regard, we note that the NHPA and the Council's rules do not require that federal undertakings avoid all impacts on historic properties. Rather, Section 106 requires that federal agencies "take into account" the effect of their undertakings on historic properties,[38] which the Council's rules interpret to include, among other things, a "reasonable and good faith effort" to identify historic properties.[39] Moreover, in authorizing the Council to promulgate regulations under which federal undertakings may be exempted from any and all provisions of the NHPA, Section 214 of the NHPA directs the Council to "tak[e] into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties."[40] We interpret these provisions to mean that, in formulating exemptions and prescribing processes, the Council and the federal agency need not ensure

[37] 36 C.F.R. § 800.14(b).

[38] 16 U.S.C. § 470f.

[39] 36 C.F.R. § 800.4(b)(1).

[40] 16 U.S.C. § 470v.

that every possible effect on a historic property is individually considered in all circumstances, but that they should take into account the likelihood and potential magnitude of effects in categories of situations. Indeed, doing so should advance historic preservation in the long run, consistent with the intent of the NHPA, by enabling all parties to focus their limited resources on the cases where significant damage to historic properties is most likely.[41] Thus, the standard of review the Nationwide Agreement must provide is not one of perfection but one of reasonableness, taking into account both the likelihood that adverse effects will not be considered in some instances and the overall benefits to be obtained from streamlining measures.

22. Within this framework, we find it significant that both the Council and the Conference, whose principal missions include administering Section 106 and protecting historic properties, have agreed to sign the Nationwide Agreement. Like these expert agencies, we conclude, as discussed in the following sections, that the procedures and standards set forth in the Nationwide Agreement, while streamlining the process, are sufficient to minimize the likelihood that facilities construction will have unreviewed and unmitigated effects on historic properties, consistent with the NHPA. Moreover, although construction in some services has slowed under current economic conditions, construction remains significant in many areas, and is likely to increase in the future as usage expands and new services are deployed. Thus, reducing unnecessary obstacles to the deployment of facilities remains an important public interest concern and a significant goal for the Commission.

23. Finally, we disagree with commenters who advocate state-by-state agreements. Although a state-by-state process could provide some relief from needless burdens, it would add immeasurable complexity for service providers and tower companies, which often operate across many states or nationwide. We believe that the Nationwide Agreement embodies general principles that are applicable on a nationwide basis, while leaving appropriate leeway for decisions in individual cases to reflect local conditions.[42] Like the Council and the Conference, we therefore conclude that a Nationwide Agreement is appropriate to address the issues before us.

2. Status of Constructions as Federal Undertakings

24. As a preliminary matter, a number of commenters argue that construction of a communications tower is not a federal undertaking under Section 106 of the NHPA.[43] For example, according to Sprint, in cases where licensees receive "blanket" authorization to operate within a specified geographic area, but do not need to obtain site-by-site Commission approval or licensing for each tower constructed within that area, the Commission has no authority to impose NHPA review requirements.[44] Similarly, some commenters also argue that the act of registering a tower under the preconstruction tower registration requirement in Part 17 of the Commission's rules is merely a ministerial act and does not

[41] AWS Comments at 3; AWS *et al.* Reply Comments at 3.

[42] *See, e.g.,* Appendix B at B-16 to B-17, *infra* (Nationwide Agreement, § VI.C) (establishing presumptive Area of Potential Effects (APE) for visual effects, while permitting use of alternative APE where circumstances warrant).

[43] CTIA Comments at 40-41; CTIA *ex parte* presentation (May 14, 2004); NAB Comments at 2-4 (tower constructions are not a "major federal action" for purposes of NEPA; only federal involvement is when constructor files Form 301); PCIA Comments at 31-32; Sprint Comments at 11-21; Verizon Comments at 3-6; AWS *et al.* Reply Comments at 9. *See also* American Tower Comments at 8-10 (arguing that tower constructions by non-licensees are not federal undertakings).

[44] Sprint Comments at 9. *See also, e.g.*, PCIA Comments at 40 ("The Commission does not generally approve the siting of any wireless telecommunications tower.")

constitute an undertaking under the NHPA.[45] The Notice did not seek comment on the question whether the Commission should, assuming that it possesses statutory authority to do so, continue our current treatment of tower construction as an "undertaking" for purposes of the NHPA. Therefore, we decline to revisit that public-interest question in this docket. Unless and until we undertake the reexamination and determine that it is appropriate to amend our rules, however, we believe our existing policies treating tower construction as an undertaking under the NHPA reflect a permissible interpretation of the Commission's authority under Section 319(d) of the Act to issue construction permits for radio towers, as well as our authority under Section 303(q) governing painting and/or illumination of towers for purposes of air navigation safety.

25. Specifically, an "undertaking" under the NHPA means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, *including…those requiring a Federal permit[,] license, or approval*."[46] Section 319(a) of the Act generally mandates preconstruction authorization from the Commission as a precondition to obtaining a license.[47] Section 319(d) authorizes the Commission to waive preconstruction approval for facilities constructed in connection with various categories of licenses if it determines that "the public interest, convenience, and necessity would be served" by such a waiver.[48] When it adopted its geographic licensing procedures for various services, the Commission determined that waiving preconstruction approval for all facilities, as permitted by section 319(d), would serve the public interest by, among other things, expediting the provision of communications services to the public.[49]

26. At the same time, the Commission, through its rules for environmental processing, expressly retained a limited approval authority for all tower construction to the extent necessary to ensure compliance with federal environmental statutes, including the NHPA.[50] Those Commission rules provide that any blanket authorization to construct facilities is conditioned on the applicant's compliance with federal environmental statutes, including the NHPA.[51] Thus, if a facility for which no preconstruction authorization is required may affect historic properties, the Commission's rules currently provide that an environmental assessment "shall be submitted by the licensee or applicant and ruled on by the Commission, and environmental processing…shall be completed…prior to the initiation of construction of the facility."[52] Because the Commission, upon consideration of Section 319 and federal environmental statutes, retained these limited approval requirements for facilities constructed in connection with geographic area licenses, we believe the Commission currently has sufficient approval authority to trigger the requirements of section 106. For purposes of this proceeding, however, we need not and do not

[45] American Tower Comments at 9; Sprint Comments at 11-14.

[46] 16 U.S.C. § 470w(7) (emphasis added).

[47] *See* 47 U.S.C. § 319(a) (providing that "[n]o license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission.").

[48] 47 U.S.C. § 319(d).

[49] *See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band,* 12 FCC Rcd 19079 ¶ 12 (1997) (discussing increased flexibility afforded to licensees to manage their spectrum and reduction in administrative burdens and operating costs where prior approval for construction under a geographic license is not required).

[50] *See, e.g.*, 47 C.F.R. §§ 1.1307(a)(4), 1.1311(b), 1.1312(b).

[51] *Amendment of Environmental Rules*, 5 FCC Rcd 2942 (1990) (requiring licensees and applicants to ascertain prior to construction whether proposed facilities may have a significant environmental effect).

[52] 47 C.F.R. § 1.1312(b).

decide whether circumstances might arise in which it would be appropriate to strike a different balance under section 319(d)'s public interest standard.

27. Similarly, we believe that the tower registration procedure under our current rules is a permissible implementation of statutory authority that we have reasonably considered to trigger NHPA compliance. Under section 303(q) of the Act, the Commission has chosen to implement rules requiring that towers meeting certain height and location criteria be registered with the Commission prior to construction.[53] The registration process provides a permissible means by which the Commission may assure, prior to construction, that towers do not pose a risk to air safety. The pre-construction registration requirement, whereby any owner proposing to construct a new antenna structure must supply the Commission with the requisite FAA clearance, may be viewed as effectively constituting an approval process within the Commission's section 303(q) authority. As such, the Commission permissibly has viewed tower registration as a federal undertaking, in which "imposition of environmental responsibilities on the structure owner is justified."[54]

28. Sprint also points to section 332(c)(7) of the Act, which preserves local zoning authority, to support its view that the Commission "has no statutory authority over the placement, construction, and modification of personal wireless service facilities."[55] However, section 332(c)(7)'s text and legislative history indicate that Congress intended to do no more than limit preemption of matters traditionally within the domain of local zoning authorities.[56] That provision's express *preservation* of local zoning authority over "decisions regarding the placement, construction and modification" of communications towers, moreover, does not evince an intent to invest local zoning authorities with exclusive jurisdiction over tower siting decisions notwithstanding federal environmental laws.[57]

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[53] 47 U.S.C. § 303(q) (authorizing the Commission "to require the painting and/or illumination of radio towers" if it determines there is a "reasonable possibility" that such towers may create a hazard to air navigation). *See also* 47 C.F.R. §§ 17.4, 17.7.

[54] *Streamlining the Commission's Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272, 4289 ¶ 41 (1995) ("We believe that by requiring owners to assume responsibility for environmental compliance at the outset, irreparable harm to the environment may be avoided. Moreover, we believe that such a requirement will effectuate the implementation of federal environmental policies which require that environmental considerations be integrated into the early planning stages of authorized actions and undertakings."); *see also State of Maryland Department of Budget and Management*, 16 FCC Rcd 17130 (Wireless Tel. Bur 2001) (granting application for antenna structure registration to construct public safety communications tower, including environmental assessment, and denying petitions to deny).

[55] Sprint Comments at 16 (citing 47 U.S.C. § 332(c)(7)(A)).

[56] *See Promotion of Competitive Networks in Local Telecommunications Markets*, 19 FCC Rcd 5637 (2004), *citing* S. Conf. Rep. No. 230, 104th Cong., 2d Sess 51 (1996) ("The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters. . . The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.").

[57] Notably, the provision is silent with respect to the Commission's environmental rules except to expressly preserve the authority of the Commission's regulations concerning radio frequency emissions. 47 U.S.C. § 332(c)(7)(B)(iv) ("No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions").

3. Consultation with Federally Recognized Indian Tribes

29. NATHPO argues that we should not adopt the proposed Nationwide Agreement at this time for the specific reason that federally recognized Indian Tribes were not sufficiently involved in its negotiation and drafting. Under the NHPA, the Council's rules and Commission policy, NATHPO states, the Commission is required to consult government-to-government with tribal governments and NHOs prior to adopting the Nationwide Agreement.[58] The Commission failed to satisfy this obligation, NATHPO argues, because only those tribes with substantial time and resources were able to participate in developing the Nationwide Agreement. Had the Commission meaningfully consulted with tribes, NATHPO contends, the resulting agreement would have better served the interests of all parties.[59]

30. The Commission recognizes that as an independent agency of the federal government, we have a trust responsibility to and a government-to-government relationship with federally recognized Indian tribes. Accordingly, it is our stated policy to consult, to the extent practicable, with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.[60]

31. We conclude that the actions our staff has undertaken in developing the Nationwide Agreement fulfill the commitment made in the *Tribal Policy Statement* through outreach and information, scoping issues and questions, and proactively inviting the meaningful participation of tribes in satisfaction of the Commission's trust responsibility toward and duty to consult with Indian tribes. Our actions in this matter were not limited to inviting written comment from Indian tribes. The Commission invited representatives of Tribal governments to participate in deliberations of the Working Group, and in a series of communications to all federally recognized tribes, Commission staff scoped the issues and specifically invited meaningful consultative discussion.[61] Commission staff also distributed materials and discussed the status of the Nationwide Agreement at several tribal conferences during the period of preparation and negotiation.[62] These initial efforts led to direct substantive discussions between Commission staff and representatives of Tribes, particularly USET and the Navajo Nation. As a result of these consultations, we

[58] NATHPO Comments at 1-3.

[59] *Id*. *See also* Navajo Nation Comments at 1-2 (Commission has not consulted with tribes on Nationwide Agreement); Cheyenne River Sioux Tribe Comments at 1(same); Confederated Tribes of the Umatilla Indian Reservation Comments at 2 (stating that it was not consulted on a government-to-government basis regarding Collocation Agreement).

[60] *See Tribal Policy Statement*, 16 FCC Rcd at 4080.

[61] *See* Letter from Jeffrey S. Steinberg, Wireless Telecommunications Bureau, Federal Communications Commission, to all federally recognized American Indian tribes, Alaska Native Villages, and Native Hawaiian Organizations (dated June 9, 2003); Letter from Jeffrey S. Steinberg, Wireless Telecommunications Bureau, Federal Communications Commission, to all federally recognized American Indian tribes, Alaska Native Villages and Native Hawaiian Organizations (dated September 5, 2002). *See also* Wireless Telecommunications Bureau and Mass Media Bureau invite Indian Tribes, Alaskan Native Villages and Native Hawaiian Organizations to Participate in Developing State Prototype Programmatic Agreement Regarding Historic Properties, Listed or Eligible for Listing in the National Register of Historic Places, *Public Notice*, DA 02-312 (Wireless Tel. Bur. and Mass Media Bur., rel. February 11, 2002).

[62] Commission staff members spoke or consulted with representatives of federally recognized tribes concerning the proposed Nationwide Agreement at the following conferences: National Summit on Emerging Tribal Economies, Phoenix, Arizona, September 17-19, 2002; Infrastructure Conference, Las Cruces , New Mexico, October 29, 2002; National Congress of American Indians ("NCAI") Conference, San Diego, California, November 12, 2002; Winter Conference of the Affiliated Tribes of Northwest Indians, Portland, Oregon, February 10-11, 2003; NATHPO Conference, Mille Lacs Reservation, Minnesota, June 23-26, 2003.

put out for public comment both the Navajo Nation's proposal for notifying Tribes of otherwise excluded undertakings and a USET proposal regarding tribal and NHO participation in considering proposed undertakings, and we are adopting aspects of the USET proposal in this *Report and Order*. Our consultation with USET has continued since we released the Notice,[63] and we have also kept other tribal organizations apprised of our work and have invited them and their members to participate. Finally, many Indian tribes and NHOs filed comments in this proceeding, and federally recognized tribes were encouraged to make *ex parte* presentations to members of the Commission staff regarding this rulemaking. Taken as a whole, we believe this record demonstrates that we have consulted to the extent practicable with federally recognized tribes in adopting this agreement.

32. We recognize that the execution of the Nationwide Agreement does not end our ongoing government-to-government relationship with federally recognized Tribes. Accordingly, we fully intend to continue regular consultation on a government-to-government basis, consistent with resource constraints, regarding the implementation of the Nationwide Agreement as well as other aspects of our relationship.[64] In connection with this ongoing effort, we anticipate that staff of the Wireless Telecommunications and Consumer & Governmental Affairs Bureaus will continue to attend tribal conferences and meet with tribal government representatives both on and off tribal lands.

C. Provisions of the Nationwide Agreement

1. Excluded Undertakings

33. Section 214 of the NHPA permits the Council to exempt from Section 106 review classes of federal undertakings that would be unlikely to impact historic properties.[65] Pursuant to this authority, the draft Nationwide Agreement lists certain types of Commission undertakings that would be exempt from completing the Section 106 process under the NHPA. Such proposed exclusions include modifications to towers; certain replacement and temporary towers; and certain towers constructed on industrial and commercial properties, along certain rights-of-way, and in SHPO/THPO-designated areas. These excluded undertakings were the subject of long-running negotiation among the participants in the Working Group.

34. Most commenters support the concept of using the Nationwide Agreement to exempt certain classes of undertakings from Section 106 review, although they may disagree with some of the proposed exclusions.[66] Some commenters, however, are skeptical about creating exclusions in general.

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[63] *See* USET Resolution No. 2004:038, passed at USET Impact Week Meeting in Arlington, Virginia, February 2, 2004 (recognizing the exemplary commitment of the Commission over the last year and a half to work with USET on a government-to-government basis and engage in meaningful consultation).

[64] *See USET MOU*, § III.C (Commission and USET will meet at one-year intervals to review their experiences under the *USET MOU* and other aspects of their relationship). *See also* letter from Keller George, President, United South and Eastern Tribes, Inc. to Chairman Michael K. Powell, Federal Communications Commission (August 23, 2004) (expressing appreciation for the Commission's commitment to consult with tribes regarding historic preservation issues).

[65] *See* 16 U.S.C. § 470v (authorizing the Council to promulgate regulations under which certain Federal agency activities may be exempted from any and all provisions of the NHPA "when such exemption is determined to be consistent with the purposes of this Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.").

[66] *See, e.g.,* American Tower Comments at 11; Verizon Comments at 6; Western/T-Mobile Comments at 10-11.

These commenters argue that the exclusions in the draft Nationwide Agreement draw arbitrary distinctions and do not effectively protect historic properties from harm.[67]

35. We conclude that categorically excluding from routine Section 106 review categories of construction that are unlikely adversely to impact historic properties is appropriate and in the public interest. In addition to facilitating the timely deployment of service, properly drafted exclusions can promote historic preservation both by conserving the Commission's, SHPOs'/THPOs' and the Council's resources to review more important cases, and by providing incentives for applicants to locate facilities in a manner that will render effects on historic properties less likely.[68] As discussed above, the NHPA does not require perfection in evaluating the potential effects of an undertaking in every instance.[69] To the contrary, we believe Section 214 contemplates a balancing of the likelihood of significant harm against the burden of reviewing individual undertakings. Moreover, the provisions in the Nationwide Agreement for ceasing construction and notifying the Commission and other interested parties upon discovery of previously unidentified historic properties provides a safeguard in the unusual instances where the availability of an exclusion might otherwise cause an adverse impact to be overlooked.[70]

36. In the following sections, we first address each of the specific exclusions proposed in the draft Nationwide Agreement. We determine to adopt the proposed exclusions for tower enhancements, replacement towers, temporary facilities, and SHPO/THPO-designated areas, with certain revisions. We also adopt more limited, simplified exclusions for construction on certain industrial and commercial properties, and along communications or utility rights-of-way. We then consider and reject proposals to permit states to opt out of particular exclusions and to require case-by-case notice to federally recognized Indian tribes of all excluded undertakings, and we address documentation and recordkeeping practices.

a. The Individual Excluded Undertakings

i. Enhancements to Towers

37. The draft Nationwide Agreement excludes certain enhancements to towers from NHPA review.[71] Specifically, it excludes the "Modification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement."[72] A substantial increase in size, in turn, is defined in the Collocation Agreement by reference to the extent of any increase in the tower's height, the installation of new equipment cabinets or shelters, the extent of any new protrusion from the tower, and excavation outside the current tower site and any access or utility easements.[73] Enhancements to towers that involve

[67] *See* EBCI Comments at 2; Maine SHPO Comments at 1; New York Botanical Garden Reply Comments at 16; Tennant Reply Comments at 2.

[68] *See* SBC Comments at 4-5.

[69] *See* ¶¶ 21-22, *supra.*

[70] Appendix B at B-25, *infra* (Nationwide Agreement, § IX); *see also 3*6 C.F.R. § 800.13; 47 C.F.R. § 1.1312(d).

[71] *Notice*, 18 FCC Rcd at 11678. The draft Nationwide Agreement refers to "modification" of a tower. This terminology, however, creates potential for confusion with modification of a license. *See* 47 C.F.R. § 1.929(a)(4) (application or amendment requesting authorization for a facility that would have a significant environmental effect constitutes a major license modification). For clarity, therefore, the final Nationwide Agreement uses the term "enhancement."

[72] *Id*.

[73] *Collocation Agreement*, 16 FCC Rcd at 5577.

collocations and do not result in a substantial increase in size are excluded from review under the Collocation Agreement.

38. Comments on the exclusion for tower enhancements generally fall into two categories. While industry commenters support the concept that such enhancements should not be reviewed, several of these commenters argue that such changes are not federal undertakings and thus the category should not be designated as an exclusion.[74] Like the servicing or maintenance of a tower, they argue, no federal decision making is involved in an enhancement and thus such activities are not federal undertakings. Furthermore, Crown argues, if the Commission adopts the proposed provision for notice of excluded undertakings to Indian tribes, misclassifying certain changes as federal undertakings would seriously disrupt routine activities associated with tower ownership.[75] On the other hand, the National Trust contends that the exclusion for certain tower enhancements should apply only if the existing tower went through the historic preservation review process.[76] Similarly, Eastern Shoshone Tribe supports a tower enhancement exclusion only if the original tower was reviewed by appropriate tribes.[77] The California SHPO requests clarification of the term "maintenance".[78]

39. We conclude that it is appropriate and necessary to include in the Nationwide Agreement an exclusion for tower enhancements that constitute federal undertakings, do not involve collocations, and do not result in a substantial increase in size. Many changes to tower sites, such as building a fence around a tower, replacing an air conditioner or electric generator, or planting shrubs on the grounds, are in the nature of service or maintenance and are not federal undertakings. Thus, the Nationwide Agreement provides explicitly that Undertakings do not include maintenance and servicing of equipment.[79] Other changes, however, are federal undertakings because they materially change the nature of the project that originally required Section 106 review. Thus, a change is a federal undertaking if it alters an essential federal characteristic of the tower or its antennas. For instance, a change in the design of a tower or the alteration of an existing antenna that modifies its visual profile constitutes a federal undertaking because it would have been reviewed under Section 106 had it been proposed at the time of initial construction. Any other interpretation would permit applicants to avoid Section 106 review by initially constructing a non-intrusive tower and then modifying it substantially under the guise of a nonfederal alteration.

40. Because certain changes to towers that do not involve collocations are federal undertakings, we conclude that such enhancements should be excluded from review if they do not involve a substantial increase in size. Under the Collocation Agreement, a change to a tower occurring in conjunction with a collocation that does not result in a substantial increase in size is excluded from Section 106 review. In some instances, a tower owner may find it beneficial to make a similar type of enhancement that is not associated with an immediate collocation; for example, in anticipation of potential future collocation or to strengthen the tower. Such a change would have the same minimal likelihood of affecting historic properties as if it were accompanied by a collocation. Therefore, it should be excluded from Section 106

[74] *See, e.g.,* American Tower Comments at 11; Crown Comments at 5-8; CTIA Comments at 34; PCIA Comments at 30-31; Western/T-Mobile Comments at 11; Nextel Reply Comments at 7; PCIA Reply Comments at 15.

[75] Crown Castle *ex parte* presentation (Dec. 5, 2003).

[76] National Trust Comments at 1. *See also* Alabama SHPO Comments at 1 (exclusion should apply if tower was previously reviewed or all excavation will be on previously disturbed ground).

[77] Eastern Shoshone Tribe Comments at 3-4; White Mountain Apache Tribe Comments at 1 (eliminate exclusions for towers built without benefit of Section 106 review).

[78] California SHPO Comments at 2.

[79] Appendix B at B-4, *infra* (Nationwide Agreement, § I.B).

review under the same standard. We note that because we are excluding such enhancements from review, and we are not adopting the proposal for notice of excluded undertakings to Indian tribes,[80] we need not define with precision the distinction between changes to a tower that are or are not federal undertakings.

41. Under the Collocation Agreement, collocations on towers constructed after March 16, 2001, are not excluded unless the tower has previously completed the Section 106 review process. In drafting the Collocation Agreement, the parties recognized that many towers had previously been built without Section 106 review. Because these towers already existed and in the vast majority of cases did not have an adverse effect on historic properties, the signatories reasoned that permitting collocations on such pre-existing towers without review, absent substantial evidence of an adverse effect from either the proposed collocation or the underlying tower, would minimize the potential for adverse effects from new construction by creating an incentive to collocate. For towers constructed after the effective date of the Collocation Agreement, by contrast, excluding collocations from review where the underlying tower had not been reviewed might create a perverse incentive for companies to build towers without review in the hope of later attracting collocations. We apply the same prior review limitation to tower enhancements that occur without accompanying collocations as we do for collocations. Otherwise, a party might be able to avoid the limitation in the Collocation Agreement by first altering a tower and then adding an excluded collocation. Thus, the exclusion for enhancements will apply to all towers constructed on or before March 16, 2001, and to towers constructed after that date that went through the Section 106 process.

ii. Replacement Towers

42. Similar to the exclusion for enhancements to towers, the draft Nationwide Agreement permits the construction of new towers without NHPA review when the new tower replaces an existing tower and does not involve a substantial increase in size, as defined in the Collocation Agreement. In addition, unlike the exclusion for enhancements, the replacement tower exclusion permits construction and excavation within 30 feet in any direction of the leased or owned property previously surrounding the tower.[81]

43. Several commenters support the replacement tower exclusion.[82] Replacement towers, these commenters argue, will permit additional collocations and thus will reduce the need for new towers.[83] Commenters further state that it is often infeasible to locate a replacement tower precisely within the existing site boundaries, and thus the 30-foot expansion provision is necessary.[84] PCIA argues that the minimal potential for impact upon archeological resources from a replacement tower is insignificant when compared with the potential intrusion of a new tower located elsewhere.[85] Finally, AWS *et al.* point out that Section IX of the draft Nationwide Agreement, which requires certain procedures when historic resources are unexpectedly discovered during construction, will protect against unexpected impacts to archeological sites.[86]

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[80] *See* ¶¶ 75-77, *infra.*

[81] *Notice*, 18 FCC Rcd at 11678.

[82] PCIA Comments at 11. *See also* American Tower Comments at 11 (good example of streamlining); Verizon Comments at 6; Western/T-Mobile Comments at 11; AWS *et al.* Reply Comments at 13-14.

[83] PCIA Reply Comments at 16-17.

[84] PCIA Comments at 11.

[85] PCIA Reply Comments at 16-17.

[86] AWS *et al.* Reply Comments at 13. *See also* PCIA Reply Comments at 17.

44. The West Virginia SHPO opposes the proposed exclusion, arguing that it would result in significant impact on archeological resources.[87] Several other commenters, including the Ohio and Wyoming SHPOs, the National Trust, and the White Mountain Apache Tribe, support the exclusion, but only when the existing tower went through NHPA review.[88] White Mountain Apache Tribe also argues that the exclusion should not apply when the tower is located on a historic property.[89] Finally, Dr. Rotenstein opposes the exclusion on the ground that it will threaten historic towers.[90]

45. We adopt the replacement tower exclusion. Similar to collocations, strengthened structures may reduce the need for more towers by housing up to two, four or more additional antennas.[91] Given the limitation of the exclusion to replacements that do not effectuate a substantial increase in size, it is highly unlikely that a replacement tower within the exclusion could have any impact other than on archeological properties. Moreover, the limitation on construction and excavation to within 30 feet of the existing leased or owned property means that only a minimal amount of previously undisturbed ground, if any, would be turned, and that would be very close to the existing construction. Balancing the small risk of new archeological disturbance against the benefits of encouraging replacement rather than the construction of new towers, and taking into account the requirement to cease work and provide notice in case of unanticipated discoveries,[92] we conclude that an exclusion for replacement towers, limited to within 30 feet of the existing leased or owned boundary, is reasonable and appropriate. We further conclude that the speculative benefits of exceptions to the exclusion for replacement towers located on historic properties or replacements for towers that may themselves be historic have not been shown to merit the costs of drafting and implementing such exceptions, including the time and resource costs of additional review by applicants.

46. Finally, for reasons similar to those discussed with respect to tower enhancements, the replacement tower exclusion will apply to towers constructed after March 16, 2001, only if the original tower completed Section 106 review. As with collocations and tower enhancements, replacing a previously constructed tower, within the substantial increase in size limitation, poses very little risk of a new adverse effect. Thus, it serves the public interest to allow such replacements without review for towers constructed on or before March 16, 2001. To maintain parity among collocations, enhancements, and replacements that are fundamentally similar in nature, we impose the same prior review limitation on each exclusion for towers constructed after March 16, 2001.

iii. Temporary Facilities

47. The draft Nationwide Agreement permits the erection of facilities without NHPA review for a temporary period not to exceed twenty-four months.[93] Specifically, the provision excludes from review the:

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[87] West Virginia SHPO Comments at 1. *See also* Alabama SHPO Comments at 1; Wisconsin SHPO Comments at 1.

[88] National Trust Comments at 1; Ohio SHPO Comments at 1; White Mountain Apache Tribe Comments at 1; Wyoming SHPO Comments at 1.

[89] White Mountain Apache Tribe Comments at 1. White Mountain Apache Tribe makes this argument about all the exclusions, but particularly emphasizes replacement towers.

[90] Rotenstein Comments at 2; Rotenstein Reply Comments at 3-4.

[91] AWS *et al.* Reply Comments at 13.

[92] Appendix B at B-25, *infra* (Nationwide Agreement, § IX).

[93] *Notice*, 18 FCC Rcd at 11678.

> Construction of any temporary communications Tower, Antenna structure, or related Facility, including but not limited to the following:
> a. A Tower or Antenna authorized by the Commission for a temporary period, such as any Facility authorized by a Commission grant of Special Temporary Authority ("STA") or emergency authorization;
> b. A cell on wheels ("COW") transmission Facility;
> c. A broadcast auxiliary services truck, TV pickup station, remote pickup broadcast station (e.g., electronic newsgathering vehicle) authorized under Part 74 or temporary fixed or transportable earth station in the fixed satellite service (e.g., satellite newsgathering vehicle) authorized under Part 25;
> d. A temporary ballast mount Tower involving no excavation;
> e. Any Facility authorized by a Commission grant of an experimental authorization.[94]

48. Most commenters who address the issue support the exclusion for temporary facilities with the twenty-four month limit.[95] USET *et al.* and the Leech Lake Band of Ojibwe oppose the provision, however, arguing that allowing temporary towers without a review will endanger archeological resources.[96] The California and Maine SHPOs oppose the exclusion if "below-ground" construction occurs.[97] Similarly, ACRA argues that, in order to ensure against irreversible effects, the temporary facilities exclusion should not apply to construction on a significant archeological site or traditional cultural and religious property.[98] Fordham University argues that twenty-four months is insufficient, and that any temporary extension of an STA should also be permitted without Section 106 review.[99]

49. We adopt the proposed temporary facilities exclusion with one revision. By their nature, temporary facilities usually involve little or no excavation. So long as no excavation will occur on previously undisturbed ground, the risk of damage to archeological or other historic properties from a temporary facility is small. Moreover, temporary facilities are often used in response to exigent circumstances where it is important that they be erected quickly. Taking these considerations together, we conclude that an exclusion for temporary facilities is appropriate where no excavation will occur on previously undisturbed ground. We revise the exclusion, however, so that a temporary facility that requires excavation other than on previously disturbed ground must complete Section 106 review.[100] At the same time, we agree with most commenters that the exclusion should be limited to a period of 24 months. This time period is in practice sufficient to accommodate nearly all temporary facilities, and is necessary to ensure that the exclusion cannot be used to avoid Section 106 review indefinitely.

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[94] *Id.*

[95] CTIA Comments at 33-34; National Trust Comments at 1; PCIA Comments at 33; Verizon Comments at 6; West Virginia SHPO Comments at 1; Western/T-Mobile Comments at 11; Wyoming SHPO Comments at 1.

[96] Leech Lake Band of Ojibwe Comments at 1; USET *et al.* Comments at 17-18.

[97] California SHPO Comments at 2-3; Maine SHPO Comments at 1.

[98] ACRA Comments at 2.

[99] Fordham University Comments at 26-27.

[100] *See* ¶¶ 132-133, *infra*, for a discussion of the definition of "previously disturbed ground."

iv. Industrial and Commercial Properties

50. The draft Nationwide Agreement permits specified construction on certain properties in active industrial, commercial, or government-office use without NHPA review.[101] The draft provision excludes the:

> Construction of a Facility 400 feet or less in overall height above ground level on a property that is in actual use solely for industrial, commercial, and/or government-office purposes and that occupies an area of 10,000 square feet or more, or that together with adjacent industrial, commercial, and/or government-office properties occupies an area of 10,000 square feet or more, where no structure 45 years or older is located within 200 feet of the proposed Facility, and where all areas to be excavated will be located on ground that has been previously disturbed. . . .[102]

51. Industry commenters generally support the concept of an exclusion for certain construction on industrial and commercial properties, arguing that facilities are needed in these locations and any additional intrusion on historic properties would be minimal.[103] Commenters contend, however, that as drafted the exclusion is too restrictive in several respects. AWS, for example, would include construction on properties used "primarily" for industrial, commercial, or government-office purposes.[104] SBC argues that limiting the exclusion to circumstances where there is no property 45 years or older within 200 feet of the site would require the tower constructor to engage in specialized research and goes beyond the standard for National Register eligibility. Therefore, SBC would apply the exclusion unless a property within a distance chosen by the Commission is listed on the National Register or has been determined eligible by the Keeper.[105] Verizon advocates elimination of all the conditions on the exclusion, stating that applicants would find it simpler to perform a full Section 106 review than to apply the exclusion as drafted.[106]

52. Many SHPOs and other historic preservation interests express concern about the industrial and commercial properties exclusion, stating that it is too broad[107] and that its adoption could impact the federal certified rehabilitation tax credit program.[108] In particular, several commenters argue that the 200-

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[101] *Notice*, 18 FCC Rcd at 11678-11679.

[102] *Id.* "Previously disturbed" ground is defined in Section VI.D.2(c)(i) of the Nationwide Agreement.

[103] CTIA Comments at 34; AWS *et al.* Reply Comments at 14.

[104] AWS Comments at 6-7.

[105] SBC Reply Comments at 7. The Keeper of the National Register is the official at the Department of the Interior who ultimately makes the determination of a site's eligibility for inclusion in the National Register. *See* 36 C.F.R. §§ 63.2 and 63.3.

[106] Verizon Comments at 6-7.

[107] S*ee* Georgia SHPO Comments at 3-4 (exclusion is giant loophole); Leech Lake Band of Ojibwe Comments at 1; Maine SHPO Comments at 1; Ohio SHPO Comments at 2; Rotenstein Comments at 2 (will not protect historic mills, mines and factories); Wyoming SHPO Comments at 1 (impossible to set a standard distance to search for nearby historic properties).

[108] Ohio SHPO Comments at 2.

foot radius for identifying nearby properties that are 45 years old or more is too small[109] and the distance should be at least 400 feet.[110] Some commenters argue that the exclusion should not apply if any National Register-eligible property is within the designated radius.[111] The National Trust states that the exclusion should not apply to towers as tall as 400 feet, but that it should be limited to towers of 200 feet or less.[112] Finally, some commenters contend that applying the exclusion on properties as small as 10,000 square feet is too generous and urge adoption of a larger minimum area, given that WalMarts are 100,000-200,000 square feet in size.[113]

53. Taking these arguments together, the Council opines that the industrial and commercial properties exclusion should not be adopted as drafted due to the controversy surrounding it, its complexity, and the possibility that it may be misapplied if its use is not supported by a qualified professional.[114] The Conference adds that elimination of this exclusion would be balanced by the Nationwide Agreement's streamlining of the identification and evaluation process.[115] The Council, however, proposes a more limited exclusion applicable to certain towers to be located in industrial parks, commercial strip malls, or shopping centers, where the applicant's research does not reveal the existence of a historic property encompassing or adjacent to the property where the facility is to be located.[116]

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[109] *See* ACRA Comments at 2; Alabama SHPO Comments at 1; California SHPO Comments at 3; Civil War Preservation Trust Comments at 3; Georgia SHPO Comments at 3; Maine SHPO Comments at 1; Maryland SHPO Comments at 1; National Trust Comments at 2; New Hampshire SHPO Comments at 2; Ohio SHPO Comments at 2; Oregon SHPO Comments at 1; South Carolina SHPO Comments at 1.

[110] Conference Comments at 3; Ohio SHPO Comments at 2 (400 feet); Letter from Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation to Chairman Michael K. Powell, Federal Communications Commission (August 25, 2004) (National Trust August 25, 2004 Letter) at 2 (500 foot radius). *But see* Georgia SHPO Comments at 3 (standard APE should be used); Leech Lake Band of Ojibwe Comments at 2 (400 feet is too small).

[111] *See* Ohio SHPO Comments at 2; South Carolina SHPO Comments at 1 (identifying properties 45 years or older requires SHPO assistance).

[112] National Trust August 25, 2004 Letter at 2 (125 feet). *But see* National Trust Comments at 2 (advocating 200 foot height limit).

[113] *See* National Trust Comments at 2; National Trust August 25, 2004 Letter (an area containing one or more significant structures totaling at least 80,000 square feet in size); Navajo Nation Comments at 2-3; South Carolina SHPO Comments at 1.

[114] Letter from John M. Fowler, Executive Director, Advisory Council on Historic Preservation to Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Attachment at 1, 3 (Feb. 19, 2004) (Council February 19, 2004 Letter).

[115] National Conference of State Historic Preservation Officers Additional Comments at 1 (dated Feb. 20, 2004) (Conference February 20, 2004 Comments).

[116] E-mail from Charlene Vaughn, Assistant Director for Federal Agency Programs, Advisory Council on Historic Preservation to Andrea Williams, General Counsel, CTIA and Frank Stilwell, Attorney, Spectrum and Competition Policy Division (March 4, 2004) (Council March 4, 2004 E-mail); *see also* E-mail from Andrea D. Williams, General Counsel, CTIA to Nancy Schamu, Executive Director, National Conference of State Historic Preservation Officers and Charlene Vaughn, Assistant Director for Federal Agency Programs, Advisory Council on Historic Preservation (March 4, 2004) (CTIA March 4, 2004 E-mail) (proposing similar exclusion applicable where similar industrial or commercial buildings or structures are clustered). Jeffrey S. Steinberg, Deputy Division Chief, Spectrum and Competition Policy Division, was copied on the CTIA March 4, 2004 E-Mail.

54. We adopt a revised industrial and commercial properties exclusion similar to that proposed by the Council. First, we limit the exclusion to industrial parks,[117] commercial strip malls,[118] or shopping centers[119] that occupy a total land area of 100,000 square feet or more. As noted by several commenters, applying the exclusion to any commercial property as small as 10,000 square feet would create an unacceptable risk of inappropriate development on small commercial properties, such as neighborhood shops, that may be located in or near historic areas. By confining the exclusion to construction in industrial parks, commercial strip malls, or shopping centers that occupy a total land area of 100,000 square feet or more, we effectively ensure that construction subject to the exclusion will occur not only on plots that substantially exceed 10,000 square feet, but on highly developed properties and on ground that, in all likelihood, will have been thoroughly disturbed when the existing structures were constructed. At the same time, these types of properties are among those where wireless telecommunications service is most often needed. Thus, an exclusion for construction in industrial parks, commercial strip malls, or shopping centers that occupy a total land area of 100,000 square feet or more combines a low likelihood of significant impact on historic properties with a high potential to satisfy service needs, thereby reducing pressure to site other facilities in potentially more sensitive locations.

55. Second, we limit the exclusion to facilities that are less than 200 feet in overall height.[120] Consistent with the comments of the National Trust, we conclude that there is an unacceptable risk that a 400-foot tower may be grossly out of scale with the existing development and may have visual effects on historic properties well outside the project area. A tower of less than 200 feet, by contrast, is ordinarily unlikely to have significant incremental effects on historic properties within an area that is already highly developed.[121] We further note that antenna structures 200 feet or less in height ordinarily do not require notification to the Federal Aviation Administration, and thus are not subject to federal lighting requirements.[122] Thus, to the extent that lighting might have a visual adverse effect on historic properties, any such effect is unlikely from towers 200 feet or less.

56. Third, we require that before applying this exclusion, the applicant must undertake a search of relevant records, and must complete a full Section 106 review under the Nationwide Agreement if it

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[117] An industrial park is defined as a tract of land that is planned, developed, and operated as an integrated facility for a number of individual industrial uses, with consideration to transportation facilities, circulation, parking, utility needs, aesthetics and compatibility. *See* H. Moskowitz & C. Lindbloom, *New Illustrated Book of Development Definitions* (Center for Urban Policy Research 1993) at 148 (Moskowitz & Lindbloom).

[118] A commercial strip mall is defined as a structure or grouping of structures, housing retail business, set back far enough from the street to permit parking spaces to be placed between the building entrances and the public right of way. *See id*. at 268 (definition of "strip commercial development"); American Heritage Dictionary at <http://www.bartleby.com/cgi-bin/texis/webinator/sitesearch?FILTER=col61&query=strip+mall&x=10&y=13>(definition of "strip mall"); Word IQ at http://www.wordiq.com/definition/Strip_mall (definition of "strip mall").

[119] A shopping center is defined as a group of commercial establishments planned, constructed, and managed as a total entity, with customer and employee parking provided on-site, provision for goods delivery separated from customer access, aesthetic considerations and protection from the elements, and landscaping and signage in accordance with an approved plan. *See* Moskowitz & Lindbloom at 244.

[120] Council March 4, 2004 E-mail; *compare* CTIA March 4, 2004 E-mail (proposing that facility should not be substantially larger than existing structures).

[121] This distinction is consistent with the Nationwide Agreement's specification of presumed APEs for visual effects of ½ mile for towers 200 feet or less in overall height and ¾ mile for towers more than 200 but no more than 400 feet in overall height. *See* Appendix B at B-17, *infra* (Nationwide Agreement, § VI.C.4).

[122] *See* 47 C.F.R. §§ 17.4(a), 17.7(a).

discovers that the property on which it proposes to construct is located within the boundaries of or within 500 feet of a historic property. As several commenters note, even within a developed site a new tower could have an additional effect on nearby historic properties. To address this concern, the draft Nationwide Agreement proposed that the exclusion would not apply if a structure 45 years or older were located within 200 feet of the proposed facility. We conclude, however, that this proposed criterion would be burdensome to apply and is not well tailored to the harm that we seek to prevent. Thus, rather than turning on the age of nearby properties regardless of their eligibility, the exclusion's applicability should depend on whether the property or a property within 500 feet is, in fact, listed or eligible for listing in the National Register. We conclude that, for towers that otherwise meet the terms of the exclusion, a 500 foot buffer zone will adequately protect historic properties from adverse impacts.[123] We further conclude, given the relatively low potential for significant harm to historic properties, that a preliminary search of relevant records constitutes a reasonable and good faith effort to identify nearby historic properties for purposes of invoking this exclusion. By a preliminary search, we mean that the applicant must at least review the National Register and the list of properties formally determined eligible, and it should also consult available records of other properties considered eligible, such as those in the SHPO's/THPO's office, as appropriate under the circumstances of the case.

57. Finally, for purposes of this exclusion, we require applicants to complete the process of tribal and NHO participation as specified in Section IV of the Nationwide Agreement. We note that historic properties of traditional religious and cultural importance often are not listed in the National Register or other publicly available sources.[124] Thus, in order to provide protection for these types of historic properties similar to that afforded to other historic properties by a search of records, it is necessary to seek information directly from Indian tribes and NHOs.[125] If as a result of this process the applicant or the Commission identifies a historic property that may be affected, the applicant must complete the Section 106 process pursuant to the Nationwide Agreement notwithstanding the exclusion.

58. In sum, we conclude that an exclusion for facilities less than 200 feet in height to be located in industrial parks, commercial strip malls, and shopping centers, subject to the provisos and preliminary research requirement discussed above, is appropriately tailored to facilitate needed infrastructure deployment with a minimum of regulatory burden while avoiding significant risk to historic properties. We further conclude that the federal certified rehabilitation tax credit program will not be affected because it does not provide any unique privileges in relation to federal undertakings that lie beyond the National Register boundaries of the property.[126]

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[123] National Trust August 25, 2004 Letter at 1-2; *see also* E-mail from Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division (September 8, 2004) (emphasizing importance of 500 foot buffer if exclusion includes towers up to 200 feet).

[124] *See* 36 C.F.R. § 800.4(a)(4) (agency shall recognize that Indian tribes and NHOs may be reluctant to divulge specific information regarding historic properties of religious and cultural significance to them).

[125] *See* 36 C.F.R. § 800.4(c)(1) (agency shall acknowledge special expertise of Indian tribes and NHOs regarding religiously and culturally significant historic properties).

[126] *See Federal Historic Preservation Tax Incentives*, National Park Service, <http://www2.cr.nps.gov/tps/tax/index.htm>

v. Utility and Transportation Corridors

59. The draft Nationwide Agreement excludes from review many towers proposed for construction in or near utility corridors, and along railways and highways.[127] The draft provision excludes from review the:

> Construction of a Facility 400 feet or less in overall height above ground level located in or within 200 feet of the outer boundary of any of the following, and where all areas to be excavated will be located on ground that has been previously disturbed…:
> a. A right-of-way designated by a government for the location of communications Towers or above-ground utility transmission lines and associated structures and equipment, and in active use for such purpose;
> b. An existing limited access Interstate Highway with a speed limit of 55 MPH or higher; or
> c. A railway corridor in active use for passenger trains;
> However, an Undertaking shall not be excluded from review under this provision if: (1) the existing highway, railway line, or communications structure is included in the National Register and the setting or other visual element is identified as a character-defining feature of eligibility on the National Register nomination; (2) the proposed Facility lies within 200 feet of any other structure that is 45 years or older; or (3) the proposed Facility lies within ¾ mile of and is visible from a unit of the National Park System that is listed or eligible for listing in the National Register, or a National Historic Landmark.[128]

60. Industry commenters generally support this exclusion, but many of them argue that it should be expanded. In addition to raising objections similar to many of those leveled against the industrial and commercial properties exclusion,[129] many industry commenters state that all highways should be covered, not simply interstate controlled access highways.[130] Similarly, several commenters would exclude qualifying construction near all active railways, not only passenger railways.[131] Finally, SBC would extend the exclusion's coverage to construction near access ramps and interchanges, and would add utility structures and overpasses to the list of nearby structures that do not negate the exclusion unless they are listed in the National Register.[132]

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[127] *Notice*, 18 FCC Rcd at 11679.

[128] *Id*.

[129] *See, e.g.,* CTIA Comments at 34 (exclusion should be simplified); PCIA Comments at 34 (excavation should not be limited to previously disturbed ground); Verizon Comments at 6-7 (conditions on exclusion should be eliminated); Nextel Reply Comments at 7 (exclusion should be simplified).

[130] Western/T-Mobile Comments at 11-12; Nextel Reply Comments at 7; SBC Reply Comments at 8-9.

[131] AWS Comments at 6; CTIA Comments at 35; PCIA Comments at 34; Western/T-Mobile Comments at 12; SBC Reply Comments at 9.

[132] SBC Reply Comments at 8, n.15.

61. On the other hand, many other commenters express concern that the corridor exclusion, as drafted, inadequately protects historic highways and railroads,[133] as well as other historic properties that may be located near highways or railroads. In particular, commenters argue that the provision creates an unacceptable risk of harm to historic trails,[134] battlefields,[135] rural scenic areas,[136] depots and hotels,[137] communities,[138] and archeological sites.[139] Thus, several commenters argue that unless states are permitted to opt out of this exclusion, it should not be adopted.[140] Others propose measures such as disallowing the exclusion if any historic trail or battlefield, in addition to a National Park Service unit or National Historic Landmark, is located within ¾ mile of the site,[141] or expanding the ¾ mile distance.[142] In addition, similar to the industrial and commercial properties exclusion, several commenters argue that 200 feet is too small a radius for searching for properties that are 45 years or older.[143]

62. On review of the record, we conclude that the Nationwide Agreement should not create an exclusion for construction along highways and railroads. As numerous commenters observe, highways and railroads frequently follow pathways that track historic settlement and transportation patterns and, earlier, areas frequented by Indian tribes. We recognize that highways and passenger railways are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest. Moreover, the existence of these modern intrusions reduces the risk that a new communications facility would impose an additional adverse effect on historic properties. Nonetheless, given the concentration of historic properties near many highways and railroads, we are persuaded that it is not feasible to draft an exclusion for highways and railroads that would both significantly ease the burdens of the Section 106 process and sufficiently protect historic properties. Furthermore, the procedures outlined below regarding the identification and evaluation of eligible properties[144] will reduce the burden and cost of completing the Section 106 process for all undertakings. Accordingly, we reject the proposed exclusion in transportation corridors.

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[133] ACRA Comments at 1-2; California SHPO Comments at 3. *See also* National Trust Comments at 2-3.

[134] Appalachian Trail Comments at 2; Idaho SHPO Comments at 1; Wyoming SHPO Comments at 1; New Mexico SHPO *ex parte* Comments at 2 (Aug. 11, 2003).

[135] Georgia SHPO Comments at 3; Civil War Preservation Trust Comments at 3.

[136] Georgia SHPO Comments at 3-4; New Mexico SHPO *ex parte* Comments at 2 (Aug. 11, 2003).

[137] Conference Comments at 4.

[138] Georgia SHPO Comments at 3 (noting that many African-American villages are located along highways and railways); New Hampshire SHPO Comments at 2.

[139] Leech Lake Band of Ojibwe Comments at 2 (many federal highways were built before the NHPA, and thus archeological sites may remain undiscovered); Navajo Nation Comments at 3 (contending that highways are constructed to avoid archeological sites, and therefore that construction within 200 feet of the right-of-way is likely to impact avoided sites).

[140] Maryland SHPO Comments at 1; Massachusetts SHPO Comments at 2; Vermont SHPO Comments at 1.

[141] *See* Georgia SHPO Comments at 3.

[142] *See* Appalachian Trail Conference Comments at 2 (disallow exclusion if National Park System unit is located within one mile of site or is visible).

[143] *See* California SHPO Comments at 3; Georgia SHPO Comments at 3; Maine SHPO Comments at 1; Maryland SHPO Comments at 1; National Trust Comments at 2-3; South Carolina SHPO Comments at 1; Wisconsin SHPO Comments at 1.

[144] *See* ¶¶ 119-127, *infra*.

63. We do, however, adopt a limited exclusion, consistent with a proposal offered by Sprint, for certain construction in or near communications and utility rights-of-way.[145] Due to the increasing usage of wireless services and advances in technology, providers of certain types of service are increasingly finding it feasible to utilize antennas mounted on short structures, often 50 feet or less in height, that resemble telephone or utility poles.[146] Where such structures will be located near existing similar poles, we find that the likelihood of an incremental adverse impact on historic properties is minimal. Moreover, it promotes historic preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures. Therefore, the Nationwide Agreement excludes from Section 106 review facilities located in or within 50 feet of a right-of-way designated for communications towers or above-ground utility transmission or distribution lines, where the facility would not constitute a substantial increase in size over existing structures in the right-of-way in the vicinity of the proposed construction.

64. For reasons similar to those discussed above with respect to the industrial and commercial properties exclusion, this exclusion does not apply if the facility would be located within the boundaries of a historic property, and we require applicants to conduct a preliminary search of relevant records for such property.[147] Due to the limited size of the structures permitted under this exclusion and their close similarity to nearby existing structures, however, we do not require research regarding historic properties within 500 feet. Finally, for the same reasons discussed above, application of this exclusion depends on successful completion of the tribal and NHO participation process.[148]

vi. SHPO/THPO-Designated Areas

65. Finally, the draft Nationwide Agreement excludes from NHPA review undertakings in geographic areas designated by the SHPO/THPO.[149] The provision excludes:

> Construction of a facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate tribes, as having limited potential to affect Historic Properties. Such designation shall be documented and made available for public review.[150]

66. All commenters who address the issue support this provision.[151] PCIA urges the addition of language that would encourage SHPOs/THPOs to, in fact, designate such areas.[152] The Ohio SHPO,

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[145] *See* Letter from Roger C. Sherman, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC (March 4, 2004). We note that these rights-of-way may parallel highways and railways. Given the limited types of structures permitted under the exclusion, however, the concerns that lead us to reject a general exclusion for construction along highways and railroads are not persuasive in this context. *See also* National Trust August 25, 2004 Letter at 3 (concurring with Sprint proposal, but adding that historic properties adjacent to right-of-way should be considered).

[146] *See* Letter from Roger C. Sherman, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC (March 3, 2004) (attaching photographs of such facilities).

[147] *See* ¶ 57, *supra.*

[148] *See* ¶ 56, *supra.*

[149] *Notice*, 18 FCC Rcd at 11679-11680.

[150] *Id*.

[151] AWS Comments at 5; CTIA Comments at 33; PCIA Comments at 34; Western/T-Mobile Comments at 11.

[152] PCIA Comments at 34.

while supporting the exclusion, notes that such designations must be made consistent with state law. Such a provision, the Ohio SHPO continues, should not be construed to permit SHPOs/THPOs to designate antenna farms.[153]

67. We adopt the SHPO/THPO-designated areas exclusion as drafted, with only minor clarifying edits.[154] Such a provision, we believe, is consistent with the concept of an exclusion – i.e., to exempt from review undertakings where an impact upon historic properties is unlikely. SHPOs/THPOs are in an excellent position, given their local knowledge and experience, to identify such areas, when permissible under state or tribal law. While we encourage SHPOs and THPOs to designate areas pursuant to this provision to the extent warranted, we emphasize that doing so is at the SHPO/THPO's discretion, and we do not find it appropriate to include additional guidance in the Nationwide Agreement.

68. While this provision permits SHPOs/THPOs, in their discretion, to identify clusters of antenna structures as areas excluded from Section 106 review under the Nationwide Agreement, such designation does not establish an antenna farm under the Commission's rules. Official designation of an antenna farm can only be made by the Commission in conformance with our rules as set forth in Part 17.[155] Similarly, any such SHPO/THPO designation would not control whether an undesignated antenna farm exists for purposes of categorical exclusion from other aspects of environmental review under our rules.[156]

b. Opt-Out Provision

69. In the *Notice*, we requested comment on a proposal by the Conference to allow SHPOs/THPOs to "opt out" of the exclusion for construction along utility and transportation corridors in areas where historic properties are likely to be present.[157] As stated in the *Notice,* the opt-out would be contingent on the SHPO/THPO engaging in good faith, in consultation with applicants, to designate alternative areas where construction would be excluded from routine review.

70. Numerous commenters, including a number of SHPOs, support an opt-out provision, focusing particularly on the corridor exclusion but extending to other exclusions as well.[158] They contend that individual states have differing historic preservation needs based on local conditions, and that states must be permitted to accommodate these differences. An opt-out provision, they assert, would enable

[153] Ohio SHPO Comments at 2.

[154] Specifically, we clarify that consultation with NHOs is required where relevant, and that the responsibility for documentation lies with the SHPO/THPO.

[155] 47 C.F.R. § 17.8.

[156] *See* 47 C.F.R. § 1.1306 n.3 (categorically excluding from most environmental review construction in an antenna farm "whether or not such area has been officially designated as an antenna farm").

[157] *Notice*, 18 FCC Rcd at 11665, n.5.

[158] Civil War Preservation Trust Comments at 2-3; Conference Comments at 2; Delaware SHPO Comments at 1; Georgia SHPO Comments at 4; National Trust Comments at 3; New Hampshire SHPO Comments at 2; Vermont SHPO Comments at 1; White Mountain Apache Tribe Comments at 1; Wyoming SHPO Comments at 2 (but concerned that an opt-out provision may initiate a secondary consultation process. Details of opt-out clause, if it is adopted, should be incorporated into the Nationwide Agreement); New Mexico SHPO *ex parte* Comments at 2-3 (Aug. 11, 2003). *See also* Maryland SHPO Comments at 1 (advocating opt-out provision for corridor exclusion unless it is revised to become inapplicable where listed or eligible sites are located within ¾ mile of the proposed site).

states to protect important scenic highways, historically significant passenger trains, and other such properties on a case-by-case basis.[159]

71. Other commenters, representing segments of industry, oppose the opt-out provision, arguing that it would greatly hamper the streamlining benefits of the Nationwide Agreement for companies that operate on a nationwide or regional basis.[160] Moreover, it inevitably would lead to state-by-state agreements, destroy uniformity, add a layer of bureaucracy, and create confusion for applicants and the Commission.[161] CTIA contends the negotiation of each such agreement would take from twelve to eighteen months to complete.[162]

72. We reject the proposed opt-out provision. As drafted, the exclusions from the Section 106 process are not dependent on local conditions, but identify circumstances under which construction is unlikely to significantly adversely affect historic properties in any state. Indeed, in order to avoid potential effects on historic properties, the Nationwide Agreement as adopted substantially limits the exclusions from which commenters most vigorously sought to opt-out. Thus, the opt-out provision is unnecessary. At the same time, such a provision would create a patchwork of varying agreements, state-by-state, and thus cause additional administrative burdens for applicants. Moreover, procedural changes, adopted by use of the opt-out provision, would likely occur over a period of time, creating additional burdens and confusion for all parties concerned.

c. Notice to Indian Tribes of Excluded Undertakings

73. The Navajo Nation proposes inclusion of language in the Nationwide Agreement that would require applicants for each excluded undertaking to provide notice to Indian tribes that have aboriginal and/or historic associations with the area.[163] A tribe would have the opportunity to indicate that the undertaking may adversely affect a historic property of traditional religious or cultural importance to that tribe, and if so, review of the undertaking under the tribal participation and other provisions of the draft Nationwide Agreement would ensue. The Navajo Nation argues that Section 101(d)(6) of the NHPA requires case-by-case tribal consultation, including for excluded undertakings,[164] and that its proposed notice provision is a "minimum necessary accommodation."[165]

74. Several tribes support the notice provision,[166] while others argue that the provision is inadequate and full consultation with tribes is required for each excluded undertaking.[167] Some historic

[159] *See, e.g.,* National Trust Comments at 3.

[160] Western/T-Mobile Comments at 12; PCIA Reply Comments at 18-19; U.S. Cellular Reply Comments at 4.

[161] Nextel Comments at 15; Verizon Comments at 4; AWS *et al.* Reply Comments at 15-16; Nextel Reply Comments at 7-8; Sprint Reply Comments at 13.

[162] CTIA Comments at 35, n.82; *but see* New Hampshire SHPO Comments at 2 (contesting CTIA's estimate).

[163] Navajo Nation Comments at 3-4; s*ee Notice*, 18 FCC Rcd at 11665-11666, ¶3 (requesting comment on Navajo Nation proposal).

[164] *Id.*

[165] *Notice*,18 FCC Rcd at 11680-11681 (setting forth Navajo Nation position).

[166] Confederated Tribes of the Umatilla Indian Reservation Comments at 2; Tuolumne Me-Wuk Tribal Council Comments at 1; White Mountain Apache Tribe Comments at 1. *See also* California SHPO Comments at 3.

preservation commenters propose that applicants also notify SHPOs/THPOs or the Commission of each excluded undertaking.[168] A number of commenters argue that the notice proposal is unwarranted for both legal and practical reasons.[169]

75. After carefully considering this issue, we reject proposals to require notice to Indian tribes or others of all excluded undertakings. First, we conclude that such notice is not required as a matter of law under the NHPA. The Navajo Nation's reliance on Section 101(d)(6)(b) for its notice proposal is misplaced. Section 214 of the NHPA allows for certain undertakings to be "exempted from any or all of the requirements of this Act" and expressly authorizes the Council to promulgate regulations to effectuate such exemption.[170] We read Section 214 as authorizing exemptions from the consultation requirement of Section 101(d)(6). There is nothing in the NHPA or in the Council's rules, including Section 800.14, in which the Council implements its exclusions authority, expressly requiring any type of notice to tribes for every individual undertaking that is excluded from review pursuant to a programmatic agreement that is signed and executed by the agency and the Council, and none of the commenters point to anything in the statute, the rules, or otherwise that would require such notice.[171]

76. Several commenters point to the absence of such "notice" provisions in other programmatic agreements entered into by other agencies and the Council[172] as support for the proposition that such a provision is legally unnecessary. Given that the Council is the agency authorized to promulgate rules to implement Section 214 of the NHPA, the absence of notice provisions both in the Council's rules and in practice supports our conclusion that such provisions are not necessary under the NHPA, the Council's rules, or otherwise.[173] Indeed, consistent with its rules, it is the Council, as evidenced by its signature to this agreement, who approves the proposed exemption "based on the consistency of the exemption with the purposes of the act . . . ."[174]

77. With respect to the specific exclusions in the Nationwide Agreement, we conclude, as discussed above, that tribal and NHO notice and participation are necessary for construction on commercial and industrial properties and in utility rights-of-way notwithstanding the exclusions.[175] This is so because, without an opportunity for tribes and NHOs to participate, there is a substantial possibility that undertakings within these exclusions could affect properties of traditional cultural and religious importance. For the other exclusions, by contrast, any such possibility is insignificant. Therefore, a notice requirement would contravene the goals of Section 214 of the NHPA and the Council's rule on

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[167] Hualapai Nation Comments at 1; Oneida Indian Nation Comments at 2; Seneca Nation of Indians Comments at 2; Taos Pueblo *ex parte* Comments at 2; Tunica-Biloxi Indian Tribe Comments at 2; Cheyenne River Sioux Tribe Reply Comments at 2. USET *et al.* state that notice is the absolute minimum necessary, but tribes have the right to be consulted. USET *et al.* Comments at 18.

[168] Conference Comments at 3-4; Massachusetts SHPO Comments at 1.

[169] Crown Comments at 7; Nextel Comments at 15-16; Sprint Reply Comments at 15-18.

[170] 16 U.S.C. § 470v.

[171] CTIA Comments at 11-13; PCIA Comments at 16-20; SBC Comments at 2-3; Nextel Reply Comments at 8.

[172] NAB Comments at 6-7.

[173] *See Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 166 (1st Cir. 2003) (Court defers to Advisory Council's interpretation and implementation of statutory term "consultation"), *citing Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

[174] 36 C.F.R. § 800.14(c)(5).

[175] *See* ¶¶ 57 and 64, *supra*.

exclusions by adding an unnecessary layer of review and regulation. The purpose of the exclusions authority is to focus the Section 106 review process on those undertakings that are more likely to have significant adverse effects and not to focus on undertakings with less likelihood of significant effects. Requiring the submission of notifications to tribes or SHPOs/THPOs for undertakings that are unlikely to have significant effects would undermine the purpose of excluding these undertakings by causing substantial delays and burdening administrative resources. Where it is unlikely that an undertaking will impact historic properties, we believe no review should be performed.

78. Finally, we agree with PCIA that tribal consultation has taken place regarding the excluded undertakings in the Nationwide Agreement. As explained above, the Commission has engaged in government-to-government consultation with tribes regarding the Nationwide Agreement, including the exclusions section.[176] Moreover, the tribal proposal was included in the draft Nationwide Agreement, and received the consideration of other tribes and the various tribal organizations that participated in this proceeding. Indeed, after considering the comments of Indian tribes, we have included a tribal participation requirement for the industrial and commercial properties and utility corridor exclusions. We conclude that tribes were afforded an opportunity to consult with respect to this issue and accordingly did so. In this way, the Commission has met its government-to-government responsibility to consult with and its trust responsibility to federally recognized tribes.

d. Documentation, Recordkeeping, and Reporting

79. The draft Nationwide Agreement provides that applicants should retain documentation of their determination that an exclusion applies to an undertaking.[177] Some commenters propose that in addition to such recordkeeping, the Nationwide Agreement should provide for access to these records by the Commission, SHPOs/THPOs or others,[178] and/or regular reporting of the use of exclusions.[179]

80. We decline to require any regular reporting of instances in which the exclusions are used. We find that such mass undifferentiated reporting of constructed facilities would be excessively burdensome and, without more, would contribute little to an understanding of how the exclusions are being applied. To the extent an exclusion may be misapplied or its application may have unanticipated effects on historic properties, we expect that the public and historic preservation groups would bring these instances to our attention under Section XI of the Nationwide Agreement. We note that as records relevant to compliance with the Commission's rules, a company must produce documentation of its determination of an exclusion's applicability to the Commission upon request.[180] SHPOs/THPOs may also require production of such records to the extent authorized under State or tribal law.

81. As a further safeguard to ensure that the exclusions are applied appropriately, we amend the draft Nationwide Agreement to add that a determination of exclusion should be made by an authorized individual within the applicant's organization. While the exclusions are drafted so that their application should not require historic preservation expertise, a responsible individual who understands the exclusions and their applicability, such as a manager or attorney, needs to ensure that they are applied appropriately. Moreover, because the applicant is responsible for compliance with our rules, this

[176] *See* ¶¶ 29-32*, supra*.

[177] Maine SHPO Comments at 2; Massachusetts SHPO Comments at 1; Ohio SHPO Comments at 1.

[178] *Id.*

[179] Ohio SHPO Comments at 1.

[180] 47 U.S.C. §§ 308(b) and 403.

responsible individual should be within the applicant's organization. We advise applicants to retain a record of the authorized individual's review as part of their record of the exclusion's applicability.

2. Participation of Indian Tribes and Native Hawaiian Organizations

82. In the *Notice*, we sought comment on two alternative sets of provisions governing participation of Indian tribes and NHOs in undertakings off tribal lands. Alternative A was developed by the Working Group.[181] This proposed alternative directs applicants to use reasonable and good faith efforts to identify Indian tribes and NHOs that may attach cultural and religious importance to historic properties that may be affected by an undertaking, and provides guidance on how to perform such identification. Alternative A further directs applicants to contact such Indian tribes and NHOs early in the process. It likewise instructs that applicants must give Indian tribes and NHOs a reasonable opportunity to respond to communications, ordinarily 30 days, and specifies that applicants should make reasonable efforts to follow up in the event of a failure to respond. Alternative A states that Indian tribes may request government-to-government consultation with the Commission at any time, and directs applicants immediately to refer any requests for such consultation to the Commission. In addition, Alternative A provides guidance for applicants to continue involving Indian tribes and NHOs that do express an interest in a proposed undertaking, requires Commission authorization and commits the Commission to consultation in cases where the applicant and the Indian tribe or NHO do not agree, provides for confidentiality of sensitive tribal information, and preserves the ability of applicants and Indian tribes to enter into alternative arrangements.

83. Alternative B was proposed by USET during the course of meetings after the Working Group completed its deliberations.[182] Alternative B requires the Commission to consult with potentially affected Indian tribes and NHOs on each proposed undertaking, in accordance with the Council's rules, unless either (1) the Indian tribe or NHO has given the applicant a letter of certification stating that such consultation is unnecessary; or (2) the applicant and the Indian tribe have reached a written agreement, filed with the Commission, regarding conditions under which such certification is unnecessary and the applicant has complied with that agreement. Alternative B encourages parties to use these alternative processes in lieu of government-to-government consultation, and it permits an Indian tribe or NHO, at its discretion, to discuss mitigation directly with the applicant where the Indian tribe or NHO believes that a proposed undertaking would have an adverse effect on a property of religious and cultural significance to that Indian tribe or NHO. This alternative does not, however, provide guidance regarding how applicants should contact and relate to Indian tribes and NHOs, stating that such guidance would be provided in an appendix or by separate publication.

84. Most industry commenters who address the issue, as well as some other commenters,[183] generally favor Alternative A over Alternative B. These commenters argue that because the Commission would commit to entertain requests for consultation at any time from Indian tribes and NHOs, Alternative A would afford a meaningful consultation process consistent with the NHPA and the Commission's obligations.[184] Given that it satisfies the Commission's legal responsibilities, these commenters add, Alternative A provides a workable framework by allowing applicants to initiate contacts with Indian

[181] *Notice*, 18 FCC Rcd at 11681-11684.

[182] *Id.* at 11684-11685.

[183] ACRA Comments at 2; California SHPO Comments at 3; Conference Comments at 4; National Trust Comments at 3.

[184] Crown Comments at 8-11; CTIA Comments at 16-18; PCIA Comments at 24-28; SBC Comments at 6-8; Western/T-Mobile Comments at 8.

tribes or NHOs on the Commission's behalf and to conclude the process where a tribe has not requested government-to-government consultation.[185] Navajo Nation also supports Alternative A, noting that it has successfully worked with companies without Commission involvement.[186] Alternative B, by contrast, is characterized by many of these industry commenters as burdensome for all parties.[187] CTIA points out that Alternative B is vague and provides no standards for determining when and how to get certifications from tribes.[188] The National Trust agrees, adding that the certification process is confusing and would create an enormous paperwork burden for many tribes.[189] In the end, PCIA, CTIA and American Tower express concern that the Commission would be involved in each individual undertaking – a task they say the Commission does not have the resources to perform.[190]

85. Although industry commenters generally favor the framework in Alternative A over Alternative B, many of them argue that the Nationwide Agreement should provide more finality and fewer constraints on applicants. In particular, several commenters seek additional finality with respect to time periods.[191] For example, Western/T-Mobile argue that tribes should have only 21 days beyond the time periods afforded to the general public for reviews,[192] and Sprint and Verizon urge that the thirty-day guideline set forth in Alternative A should be a firm limit.[193] The National Trust, however, argues that flexible time frames give tribes with limited resources a meaningful opportunity to participate.[194] Verizon also opposes any provision that would inhibit its ability to seek tribal review at any point in the process that it chooses.[195] Sprint argues that the Commission is required to consult with tribes only when the tribe has identified a historic property of religious and cultural importance to it, and hence that applicants should not be required to look for such properties.[196] In addition, some commenters advocate adding a provision that applicants are not required to pay fees to tribes for their role in review, arguing that there is no legal basis for such payments.[197] Nextel and Cingular oppose Alternative A outright, arguing that it lacks finality and is unduly burdensome.[198]

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[185] Crown Comments at 10-11; CTIA Comments at 17; PCIA Reply Comments at 7-8.

[186] Navajo Nation Comments at 4.

[187] CTIA Comments at 28-30; PCIA Comments at 20-21.

[188] CTIA Comments at 29-30.

[189] National Trust Comments at 3.

[190] American Tower Comments at 12-13; CTIA Comments at 28-30; PCIA Comments at 20-21. *See also* Crown Comments at 11-14 (process confusing and can be manipulated); Nextel Reply Comments at 8-10 (process vague and ambiguous).

[191] CTIA Comments at 38-39; PCIA Reply Comments at 19-20.

[192] Western/T-Mobile Comments at 7-8.

[193] Verizon Comments at 10-11; Sprint Reply Comments at 21. *See also* SBC Comments at 8 (the Commission should set time period); AWS *et al.* Reply Comments at 4-5.

[194] National Trust Comments at 4. *See also* USET *et al.* Reply Comments at 1-2 (supporting time frames if tribes are afforded sufficient resources to meet deadlines).

[195] Verizon Comments at 11-12.

[196] Sprint Reply Comments at 17-19.

[197] AWS *et al.* Reply Comments at 5; CTIA Reply Comments at 5-6; PCIA Reply Comments at 11-12.

[198] Cingular Comments at 6; Nextel Comments at 17-18.

86. Most tribal commenters, by contrast, oppose Alternative A and support Alternative B. USET *et al.*, Eastern Shoshone Tribe, Mississippi Band of Choctaw, the Confederated Tribes of the Umatilla Indian Reservation and others argue that Alternative A illegally delegates consultation to private entities.[199] EBCI further argues that Alternative A is burdensome and does not ensure full input from tribes.[200] Alternative B, according to these commenters, appropriately places tribes at the center of the consultation process, and best ensures protection of tribal sacred and religious sites.[201] USET *et al.* contend that only tribes know where their traditional cultural and religious sites are, and thus their expertise must be directly involved.[202] Moreover, USET *et al.* contend that the certification provisions will allow tribes to be fairly compensated for their professional assistance.[203] The Confederated Tribes of the Umatilla Indian Reservation add that requiring Commission involvement in each undertaking, as under Alternative B, will ensure that an experienced party is present to protect the interests of tribes.[204] Fordham University agrees that the Commission may not delegate initiation of the Section 106 process on the ground that the process would be too complicated for applicants to complete without Commission assistance.[205]

87. USET *et al.* in particular spell out the argument that Alternative A impermissibly delegates the initiation of the Section 106 process to applicants, contending such delegation contravenes Indian tribes' right to consult directly with the Commission.[206] Specifically, they argue that such delegation violates separation of powers, citing *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935) and *Northern Pipeline Construction Co. v. Marathon Pipeline Co,* 458 U.S. 50 (1982).[207] Additionally, relying upon OMB Circular A-76, which mandates that certain inherent governmental functions must be performed by federal employees because policy- making discretion and value judgments are involved,[208] USET *et al.* argue that applicant initiation of the Section 106 process with tribes impermissibly delegates an inherent government function to nonpublic entities. Further, USET *et al.* contend, the U.S. government does not delegate its foreign policy functions, and thus it may not delegate its obligation to consult directly with tribes by permitting third parties to do so.[209]

88. Several commenters, including Cingular, Ameritech and Central Alarm, oppose both alternatives, arguing that tribal matters should be addressed in a separate agreement.[210] Hualapai Nation

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[199] Confederated Tribes of the Umatilla Indian Reservation Comments at 1; Eastern Shoshone Tribe Comments at 2-3; Mississippi Band of Choctaw Comments at 2; USET *et al.* Comments at 19.

[200] EBCI Comments at 2.

[201] USET *et al.* Reply Comments at 3.

[202] *Id.* at 4.

[203] *Id.* at 3-4.

[204] Confederated Tribes of the Umatilla Indian Reservation Comments at 1.

[205] Fordham University Comments at 29-30.

[206] Mississippi Band of Choctaw Comments at 2; USET *et al.* Comments at 7-8.

[207] *Id.*

[208] OMB Circular A-76, Section 5.0. Examples of inherently Governmental functions USET *et al.* point to as a basis for their argument are the management of Government programs requiring value judgments; the regulation of the use of space, oceans, navigable rivers and other natural resources; and the conduct of foreign relations. USET *et al.* Comments at 8.

[209] USET *et al.* Reply Comments at 4.

[210] Ameritech Comments at 2; Central Alarm Comments at 2-3; Cingular Comments at 6.

supports portions of each proposal, noting that the certification process is unworkable when tribes have overlapping interests in a particular site.[211]

89. Since issuing the *Notice*, the Commission has continued to work with Indian tribes outside the context of this proceeding to improve the means of tribal and NHO participation in the Section 106 process. In particular, the Commission, after consultation with federally recognized tribes, has developed and implemented an electronic Tower Construction Notification System to facilitate identification of and appropriate initial contact with Indian tribes and NHOs that may attach religious and cultural significance to historic properties within the geographic area of a proposed undertaking.[212] This system permits each Indian tribe and NHO voluntarily to identify in a secure electronic fashion the geographic areas in which historic properties of religious and cultural significance to that Indian tribe or NHO may be located. When an applicant then voluntarily enters into the system the location and other basic information about a proposed construction project, the Commission automatically forwards the information electronically or by mail to participating tribes and NHOs. Finally, Indian tribes and NHOs have the option of responding to applicants through the Tower Construction Notification System. By rationalizing the process of identification and initial contact through the Commission, we believe the Tower Construction Notification System will relieve burdens and provide certainty for tribes and NHOs, applicants, and the Commission alike.[213]

90. The Tower Construction Notification System is an evolving tool, and we anticipate, in consultation with federally recognized Indian tribes and other interested parties, adding future enhancements that will further improve its utility. For example, under a recent enhancement, the Tower Construction Notification System now automatically informs applicants of the Indian tribes and NHOs to whom the system has forwarded their construction proposals. In addition, we expect in the near future that the system will enable Indian tribes and NHOs to identify specific types or locations of construction within their geographic areas of concern that they are not interested in reviewing. Applicants will be able to access this information. We expect that experience with the system will suggest additional modifications.

91. Upon consideration of the record, and in light of the developments described above, we adopt procedures for participation of tribes and NHOs that incorporate aspects of both Alternatives A and B with certain modifications. First, we recognize that pursuant to the federal government's unique legal relationship with Indian tribal governments, as well as specific obligations under the NHPA and the Council's and Commission's rules,[214] the Commission has a responsibility to carry out consultation with any federally recognized Indian tribe or any NHO that attaches religious and cultural significance to a historic property that may be affected by a Commission undertaking. As the Commission has previously recognized, the federal government has a historic trust relationship that requires it to adhere to fiduciary standards in dealing with federally recognized tribes.[215] This fiduciary responsibility and duty of consultation rest with the Commission as an agency of the federal government, not with licensees, applicants, or other third parties.

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[211] Hualapai Nation Comments at 1-2.

[212] *Public Notice*, FCC Announces Voluntary Tower Construction Notification System To Provide Indian Tribes, Native Hawaiian Organizations, and State Historic Preservation Officers With Early Notification of Proposed Tower Sites, DA 04-270 (rel. February 3, 2004).

[213] *Cf.* National Trust Comments at 4 (urging Commission to develop databases to help applicants identify tribes).

[214] *See* 16 U.S.C. §§ 470a(d)(6), 470f; 36 C.F.R. § 800.2(c)(2)(ii); 47 C.F.R. § 1.1308(b) Note.

[215] *See Tribal Policy Statement*, 16 FCC Rcd at 4080.

92. At the same time, we cannot fulfill our duty of consultation in a vacuum. The first step in enabling consultation with Indian tribes and NHOs is to identify those tribes and NHOs that may attach religious and cultural significance to a historic property that may be affected by a specific undertaking. Because our applicants possess unique knowledge regarding the facilities that they propose to construct, the Nationwide Agreement that we adopt directs applicants to make reasonable and good faith efforts to identify the Indian tribes and NHOs that may have interests in a geographic area. The Nationwide Agreement further specifies that where an Indian tribe or NHO has voluntarily provided information to the Tower Construction Notification System, reference to that database constitutes a reasonable and good faith effort at identification. In addition, the Nationwide Agreement provides guidance regarding other means of fulfilling this obligation.

93. The Nationwide Agreement specifies that, after the applicant has identified potentially interested tribes and NHOs, contact should be made at an early stage in the planning process with each such tribe or NHO by either the Commission or the applicant, depending on the expressed wishes of the particular Indian tribe or NHO. The Commission will take steps to ascertain and publicize the contact preferences of all federally recognized Indian tribes and NHOs, both as to who must make the initial tribal contact and by what means,[216] as well as any locations or types of construction projects for which the Indian tribe or NHO does not expect notification. To ensure that communications among parties are in accordance with the reasonable preferences of individual tribes and NHOs, the Commission will also use its best efforts to arrive at agreements regarding best practices with Indian tribes or NHOs, strive for uniformity in such best practices and encourage applicants to follow them. Through these best practices the Commission hopes to facilitate expeditious completion of Section 106 review by minimizing misunderstandings among the parties to that process.

94. If there is no preexisting relationship between the applicant and an Indian tribe or NHO, and absent contrary indication from the Indian tribe or NHO, initial contact will be made by the Commission through its electronic Tower Construction Notification System. Where there is such a preexisting relationship the applicant may make the initial contact in the manner that is customary to that relationship or in any manner acceptable to the Indian tribe or NHO. In these circumstances, the applicant shall copy the Commission on any initial contact to the Indian tribe or NHO unless the Indian tribe or NHO has agreed such copying is unnecessary. The Nationwide Agreement specifies that any direct contact with the Indian tribe or NHO shall be made in a sensitive manner that is consistent with the reasonable wishes of the Indian tribe or NHO, including through the Tower Construction Notification System where such means is consistent with the tribe or NHO's preference. Where the tribe or NHO's wishes are not known, the Nationwide Agreement sets forth guidelines regarding respectful address and sufficient information. The text further directs that the applicant afford the tribe or NHO a reasonable opportunity to respond, ordinarily 30 days, allow additional time to respond as reasonable upon request, and make reasonable efforts to follow up in case the tribe or NHO does not respond to an initial communication.

95. The purpose of the initial contact, whether made by the Commission or the applicant, as specified in the Nationwide Agreement that we adopt, is to begin the process of ascertaining whether historic properties of religious and cultural significance to an Indian tribe or NHO may be affected by an undertaking, thereby triggering the duty of consultation. Unless the tribe or NHO affirmatively disclaims further interest or has agreed otherwise, this initial contact does not satisfy the applicant's obligation or

[216] Possible means of initial contact include electronic notification through the Commission's Tower Construction Notification System, written communication from the Commission at the Applicant's request, direct written, telephonic or e-mail contact from the Applicant, any other means that a tribe or NHO has informed the Commission is acceptable, and any other means specified in an agreement with the Applicant.

constitute government-to-government consultation by the Commission. It is our hope and intent that, where direct contacts from an applicant are acceptable to the Indian tribe or NHO, amicable contacts will enable these consulting parties to complete the Section 106 process so as to obviate the need for government-to-government consultation in a vast majority of cases. At the same time, because the duty to consult rests with the Commission as a federal government agency, the Nationwide Agreement directs applicants to promptly refer to the Commission any tribal request for government-to-government consultation, and to seek Commission guidance in cases of disagreement or failure to respond. Finally, the Nationwide Agreement substantially adopts provisions from Alternative A regarding inviting Indian tribes and NHOs to become consulting parties in the Section 106 process, confidentiality, and the preservation of alternative arrangements.

96. We conclude that the provisions we adopt are consistent with the Commission's fulfillment of its tribal consultation responsibilities under the NHPA and other sources of federal law. We agree with USET *et al.* that the NHPA does not provide for delegation of the tribal consultation responsibility to private entities.[217] The provisions that we adopt, however, do not delegate the Commission's consultation responsibilities but provide for direct contacts with an Indian tribe or NHO (whether initially or thereafter) by an applicant only in accordance with the expressed wishes of the Indian tribe or NHO. Moreover, the Nationwide Agreement further provides that, where the applicant is unknown to the tribe or NHO, the initial contact will generally be made by the Commission and does not in any circumstance allow applicants and licensees to embark upon and conclude the Section 106 process without Commission participation and without tribal or NHO consent.

97. The Nationwide Agreement expressly states that the initial contact between applicants or the Commission and Indian tribes and NHOs is required at "an early stage of the planning process… in order to begin the process of ascertaining whether… Historic Properties [of religious and cultural significance to them] may be affected."[218] The Nationwide Agreement expresses the ambition that this initial contact will lead to voluntary direct discussions through which applicants and tribes or NHOs will resolve questions involving the presence of relevant historic properties and effects on such properties to the tribe or NHO's satisfaction without Commission involvement.[219] However, the Nationwide Agreement makes clear that in the absence of such an agreement, decision-making authority and the duty to consult rest with the Commission. Thus, federally recognized Indian tribes are free, at any point, to request government-to-government consultation with the Commission, and the Commission is accessible and able to engage in government-to-government consultation with any tribe on any undertaking at any time.[220] Moreover, if an applicant and an Indian tribe or NHO disagree regarding whether an undertaking will have an adverse effect on a historic property of religious and cultural significance, or if the tribe or NHO does not respond to the applicant's inquiries, the Nationwide Agreement directs the applicant to seek guidance from the Commission,[221] following which appropriate consultation will occur and only then will the Commission make a decision regarding the proposed undertaking. The Commission has not delegated to the applicant any decision-making or rulemaking power; it retains the decision-making role throughout the process. Rather, the Commission puts the exploratory phase of the process into the hands of those parties with the most intimate knowledge of the proposed undertaking and, subject to the expressed wishes of an Indian tribe or NHO, authorizes them to provide information to, solicit

[217] USET *et al.* Comments at 5.

[218] Appendix B at B-11 to B-12, *infra* (Nationwide Agreement, § IV.C).

[219] *Id.* at B-12 to B-13, *infra* (Nationwide Agreement, § IV.F).

[220] *Id.*

[221] *Id.*

information from, and engage in voluntary discussions with the tribes and NHOs, thereby promoting efficiency and efficaciousness.[222] It is perhaps for this reason that, as PCIA notes, the Council, in Section 800.2(c)(4) of its rules, permits agencies to authorize applicants to initiate Section 106 discussions or contacts with consulting parties such as tribes.[223] Given that the initial contact with the Indian tribe or NHO is generally made by the Commission, the open door to government-to-government consultation and the proscription on applicants unilaterally concluding the process without Commission guidance or tribal/NHO consent, this process is in keeping with applicable federal consultation responsibilities.[224]

98. We similarly reject USET *et al.'s* argument that the role of applicants in initiating the Section 106 process constitutes an illegal delegation. Except where there is a preexisting relationship between a particular tribe or NHO and the applicant or a particular tribe has advised the Commission of its willingness to be contacted initially by applicants, the first contact concerning a proposed undertaking will generally come from the Commission. In any event, as CTIA notes, the *Schechter Poultry* and *Northern Pipeline* cases USET *et al.* rely upon are inapposite because they relate to Congressional delegations of power to other branches of the federal government and not to "delegations" from a government agency to private entities.[225] Moreover, federal agencies may permit private sector entities to perform delineated governmental functions when clear standards are set forth, guidelines for policymaking are offered, and specific findings are required. This is especially true when the private entity's participation is subject to the government agency's ultimate reviewing authority,[226] which, as described above, is the case here.

99. We likewise disagree with USET *et al.* that permitting our licensees and other applicants to make initial contact with tribes, to the extent contemplated under the Nationwide Agreement, runs afoul of OMB Circular A-76, which addresses functions of government that are non-delegable to the private sector. As discussed above, the Commission is not delegating a function, but simply seeking assistance from our licensees and applicants in beginning a process over which the Commission ultimately retains control. OMB Circular A-76 is intended to ensure that certain regulatory power or management over others remains in the hands of the Government. But the Commission's practice and the process described in the Nationwide Agreement in no way delegate power or control over Indian tribes to applicants. As CTIA notes, the Nationwide Agreement does not authorize the applicant to engage in government-to-government relations with the tribe as a substitute for the Commission; it does not give the applicant any authority to dismiss the Indian tribes' assertion of an adverse effect; and it does not afford the applicant any power to deny Indian tribes' rights to government-to-government consultation.[227] Moreover, while initial contact is comparable in nature to a diplomatic initiative, we note that the State Department and the White House frequently employ private envoys to handle various aspects of communication with foreign nations. In so doing, however, they retain ultimate policymaking authority and thus do not violate prohibitions on delegation.

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[222] CTIA Comments at 20-21; PCIA Comments at 21.

[223] PCIA Comments at 21-23; PCIA Reply Comments at 7; 36 C.F.R. § 800.2(c)(4).

[224] CTIA Comments at 20.

[225] *Id.* at 21.

[226] *Perot v. Federal Election Commission*, 97 F.3d 553, 559 (D.C. Cir. 1996); *R.H. Johnson v. Securities and Exchange Commission* 198 F.2d 690, 695 (2d Cir. 1952); *United Black Fund v. Hampton*, 352 F.Supp. 898, 904 (D.D.C. 1972).

[227] CTIA Comments at 25.

100. For these reasons, we conclude that the Nationwide Agreement, as we adopt it today, does not unlawfully delegate or derogate the Commission's duties of consultation. At the same time, in combination with the other developments described above, the Nationwide Agreement provides substantial assistance to applicants in carrying out their assigned role. For example, while we agree with Fordham University that the initiation of the Section 106 process with respect to contacting tribes and NHOs is often a complicated activity, voluntary use of the Tower Construction Notification System will greatly facilitate this process. The Nationwide Agreement also provides guidance regarding other means of identifying potentially affected Indian tribes and NHOs.[228] In context, we find that the obligations the Nationwide Agreement imposes on applicants in this area are not unreasonable.

101. With regard to payments to Indian tribes, the Council has offered guidance that when an agency or applicant seeks specific information and documentation from a tribe regarding the location, nature, and condition of individual sites, the tribe would appear to be acting in the role of a consultant or contractor, and hence would seem to be justified in requiring compensation for its services. When a tribal government is contacted for its views in order to fulfill the agency's legal obligation to consult, by contrast, the agency is not required to pay the tribe for its views.[229]

102. The Nationwide Agreement also provides guidance regarding the means of addressing Indian tribes and NHOs, time periods, and similar matters.[230] We disagree, however, with commenters who urge us to prescribe more definitive time periods or provide greater finality.[231] Ultimately, the Commission has a government-to-government relationship with and fiduciary responsibility to Indian tribes, as manifested in the duties of consultation under general principles of law and under the specific provisions of the NHPA. Thus, absent the Indian tribe or NHO's agreement, only the Commission can confer finality with respect to tribes or NHOs for an undertaking that is not excluded from Section 106 review. Moreover, while ultimately no further consultation is required if an undertaking will not affect a historic property of cultural and religious significance to a tribe or NHO, applicants must work with tribes and NHOs in their efforts to determine whether such eligible properties exist,[232] and must refer to the Commission for finality absent tribal or NHO agreement with their identification efforts. It is our hope, through the guidance in the Nationwide Agreement and through the separate negotiation of voluntary best practices with Indian tribes and NHOs, to facilitate consensual resolutions that satisfy the needs of all parties swiftly and with a minimum expenditure of resources.

103. In sum, we conclude that the Nationwide Agreement's provisions, authorizing licensees and other applicants to contact tribes and NHOs directly in the first instance only in circumstances reflecting a tribe's familiarity with a particular applicant or preference for direct contact from applicants, best facilitate swift deployment of facilities while, at the same time, ensuring tribal cultural properties and other sacred sites of a historic nature are protected in a manner respectful of tribal sovereignty and consistent with the obligations of the Commission under the NHPA. And, in the event communications initiated and conducted in accordance with a tribe's expressed preferences cease to be acceptable, the Agreement directs the applicant immediately to notify the Commission, which will then engage in government-to-government consultation with the tribe. In this manner, the provisions governing

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[228] Appendix B at B-10 to B-11, *infra* (Nationwide Agreement, § IV.B).

[229] John Fowler, *Fees in the Section 106 Review Process*, Executive Director Memorandum, Advisory Council on Historic Preservation at 2-3 (July 6, 2001).

[230] Appendix B at B-12 to B-13, *infra* (Nationwide Agreement, § IV.F).

[231] PCIA Reply Comments at 7.

[232] *See* ¶ 125, *infra.*

participation by federally recognized tribes and NHOs fully satisfy the Commission's consultation responsibilities under the NHPA and other federal law.

3. Public Participation

104. Section V of the draft Nationwide Agreement establishes procedures to streamline and tailor the public participation provisions of the Council's rules to fit the communications context.[233] Specifically, this section provides for notice of a proposed undertaking to the relevant local government and the public on or before the date the project is submitted to the SHPO/THPO, recommends means of providing public notice, and specifies the content of these notices. The provision also states that the SHPO/THPO may make available lists of additional interested organizations that should be contacted, and it requires the applicant to consider public comments and provide those comments to the SHPO/THPO. In addition, it sets out procedures for identifying consulting parties and the rights of consulting parties. In the *Notice,* we specifically sought comment on whether we should specify a time period for public and local government responses, and on whether to include a confidentiality clause for information included in the Submission Packet.[234]

105. Most commenters that address the issue generally support the public participation provisions,[235] although Nextel argues that they are overly burdensome and unnecessary[236] and two commenters suggest that the procedures for public notice are inadequate.[237] Several parties, however, advocate specific changes or additions to the section. In particular, several commenters support time limits on the filing of comments by consulting parties and/or non-consulting parties.[238] Fordham University, for instance, advocates that comments should be provided within 30 days after public notice.[239] Blooston agrees, noting that a 30-day limit would add certainty to the process.[240] The California SHPO argues that notice to the local government and the public should be required before the Submission Packet is provided to the SHPO/THPO.[241] Western/T-Mobile oppose the provision that SHPOs/THPOs may provide lists of organizations to be contacted by applicants, arguing that the general notification provision is sufficient to inform the public.[242] Several industry commenters support a

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[233] *Notice*, 18 FCC Rcd at 11685-11687. *See, e.g.,* 36 C.F.R. §§ 800.2(d) (general requirement to seek and consider public views and provide information to public), 800.3(e) (planning for public involvement at initiation of Section 106 process), 800.6(a)(4) (public involvement in resolving adverse effects).

[234] *Id.* at 11686 nn.10-11. We noted that CTIA believed a confidentiality clause was necessary to ensure appropriate treatment of confidential and proprietary information, but that the Ohio SHPO was concerned that SHPOs need information regarding the consideration of alternative sites but may have difficulty protecting such information under state law.

[235] *See, e.g.,* Maryland SHPO Comments at 1 (stating that the section provides clear direction); Wyoming SHPO Comments at 2.

[236] Nextel Comments at 19; Nextel Reply Comments at 5.

[237] Rotenstein Comments at 3; Tennant Reply Comments at 1.

[238] Ameritech Comments at 3; Blooston Comments at 3; Central Station Alarm Comments at 3; Civil War Preservation Trust Comments at 3-4; Western/T-Mobile Comments at 9.

[239] Fordham University Reply Comments at 10.

[240] Blooston Comments at 3, 5.

[241] California SHPO Comments at 3.

[242] Western /T- Mobile Comments at 9-10. *See also* Hualapai Nation Comments at 2 (applicant, not SHPO/THPO, should identify organizations to be contacted).

confidentiality provision for proprietary information, which presumably would include the location of proposed towers and other related information.[243] The New Hampshire and Ohio SHPOs, however, oppose the confidentiality proposal, noting that it would likely conflict with state freedom of information laws.[244] The Civil War Preservation Trust proposes to require notification to the Commission for each undertaking,[245] and the Ohio SHPO suggests that applicants should be required to notify the SHPO/THPO of all designated consulting parties.[246] Finally, Dr. Rotenstein contends that the criteria in the draft Nationwide Agreement for designating consulting parties are too narrow, and should be expanded to include individuals with any demonstrated interest in the undertaking.[247]

106. We adopt the public participation provisions substantially as drafted. Contrary to Nextel's assertion, the Nationwide Agreement simplifies, by tailoring to the communications context, the process in the Council's existing rules for providing notice, involving the public, identifying consulting parties, and addressing comments received. The Nationwide Agreement achieves this end in large part by consolidating provisions relating to public participation and consulting parties in one place and by providing clear and direct guidance. We conclude that the provisions as drafted achieve the important public participation goals of the Council's rules in a manner that will reduce misunderstandings and relieve burdens on applicants, SHPOs/THPOs and the Commission alike.

107. We reject most of the changes that commenters have proposed to this section. Specifically, we find that there should not be a firm time limit on public comments on a proposed undertaking, but that all comments received prior to completion of the review process should be considered. We believe it would contradict the intent of the NHPA and the Council's rules to potentially disregard legitimate historic preservation concerns simply because they are not raised prior to an arbitrary deadline.[248] Indeed, both the Council's rules and the Nationwide Agreement require consideration of potential effects on historic properties that are discovered even *after* construction begins, much less before.[249] We also note that the lack of a time limit on when public comments may be filed is consistent with the Council's rules.[250]

108. We further conclude, consistent with common practice, that use of the local zoning process, local newspaper publication, or an equivalent process constitutes sufficient notice of a proposed undertaking in the nature of a communications facility to the general public.[251] Moreover, it is appropriate to permit the SHPO/THPO, as the consulting party most familiar with the local community of

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[243] Ameritech and Central Alarm Comments at 3; Blooston Comments at 4. *See also* USET *et al.* Comments at 19, 21 (supporting confidential treatment of matters related to tribal consultation).

[244] New Hampshire SHPO Comments at 2 (strongly supporting the Ohio SHPO's position cited in the *Notice*, 18 FCC Rcd at 11686 n.11); *see also* PCIA Comments at 28 (opposing confidentiality clause for tribal information).

[245] Civil War Preservation Trust Comments at 3.

[246] Ohio SHPO Comments at 1.

[247] Rotenstein Comments at 3.

[248] 16 U.S.C. § 470j(a)(2); 36 C.F.R. §§ 800.2(d), 800.3(e).

[249] *See* 36 C.F.R. § 800.13; Appendix B at B-25, *infra* (Nationwide Agreement, § IX).

[250] 36 C.F.R. § 800.2(d)(1).

[251] While we expect that in most instances applicants will provide public notice through local zoning and/or publication in a local newspaper, we recognize that there may be cases in which neither of these alternatives is feasible, and therefore retain flexibility for applicants to employ other equivalent means. *See* New Hampshire SHPO Comments at 2.

interest, to provide by generally available list the names of additional parties that should be contacted in order to further ensure a full opportunity for public participation under the circumstances of each case. In order to preserve applicants' flexibility to pursue the process in the most efficient sequence under the circumstances of each case, we only require that notice to the local government and the public occur on or before the date materials are submitted to the SHPO/THPO. We also find that adoption of a national confidentiality standard would be infeasible given the SHPOs'/THPOs' need for information and the diversity of laws on this subject in the various states.[252]

109. We do agree with the Ohio SHPO that it is appropriate for the applicant to inform the SHPO/THPO, as part of the Submission Packet, of the identity of designated consulting parties. Such information will enable the SHPO/THPO to perform a more intelligent review and will help ensure that the applicant has performed a sufficient analysis. Accordingly, we add this provision to the Nationwide Agreement and we include a request for the relevant information on the attached forms. We find, however, that it is unnecessary and burdensome for applicants to notify the Commission of each undertaking as part of the public participation process. Finally, we conclude that the criterion encouraging applicants to grant consulting party status to one who has "a demonstrated legal or economic interest in the undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation," is consistent with, and required by, the Council's rules.[253]

4. Identification, Evaluation and Assessment of Effects

110. Section VI of the draft Nationwide Agreement establishes procedures and standards for identifying historic properties, evaluating their historic significance, and assessing any effect the proposed undertaking may have upon those historic properties.[254] Commenters address five principal subjects in this area, including: (1) the definition of area of potential effects (APE); (2) the means of identifying and evaluating historic properties within the APE for visual effects; (3) the need for archeological surveys; (4) the definition of an adverse effect; and (5) the use of qualified experts. Each of these matters is discussed below.

a. Area of Potential Effects

111. The Area of Potential Effects ("APE") is the area within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if such properties exist.[255] As such, the APE defines the area within which an applicant must look for historic properties that may be affected by an undertaking. The Council's rules provide that the APE is influenced by the scale and nature of an undertaking and may be different for different types of effects.[256] According to the Council's

[252] We note that confidentiality of tribal information is treated separately in Section IV.I of the Nationwide Agreement. *See* Appendix B at B-14*, infra*, (Nationwide Agreement, § IV.I).

[253] *See* 36 C.F.R. § 800.2(c)(5) (additional consulting parties may include individuals and organizations with a demonstrated interest "due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties").

[254] *Notice*, 18 FCC Rcd at 11687-11690.

[255] 36 C.F.R. § 800.16(d).

[256] *Id.*

rules, the APE is determined by the Federal agency responsible for an undertaking in consultation with the SHPO/THPO.[257]

112. The draft Nationwide Agreement provides that each undertaking has one APE for direct (physical) effects, consisting of the area of potential ground disturbance and the portion of any historic property that will be destroyed or physically altered by the undertaking, and a second APE for indirect visual effects. The draft further establishes a rebuttable presumption that the latter APE is the area from which the tower will be visible within ½ mile of the proposed tower for a tower that is 200 feet or less in height, ¾ mile for a tower more than 200 feet but no more than 400 feet in height, and 1.5 miles for a taller tower. The applicant and the SHPO/THPO may mutually agree on an alternative to the presumed distance in any case, and disputes regarding whether to use an alternative APE may be submitted to the Commission for resolution.[258] The *Notice* specifically sought comment on a proposal by the Conference that would require the applicant to establish the visual APE for a facility 1,000 feet or taller on a case-by-case basis, in consultation with the SHPO/THPO.[259]

113. No commenter opposes the proposed definition of the APE for direct effects. Several SHPOs and others in the historic preservation community, however, argue that the presumed visual APEs would not sufficiently protect historic properties.[260] These commenters generally favor a pure case-by-case assessment, guided only by the Council's rules.[261] The Vermont and New Hampshire SHPOs argue, for example, that geographic characteristics vary from state-to-state, and thus a uniform standard is inappropriate.[262] The Wyoming SHPO agrees, arguing that a uniform APE would not protect scenic trails.[263] Others contend that, at a minimum, the APE for towers above a certain height, *e.g.*, 1000 feet, should be determined case-by-case because they are likely to have effects beyond the presumed distances set forth in the draft Agreement.[264] The Appalachian Trail Conference argues for a minimum one-mile standard in order to protect historic trails and preserve consistency with the Scenic Trails initiative.[265] The Alabama SHPO proposes the following based on its guidelines:

> …. a tower under 100 feet requires a ½ mile APE, 101-150 feet requires ¾ miles, 151-250 feet requires 1 mile, 251-350 feet requires 1.5 miles, 301-400 feet requires 2 miles and anything

[257] *Id.* § 800.4(a)(1).

[258] *Notice*, 18 FCC Rcd at 11688.

[259] *Id.* at 11688 n.12.

[260] Oregon SHPO Comments at 2.

[261] Civil War Preservation Trust Comments at 4 (APE should be established during season when line of sight is at its maximum, and should consider lighting of tower); National Trust Comments at 4; Navajo Nation Comments at 4; Rotenstein Comments at 3-4 (APE should be set by experts on a case-by-case basis); USET *et al.* Comments at 16; Wyoming SHPO Comments at 1.

[262] New Hampshire SHPO Comments at 2-3 (stating that 1.5 mile APE is required for all towers in New Hampshire); Vermont SHPO Comments at 1.

[263] Wyoming SHPO Comments at 1.

[264] ACRA Comments at 3; Appalachian Trail Comments at 2; Civil War Preservation Trust Comments at 4; Conference Comments at 1, 5; Maryland SHPO Comments at 1; National Trust Comments at 4 (suggestion that the APE of towers greater than 600 feet should be determined on a case-by-case basis).

[265] Appalachian Trail Comments at 2.

over 400 feet has to consult [with the SHPO/THPO].[266]

114. Although Verizon supports the draft provisions,[267] some industry commenters, on the other hand, contend that the presumed APEs are too large, and indeed are inconsistent with the Council's rules. These parties note that under the Council's rules, an adverse effect can occur only "when an undertaking may alter, directly or indirectly, any of the characteristics . . . 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."[268] Because only features within the boundaries of a property are considered in a National Register nomination, they continue, an undertaking must physically alter a feature within the site boundaries to have an adverse effect. Hence, they contend, the APE for visual effects should be limited to the footprint of the tower and the immediately adjacent area where the tower's shadow may be cast.[269] Fordham University agrees that the presumed APEs are often too large, and proposes a smaller APE for urban areas where suitable tower sites are more difficult to locate. Such sites, Fordham argues, are quite different from rural locations, such as the Gettysburg Battlefield, where larger APEs are appropriate.[270]

115. We adopt the APE provisions substantially as drafted, with only technical and clarifying revisions. In doing so, we emphasize that the scaled distances for visual APEs in the Nationwide Agreement are not inflexible mandates but presumptions, subject to variation in specific instances either by mutual agreement or, in cases of dispute, by Commission decision. Thus, while providing a structure to facilitate the determination of the APE in most cases, the Nationwide Agreement ultimately affords the case-by-case flexibility that commenters advocate. Although some commenters argue that the presumed distances are too small or too large, these distances were discussed at length in the Working Group, and have been agreed to by the experts at the Council and the Conference who are charged with protecting the Nation's historic heritage. In this context, commenters' subjective and anecdotal objections do not persuade us that the presumed distances are inappropriate for the typical case, subject to departure where conditions require.

116. With respect to the tallest towers, although several commenters argue against presuming any visual APE, they offer no more than bald assertions that a 1.5 mile radius is ordinarily insufficient. To be sure, the height of a tower will be a factor in determining whether to depart from the presumed APE, and departure may more often be warranted for the tallest towers. Nonetheless, we are unconvinced that 1.5 miles is inappropriate as a starting point for analysis.

117. As discussed below, we disagree with the argument that visual adverse effects can only result from construction within or very near the boundaries of a listed or eligible property.[271] We therefore decline to adopt a visual APE consistent with this definition of adverse effect. We do add a general definition of the APE for visual effects in order to clarify, consistent with the definition of adverse effect, that it refers only to the geographic area in which the undertaking has the potential to introduce visual elements that diminish the setting, including the landscape, of a historic property where setting is a character-defining feature of eligibility.

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[266] Alabama SHPO Comments at 1.

[267] Verizon Comments at 13.

[268] 36 C.F.R. § 800.5(a)(1).

[269] PCIA Comments at 39-41 (footprint plus 100 yards); AWS Comments at 13; Western/T-Mobile Comments at 15-16 (footprint plus 100 yards).

[270] Fordham Comments at 11-12.

[271] *See* ¶¶ 140-142*, infra.*

b. Identification and Evaluation of Properties That May Incur Visual Effects

118. After the APE is established, the draft Nationwide Agreement, like the Council's rules, requires the applicant to identify historic properties within the APE and evaluate their historic significance.[272] Again tracking the Council's rules, the draft Nationwide Agreement defines a Historic Property, in relevant part, as "[a]ny prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register…."[273] The Council's rules further provide that properties eligible for inclusion in the National Register include "both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria."[274] This definition implements Section 106 of the NHPA, which provides that a federal agency shall take into account the effect of any federal undertaking on any property "included or eligible for inclusion in the National Register."[275] The draft Nationwide Agreement specifies that in identifying historic properties, the applicant shall "us[e] research techniques and employ[ ] methodology generally acceptable to the preservation profession and consider[ ] public comments," and that the level, nature, and extent of identification efforts "will vary depending on the location of the project, the likely nature and location of Historic Properties within the APE," and the state of existing knowledge.[276]

119. Some commenters urge the Commission to limit the definition of Historic Properties to properties that are listed in the National Register or have been previously determined eligible by the Keeper.[277] These commenters contend that the current process, under which applicants must actively search for previously unidentified eligible properties within the APE, is unworkably burdensome because too many properties are "eligible" and there is no ready way to identify these properties.[278] In addition, they note, the process places the prospective tower constructor in the role of determining what properties are eligible – a role the SHPO is supposed to perform.[279] These commenters further cite legislative history that, they state, indicates that when Congress amended Section 106 to include eligible properties, it intended only properties that the Keeper had determined to be eligible.[280] Commenters cite two court decisions that, they claim, support this interpretation.[281] Thus, Sprint argues, the Commission lacks authority to order companies to research sites that have not previously been determined eligible.[282]

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[272] *Notice*, 18 FCC Rcd at 11688-11689; s*ee* 36 C.F.R. § 800.4(b),(c).

[273] *Notice*, 18 FCC Rcd at 11676; s*ee* 36 C.F.R. § 800.16(l)(1).

[274] 36 C.F.R. § 800.16(l)(2); *see also Notice*, 18 FCC Rcd at 11677 (terms not defined in the Nationwide Agreement shall have the same meaning as in the Council's rules or the Commission's rules).

[275] 16 U.S.C. § 470f.

[276] *Notice*, 18 FCC Rcd at 11688.

[277] American Tower Comments at 17; Fordham University Comments at 15-16 (definition should be limited to properties listed in the National Register, previously determined eligible by the Keeper, or identified at the time by the SHPO/THPO); PCIA Comments at 41-44; State of Maryland Comments at 3; AWS *et al.* Reply Comments at 9-10; Fordham University Reply Comments at 2; SBC Reply Comments at 4-5; Sprint Reply Comments at 5-11.

[278] Fordham University Comments at 15-16.

[279] Sprint Reply Comments at 7-8.

[280] PCIA Comments at 42-44 (citing S.Rep. No. 94-367 at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2442, 2450).

[281] *Id*. at 43 (citing *Birmingham Realty Co. v. General Services Administration*, 497 F.Supp. 1377, 1388 (N.D. Ala. 1980)*; Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta*, 497 F.Supp. 504, 512 (N.D. Ala. 1980)).

[282] Sprint Reply Comments at 5-6.

120. We also have in the record a letter from the Chairmen of the U.S. House of Representatives Committee on Resources and Subcommittee on National Parks, Recreation and Public Lands to the Chairman of the Council addressing this issue.[283] Chairmen Pombo and Radanovich note that the Council originally defined properties eligible for inclusion in the National Register under Section 106 to include only properties that the Keeper had previously determined to be eligible, and state that the change in the Council's policy has been particularly burdensome to the wireless telecommunications industry.[284] They further note the pendency of the Nationwide Agreement, and suggest that the Council consider addressing this definitional issue either in the Nationwide Agreement or in a then-pending Council rulemaking.[285] The Botanical Garden opposes any change in definition, citing Council rules and the NHPA.[286]

121. We conclude, based on our review of the record, that it is appropriate to narrow and define applicants' obligations with respect to the identification and evaluation of historic properties within the APE for visual effects. In doing so, we do not alter the definition of Historic Property used in the draft Nationwide Agreement and the Council's rules. In this regard, we defer to the Council's clearly stated interpretation of its own governing statute,[287] which was recently upheld by the federal court reviewing amendments to the Council's rules.[288] We also note that Section 800.14 of the Council's rules, which authorizes programmatic agreements, discusses alternative procedures to Subpart B of the Council's rules, but the definition of Historic Property is in Subpart C.[289] For all these reasons, we conclude that questions regarding the definition of historic properties are outside the scope of this proceeding and should be addressed, if at all, by the Council.

122. At the same time, we believe that it would serve the public interest and is consistent with both the NHPA and Council regulations to narrow applicants' identification efforts. Section 106 is silent on the methodology necessary to identify properties "included in or eligible for inclusion in the National Register." Indeed, a federal court has held that the Council's requirement that federal agencies conduct surveys to identify historic properties is not mandated by the plain meaning of Section 106.[290] Consistent with that holding, the streamlined procedures detailed below effectively place the burden of conducting surveys for identifying potentially eligible properties upon the SHPO/THPO rather than upon the federal agency.

123. Pursuant to its statutory authority, the Council has issued regulations that delineate how federal agencies are to identify historic properties for purposes of Section 106. In particular, the agency must make "a reasonable and good faith effort" that takes into account the burdens of evaluation, the nature and extent of potential effects, the magnitude of the undertaking and the degree of federal involvement in the proposed undertaking.[291] Council regulations provide further that this obligation may

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[283] Letter from Richard Pombo, Chairman, U.S. House of Representatives, Committee on Resources and George Radanovich, Chairman, U.S. House of Representatives, Subcommittee on National Parks, Recreation and Public Lands, to John Nau, III, Chairman, Advisory Council on Historic Preservation (Nov. 26, 2003).

[284] *Id* at 1-2.

[285] *Id* at 2.

[286] Botanical Garden Reply Comments at 15.

[287] *Cf. Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[288] *National Mining Association*, 167 F. Supp. 2d at 290-292.

[289] 36 C.F.R. § 800.14; 36 C.F.R. § 800.16(l)(1).

[290] *National Mining Association*, 167 F. Supp. 2d at 291-292.

[291] *See* 36 C.F.R. § 800.4(b)(1).

be met through procedures specified in subpart B of the rules or as modified in a Programmatic Agreement tailored to the agency's specific needs.[292] Here, the record demonstrates that requiring applicants to undertake, and submit to the SHPO/THPO for review the results of, field surveys for thousands of new communications facilities annually causes considerable delay in the deployment of communications services and imposes a hefty burden on the resources of applicants and SHPO/THPOs alike.[293] Moreover, only those historic properties within the APE for which visual setting or visual elements are character-defining features of eligibility are potentially subject to visual adverse effects. Of these properties, many will not incur adverse effects from a communications facility, depending on the extent to which the facility is visible from the property and other factors. Taking these considerations together, we conclude that the burdens of conducting field surveys and taking other active measures beyond reviewing defined sets of records to identify historic properties in the APE for visual effects, in the context of the facilities covered by this Nationwide Agreement, are not merited by the small potential benefit to historic preservation. We note that the Council has provided for the record its legal basis for recommending a departure from its Subpart B rules with respect to the identification of historic properties within the APE for visual effects.[294]

124. Specifically, the Nationwide Agreement requires that, for most types of historic properties within the APE for visual effects, identification and evaluation efforts are limited to the applicant's review of five sets of records available within the SHPO/THPO's office or in a publicly available source identified by the SHPO/THPO. First, the applicant must identify properties that are actually listed in the National Register. Second, it must identify properties that the Keeper of the National Register has formally determined to be eligible. Third, identification efforts must include properties that the SHPO/THPO is in the process of nominating for the National Register, as certified by the SHPO/THPO. Fourth, identification includes properties that the SHPO/THPO's records identify as having previously been determined eligible by a consensus of the SHPO/THPO and another federal agency or local government representing the Department of Housing and Urban Development. Fifth, identification efforts shall include properties shown in the SHPO/THPO's inventory as having previously been evaluated by the SHPO/THPO and found by it to meet the National Register criteria.[295] Except as described below, an applicant need not identify historic properties within the APE for visual effects that are not in one of these categories, nor need it evaluate the historic significance of such properties. Moreover, by limiting identification to available records of properties that have already been evaluated, we eliminate the need for the applicant to evaluate the historic significance of identified properties.[296]

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[292] *Id*. at § 800.14(b)(2)(iii) ("Compliance with the procedures established by an approved programmatic agreement satisfies the agency's Section 106 responsibilities for all individual undertakings of the program covered by the agreement. . .").

[293] *See*, *e.g.*, AT&T Wireless Comments at 15, n.26, citing *Birmingham Realty Co. v. General Services Administration*, 497 F. Supp. 1377, 1388, n.22 (N.D. Ala. 1980) ("a literal construction of the phrase 'eligible for inclusion in the National Register' would, under broadly stated criteria for eligibility . . . lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion on the Register."); Fordham University Reply Comments at 4; Sprint Reply Comments at 9-10.

[294] *See* Letter from Javier Marques, Associate General Counsel, Advisory Council on Historic Preservation, to Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division [*sic*] (dated March 5, 2004).

[295] We note that the Nationwide Agreement requires SHPOs/THPOs, subject to state and tribal laws, regulations, and procedures, to retain and make available for purposes of Section 106 review information provided by applicants pertaining to the location and National Register eligibility of historic properties. Appendix B at B-24, *infra* (Nationwide Agreement, § VII.E).

[296] An applicant may, however, at its discretion evaluate whether a property identified in the SHPO/THPO's records has become ineligible for listing, and if it determines that the property is not eligible, may recommend in its Submission Packet the property's removal from consideration. In addition, evaluation may be necessary as part of

125. We find, however, that review of records maintained by the SHPO/THPO is insufficient for identification of historic properties of traditional religious and cultural significance to Indian tribes and NHOs. As the Council's rules recognize, Indian tribes and NHOs possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.[297] Moreover, Indian tribes and NHOs frequently have confidentiality and privacy concerns about including sites of religious and cultural significance to them in publicly available records.[298] Therefore, we conclude that identification and evaluation of historic properties without the involvement of potentially affected Indian tribes and NHOs would create an unacceptable risk that historic properties of traditional cultural and religious significance to them may be overlooked.[299] Accordingly, as part of the process of Indian tribe and NHO participation pursuant to Section IV of the Nationwide Agreement, an applicant or the Commission shall gather information from Indian tribes or NHOs to assist in identifying and evaluating historic properties of traditional cultural and religious significance to them.[300] This process may include a field survey or other affirmative efforts at identification if the Indian tribe or NHO demonstrates that such efforts are appropriate.

126. As part of the Submission Packet to be provided to the SHPO/THPO and consulting parties,[301] the Nationwide Agreement requires the applicant to list the historic properties that it has identified pursuant to the Nationwide Agreement.[302] Upon reviewing this list, the SHPO/THPO may identify other properties already included in its inventory within the APE that it considers eligible for inclusion in the National Register.[303] In this event, the SHPO/THPO may notify the applicant of these additional properties pursuant to Section VII.A.4 of the Nationwide Agreement in order for the applicant to assess the potential effects on such properties. We conclude that this process, without imposing additional burdens of identification and evaluation on applicants, provides a safeguard for the SHPO/THPO to identify specific historic properties that may be affected in rare instances where the process provided in the Nationwide Agreement might otherwise cause significantly affected properties to be overlooked.[304]

127. Finally, these limitations on the identification and evaluation process do not apply within the APE for direct effects. The APE for direct effects, because it is limited to the area where the tower

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the assessment of effect if the SHPO/THPO's records are insufficient to describe the features that qualify a property for listing.

[297] 36 C.F.R. § 800.4(c)(1).

[298] *See* 36 C.F.R. § 800.4(a)(4) (directing agencies, when identifying historic properties, to be mindful of reluctance of Indian tribes and NHOs to divulge specific information regarding the location, nature, and activities associated with religiously and culturally significant sites).

[299] We note that the NHPA imposes a specific obligation on federal agencies to consult with any Indian tribe or NHO that attaches religious and cultural significance to historic properties in carrying out its obligations under Section 106. 16 U.S.C. § 470a(d)(6)(B).

[300] *Cf.* 36 C.F.R. § 800.4(a)(4) (imposing similar obligation under Council's rules of general applicability).

[301] *See* Appendix B at B-21 to B-22, *infra* (Nationwide Agreement, § VII.A).

[302] *Id.* at B-18 (Nationwide Agreement, § VI.D.1.c); *see also* Attachments 3 and 4 (FCC Forms 620 and 621).

[303] The SHPO/THPO may also advise the applicant that certain properties on the list are no longer eligible for inclusion, and that effects on those properties therefore need not be assessed.

[304] In addition, to the extent a public comment identifies a potentially affected historic property that the applicant has not otherwise identified, the applicant shall consider that comment. *See* Appendix B at B-15, *infra* (Nationwide Agreement, § V.E).

will cause ground or physical disturbances, is much smaller than for visual effects. As a result, searches of those areas do not present the potential for delay likely to arise in assessing visual effects. At the same time, the potential magnitude of effects to properties within the APE for direct effects is much greater, in some instances including destruction of the property, and these effects are not readily discoverable other than through careful examination of the site. Therefore, as discussed below, additional identification efforts, potentially including an archeological field survey, may be required within the APE for direct effects.

c. Archeological Field Surveys

128. Historic properties that may be subject to direct effects as a result of an undertaking include above-ground and archeological properties that may be physically altered or destroyed. For purposes of identifying archeological historic properties, the draft Nationwide Agreement provides that no archeological field survey is required if the undertaking is unlikely to cause direct effects to archeological resources, and that disagreements regarding the necessity for an archeological survey may be referred to the Commission.[305] The draft further states that it may be assumed that no archeological resources exist where all areas to be excavated will be located on ground that has been previously disturbed to a depth of two feet or six inches deeper than the general depth of the anticipated disturbance (excluding footings and similar limited areas), whichever is greater, and no archeological resources are recorded in public files of the SHPO/THPO or any potentially affected Indian tribe or NHO.[306] In other words, if the ground to be excavated has been previously disturbed, the applicant must research the SHPO/THPO's and Tribe/NHO's files, and if no records of archeological resources are found, it may assume that no survey is necessary.

129. Those industry commenters that address the issue generally support these provisions as drafted, emphasizing in particular that it would be a waste of resources to require a field survey at many sites where the likelihood of finding archeological properties is remote.[307] Other commenters, however, oppose the draft provisions in various respects. For example, USET *et al.* argue that the Commission must require a Phase I archeological survey for each undertaking unless every potentially affected Tribe or NHO has agreed that a survey is unnecessary.[308] Without such a survey, they continue, it is not possible to determine whether or not an impact upon Indian traditional cultural and religious sites may occur.[309] Several commenters contend that the criterion for previously disturbed ground is inadequate, arguing that archeological resources are often located several feet deep and may be found in portions of the project area other than those to be excavated.[310] Moreover, commenters state, the provision would potentially include as "previously disturbed" cultivated farms and riparian areas that often contain archeological resources.[311] The Maine SHPO further argues that state records may be incomplete, and thus the draft provisions may cause archeological resources to be overlooked.[312] In addition, the West

[305] *Notice*, 18 FCC Rcd at 11688-11689.

[306] *Id.* at 11689.

[307] *See* PCIA Comments at 11; AWS *et al.* Reply Comments at 7-8; Sprint Reply Comments at 19.

[308] USET *et al.* Comments at 22.

[309] *Id.; see also* Confederated Tribes of the Umatilla Indian Reservation Comments at 2 (characterizing provision as lawyerly, incomprehensible to practitioners, and unlikely to protect the resources in question).

[310] Alabama SHPO Comments at 1 (some sites are meters deep); California SHPO Comments at 3-4; Maine SHPO Comments at 1-2. *See also* ACRA Comments at 3.

[311] Ohio SHPO Comments at 2.

[312] Maine SHPO Comments at 2.

Virginia SHPO seeks clarification of who decides when an archeological survey is required.[313] The Idaho SHPO agrees with the draft Nationwide Agreement that archeological surveys should be performed only when necessary, but argues that the SHPO/THPO, as the party with the most relevant local knowledge, should make the determination of necessity.[314]

130. Upon review of the record, we conclude that an archeological field survey should not be required where archeological resources are unlikely to be affected. Many facilities are placed in locations where the likelihood of affecting archeological resources is remote; for example, on paved ground in a highly developed downtown area. Requiring onsite archeological work in these instances would add substantial delay and cost to facilities deployment to no appreciable benefit.

131. At the same time, we conclude, based on the record, that it is necessary to refine the standards and procedures in the draft Nationwide Agreement for determining when an archeological field survey is required. In particular, we find, given the breadth of commenters' concerns, that it is inadequate to give applicants general discretion to eschew an archeological field survey when an undertaking is "unlikely to cause direct effects to archeological sites." Rather, the Nationwide Agreement must define with specificity the circumstances under which a field survey is not required.

132. The Nationwide Agreement that we adopt specifies two such circumstances. First, consistent with the draft Nationwide Agreement, no archeological field survey is necessary when the ground on which construction will occur has been previously disturbed. Where the ground has been previously disturbed in the locations and at the depths that are proposed to be excavated in connection with future construction, the likelihood of direct effects to archeological resources ordinarily is remote, whether or not archeological resources may be located at greater depths or in other portions of the project area. Due to differences in the compaction characteristics of soils in different parts of the Nation, however, we require a previous disturbance to at least two feet below the proposed construction depth (excluding footings and other anchoring mechanisms), rather than six inches as in the proposed Nationwide Agreement, to satisfy this criterion. We find that a two-foot margin is necessary to provide reasonable assurance that archeological resources are unlikely to be affected under any soil conditions.[315] The second circumstance under which no archeological field survey is required is when geomorphological evidence indicates that cultural-resource bearing soils do not occur within the project area, or may occur but at more than two feet below the proposed construction depth.[316] Where a qualified expert has found that such conditions exist, direct effects on archeological resources are inherently unlikely, and accordingly it is ordinarily not reasonable to require further identification efforts.

133. With respect to both of these criteria, the depth of proposed construction to be considered excludes footings and other anchoring mechanisms that may require excavation substantially deeper than the general level at a site. These footings cover very small areas within a project site, usually no more than two to three feet (and often less) in diameter, and may extend 20 to 30 feet deep or more. Under the circumstances, we find that a field survey in such narrow deep areas is infeasible, and indeed may typically cause more harm than the minimal amount of damage to archeological resources that could occur during construction. Therefore, performing a field survey at the depths reached by footings and

[313] West Virginia SHPO Comments at 1. *See also* California SHPO Comments at 3.

[314] Idaho SHPO Comments at 2.

[315] *See* Council February 19, 2004 Letter, Attachment at 6 (proposing two-foot margin).

[316] *See id.*

other anchoring mechanisms is ordinarily not part of a reasonable and good faith effort to identify historic properties.

134. Finally, similar to the procedure for identifying historic properties that may incur visual effects, we include provisions to ensure the ability of Indian tribes and NHOs to provide information regarding the potential presence of archeological historic properties of religious and cultural significance to them, and we provide a safeguard opportunity for the SHPO/THPO to identify the need for a field survey. Specifically, as part of the tribal and NHO participation process pursuant to Section IV of the Nationwide Agreement, the applicant or the Commission must gather information from identified Indian tribes and NHOs to assist in identifying archeological historic properties, including the need for a field survey. In addition, the applicant must substantiate its determination that no archeological field survey is necessary as part of its Submission Packet, and the SHPO/THPO may identify a need for a field survey, notwithstanding the applicability of either of the criteria discussed above, during its review pursuant to Section VII.A. We emphasize that an Indian tribe or NHO, or a SHPO/THPO, must provide evidence supporting a high probability of the presence of intact archeological historic properties within the APE for direct effects in order for a field survey to be necessary under these circumstances.

135. Taken together, we conclude that these standards and procedures, while they do not guarantee that no archeological resources will ever be found, constitute a reasonable and good faith effort to identify archeological historic properties as contemplated by the NHPA and the Council's rules. Any discoveries that may be made during construction after following these procedures are appropriately handled pursuant to Section IX of the Nationwide Agreement.

d. Definition of Adverse Effect

136. Once historic properties have been identified and their historic significance evaluated, the next step in the Section 106 process is assessment of whether the proposed undertaking would have an adverse effect on those historic properties.[317] The draft Nationwide Agreement provides that effects shall be evaluated using the Criteria of Adverse Effect set forth in the Council's rules.[318] The draft further provides guidance, consistent with the Council's rules, that a facility will have a visual adverse effect if its visual effect will noticeably diminish the integrity of one or more characteristics qualifying a property for the National Register, and that a facility will not cause a visual adverse effect unless visual setting or elements are character-defining features of eligibility.[319] The provision then provides examples of historic properties on which visual adverse effects might occur, including: "(1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape."[320] In the *Notice*, we sought comment not only on this provision of the draft Nationwide Agreement, but also on an alternative proposal by PCIA that uses the same examples

[317] *See* 36 C.F.R. § 800.5.

[318] *Notice*, 18 FCC Rcd. at 11689; *see* 36 C.F.R. § 800.5(a)(1) ("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. ….").

[319] *Notice*, 18 FCC Rcd at 11689.

[320] *Id.* at 11689-11690.

and much of the same language, but differs principally in suggesting that a facility must be located within the boundary of a historic property in order to have a visual adverse effect on that property.[321]

137. Consistent with the alternative definition on which the *Notice* sought comment, several commenters argue that a visual adverse effect ordinarily can result only from a facility that is located within the boundaries of a historic property, and that the Nationwide Agreement should so state.[322] These commenters argue that under Section 800.5(a)(1) of the Council's rules, an adverse effect must alter the characteristics of a historic property that make it eligible for the National Register. Moreover, they contend, what makes a property eligible are the physical features within its boundaries. Hence, in order to have an adverse effect, an undertaking must alter or diminish the ability of the physical features of a historic property to convey the integrity of the property's setting, feeling, association, or other characteristic of eligibility. This in turn, they conclude, ordinarily requires that the undertaking be located within the boundary of the historic property.[323] Consideration of visual effects from a facility located outside these boundaries, they contend, is not a matter of historic preservation but of aesthetics, which is properly considered in local zoning.[324]

138. Other commenters, including several SHPOs and Indian tribes, oppose PCIA's proposed definition of visual adverse effects. These commenters favor retaining the description in the draft Nationwide Agreement, which closely tracks the Council's rules. The alternative provision, they contend, is inconsistent with those rules.[325]

139. Some commenters also address the examples in the draft Nationwide Agreement of situations where a facility may have a visual adverse effect on a historic property. Fordham University, while supporting the textual description in the draft, argues that the examples are too broad, and that they should be replaced with more appropriate examples.[326] For instance, it states that the assessment of effects should include the setting in which a facility will be located, such as in a city.[327] The Delaware SHPO also contends that the draft examples are inappropriate because they are restrictive and misleading.[328] The Wyoming SHPO advocates adding historic trails as an additional type of property that

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[321] *Id.* at 11690, n.13. The alternative provision provides: "Construction of a Facility will not cause a visual adverse effect except where the Facility noticeably diminishes the visual elements of setting, feeling or association within the boundary of a Historic Property, where such elements are important elements of that historic property's eligibility. Examples include Facilities located within the actual, or, for unlisted properties, the most logical or reasonable boundary of: (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape."

[322] AWS Comments at 14; Blooston Comments at 4; PCIA Comments at 34-39; Western/T-Mobile Comments at 15-16; AWS *et al.* Reply Comments at 10-11.

[323] AWS *et al.* Comments at 14; PCIA Comments at 38-39; Western/T-Mobile Comments at 15-16.

[324] NAB Comments at 10; PCIA Comments at 35, n.72.

[325] Georgia SHPO Comments at 5; Maryland SHPO Comments at 1 (visual adverse effects cannot be limited to facilities "within an historic property's boundaries"); Navajo Nation Comments at 4 (alternative definition turns the NHPA concept on its head); Ohio SHPO Comments at 2-3.

[326] Fordham University Comments at 17-20.

[327] *Id.* at 11-12.

[328] Delaware SHPO Comments at 1.

may be susceptible to visual adverse effects.[329] Dr. Rotenstein supports the examples, but opines that the definition is otherwise unclear.[330]

140. We adopt with some revisions the provision of the Nationwide Agreement describing visual adverse effects. Although the Council's rule is not entirely clear, it is plain that setting is among the characteristics of a historic property that, when altered and diminished in integrity, may produce an adverse effect.[331] It seems reasonable to us that, under some circumstances, the introduction of a large visual intrusion outside the boundaries of a historic property within the APE may diminish the integrity of setting, including the landscape, on that property in such a way as to alter a characteristic of visual setting or visual elements that qualifies the property for inclusion in the National Register. By contrast, where the features that qualify a property for listing on the National Register are unrelated to its visual setting (for example, its interior design), then a visual intrusion outside the property boundaries will not constitute an adverse effect. Indeed, any other view arguably would be inconsistent with Section 106, which directs federal agencies, without limitation, to consider the "effect" of their undertakings on historic properties.[332] More important, the Council has consistently interpreted Section 106 and its rules in this manner. Therefore, we are unconvinced that the alternative definition advocated by several commenters is more faithful to Section 106 as currently implemented by the Council.

141. In addition, we disagree with the suggestion of some commenters that the draft text is not clear.[333] The provision in the draft Nationwide Agreement clarifies the Council's rule by simplifying the language, making clear that an undertaking (whether inside or outside the boundaries of a historic property) will not cause a visual adverse effect unless visual setting or visual elements are character-defining features of eligibility. We find that this language provides guidance as clear as is feasible for a judgment that is inherently somewhat subjective. We note in this regard that the alternatives proposed by commenters also include qualifiers and generalities that are, if anything, more difficult to apply than the language that we adopt.[334]

142. We do revise the draft Nationwide Agreement to clarify that a facility may have a visual adverse effect on a historic property only if the historic property is within the APE. In addition, the presence within the APE of a historic property for which visual setting or visual elements are character-defining features of eligibility does not in itself mean that the undertaking will necessarily have an adverse effect on that property, but rather the undertaking must noticeably diminish the integrity of a qualifying characteristic of eligibility. Finally, we delete the examples of types of properties to which visual adverse effects may occur. We conclude that in the context of the clarified definition of visual adverse effect, the addition of examples of representative types of situations where there may be but is not necessarily a visual adverse effect would create an unnecessary risk of confusion.

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[329] Wyoming SHPO Comments at 1.

[330] Rotenstein Comments at 4.

[331] 36 C.F.R. § 800.5(a)(1).

[332] 16 U.S.C. § 470f.

[333] *See* Fordham University Comments at 19-20.

[334] *See, e.g,* AWS *et al.* Comments at 14 (proposing five-sentence definition that includes requirement that the facility "would have to prevent or inhibit the physical features of [a historic] property from expressing or conveying a sense of a particular period of time"); Fordham University Comments at 19.

e. Use of Qualified Experts

143. The draft Nationwide Agreement provides that "[i]dentification, evaluation, and assessment are most expeditiously accomplished by individuals with historic preservation and cultural resource management expertise and experience."[335] Several commenters argue, either directly or indirectly, that this provision is inadequate and suggest that applicants should be required to use experts that meet the Secretary of the Interior's qualifications.[336] These commenters contend that many of the delays and misunderstandings in the Section 106 process today result from poor quality work due to the failure of companies to use qualified experts.[337] One SHPO argues that federal regulations mandate the use of qualified experts.[338] Some commenters further argue that the Nationwide Agreement should go beyond the Secretary's standards, and should require specific procedural or geographic expertise. For example, O´ahu Civic Clubs Committee contends that experts with knowledge of native Hawaiian sites should be utilized in Section 106 reviews in Hawaii.[339]

144. PCIA does not oppose encouraging the use of qualified experts, but argues that their use should not be mandatory.[340] As a matter of policy, PCIA states, the Commission should not dictate standards to companies; rather, "private industry or standards bodies" should do so.[341] In addition, PCIA contends, the federal government has had difficulty defining qualifications, noting that even the U.S. Office of Personnel Management has been unable to set professional standards in this area.[342] SBC argues that the use of objective standards (*e.g.*, for exclusions) should preclude the need to have evaluations performed by those with special training.[343]

145. We revise the Nationwide Agreement to require that aspects of identification, evaluation, and assessment be performed by experts who meet the Secretary of the Interior's qualifications. The NHPA expressly recognizes the importance of using qualified experts in historic preservation reviews. It states that "[a]gency personnel or contractors responsible for historic resources shall meet qualification standards established by the Office of Personnel Management in consultation with the Secretary and appropriate professional societies of the disciplines involved."[344] We find it consistent with the objectives embodied in the NHPA that where a licensee or applicant, like a contractor, performs portions of the

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[335] *Notice*, 18 FCC Rcd. at 11687.

[336] California SHPO Comments at 2-3; Georgia SHPO Comments at 1-2; Idaho SHPO Comments at 1; Massachusetts SHPO Comments at 1 (Nationwide Agreement needs a definition for "qualified professionals" that references the definition adopted by the Secretary of the Interior); Oregon SHPO Comments at 1; USET *et al.* Comments at 13, 21; Vermont SHPO Comments at 1; Rotenstein Reply Comments at 2-3; *see* 36 C.F.R. Part 61 (Secretary of the Interior's standards).

[337] California SHPO Comments at 1; Georgia SHPO Comments at 1-2; Idaho SHPO Comments at 1.

[338] Oregon SHPO Comments at 1.

[339] O'ahu Comments at 3.

[340] PCIA Reply Comments at 22.

[341] *Id*.

[342] *Id.*

[343] SBC Reply Comments at 4.

[344] 16 U.S.C. § 470h-4(a).

Section 106 process that implicate professional expertise in the agency's stead, it also should use Secretary-qualified experts.[345]

146. The Secretary's standards generally establish minimum levels of education and/or experience for qualified experts in history, architectural history, archeology, and related fields.[346] The record before us details the errors in the Section 106 process, leading to delays, that often occur where qualified experts are not used.[347] This persuades us that the mandatory use of Secretary-qualified experts for identification and evaluation of properties within the APE for direct effects, and for assessment of effects on all historic properties, is appropriate and indeed critical to provide the level of reliability and trust necessary to support the streamlined procedures and standards established in the Nationwide Agreement. The standards in the Nationwide Agreement for these aspects of historic preservation review are not and by their nature cannot be so objective as to render the use of qualified experts unnecessary.[348] Thus, requiring the use of Secretary-qualified experts for these purposes advances the objectives of Section 214 of the NHPA. To the extent it may be infeasible or unduly burdensome to locate and retain Secretary-qualified experts in unusual circumstances, we will consider requests for waiver on a case-by-case basis.[349]

147. With respect to the identification of properties within the APE for visual effects, by contrast, the Nationwide Agreement largely reduces the applicant's obligations to reviewing defined sets of records in the SHPO's/THPO's files. We find that specialized training is not necessary to glean from these records whether the properties contained therein have been previously determined or considered eligible for inclusion in the National Register as specified in the Nationwide Agreement. Use of a Secretary-qualified expert to perform this review may ease burdens on an applicant, for example by enabling it to evaluate whether a property in the SHPO's/THPO's records is no longer eligible for listing and therefore that potential effects on that property need not be assessed. We conclude, however, that whether to make such judgments prior to assessment is appropriately a business decision to be made by the applicant. Therefore, while we encourage applicants to use Secretary-qualified experts to identify historic properties within the APE for visual effects, we do not require the use of Secretary-qualified experts for this purpose. We note, however, that some states restrict access to the SHPO's files to persons who meet the Secretary's standards,[350] and the Nationwide Agreement is not intended to preempt states from applying such generally applicable procedural requirements to the Commission's applicants.

148. Although we encourage and expect that applicants will use experts with relevant experience in the Section 106 process and the specific geographic area, we do not include such a requirement in the Nationwide Agreement. Unlike the Secretary's standards for general professional qualifications, there are no widely accepted or legally mandated standards for Section 106 experience or geographic expertise.[351]

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[345] *See also* 36 C.F.R. § 800.2(a)(3) ("If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.").

[346] *See* 36 C.F.R. Part 61, Appendix A (providing professional standards for the fields of history, archeology, architectural history, architecture, historic architecture).

[347] California SHPO Comments at 1; Georgia SHPO Comments at 1-2; Idaho SHPO Comments at 1.

[348] *Cf.* ¶ 81, *supra* (use of experts unnecessary to establish objectively defined exclusions).

[349] *See* 47 C.F.R. § 1.3 (permitting waiver of rules "for good cause shown").

[350] Idaho SHPO Comments at 2.

[351] We note that "Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." 36 C.F.R. § 800.4(c)(1).

Therefore, any requirement along these lines would be either potentially arbitrary or too general to enforce. We note that to the extent an applicant uses experts who are unfamiliar with Section 106 or the geographic area, this may affect the SHPO's/THPO's review.

5. Procedures for SHPO/THPO and Commission Review

149. Section VII of the Nationwide Agreement establishes procedures for SHPO/THPO review of applicants' determinations and for submission of certain matters to the Commission.[352] Generally, the draft Nationwide Agreement provides that applicants shall submit their determinations to the SHPO/THPO using the prescribed Submission Packet, and that the SHPO/THPO has 30 days to review the submission. If the SHPO/THPO agrees with the applicant's determination that no historic properties would be affected or does not respond to such a determination within 30 days, the Section 106 process is complete and no Commission processing is necessary. If the SHPO/THPO does not respond within 30 days to an applicant's determination of no adverse effect, the draft establishes a presumption that the SHPO/THPO concurs with the applicant's determination, requires the applicant to forward the Submission Packet to the Commission, and permits the Commission to establish a time period within which the process will be considered complete unless the Commission notifies the applicant otherwise. Section VII also specifies procedures for resolution in cases of adverse effect, similar to those set forth in the Council's rules.[353] In addition, the Section provides that instances in which the applicant and SHPO/THPO do not agree on an assessment may be submitted to the Commission.

150. Commenters generally support the establishment of time periods for the review process, and in particular numerous commenters support the provision that an applicant's determination of no historic properties affected is final if the SHPO/THPO does not disagree with it within 30 days.[354] Several commenters, however, advocate extending the same principle to determinations of no adverse effect.[355] CTIA, for example, argues that if applicants can be trusted to make reasonable assessments in cases of no historic properties affected, they should similarly be trusted where there is no adverse effect, and that requiring submissions to the Commission would impose undue delay and expenditure of resources.[356] If it is deemed necessary for applicants to submit determinations to the Commission under these circumstances, some commenters add, the Commission's review should be limited to 10 to 15 days.[357]

151. Some commenters also advocate specification of time periods to govern other aspects of the process. Verizon, for example, states that the Commission should be bound to resolve disputes between applicants and SHPOs/THPOs within 30 days.[358] CTIA supports time limits for the various activities in resolving adverse effects.[359] The Alabama and Georgia SHPOs, on the other hand, oppose the provision that, where an applicant forwards a public comment to the SHPO/THPO during the last five days of the

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[352] *Notice*, 18 FCC Rcd at 11690-11693.

[353] *See* 36 C.F.R. §§ 800.6, 800.7.

[354] *See, e.g.,* American Tower Comments at 5; Verizon Comments at 13; Western/T-Mobile Comments at 4-5.

[355] American Tower Comments at 5; CTIA Comments at 36-38; Western/T-Mobile Comments at 4-5; PCIA Reply Comments at 20.

[356] CTIA Comments at 38.

[357] American Tower Comments at 6 (15 days); CTIA Comments at 38 (10-15 days).

[358] Fordham University Comments at 21-23; Verizon Comments at 13.

[359] CTIA Comments at 38 n.91. The *Notice* specifically sought comment on this question. *See Notice,* 18 FCC Rcd at 11693 n.18.

SHPO/THPO's review period, the period will be extended so that the SHPO/THPO shall have at least five calendar days to review it, arguing that such an extension is too short.[360]

152. The draft Nationwide Agreement provides that if a SHPO/THPO determines that an applicant's Submission Packet is inadequate, the SHPO/THPO shall immediately return the Submission Packet with a description of the deficiencies, and the applicant may resubmit an amended Submission Packet within 60 days.[361] The *Notice* specifically invited comment on this provision,[362] and several parties responded. In particular, a number of commenters advocate eliminating the 60-day limit on resubmissions.[363] Blooston supports the PCIA and CTIA proposal to toll the 30-day review period when the SHPO/THPO returns a Submission Packet to the applicant for more information.[364] The California SHPO, by contrast, argues that in such instances, a new review period should commence upon the applicant's resubmission.[365]

153. Several commenters address the provisions for Commission resolution of disagreements between the applicant and the SHPO/THPO. Verizon, for example, argues that an applicant should be able to ask the Commission to resolve disputes with a SHPO/THPO regarding the sufficiency of documentation.[366] The Ohio SHPO argues that the Nationwide Agreement should specify that SHPOs as well as applicants may bring disputes before the Commission,[367] and the Wyoming SHPO seeks language permitting SHPOs to reassess their position before an applicant refers a dispute to the Commission.[368]

154. White Mountain Apache Tribe favors revision of the draft provision that encourages applicants and SHPOs/THPOs to investigate measures that would convert an adverse effect determination into no adverse effect, arguing that applicants and SHPOs/THPOs should be required to consider such measures.[369] The Georgia SHPO argues that conditional no adverse effect determinations should be made before an adverse effect recommendation, in order to deter the use of such determinations to avoid mitigation procedures.[370] Finally, the Civil War Preservation Trust argues that where the SHPO or other consulting party disagrees with the applicant on a finding either of no historic properties affected or no adverse effect and the applicant submits the dispute to the Commission, as well as in all cases of adverse effect, then the Commission's determination must be submitted to the Council for review.[371]

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[360] Alabama SHPO Comments at 1; Georgia SHPO Comments at 5. *See also* Idaho SHPO Comments at 2 (arguing that this provision is unclear).

[361] *Notice*, 18 FCC Rcd at 11690-11691 (§ VII. A.4).

[362] *Id.* at 11691 n.15.

[363] Maryland SHPO Comments at 1; Verizon Comments at 14; Western/T-Mobile Comments at 17; Fordham University Reply Comments at 11.

[364] Blooston Comments at 5; *see Notice*, 18 FCC Rcd at 11691 n.15.

[365] California SHPO Comments at 4. *See also* SBC Comments at 8 (seeking clarification of this provision).

[366] Verizon Comments at 14.

[367] Ohio SHPO Comments at 3. *See also* California Comments at 3; New Hampshire SHPO Comments at 3.

[368] Wyoming SHPO Comments at 2.

[369] White Mountain Apache Tribe Comments at 1. *See also* Maryland SHPO Comments at 1 (supporting procedures for determinations of conditional no adverse effect). The *Notice* specifically sought comment on this question. *Notice*, 18 FCC Rcd at 11692, n.16.

[370] Georgia SHPO Comments at 5-6.

[371] Civil War Preservation Trust Comments at 5.

155. We adopt Section VII of the Nationwide Agreement substantially as written. With respect to Applicant determinations of no adverse effect, while we expect that SHPOs/THPOs will endeavor in good faith to review such determinations within the time frame specified in the Nationwide Agreement, we conclude that it is appropriate to require a submission to the Commission where the SHPO/THPO fails to do so. By their nature, determinations of no adverse effect ordinarily involve closer and more subjective judgments of whether an adverse effect may occur than do cases where no historic properties are affected. Indeed, this difference is reflected in the generally applicable procedures set forth in the Council's rules.[372] Therefore, consistent with the positions taken by the Council and the Conference in negotiating the Nationwide Agreement, it is sound historic preservation policy that where a SHPO/THPO has not reviewed an applicant's determination of no adverse effect, the federal agency should have the opportunity to do so. In order to avoid undue delay, we conclude, as contemplated in the draft Nationwide Agreement, that an applicant's determination of no adverse effect will be final 15 days after electronic submission to the Commission, or 25 days after submission to the Commission by other means, unless the relevant Bureau notifies the applicant otherwise. We find that an additional 10 days is appropriate for hard copy submissions both because non-electronic submissions may take longer to reach the relevant personnel and in order to encourage electronic filing, which saves resources and reduces uncertainty for all parties. We delegate to the operating Bureaus authority to promulgate procedures to trigger this 15-day or 25-day period.

156. We decline to adopt the other time limits that various commenters advocate. While we will endeavor to resolve disputes between SHPOs/THPOs and applicants as quickly as possible, and to facilitate the timely resolution of adverse effects, we conclude that the variety of factual circumstances under which these situations may arise makes it inadvisable to adopt binding time frames. We also find that up to five additional days for SHPOs/THPOs to review comments that are filed toward the end of their review period is reasonable, given that such filings will necessitate additional review only of the new material. We reject as unnecessary the various proposed revisions to the dispute resolution provisions.[373] In addition, given the variety of factual situations that may arise, we find it appropriate to leave the parties flexibility to determine in each matter whether and when to consider means to achieve conditional findings of no adverse effect. We find no legal support or rationale for the suggestion that the Council must be given an opportunity to review determinations of no historic properties affected and no adverse effect under a programmatic agreement. We note that, consistent with the Council's rules, the draft Nationwide Agreement does provide that the Council shall be invited to participate where it is determined that a proposed undertaking would have an adverse effect.[374]

157. We do, however, revise and clarify the draft provision for the return and amendment of inadequate submissions. The intent of the requirement that resubmissions occur within 60 days is to permit SHPOs/THPOs to manage their dockets effectively by dismissing stale proceedings. We did not intend to suggest any limitation on the resubmission of a project as a new matter, and we amend the Nationwide Agreement to clarify this point. Additionally, we specify that the resubmission commences a new 30-day review period. While we are aware of the potential for SHPOs/THPOs to evade the time limit in the Nationwide Agreement through unnecessary returns, we believe the requirement to describe

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[372] *Cf.* 36 C.F.R. § 800.4(d)(1) (procedures to be followed upon finding of no historic properties affected) *with* 36 C.F.R. § 800.5(b),(c),(d) (procedures to be followed upon finding of no adverse effect).

[373] For example, nothing in the Nationwide Agreement prevents a SHPO/THPO from bringing a dispute to the Commission, or an applicant from raising a question regarding sufficiency of documentation, or any party from bringing an issue before the Council. We do not expect, however, that any of these things will happen in the normal course, and it is impractical for the Nationwide Agreement to provide explicitly for every contingency.

[374] Appendix B at B-24, *infra* (Nationwide Agreement, § VII.D.2).

deficiencies will limit this potential, and we conclude that it is unreasonable to permit applicants to benefit from a potentially shorter ultimate review period due to their own initial shortcomings. We intend to monitor any complaints about the application of this provision, and we will not hesitate to request an amendment or other appropriate measures from the other signatories if experience proves it necessary.[375]

6. Other Provisions

158. In addition to the subjects discussed above, a number of parties filed comments addressing other provisions of the draft Nationwide Agreement. For example, the Ohio SHPO suggests reference to the National Park Service guidelines, as set out in the National Register bulletins, with respect to the identification of historic properties.[376] We decline to include such a reference, which would be inconsistent with the identification procedures we adopt herein. The Hualapai Tribe argues that applicants must consider generator noise when assessing adverse effects.[377] We are aware of no case, however, where noise from a communications facility generator has been found to have an adverse effect on a historic property. We therefore conclude that the unusual case in which generator noise may have an adverse effect is best addressed through the public comment and objection process in Section XI. While the Conference argues that it would promote efficiency to permit applicants and SHPOs, as well as the Commission, to submit questions regarding eligibility to the Keeper, we conclude that such a provision would be inconsistent with the Keeper's rules.[378] The White Mountain Apache Tribe argues that the requirement that an applicant cease construction upon post-review discovery of a potentially affected historic property should also include a directive to cease operation at a constructed facility.[379] We conclude that it is more appropriate for the Commission to determine whether to order cessation of operations under such circumstances on a case-by-case basis, consistent with the procedural requirements of Section 312 of the Communications Act.[380] We also reject as infeasible and potentially arbitrary, given the variety of potential factual situations, American Tower's proposal to include a strict time limit on when members of the public may file comments and objections under Section XI.[381] In response to the Council's comment, we add a provision encouraging, but not requiring, applicants to disassemble towers constructed adjacent to or within the boundaries of a historic property if those towers become obsolete or remain vacant for a year or more.[382] Finally, WCA seeks the addition of several new communications services, such as the 700 MHz service and Wireless Communications Service, to the list of covered services in Attachment 2.[383] We add these services to the list of services attached to the Nationwide Agreement.

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[375] *See* Appendix B at B-27 to B-28, *infra* (Nationwide Agreement, §§ XII (Amendments), XIV (Annual Review)).

[376] Ohio SHPO Comments at 2 (Number 7).

[377] Hualapai Tribe Comments at 2.

[378] Conference Comments at 5 (Number 22); *see* 36 C.F.R. § 63.2 (no authority for applicant to request eligibility determination from the Keeper).

[379] White Mountain Apache Tribe Comments at 1. *See also* Appendix B at B-25, *infra* (Nationwide Agreement, § IX.A).

[380] 47 U.S.C. § 312.

[381] American Tower Comments at 13.

[382] Council February 19, 2004 Letter, Attachment at 2, 8; *see* Appendix B at B-24, *infra* (Nationwide Agreement, § VII.F).

[383] WCA Comments at 3-4.

159. The Conference suggests clarification regarding the role of the THPO and the applicability of the Nationwide Agreement. As set forth in the Nationwide Agreement,[384] the Nationwide Agreement does not apply on tribal land, as defined in the NHPA and the Council's regulations,[385] unless a tribe chooses to adopt its provisions. Thus, where a tribe has elected to apply the Nationwide Agreement on tribal lands and has assumed SHPO functions under Section 101(d)(2) of the NHPA,[386] the term "SHPO/THPO" denotes the THPO. In all areas that are not on tribal lands, as well as on the lands of any tribe that has adopted the Nationwide Agreement but has not assumed SHPO functions under Section 101(d)(2), "SHPO/THPO" refers to the SHPO. Finally, if a tribe has elected to apply the Nationwide Agreement on its lands and has not assumed SHPO functions under Section 101(d)(2), it may, upon notice to the Commission, authorize a representative to perform functions equivalent to those of a SHPO/THPO, in which case in addition to the SHPO, the term "SHPO/THPO" also designates the tribe's authorized representative for undertakings on tribal lands. The exercise of dual jurisdiction under this limited circumstance is consistent with the Council's rules.[387]

160. The Wisconsin SHPO argues that a sunset provision should be added to the Nationwide Agreement, suggesting that the Nationwide Agreement should terminate after seven years.[388] In light of the provisions for amendment, termination, and annual review of the Nationwide Agreement,[389] we conclude that a fixed sunset period is unnecessary and would potentially undermine the effectiveness of the Nationwide Agreement in setting binding rules. EBCI advocates that wherever the Nationwide Agreement mentions historic properties, it should also specifically reference traditional cultural properties and Tribal religious and sacred sites.[390] We observe that the global definition in the Nationwide Agreement of Historic Properties includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria,[391] and we therefore find it unnecessary to repeat this acknowledgement every time the term is used. We note that this is consistent with the approach taken in the Council's rules.[392]

161. Finally, several commenters propose the addition of provisions addressing specific situations or issues. The Civil War Preservation Trust, for example, requests that the official list of all 384 Civil War battlefields be cited in the Nationwide Agreement.[393] O´ahu asks that the Nationwide Agreement expressly identify it as an NHO.[394] The State of Maryland requests addition of expedited procedures for public safety facilities.[395] NATE seeks language emphasizing the importance of

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[384] Appendix B at B-5, *infra* (Nationwide Agreement, § I.D).

[385] 16 U.S.C. § 470w(14); 36 C.F.R. § 800.16(x).

[386] 16 U.S.C. § 470a(d)(2).

[387] 36 C.F.R. § 800.2(c)(2)(i)(B).

[388] Wisconsin SHPO Comments at 1; *see also* California SHPO Comments at 4.

[389] *See* Appendix B at B-27 to B-28, *infra* (Nationwide Agreement, §§ XII, XIII, XIV).

[390] EBCI Comments at 1-2.

[391] *See* Appendix B at B-7, *infra* (Nationwide Agreement, § II.A.9).

[392] *See* 36 C.F.R. § 800.16(l)(1) (definition of "historic property").

[393] Civil War Preservation Trust Comments at 4. *See Civil War Sites Advisory Commission Report on the Nation's Civil War Battlefields* <http://www2.cr.nps.gov/abpp/cwsac/cws0-1.html>

[394] O'ahu Comments at 3.

[395] State of Maryland Comments at 1-2.

constructing new towers.[396] Mr. Tennant advocates special provisions for lighted towers.[397] We observe that the Nationwide Agreement is intended to establish rules for conduct of the Section 106 process generally, not to address specifically every situation that may arise. Moreover, we did not specifically seek comment on any of these questions in the *Notice*. We find that the record does not provide a compelling basis for expanding the Nationwide Agreement to address these or other similar issues raised in the comments.

7. Forms

162. The draft Nationwide Agreement proposes forms (or templates) that Applicants would be required to use when submitting materials to SHPOs/THPOs. The forms are designed to simplify the submission of Section 106 material, clarify for applicants and SHPOs/THPOs what is required, and provide uniformity in submissions nationwide.[398] The draft Nationwide Agreement includes two forms: Form NT for proposed new towers, and Form CO for proposed collocations that are not excluded from Section 106 review by either the Collocation Agreement or the Nationwide Agreement.

163. Commenters support the use of standard forms or templates for Section 106 submissions. PCIA and CTIA note that forms provide meaningful streamlining if they are designed to set out a roadmap for compliance with the Section 106 review process.[399] Blooston agrees, noting that forms facilitate reviews and ensure that important information is not overlooked.[400] Several commenters, however, propose changes to the forms to make them more user-friendly and less burdensome for use by an applicant's consultants and employees.[401] The Maryland SHPO urges that the forms should require applicants to supply UTM and USGS quadrant maps.[402] The Conference states that the forms should require the name and qualifications of the individual performing the research.[403] The Georgia SHPO indicates that Form NT, Item 5, which asks about the status of construction, should be modified with a disclaimer that the SHPO is foreclosed if construction has started and that the applicant should notify the Commission in such situations.[404] The Alabama SHPO requests that the forms identify the construction date.[405] The Wyoming, Oregon, and New Hampshire SHPOs urge incorporation of a requirement for balloon tests.[406] NAB comments that the forms were not fully vetted with the industry prior to the initiation of this rulemaking.[407] Moreover, NAB requests that use of the forms be voluntary.[408]

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[396] NATE Reply Comments at 2.

[397] Tennant Reply Comments at 2.

[398] *Notice*, 18 FCC Rcd at 11727-11744.

[399] CTIA Comments at 39-40; PCIA Comments at 12.

[400] Blooston Comments at 5-6.

[401] American Tower Comments at 18; Conference Comments at 5; PCIA Comments at 12; Western/T-Mobile Comments at 16-17.

[402] Maryland SHPO Comments at 2.

[403] Conference Comments at 2.

[404] Georgia SHPO Comments at 6.

[405] Alabama SHPO Comments at 1.

[406] New Hampshire SHPO Comments at 4; Oregon SHPO Comments at 2; Wyoming SHPO Comments at 2;.

[407] NAB Comments at 13.

[408] *Id*. (observing that the draft Nationwide Agreement is unclear whether use of the Submission Packet is mandatory).

164. We revise and adopt Form NT and Form CO for submissions to SHPOs and THPOs.[409] In an effort to simplify the forms and make them more user-friendly, we make a number of formal changes in response to the comments. We also include among the required attachments one or more USGS quadrant maps, and we expressly require information regarding the individuals performing the work. In response to the Georgia SHPO's comment, we add language clarifying that failure to complete the Section 106 review process prior to construction may violate Section 110(k) of the NHPA and the Commission's rules, and referring the applicant to Section X of the Nationwide Agreement.[410] We decline, however, to require a balloon test as part of the submission materials. Although a balloon test may be helpful in assessing a proposed undertaking's effect in some cases, it is often unnecessary and is not routinely required in most states. In specific cases where the applicant has not performed a balloon test and the SHPO/THPO determines that such a test is necessary to assess effects, it may return the submission to the applicant for this additional information.[411] Finally, in order to achieve the benefits of uniformity and simplicity for SHPOs/THPOs as well as applicants, we make use of the forms mandatory for all undertakings that are not excluded from Section 106 review. We conclude that the negotiating process as well as the notice and comment in this rulemaking proceeding have provided interested parties with ample opportunities to influence their content and form.

D. Transition Period

165. In the *Notice*, we requested comment on how the Nationwide Agreement should apply to Section 106 reviews that are pending at the time it becomes effective.[412] Specifically, should cases then undergoing review be completed according to the rules of Part 800, or should the Nationwide Agreement apply?

166. Several commenters recommend only a prospective application. The California and New Hampshire SHPOs, for example, argue that all pending reviews should continue under the traditional Section 106 process.[413] Fordham University argues that application of the Nationwide Agreement to pending cases should be determined on a case-by-case basis, and that the Nationwide Agreement should apply only where it simplifies the process.[414] PCIA and the New York Botanical Garden agree, noting that retroactive application would be problematic.[415] ACRA, however, suggests retroactive application unless the applicant and SHPO/THPO otherwise agree.[416]

167. We agree with most commenters that the Nationwide Agreement should apply prospectively. The Nationwide Agreement includes not only timelines and procedures, but also standards and forms that help ensure that the timelines and procedures will be reasonable for SHPOs/THPOs and

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[409] The Office of Management and Budget has designated proposed Forms NT and CO as FCC Forms 620 and 621, respectively.

[410] In addition, where construction has commenced or been completed, the revised forms ask for the commencement and completion dates.

[411] *See* Appendix B at B-22, *infra* (Nationwide Agreement, § VII.A.4).

[412] *Notice*, 18 FCC Rcd at 11666.

[413] California SHPO Comments at 4; New Hampshire SHPO Comments at 4.

[414] Fordham University Comments at 31-32.

[415] PCIA Comments at 44-45; New York Botanical Garden Reply Comments at 7-8.

[416] ACRA Comments at 1.

will not compromise historic preservation. Because pending applications may not meet the Nationwide Agreement's standards, and in all likelihood will not use the prescribed forms,[417] to apply it automatically to all pending cases would cause confusion and potentially impose unreasonable burdens on SHPOs/THPOs. We note, however, that should a party wish to take advantage of the provisions in the Nationwide Agreement, it may withdraw its filing and resubmit under the Nationwide Agreement.

E. Amendment of Commission Rules

168. In the Notice, we proposed amending Section 1.1307(a)(4) of the Commission's rules, which directs that proposed undertakings be evaluated for their effects on historic properties, expressly to require that applicants follow the procedures set forth in the Council's rules, as modified and supplemented by the Nationwide Agreement and the Collocation Agreement.[418] Few commenters addressed this proposal. PCIA and ACRA support the proposed rule change, arguing that it will bring certainty to the process and otherwise facilitate NHPA reviews.[419]

169. We adopt the change to Section 1.1307(a)(4) as proposed. The rule will bring administrative certainty by making it clear that the provisions of the Nationwide Agreement are mandatory and binding upon applicants, and that non-compliance with its procedures will subject a party to potential enforcement action.

F. Other Matters

170. Finally, several commenters raise issues other than the adoption and drafting of the Nationwide Agreement. Several of these comments involve the Collocation Agreement. For example, USET *et al.* argue that the Collocation Agreement is invalid because the Commission did not fuilfill its obligation to engage in government-to-government consultation with federally recognized tribes.[420] EBCI contends that the Collocation Agreement does not sufficiently acknowledge soil disturbance, and thus may permit damage to sites significant to tribes.[421] NATE proposes amending the definition of "substantial increase in size" in order to encourage construction outside the lease area.[422] The Collocation Agreement has been binding on the Commission, Council, and Conference since its execution on March 16, 2001, and potential revision of its terms is not within the scope of the *Notice*. Any possible revisions to the Collocation Agreement will be pursued through the process set forth in that document.[423]

171. Other commenters seek revision or clarification of the Commission's rules governing aspects of environmental review other than the Section 106 process. For example, Cingular requests that we establish a safe harbor for licensees purchasing existing towers, such that any liability for towers that did not go through the Section 106 process would attach solely to the original tower owner, and not to the

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[417] We note that use of the forms will not be effective until they are approved by the Office of Management and Budget.

[418] *Notice*, 18 FCC Rcd at 11666; *Errata*, 18 FCC Rcd at 12854-12855.

[419] ACRA Comments at 1; PCIA Comments at 45.

[420] USET *et al.* Comments at 12.

[421] EBCI Comments at 2.

[422] NATE Reply Comments at 1.

[423] *See Collocation Agreement*, 16 FCC Rcd at 5579-5580 (Amendments), 5580 (Annual Meeting of the Signatories).

purchaser.[424] Mr. Tennant, on the other hand, opposes safe harbors for any towers that did not go through the Section 106 process.[425] The State of Maryland requests guidance on when Environmental Assessments should be filed, including procedures and timelines.[426] American Tower requests clarification that it need not file environmental assessments for conditional no adverse effect or no effect recommendations from SHPOs/THPOs.[427] These issues are outside the scope of the *Notice*, and we decline to address them here. Hence, these matters will continue to be governed by the existing rules and Commission or staff guidance.[428] The relevant Bureaus will offer guidance on process issues as needed to resolve uncertainty.

172. The Ohio SHPO suggests that the Commission should offer training sessions and other guidance on the implementation of the Nationwide Agreement.[429] We direct the operating Bureaus to develop such programs and materials, using live, web-based, and/or written media, as needed and consistent with the availability of resources.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

173. Pursuant to the Regulatory Flexibility Act,[430] the Final Regulatory Flexibility Analysis (FRFA) for the *Report and Order* is set forth in Appendix C. The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, will send a copy of the *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

B. Paperwork Reduction Act of 1995 Analysis

174. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. Public and agency comments are due [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance

[424] Cingular Comments at 2-3; *see also* American Tower Comments at 15-16 (requesting clarification of responsibilities of tower owners and licensees).

[425] Tennant Comments at 2.

[426] State of Maryland Comments at 2.

[427] American Tower Comments at 14-15; AWS Comments at 17.

[428] *See Collocation Agreement Fact Sheet* at 10 ("applicants should not file an EA with the Commission under Section 1.1307(a)(4) if a SHPO has concurred in a proposed finding of 'no effect' or 'no adverse effect'. . . ."). *See Tower and Antenna Siting Issues*, Wireless Telecommunications Bureau, <http://wireless.fcc.gov/siting/environment.html#collocation>.

[429] Ohio SHPO Comments at 1.

[430] 5 U.S.C. § 603.

of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A copy of any comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, 445 12th St., S.W., Room 1-C804, Washington, D.C. 20554, or via the Internet to Judith-B.Herman@fcc.gov, and to Edward C. Springer, OMB Desk Officer, 10236 New Executive Office Building, 724 17th St., N.W., Washington, D.C. 20503, or via the Internet to Edward.Springer@omb.eop.gov.

175. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In Appendix C to this *Report and Order*, we have assessed the effects of certain policy changes brought about by the Nationwide Agreement that might impose information collection burdens.[431] More specifically, we believe that businesses with fewer than 25 employees will be affected by the Nationwide Agreement in a manner similar to other small entities. Burdens and benefits may be felt more acutely by small businesses due to their reduced ability to spread regulatory costs across a larger number of projects. The Nationwide Agreement does impose reporting, recordkeeping, and other compliance requirements as described in Appendix C, Section D.[432] However, Part III of the Nationwide Agreement, which allows for the construction of certain telecommunications facilities without the need to submit Section 106 materials to the SHPO/THPO, will probably provide the greatest regulatory relief for small businesses, including those with fewer than 25 employees.[433] We believe that the Part III exclusions will be especially helpful for smaller entities including those with fewer than 25 employees who rely more heavily on the prompt, predictable completion of each project to maintain a satisfactory cash flow. Businesses that avail themselves of an exclusion will have some costs. For example, they will have to determine whether a specific project satisfies the criteria for that exclusion and maintain documentation of that determination in their files.

C. Congressional Review Act Analysis

176. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Contact Information

177. For further information, contact Frank Stilwell at (202) 418-1892.

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[431] *See* Appendix C ("Final Regulatory Flexibility Analysis"), Section D ("Description of Reporting, Recordkeeping, and Other Compliance Requirements") at C-20 to C-21.

[432] *Id*.

[433] Appendix B at B-8 to B-10, *infra* (Nationwide Agreement, § III).

E. Accessibility Information

178. Accessible formats of this *Report and Order* (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov.

V. ORDERING CLAUSES

179. Pursuant to Sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), IT IS ORDERED that this *Report and Order* and the policies set forth herein are ADOPTED and that Part 1 of the Commission's rules, 47 C.F.R. Part 1 is AMENDED, effective sixty days after publication in the Federal Register. The information collections contained in the applicable rules (FCC Forms 620 and 621) will become effective following OMB approval. The Commission will publish a document at a later date establishing the effective date of those rules.

180. IT IS ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

181. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary