NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

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Submitted via ECFS

Joel Taubenblatt
Acting Bureau Chief, Wireless
Telecommunications Bureau
Federal Communications Commission
45 L Street Northeast
Washington, DC 20554

Re: National Association of Tribal Historic Preservation Officers' Comments on the Federal Communications Commission's Prosed Rule, *Modernizing the Commission's National Environmental Policy Act Rules*
WT Docket No. 25-217; FCC 25-47

Dear Chief Taubenblatt:

The National Association of Tribal Historic Preservation Officers ("NATHPO") submits these comments in response to the Federal Communications Commission's ("FCC") notice of proposed rulemaking, *Modernizing the Commission's National Environmental Policy Act Rules*, published in the Federal Register on August 19, 2025 ("NPRM").[1] These comments specifically respond to the FCC's request for comments on matters related to the FCC's compliance with Section 106 of the National Historic Preservation Act ("NHPA").[2] NATHPO opposes the suggested changes to the FCC's procedures for complying with Section 106 of the NHPA. Recent changes to the National Environmental Policy Act ("NEPA")—including statutory amendments,[3] court decisions,[4] and the Council on Environmental Quality's rescission of its NEPA implementing regulations[5]—as well as executive orders,[6] have no bearing whatsoever on the FCC's obligations under the NHPA. There is no legal or policy reason for the FCC to implement any of the proposed changes to its Section 106 procedures.

The questions posed by the FCC in its NPRM regarding whether changes to the FCC's NEPA procedures demand changes to the FCC's Section 106 procedures are rooted in a fundamental misunderstanding of NEPA and the NHPA. The FCC appears to be laboring under the false

[1] 90 Fed. Reg. 40,295 (Aug. 19, 2025).
[2] 54 U.S.C. § 306108.
[3] *See* Pub. L. No. 118-5, 137 Stat. 10 (2023).
[4] *See, e.g.*, *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025); *Marin Audubon Soc'y v. Fed. Aviation Admin.*, 121 F.4th 902 (D.C. Cir. 2024).
[5] *See* 90 Fed. Reg. 10,610 (Feb. 25, 2025).
[6] *See, e.g.*, Exec. Order No. 14,145, 90 Fed. Reg. 8,353 (Jan. 20, 2025). It is unclear to NATHPO how updating the FCC's NEPA procedures relate to "Unleashing Energy Dominance through Efficient Permitting." *Id*. § 5, 90 Fed. Reg. at 8,355. The FCC does not permit energy development or transportation; it licenses the use of spectrum. Moreover, the FCC is not one of the "relevant agencies" subject to EO 14145. *See id*. § 5(d), 90 Fed. Reg. at 8,355. Finally, as an independent regulatory commission, the FCC is not bound by executive orders.

impression that its obligations Section 106 of the NHPA are somehow tied to its obligations under NEPA. They are not. As the FCC is surely aware, NEPA and the NHPA are separate statutes that impose separate legal obligations on the FCC, and which are triggered by separate factors and legal standards. Changes to NEPA and the FCC's NEPA procedures in no way affect the FCC's independent statutory obligations under Section 106 of the NHPA.

NATHPO is the only national organization devoted to supporting Tribal Historic Preservation Officers ("THPO") and Tribal Historic Preservation Programs.[7] Founded in 1998, NATHPO is a national, non-profit membership organization comprised of Tribal governmental officials, primarily THPOs, who implement federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO is a voting member of the Advisory Council on Historic Preservation ("ACHP").[8] NATHPO submits these comments and incorporates its April 30, 2025, and May 15, 2025, comments (attached) submitted in response to CTIA—The Wireless Association's ("CTIA") March 27, 2025, petition for rulemaking.

BACKGROUND

Considered to be "the most far-reaching preservation legislation ever enacted in the United States[,]"[9] the NHPA seeks to "foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."[10] When Congress enacted the NHPA in 1966, it found and declared "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."[11] The NHPA is "designed to encourage preservation of sites and structures of historic, architectural, or cultural significance."[12]

The NHPA's "productive harmony" is achieved, most importantly, through Section 106. In full, Section 106 provides:

> 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, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency

[7] *See* 54 U.S.C. §§ 320701–320706.
[8] *Id*. § 304101(a)(8).
[9] Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 1, 11 (Robert E. Stipe ed., 2003)
[10] 54 U.S.C. § 300101(1).
[11] Pub. L. No. 89-665, § 1, 80 Stat. 915, 915 (1966).
[12] *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (quoting *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093–94 (9th Cir. 2005)) (quotation marks omitted).

> shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking.[13]

Congress has called Section 106 "[o]ne of the most important provisions of the National Historic Preservation Act[.]"[14]

Congress delegated to the ACHP authority to "promulgate regulations as it considers necessary to implement section [106] of th[e] [NHPA] in its entirety."[15] These regulations are promulgated at 36 C.F.R. Part 800. Federal courts "have previously determined that federal agencies must comply with these regulations."[16] The ACHP's regulations establish a four-step process to take into account the effects of undertakings on historic properties.

First, federal agencies must (a) "determine whether the proposed Federal action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause adverse effects on historic properties[]";[17] and (b) identify and invite consulting parties, including Indian Tribes, to consult in the Section 106 process.[18] Second, federal agencies must (a) define the undertaking's area of potential effects;[19] (b) make a reasonable and good faith effort "to identify historic properties within the area of potential effects[]";[20] and (c) "apply the National Register [of Historic Places ('National Register')] criteria . . . to properties that have not been previously evaluated for National Register eligibility."[21] Third, federal agencies must "apply the adverse effect criteria to historic properties within the area of potential effects."[22] Finally, federal agencies must "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties."[23]

Federal agencies are not free to proceed through the Section 106 process unilaterally. Instead, the Section 106 process must be completed "through consultation among the [federal agency] and other parties with an interest in the effects of the undertaking on historic properties."[24] Consultation is the cornerstone of the Section 106 process. This "consultative process—designed to be inclusive and facilitate consensus—ensures competing interests are appropriately considered and adequately addressed."[25]

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[13] 54 U.S.C. § 306108.
[14] S. REP. NO. 102-336, at 12 (1992).
[15] 54 U.S.C. § 304108(a).
[16] *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (citing *Pit River Tribe*, 469 F.3d at 787; *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)).
[17] 36 C.F.R. § 800.3(a)
[18] *Id.* § 800.3(f).
[19] *Id*. § 800.4(a)(1)
[20] *Id*. § 800.4(b)
[21] *Id*. § 800.4(c)(1).
[22] *Id*. § 800.5(a).
[23] *Id*. § 800.6(a).
[24] *Id.* § 800.1(a).
[25] *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-5259, slip op. at *2 (D.C. Cir. Oct. 9, 2016) (ECF No. 1640062); 36 C.F.R. § 800.1(a) ("The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.")

In 1992, the NHPA was amended to "specifically include Indian tribes and Native Hawaiian organizations in the [NHPA]."[26] These amendments explicitly recognized that historic "[p]ropert[ies] of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."[27] Most important, the amendments required that "[i]n carrying out [their] responsibilities under section [106 of the NHPA], Federal agencies shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to propert[ies]" potentially affected by an undertaking.[28] Over the past thirty-three years, these amendments have empowered Tribal Nations to engage in and influence federal decision making that affects their places of cultural significance, and to protect their culturally important places from adverse effects in a way not previously possible under federal law.[29]

The ACHP's regulations also allow for the development of "Federal agency program alternatives"[30] which allow federal agencies to "tailor the Section 106 review process for a group of undertakings or an entire program that may affect historic properties."[31] These program alternatives include programmatic agreements.[32] Programmatic agreements "allow federal agencies to govern the implementation of a particular agency program . . . or multiple undertakings similar in nature[.]"[33] Programmatic agreements may be appropriate "[w]hen effects on historic properties are similar and repetitive or are multi-State or regional in scope[.]"[34] The FCC has entered into two nationwide programmatic agreements that govern its Section 106 compliance for certain undertakings subject to FCC licensure and approval.[35]

DISCUSSION

I. Major Federal Action and Undertaking are not Coterminous

In its NPRM, the FCC states that it currently requires Section 106 reviews for tower construction under "it[s] retained 'limited approval authority[.]'"[36] Specifically, the FCC states that where it retains authority over tower construction to require compliance with NEPA, it has likewise

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[26] S. REP. NO. 102-336, at 13.
[27] 54 U.S.C. § 302706(a).
[28] *Id*. § 302706(b).
[29] *See* Wesley James Furlong, *"Subsistence is Cultural Survival": Examining the Legal Framework for the Recognition and Incorporation of Traditional Cultural Landscapes within the National Historic Preservation Act*, 22 TRIBAL L.J. 51, 66–68 (2023), https://digitalrepository.unm.edu/tlj/vol22/iss/4/.
[30] *See* 36 C.F.R. § 800.14.
[31] *Program Alternatives*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/program_alternatives (last visited Sept. 17, 2025).
[32] *See* 36 C.F.R. § 800.14(b).
[33] *Programmatic Agreements*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/program_alternatives/pa (last visited Sept. 17, 2025).
[34] 36 C.F.R. § 800.14(b)(1)(i).
[35] *See* Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Sept. 2004), https://www.achp.gov/sites/default/files/programmatic_agreements/2019-04/nw.fcc_.undertakings%20approved%20by%20fcc.pa_.04oct04.pdf; Second Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (July 2020), https://www.achp.gov/sites/default/files/programmatic_agreements/2020-07/FCC%20SecondAmendmentNPAforCollocationofWirelessAntennas.pdf.
[36] 90 Fed. Reg. at 40,300.

required compliance with Section 106 before construction.[37] The FCC postulates that if it changes its NEPA regulations to clarify that the deployment of certain antenna structures no longer constitutes a major federal action (and thus does not require NEPA review), "should the [FCC] also determine that such deployments are no longer subject to NHPA review[?]"[38] Asked another way: "If § 1.1313 is amended to exclude certain antenna structure deployments, including those involving geographic area licenses, from NEPA review, would that remove the 'limited approval authority' that the D.C. Circuit found significant to qualify as an NHPA undertaking?"[39]

The answer to these questions is, emphatically, "No." Whether the deployment of certain antenna structures continues to constitute a major federal action under the statutory definition in NEPA is irrelevant to whether they constitute an undertaking under statutory definition in the NHPA and thus require Section 106 review. NEPA and the NHPA are two separate statutes. Likewise, major federal action and undertaking are two separate terms, defined differently, used in different statutes, triggered by separate factual circumstances, and impose separate legal obligations on federal agencies.

NEPA defines major federal action as "an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility."[40] The inclusion of the words "*that the agency carrying out such action determines*" and "*substantial*" do significant work in limiting the scope of what constitutes a major federal action. First, this definition gives agencies significant discretion in determining what is and is not a major federal action, rather than simply providing a set definition. Second, qualifying "Federal control and responsibility" with "substantial" serves to limit the types of actions that meet this definition.

These limitations are borne out in the next subdivision of the definition, entitled "Exclusion."[41] NEPA specifically excludes from the definition of major federal action "non-Federal action[s]" which it defines as those "with no or minimal Federal funding[]" and those "with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project[.]"[42] The statute further clarifies that major federal actions do not include "funding assistance solely in the form of general revenue sharing funds" and "loans, loan guarantees, or other forms of financial assistance" where federal agencies do not have compliance, control, or enforcement responsibilities over the funds;[43] loans guaranteed by the Small Business Administration;[44] civil and criminal enforcement actions;[45] "activities and decisions with effects located entirely outside the jurisdiction of the United States;"[46] and non-discretionary activities actions and decisions "made in accordance with the agency's statutory authority."[47]

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[37] *Id*.
[38] *Id*. at 40,301.
[39] *Id*.
[40] 42 U.S.C. § 4336e(10)(A).
[41] *Id*. § 4336e(10)(B).
[42] *Id*. § 4336e(10)(B)(i)(I)–(II).
[43] *Id*. § 4336e(10)(B)(ii)–(iii).
[44] *Id*. § 4336e(10)(B)(iv).
[45] *Id*. § 4336e(10)(B)(v).
[46] *Id*. § 4336e(10)(B)(vi).
[47] *Id*. § 4336e(10)(B)(vii).

In comparison, the NHPA defines undertaking as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency[.]"[48] This includes "those carried out by or on behalf of the Federal agency;"[49] "those carried out with Federal financial assistance;"[50] "those requiring a Federal permit, license, or approval; and"[51] "those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency."[52] This definition is largely recodified verbatim in the ACHP's Section 106 implementing regulations.[53] Federal courts have repeatedly affirmed that projects, activities, and programs do not need to receive federal funding to be considered undertakings.[54]

NEPA's definition of major federal action stands in sharp contrast to the NHPA's and the ACHP's definitions of undertaking. In its NPRM, the FCC notes that in its petition for rulemaking, CTIA asserted "that some courts have treated the NHPA term 'undertaking' and the NEPA term 'major federal action' as 'essentially coterminous,' and have found that an agency's involvement in a project must be 'substantial' to constitute an undertaking under the NHPA."[55] As the above definitions bear out, major federal action and undertaking *are not* coterminous. While some courts have treated major federal action and undertaking similarly, these courts and CTIA's assertions are incorrect. In fact, the definition of undertaking encompasses a far broader range of activities than the definition of major federal action.

As a threshold matter, major federal actions are limited to "action[s] that *the agency carrying out such action*[*s*] determines [are] subject to substantial Federal control and responsibility."[56] In contrast, undertakings include activities, projects, and programs (*viz*. actions) that are not only "carried out by or on behalf of a Federal agency[,]"[57] but those that are carried out by non-federal agency entities—whether that be private actors, states, local governments, or Tribal Nations, for example—that are "under the direct or indirect jurisdiction of a federal agency[]" and that are "carried out with Federal financial assistance[,]" or "require[e] a Federal permit, license, or approval[.]"[58] Accordingly, the universe of federal and non-federal actions that are covered by the definition of undertaking far exceeds the limited scope of federal actions that qualify as major federal actions.

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[48] 54 U.S.C. § 300320.
[49] *Id*. § 300320(1).
[50] *Id*. § 300320(2).
[51] *Id*. § 300320(3).
[52] *Id*. § 300320(4).
[53] *See* 36 C.F.R. § 800.16(y). There is one difference: the regulatory definition does not include undertakings that are subject to state or local regulation pursuant to delegated federal authority. This is because the United States Court of Appeals for the District of Columbia Circuit held that such undertakings do not trigger Section 106 review. *See Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003).
[54] *See CTIA-Wireless Ass'n v. Fed. Commc'ns Comm'n*, 466 F.3d 105, 112 (D.C. Cir. 2006) (discussing *Sheridan Karorama Historical Ass'n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995)) ("[A] 'project, activity, or program' does not require federal funding to be an 'undertaking' under section 106 of the NHPA. Instead, only a 'Federal permit, license or approval' is required." (citations omitted)); *Fein v. Peltier*, 949 F. Supp. 374, 379 (D.V.I. 1996).
[55] 90 Fed. Reg. at 40,301.
[56] 42 U.S.C. § 4336e(10)(A) (emphasis added).
[57] 54 U.S.C. § 300320(1).
[58] *Id*. § 300320(2)–(3).

NEPA further limits the scope of activities that constitute major federal actions based on the amount of control or responsibility federal agencies have over the activities. For example, only activities that are "subject to *substantial* Federal control or responsibility[]" are major federal actions.[59] Likewise, NEPA excludes from the definition of major federal actions activities "with . . . *minimal* federal involvement[.]"[60] These limitations do not exist in the definition of undertaking. Instead, undertakings are any "project, activity, or program . . . under the direct or indirect jurisdiction of a Federal agency[.]"[61] The amount of the agency's control or responsibility over the project, activity, or program is irrelevant in determining whether it is an undertaking. So long as the project, activity, or program is under the direct or indirect jurisdiction of a federal agency, it is an undertaking.

Likewise, NEPA imposes limits on what type of activities constitute major federal actions based on the receipt of federal financial assistance. For example, NEPA excludes from the definition of major federal action activities "with . . . *minimal* Federal funding"[62] and activities that receive federal financial assistance—either through revenue sharing, loans, loan guarantees, or other forms—where the federal agency does not have compliance, control, or enforcement responsibilities over the funds.[63] No such limitation exists in the definition of undertaking. Instead, any "project, activity, or program" that is "funded in whole or in part" by a federal agency or is "carried out with Federal financial assistance[]" is an undertaking.[64] The amount of funding and whether the federal agency retains compliance, control, or enforcement responsibilities over the funds are irrelevant.

Additionally, NEPA excludes from the definition of major federal action non-discretionary activities actions and decisions "made in accordance with the agency's statutory authority."[65] No such limitation exists in the definition of undertaking. Instead, any "project, activity, or program . . . under the direct or indirect jurisdiction of a Federal agency[]" that is "carried out by or on behalf of a Federal agency[]" is an undertaking.[66] Whether these projects, activities, or programs are discretionary or non-discretionary is irrelevant.

By the plain language of their statutory definitions, undertaking encompasses a far broader set of activities than major federal action.[67] These terms are clearly not coextensive. While it is often the case that the same activity will constitute both a major federal action and an undertaking, thereby triggered review under both NEPA and the NHPA, this is not always the case. An activity may be an undertaking *but not* a major federal action, thereby requiring a federal agency to comply with the NHPA but not NEPA.[68] In fact, the ACHP's Section 106 implementing

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[59] 42 U.S.C. § 4336e(10)(A) (emphasis added).
[60] *Id*. § 4336e(10)(B)(i)(II) (emphasis added).
[61] 54 U.S.C. § 300320.
[62] 42 U.S.C. § 4336e(10)(B)(i)(I) (emphasis added).
[63] *Id*. § 4336e(10)(B)(ii)–(iii).
[64] 54 U.S.C. § 300320(2).
[65] 42 U.S.C. § 4336e(10)(B)(vii).
[66] 54 U.S.C. § 300320(1).
[67] SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 116 (2012) ("Thus, an undertaking embraces any identifiable or discrete unit of action. Congress plainly intended the word 'undertaking' to be read broadly, encompassing most specific agency activities.").
[68] SARA C. BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 145 (2d ed. 2018) ("Some undertakings requiring Section 106 compliance, however, will not be considered major federal actions requiring

regulations explicitly contemplate this exact scenario.[69] This is because "the NHPA 'applies to a broader range of federal agency [action]'" than NEPA.[70]

There is no validity to CTIA's contention that major federal action and undertaking are "essentially coterminous." Thus, any changes to NEPA's definition of major federal action and the FCC's NEPA obligations have no bearing on the FCC's independent obligations under Section 106 of the NHPA.

II. Wireless Buildout Pursuant to Geographic Area Licenses are Undertakings

In its NPRM, the FCC asks whether it would still need to comply with Section 106 of the NHPA if it determines that the deployment of wireless infrastructure subject to geographic area licenses are no longer major federal actions.[71] As discussed above, undertaking and major federal action do not mean the same thing; thus, the premise of the FCC's questions is flawed. Nevertheless, even if the FCC determined that such deployments are not major federal actions, the FCC would still need to comply with Section 106 because they would still be undertakings.

Recall, an undertaking is any "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[.]"[72] They deployment of wireless infrastructure is a project or activity and it is under the direct or indirect jurisdiction of the FCC because it requires a federal license: a geographic area license. The FCC cannot seriously contend that the deployment of wireless infrastructure is not an activity or project and is not under the direct or indirect jurisdiction of the FCC. Instead, the FCC suggests that geographic area licenses are not sufficient to constitute federal "approvals" of the deployment of wireless infrastructure to make such deployments undertakings.[73] The FCC is fundamentally incorrect.

While the FCC generally does not permit the construction of wireless facilities, it "does, however, require licensing of the spectrum used by wireless [facilities]."[74] The FCC licenses the use of spectrum by issuing geographic area licenses.[75] The United States Court of Appeals for

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NEPA review. Similarly, even if an agency decides that a project qualifies for a categorical exclusion under NEPA . . . , the agency must still perform a NHPA Section 106 review for the project.").

[69] *See* 36 C.F.R. § 800.8(b) ("If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to [36 C.F.R.] § 800.3(a).").

[70] Hunter S. Edwards, *The Guide for Future Preservation in Historic Districts Using a Creative Approach: Charleston, South Carolina's Contextual Approach to Historic Preservation,* 20 U. FLA. J.L. & PUB. POL'Y 221, 232 n.57 (2009) (quoting JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 9 (2007))

[71] 90 Fed. Reg. at 40,300–01.

[72] 54 U.S.C. § 300320(3).

[73] The FCC is fundamentally off base asserting that "approval" is required for a non-federal project, activity, or program to constitute an undertaking. This assertion ignores that an undertaking includes projects, activities, and programs that "requir[e] a Federal permit, *license*, or approval[.]" *Id.* Whether a geographic area license constitutes an "approval" is irrelevant, as it is a *license*.

[74] *United Keetoowah Band of Cherokee Indians in Okla. v. Fed. Commc'ns Comm'n*, 933 F.3d 728, 735 (D.C. Cir. 2019).

[75] *Id*.

the District of Columbia Circuit has previously observed that while geographic area licenses "authorize using spectrum rather than building wireless facilities, . . . *they necessarily contemplate facility construction*."[76] For example, through geographic area licenses, the FCC "exercises continuing authority to inspect radio installations to ascertain their compliance with any and all applicable laws, whether or not the licensee itself constructed those installations."[77]

Moreover, while geographic area licenses may not *per se* authorize the construction of wireless facilities, the licenses allow use of spectrum. Without the use of spectrum, wireless facilities are useless to wireless providers. Thus, but for a geographic area license to use spectrum, wireless facilities have no utility and would not be constructed. The FCC concedes this point in its NPRM as it frames CTIA's petition for rulemaking as requesting that the FCC "should find that non-ASR *facilities deployed pursuant to geographic area licenses* are [not] . . . undertakings for the purposes of the NHPA[.]"[78]

In its NPRM, the FCC asserts that the D.C. Circuit upheld the FCC's previous determination that tower construction was an undertaking only because of the FCC's so-called "limited approval authority" it retains to require NEPA compliance before construction. The FCC postulates that if it determines—self-servingly—that NEPA is no longer required for tower construction, that tower construction no longer constitutes an undertaking. The NPRM insinuates that the D.C. Circuit has held that tower construction is an undertaking only because of the FCC's limited approval authority. The FCC overstates and misconstrues the D.C. Circuit's holding.

In *CTIA-Wireless Association v. Federal Communications Commission*, the D.C. Circuit upheld the FCC's determination that tower construction was an undertaking subject to Section 106 review "because (1) the [FCC]'s tower registration process 'may be viewed as effectively constituting an approval process within the [FCC]'s section 303(q) authority,' and (2) a 'limited approval authority' retained by the FCC with respect to NEPA additionally constitutes federal approval[.]"[79] The D.C. Circuit affirmed the FCC on both points, not just on the FCC's limited approval authority.

The D.C. Circuit held that it "was neither arbitrary nor capricious in determining that tower construction, to the extent covered by the FCC's registration process, constitutes a federal undertaking subject to section 106 of the NHPA."[80] The D.C. Circuit also held that it "was neither arbitrary and capricious in determining that the FCC's approval authority under NEPA makes tower construction an undertaking."[81] In its NPRM, the FCC conveniently omits the portion of the D.C. Circuit's opinion which affirms the FCC's previous determination that its tower registration process constitutes a form of approval that makes tower construction an undertaking.

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[76] *Id*. at 736 (emphasis added).
[77] *Id*. (citing 47 C.F.R. §§ 1.9020(c)(5), 303(n)).
[78] 90 Fed. Reg. at 40,297.
[79] *CTIA-Wireless*, 466 F.3d at 113 (internal citations omitted).
[80] *Id*. at 114 (internal citation omitted).
[81] *Id*. at 115 (internal citation omitted).

Moreover, the FCC construes the D.C. Circuit's decision as dispositive in affirming the FCC's interpretation that tower construction was, and currently still is, an undertaking *only* because of the FCC's limited approval authority. The FCC reads far too much into the D.C. Circuit's opinion, as it never says this. The opinion must be read in context. Specifically, the D.C. Circuit merely held that it was not arbitrary and capricious for the FCC to determine that its limited approval authority constituted approval sufficient to make tower construction an undertaking. The D.C. Circuit *did not* say that is the only reason that tower construction is an undertaking. Nor did the court say that geographic area licenses are insufficient to make tower construction (or other wireless deployments) undertakings. Indeed, the D.C. Circuit specifically said that this issue was not before it.[82]

In the NPRM, the FCC relies heavily on its previous determination that it was only required to comply with Section 106 for tower construction because it determined that it retained limited approval authority to require NEPA compliance. As discussed above, this is not the entirety of what the FCC has previously determined. In the NPRM, the FCC questions whether it would still need to comply with Section 106 if it determined that it no longer retained its limited approval authority. These questions rest on a false pretense.

Whether the FCC is required to comply with Section 106 is determined by the law—the NHPA and the ACHP's implementing regulations—not the FCC's previous (mis)interpretations of that law. The D.C. Circuit has made exceedingly clear that "no deference [is owed] to the [FCC]'s interpretations of the NHPA[.]"[83] The FCC's prior determination that it only needs to comply with Section 106 tower construction because of its retained limited approval authority is irrelevant in determining the extend of the FCC's actual obligations to comply with Section 106. Accordingly, even if the FCC determines that wireless infrastructure deployments are no longer major federal actions and that it no longer retains its limited approval authority, this has no bearing on the FCC's obligations under Section 106.

As discussed throughout these comments, major federal action and undertaking are not coterminous. An activity that is not a major federal action and does not trigger NEPA review may nevertheless still be an undertaking and trigger NHPA review. Moreover, the deployment of wireless infrastructure subject to geographic area licenses are undertakings, regardless of the FCC's self-serving (mis)interpretation of the NHPA. Potential changes to the FCC's NEPA obligations have no bearing on this fact.

III. The FCC's Proposed Rulemaking is Unlawful

In its NPRM, the FCC contemplates whether it should exempt itself from Section 106 review based on changes to NEPA. In order to achieve this result, the FCC would, essentially, attempt to do one of three things: (1) unilaterally exempt an entire category of undertakings from Section 106 review; (2) declare that an entire category of federally licensed projects and activities are not undertakings; or (3) re-define the term undertaking to exclude FCC-licensed projects, activities, or programs from Section 106 review. The FCC cannot do any of these actions.

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[82] *See id*. at 113 n.3.

[83] *United Keetoowah Band*, 933 F.3d at 738; *see also Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088 (D.C. Cir. 2019).

The NHPA established the ACHP[84] and delegated to it exclusive rulemaking authority to "promulgate regulations as it considers necessary to govern the implementation of section [106] . . . in its entirety."[85] Federal courts have repeatedly recognized that the ACHP's Section 106 rulemaking authority is exclusive.[86] Pursuant to this authority, the ACHP has promulgated its Section 106 implementing regulations at 36 C.F.R. Part 800. All federal agencies, including the FCC, "must comply with these regulations."[87]

As part of its implementing regulations, the ACHP has developed procedures that allow federal agencies to seek exemptions from Section 106 review for certain programs or categories of undertakings.[88] The actions that would be exempted from Section 106 review must otherwise be undertakings,[89] the potential effects must be foreseeable and likely minimal or not adverse,[90] and the exemption must be consistent with the purpose of the NHPA.[91] In seeking an exemption, the federal agency must demonstrate that it has engaged in consultation with State Historic Preservation Officers ("SHPO") and THPOs, Tribal Nations, and Native Hawaiian organizations, and has engaged with the public.[92] The federal agency seeking an exemption must submit documentation of consultation to the ACHP, along with documentation that its exemption meets the criteria set forth in the regulations—specifically, that the exemption is for what would otherwise be an undertaking, the potential effects are foreseeable and likely minimal or not adverse, and the exemption is consistent with the purpose of the NHPA.[93]

Only upon the submission of this documentation *may* the ACHP approve the exemption.[94] In making this determination, the ACHP takes into consideration the magnitude of the exemption, the potential effects, and the purpose of the NHPA.[95] The ACHP's approval is discretionary; federal agencies do not have a right to obtain exemptions. Moreover, federal agencies, themselves, cannot decare programs or categories of undertakings exempt from Section 106 review. Only the ACHP can declare an exemption.

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[84] 54 U.S.C. § 304101(a).
[85] *Id*. § 304108(a).
[86] *CTIA-Wireless*, 466 F.3d at 116 ("Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the [ACHP] . . . . Congress has authorized the [ACHP] to administer the provision at issue here: section 106."); *Te-Moak Tribe*, 608 F.3d at 607 (quoting 16 U.S.C. § 470s (re-codified as amended at 54 U.S.C. § 306108(a)) ("The NHPA explicitly delegates authority to the [ACHP] 'to promulgate such rules and regulations as it deems necessary to govern the implementation' of section 106."); *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287 (D.C. Cir. 1992) ("[T]he [ACHP]'s regulations implementing the NHPA[are] promulgated under authority granted by Congress . . . ." (citation omitted)); *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 166 (1st Cir. 2003) ("Fortunately, the NHPA delegates authority to the [ACHP] to promulgate regulations interpreting and implementing § 106." (citation omitted)).
[87] *Te-Moak Tribe*, 608 F.3d at 607 (citing *Pit River Tribe*, 469 F.3d at 787; *Muckleshoot Indian Tribe*, 177 F.3d at 805).
[88] 36 C.F.R. § 800.14(c).
[89] *Id*. § 800.14(c)(1)(i).
[90] *Id*. § 800.14(c)(1)(ii).
[91] *Id*. § 800.14(c)(1)(iii).
[92] *Id*. § 800.14(c)(2)–(4).
[93] *Id*. § 800.14(c)(5).
[94] *Id*.
[95] *Id*.

In effect, the FCC's proposed rulemaking attempts to unilaterally exempt an entire category of undertakings from Section 106 review. As discussed above, the deployment of wireless infrastructure that is subject to geographic area licenses are undertakings and thus subject to Section 106 review. For years, the FCC has consistently maintained that such deployments are undertakings. To achieve the desired results of CTIA's petition for rulemaking, the FCC, in effect, would be exempting this entire category of (admitted) undertakings from Section 106 review. The FCC cannot do this.

As discussed above, only the ACHP can exempt categories of undertakings from Section 106 review. The FCC's unilateral actions in this matter are unlawful. The FCC is free to follow the procedures at 36 C.F.R. § 800.14(c) and seek an exemption, but the NPRM does not meet these requirements. Moreover, it is unlikely that the FCC could satisfy the criteria for an exemption. The FCC would have to admit that the deployment of wireless infrastructure subject to geographic area licenses are undertakings. It is unlikely that the FCC would be able to certify that the potential effects of the deployment of wireless infrastructure are foreseeable and likely minimal or not adverse. The years of experience Tribal Nations and THPOs have incurred in dealing with the FCC's two existing nationwide programmatic agreements demonstrate the potential effects from these undertakings are foreseeable, not minimal, and often adverse.[96] The FCC has also not engaged in the required consultation with Tribal Nations, THPOs, SHPOs, and Native Hawaiian organizations.

Finally, exempting wholesale the deployment of wireless infrastructure from Section 106 review is not consistent with the purpose of the NHPA. The purpose of the NHPA is "to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."[97] The NHPA, and Section 106 specifically, is "designed to encourage preservation of sites and structures of historic, architectural, or cultural significance."[98] The NHPA also reflects and codifies the federal government's trust duty to Tribal Nations to protect their historic and cultural resources.[99]

In rejecting the FCC's previous efforts to exempt itself from Section 106 review, the D.C. Circuit observed that thousands of historic properties of significance could potentially be adversely effected by the deployment of small-cell wireless facilities alone.[100] The court held that the FCC had not justified that it was in the public interest to exempt the deployment of those facilities from Section 106 review.[101] What was true then is true now. The wholesale exemption of wireless facilities deployment subject to geographic area licenses from Section 106 review is not in the public interest and not consistent with the purpose of the NHPA.

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[96] These nationwide programmatic agreements are legally binding documents that mandate specific actions by the FCC in order to comply with Section 106 for certain categories of undertakings. The FCC's attempt to exempt itself from Section 106 would likely violate the terms of these nationwide programmatic agreements.
[97] 54 U.S.C. § 300101(1).
[98] *Pit River Tribe*, 469 F.3d at 787 (citation omitted).
[99] *See Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1108–10 (S.D. Cal. 2008).
[100] *United Keetoowah Band*, 933 F.3d at 744.
[101] *Id*. at 740.

The FCC's proposed rulemaking also, in effect, seeks to declare an entire category of federally licensed projects and activities not undertakings. In its petition for rulemaking, CTIA asserted that the FCC possesses the unilateral discretion to determine what constitutes an undertaking and can therefore declare that the deployment of wireless infrastructure subject to geographic area licenses are not undertakings and thus not subject to Section 106. This is incorrect; the FCC does not have such authority. CTIA's suggestion grossly misrepresents and overstates the FCC's limited authority under 36 C.F.R. § 800.3(a).

36 C.F.R. § 800.3(a) establishes the standard for federal agencies to determine whether an undertaking triggers Section 106 review. The regulation requires federal agencies to determine whether the proposed "action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is the type of activity that has the potential to cause effects on historic properties."[102] This is a project specific determination made based on the type of undertaking and the type of effects such project is generally likely to cause.[103] While 36 C.F.R. § 800.3(a) grants federal agencies discretion to determine whether specific undertakings trigger Section 106 review, it does not grant them discretion or authority to exempt entire categories of undertakings from Section 106 review or re-define the definition of undertaking as they find convenient. The FCC does not have the authority to unilaterally declare that these activities are no longer undertakings, and 36 C.F.R. § 800.3(a) does not grant the FCC that authority.

Finally, the FCC's proposed rulemaking, in effect, seeks to re-define the term undertaking by removing the term "license" from the definition, as applied to the FCC. Recall, the NHPA defines undertaking as "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[.]"[104] The ACHP's regulations codify this definition verbatim.[105]

The FCC has no legal authority to purport to re-define the term undertaking as applied to the FCC. Congress delegated to the ACHP exclusive Section 106 rulemaking authority and defined the term undertaking in statute.[106] Accordingly, the FCC does not have authority to undertake a rulemaking to re-define the term undertaking or ignore the statutory definition of the term in order to exempt activities and projects that require an FCC-issued license.[107] Moreover, the FCC is not entitled to any deference in interpreting the meaning of the NHPA, the definition of undertaking, or its obligations under Section 106 and the ACHP's regulations.[108] The FCC cannot—and more precisely, does not possess the authority to—rulemake itself out of compliance with the NHPA by unilaterally exempting an entire category of undertakings from

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[102] 36 C.F.R. § 800.3(a).
[103] *See Sisseton-Wahpeton Oyate of Lake Traverse Rsrv. v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *7 (D.S.D. Sept. 29, 2016) ("The NHPA's implementing regulations require that this initial question not involve site-specific details of the project and historic properties existing within the APE, but look only at the type of work planned generally, assuming there could be historical properties present.").
[104] 54 U.S.C. § 300320(3).
[105] 36 C.F.R. § 800.16(y).
[106] 54 U.S.C. § 304108(a).
[107] *See Am. Libr. Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005) ("It is axiomatic that administrative agencies may issues regulations only pursuant to authority delegated to them by Congress.").
[108] *See United Keetoowah Band*, 933 F.3d at 738 ("We owe no deference to the FCC's interpretations of the NHPA . . . which [is] primarily administered by the [ACHP.]").

Section 106 review. The ACHP, and not the FCC, was delegated Section 106 rulemaking authority. Accordingly, the FCC has no legal authority to promulgate regulations that purport to implement or define the agency's compliance with Section 106.

CONCLUSION

The NHPA and its Tribal consultation process are fundamental tools that Tribal Nations and THPOs use to protect their places of cultural and historic significance. They are also fundamental tools that federal agencies use to uphold and fulfill their legal and trust obligations to Tribal Nations. While NATHPO shares in others' frustration with the current project review process, NATHPO strongly opposes the elimination of NHPA (and NEPA) reviews and Tribal consultation by the FCC as the purported solution. To do so would violate the law, undermine the purpose of the NHPA, and abdicate the FCC's trust responsibility to Tribal Nations.

The best way for the FCC—and, indeed, other federal agencies—to address the consultation process that, at times, is insufficient and fails to afford adequate protections to Tribal cultural and historic resources, would be to increase federal financial support for THPOs. Moreover, much could be gained by the FCC engaging in meaningful and good faith consultation with Tribal Nations and THPOs about targeted and thoughtful ways to update the FCC's NEPA and NHPA review processes. As NATHPO observed in its September 5, 2025 letter (also submitted to this docket), however, the FCC appears uninterested in engaging in meaningful and good faith consultation with Tribal Nations and THPOs. The wholesale abandonment of its NHPA (and NEPA) obligations is unlawful and fails to serve the best interests of Tribal Nations, the FCC, and wireless operators. Recall, the FCC's previous attempt to achieve this same goal was roundly rejected by the D.C. Circuit.

NATHPO is deeply disappointed in the FCC for proceeding with this proposed rulemaking and its disregard for meaningful and good faith consultation. Nevertheless, NATHPO stands ready to engage meaningfully with the FCC to address the systemic issues in its NHPA and NEPA review process, but only if the FCC is willing to engage with NATHPO, Tribal Nations, and THPOs on these issues in good faith.

Sincerely,

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