State of California – The Resources Agency

Memorandum

Date : August 8, 2003

To : Federal Communications Commission

From : **Knox Mellon**
California State Historic Preservation Officer
P.O. Box 942896
Sacramento, CA 94296-0001

Subject : FCC Docket No. 03-128 – Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission

Attached are the comments of the California State Historic Preservation Officer with regards to the proposed "Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission," Docket No. 03-128.

Comments of the California State Historic Preservation Officer on FCC Docket No. 03-128 – Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission

The FCC has requested comments on the following:

1. The draft Nationwide Programmatic
2. How the draft 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 tribes and NHOs.
3. Treatment of Section 106 reviews that are in process at the time the Nationwide becomes effective. To what extent should the timelines, processes and standards in the Nationwide replace 36 CFR Part 800 for Section 106 reviews that are pending before the SHPO or are at other stage in the process.

1. The draft Nationwide Programmatic –

General comment - The PA as written empowers applicants to make dispositive decisions regarding exemptions/exclusions. In our experience, many applicants lack the knowledge and experience needed to ensure that such decisions are accurate and reliable and conform to the requirements of applicable regulation. We can cite numerous cases where applicants and their consultants are inadequately qualified to prepare accurate and useful National Register evaluations. For example, archaeologists often evaluate buildings and structures and other built environmental properties. At the very least Stipulation VI, paragraph 2 should require evaluations to be completed by persons qualified under the Secretary of the Interior's Professional Qualifications Standards in the appropriate disciplines.

Page A-1, Paragraph 1, line 3 – The line currently reads, "effects of certain of the Undertakings". The words "of certain" should be deleted.

Page A-4, I.B. last sentence – What constitutes maintenance? A definition should be provided.

Page A-6, II.A.3. – The definition of APE differs from that in 36 CFR 800.

Page A-6, II.A.8. – The definition of historic property states that properties, "…included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior". Does this mean that only formal determinations of eligibility will be recognized?

Page A-7, II.D. – Is some sort of proof needed that an e-mail or fax was received?

Page A-8, III.A.1. – Associated excavation should not be excluded.

Page A-8, III.A.3.a & e – Exclusions under a & e are unacceptable. Although the installations are temporary, potential damage to historic properties could occur. Also

there is no mention of whether these temporary installations involve ground disturbance. If they do, then they should not be addressed differently from a standard installation. In addition, there is no mention of what occurs if a temporary installation is located in the middle of a historic district.

Page A-8, III.A.4. – There is the potential for serious view shed issues to arise with this exclusion. When a tower is 400 feet tall, a 200 foot window for historic structures is hardly reasonable.

Page A-9, III.A.5. – This section also has potential view shed issues for historic properties and traditional cultural properties.

Page A-9, III.A.5.a. – This exclusion states, "A right-of-way designated by a government for the location of communication towers…" What type of government? Federal, state or local?

Page A-9, III.A.5.b-c. – These exclusions ignore the demonstrable fact that highways and railroads are over 50 years of age and may be eligible for the National Register.

Page A-9, III.A.5. paragraph following a., b., c. – States that "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…" This should include properties eligible for the National Register. What is the status of scenic highway designations under this provision?

Page A-9, III.B. – The process outlined by the Navajo is appropriate.

Page A11-A-15 – The CASHPO's preference is Alternative A.

Page A-15, V.A. & B. – Both paragraphs state that contact should occur on or before the date an applicant submits a submission packet. This contact should always occur <u>before</u> a submission packet is provided.

Page A-16, V.E., last sentence – The last sentence states, "An Applicant need not submit to the SHPO/THPO any comment that does no substantially relate to potentially affected Historic Properties." In this instance what is the definition of "substantially"?

Page A-17, VI. paragraph two – Identification, evaluation, and assessment of historic properties should be performed by professionals that meet the Secretary of the Interior's Professional Qualifications Standards.

Page A-18, VI.C.3. – Who is making the determination that an undertaking is unlikely to cause direct effects to archeological sites? Will it be a qualified archeologist, or a person with little or no archeological experience such as an engineer or a biologist? Also, the last sentence states that disagreements regarding the necessity for an archeological survey may be referred to the Commission for resolution. What happens after that?

Page A-18, VI.C.4. – What if the previously disturbed ground is in the middle of a site? Just because there has been disturbance does not mean that there is no

potential for archeology there. This exclusion needs to be further qualified (i.e. monitoring).

Page A-19, VI.E.3. – Is a cultural resource professional the person determining the possible visual effect? What about historic districts where the setting is essential? Or other properties where setting, as opposed to landscape or view, are essential?

Page A-20, VII.A.4. – Resubmission should restart the 30 day clock.

Page A-20, VII.B.3. – What if the documentation provided is inadequate and the SHPO does not have sufficient information with which to provide, "a short and concise explanation of exactly how the criteria of eligibility and/or criteria of Adverse Effect would apply"?

Page A-20, VII.B.4. – Once an applicant chooses to submit the matter to the Commission, then what happens? Does the FCC then consult with the SHPO?

Page A-26, XI. – Any public comments should also include SHPO notification and loop into the stipulation that allows the SHPO to get NCSHPO to consult to resolve objections.

Page A-26 – There is no resolving objections stipulation.

Page A-27 – There is no duration/sunset stipulation.

2. **How the draft Nationwide Agreement should be crafted consistent with the Commission's government to government relationship with and trust responsibility to federally recognized Indian tribe, and statutory and regulatory provisions governing the Commission's relationship with such tribes and NHOs. –**

   The CASHPO has no additional comments.

3. **Treatment of Section 106 reviews that are in process at the time the Nationwide becomes effective. To what extent should the timelines, processes and standards in the Nationwide replace the 36 CFR Part 800 for Section 106 reviews that are pending before the SHPO or are at other stage in the process.–**

   Undertakings submitted prior to the Nationwide going into effect should complete the process as outlined at 36 CFR Part 800.