

Gerhardt, Christine-WDC

Subject: 2/18 Ex Parte

-----Original Message-----

From: Clark, John F. - WDC
Sent: Wednesday, February 18, 2004 5:28 PM
To: 'Sheryl.Wilkerson@fcc.gov'
Cc: John Muleta (E-mail); Amos J. Loveday Jr. (E-mail); Jeffery Steinberg (E-mail); Dan Abeyta (E-mail); Frank Stilwell (E-mail); Andrea D. Williams (E-mail); Ann West Bobeck (E-mail); Robert G. Howarth (E-mail); Vince Sampson (E-mail); Alan Downer; Bambi Kraus; NATHPO; Elizabeth Merritt; Andrea Bruns; Klima, Don (dklima@achp.gov); esanderson@preservation.ri.gov; gsmith@johnstondc.com; Jay Keithley; John Fowler; Javier Marques; Jo Reese; Sheila Burns; schamu@ncshpo.org; Valerie Hauser; Charlene Vaughn (E-mail); Andrea Bruns (E-mail); Andy Lachance (E-mail); Ben G. Almond (E-mail); Connie Durcsak (E-mail); David Jatlow (E-mail); H. Anthony Lehv (E-mail); Harold Salters (E-mail); Jay Keithley (E-mail); Roger Sherman (E-mail); Tony Russo (E-mail)
Subject: Negotiations on the NPA

Dear Sheryl:

On January 21, 2004, members of the wireless and broadcast industry met with you to request a delay of one month in the Commission's consideration of the order that will adopt a Nationwide Programmatic Agreement for Section 106 historic preservation review for FCC projects ("NPA"). We made that request for the purpose of working with the Advisory Council on Historic Preservation ("ACHP") and the National Conference of State Historic Preservation Officers ("NCSHPO") to try to agree on language to be added to the NPA to limit consideration of visual effects to potentially eligible properties.

Since that time, negotiations with ACHP and NCSHPO, together with representatives of several Indian tribes and the cultural resources consultant industry, have been conducted under the auspices of the ACHP and the Telecommunications Working Group ("TWG") that the ACHP originally formed to help craft the NPA. The ACHP and industry independently developed proposed language to effectuate the goals of the negotiation. Meetings and conference calls were held on January 29, and February 6, 12 and 17 to discuss this issue. As a result of these efforts, some points of agreement were reached, but as of the last meeting on Tuesday two days ago, much remained to be done to fashion a complete agreement.

Yesterday evening, Charlene Vaughn of the ACHP submitted to the TWG Drafting Committee a new revision of the ACHP proposal for amendments to the NPA. This new ACHP proposal was surprising to us, because it contained many revisions to key terms and provisions in the NPA that had not previously been discussed. In our view, these changes went far beyond the limited issues we asked the Commission for time to resolve.

We understood that the Commission would only allow time for these negotiations to no later than tomorrow, February 19, 2004. The number and scope of the changes proposed by ACHP, however, many for the first time, seek to change crucial, foundational terms and myriad aspects of the NPA that we find ourselves unable to address. Despite our own concerns about particular provisions of the NPA, we do not believe that it would be appropriate for industry to initiate consideration of these changes proposed by the ACHP, as you and others have indicated to us that the Commission, ACHP and NCSHPO otherwise had long ago reached agreement on these terms for the final version of the NPA.

We have attached a critique of the latest ACHP proposal that highlight some of our concerns. We thought a few weeks ago that the parties were close to an agreement, but it appears that in some important ways ground has been lost since then.

The members of our Coalition are disappointed that these negotiations could not produce an agreement on the narrow issues for which we requested an extension of time. Industry developed a proposal that would have achieved that goal, without making major changes to the other sections of the NPA, but this proposal was not discussed in any detail in the meetings of the TWG Drafting Committee. A copy of our original proposal is also attached.

We want to again express our support for the Commission's efforts to streamline and improve the Section 106 process for telecommunications and broadcast projects, and our willingness to assist in achieving that goal. In that regard, we hope that these negotiations have not been completely in vain.

Very sincerely,

The Wireless Coalition to Reform Section 106

AT&T Wireless Services, Inc

American Tower Corporation
Cingular
PCIA
Sprint Corporation
T-Mobile USA
Verizon Wireless

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ACHP Revised Language for Section VI of the draft FCC Nationwide PA
February 17, 2004

[Containing comments and suggested revisions
from the Coalition to Reform Section 106
dated Wednesday, February 18, 2004]

VI. IDENTIFICATION AND EVALUATION

- A. In preparing the Submission Packet ~~for the SHPO/THPO or consulting tribes or NHOs~~ pursuant to Section VII of this Nationwide PA and Attachments 3 and 4, the Applicant shall:
1. define the area of potential effects;
 2. identify ~~h~~Historic ~~p~~Properties ~~listed on or eligible for listing on the National Register of Historic Places. [this redundant phrase appears again and again in this proposal. Why is it necessary when the definition of Historic Properties already contains a more appropriate use of the words from the NHPA?]~~ within the ~~area of potential effects~~APE;
 3. evaluate the historic significance of the identified properties, as appropriate; and,
 4. assess the effects of the Undertaking on Historic Properties.
- B. Exclusion of Specific Geographic Areas from Review. The SHPO/THPO, consistent with relevant State or tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological sites or for visual effects. [This paragraph is lifted from below]
- ~~B.C.~~ C. The Applicant, the SHPO/THPO, and the Commission, as appropriate, shall apply the following standards when preparing or reviewing the Submission Packet:

~~1. Exclusion of Specific Geographic Areas from Review.~~

~~The SHPO/THPO, consistent with relevant State or tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological sites or for visual effects. [The use of an exclusion zone is fine, but it should not be described in this section, which implies that it should only be considered in connection with a Submission Packet]~~

~~2.1.~~ 1. Area of Potential Effects.

- a. ~~The area of potential effects (APE) is the geographic area or areas within which an Undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. [This paragraph directly contradicts the definition of APE already contained in the NPA, upon which all parties have relied for years. This is a new proposal not previously seen before last evening].~~
- b. The APE for direct effects is ~~defined~~ limited to ~~as~~ the geographic area in which of potential ground disturbance is proposed or there is the potential for ~~and the portion of any a hHistoric pProperty, or any portion thereof, to that will~~ be destroyed or physically altered by the Undertaking. **[This provision differs in crucial and unacceptable ways from the language agreed to by ACHP in the June version of the NPA. The original language is restored here.]**
- c. ~~The APE for visual effects is defined as the geographic area in which the Undertaking has the potential to introduce visual elements that diminish or alter the setting or landscape of a historic property. [This definition is entirely new, not previously discussed or evaluated, and conflicts with the definitions of the key terms of "effect" and "APE": (1) that are already contained in the NPA; (2) that precisely track the ACHP's rules; and (3) upon which much of the NPA is based and these negotiations have long relied.]~~
- d. Applicants shall apply the following guidelines when establishing the APE for visual effects related to undertakings covered by this PA.
- i. Unless otherwise established through consultation with the SHPO/THPO and consulting tribes or NHOs, ~~the presumed APE for visual effects~~~~area of potential effect~~ for construction of new facilities is the area from which the tower will be visible:
- A. within a half mile from the tower site if the tower is 200 feet or less;
 - B. within $\frac{3}{4}$ of a mile from the tower site if the tower between 200 and 400 feet; or
 - C. within $1\frac{1}{2}$ miles when the tower will be over 400 feet.
- ii. Should the Applicant determine, or the SHPO/THPO ~~or consulting tribes or NHOs~~ recommends an alternate area

of potential effect for visual effects, the Applicant and SHPO may:

A. Agree to the alternative boundaries; or

B. Refer the issue to the Commission or the ACHP for resolution, after making a good faith effort to reach a compromise.

C.D. Identification and Evaluation of Historic Properties for Visual Effects. **[This is the first internal heading in the section. The whole section could benefit from a review of organization and layout]**

1. Applicants shall not be required to conduct any type of historic properties survey **[definition? as noted, this term is used in different ways]** when identifying ~~historic~~ Historic ~~p~~Properties listed and eligible for listing on the National Register within the area of potential effects or otherwise, for visual effects unless such surveys are deemed appropriate to identify sites of religious and cultural significance to tribes.
2. Applicants shall identify ~~h~~Historic ~~p~~Properties listed on and eligible for listing on the National Register in the APE by reviewing the following records, ~~which can be~~ found within the offices of the SHPO:
 - a. properties listed in the National Register;
 - b. properties formally determined eligible by the Keeper for listing in the National Register;
 - c. properties that the SHPO certifies are in the process of being nominated to the National Register;
 - d. properties determined eligible as part of a Section 106 consensus determination of eligibility between the SHPO and a Federal Agency or local government representing the Department of Housing and Urban Development (HUD); and
 - e. properties within the State inventory that the SHPO identifies as having been previously evaluated for National Register eligibility by the SHPO as meeting the criteria for eligibility. **[This category is an undefined requirement of overbroad scope that seems to require industry to hire consultants to pore over potentially hundreds or thousands of SHPO records to search for those properties that the SHPO has determined eligible for the National Register, but then did not so much as**

record or flag them for future reference. WHY REQUIRE THIS FOR VISUAL EFFECTS?]

3. Applicants, ~~at their discretion, may~~ are encouraged but not required to use the services of Qualified Professionals when identifying historic properties listed and eligible for listing on the National Register.
4. The
4. ~~The~~ applicant shall provide the SHPO a proposed list of historic properties listed and eligible for listing on the National Register based on the foregoing identification steps in its Submission Packet.
 - a. ~~During~~ Within the first fifteen days of the review period outlined in Section VII.A, the SHPO may identify additional properties included in the State inventory and located within the area of potential effects that the SHPO considers eligible for listing on the National Register and such properties shall be added to the list. **[This suggested time limit would allow a "SHPO safety net" proposal, but would not unduly delay or extend the Section 106 review]**
 - b. ~~The S~~
b. ~~The S~~ The SHPO may also advise the Applicant that previously identified properties on the list no longer qualify for the National Register and such properties shall be removed from the list.
5. Concurrent with the identification of properties with the SHPO and in accordance with Section IV of the PA, the Commission or the Applicant, as appropriate, shall consult with the appropriate Indian tribes or NHOs to identify historic properties of religious and cultural significance within the area of potential effects that meet the National Register criteria of eligibility.

D. Identification and Evaluation of Historic Properties for Direct Effects

1. Applicants shall consider the properties on the list created pursuant to Section VI. C when identifying historic properties listed in or eligible for listing in the National Register, including buildings, structures, and historic districts, within the APE for direct effects. **[This paragraph is circular and difficult to understand. Moreover, it seems to limit the consideration of physical effects to only the properties listed above, which excludes numerous properties. This is considerably more restrictive than is Industry's proposal.]**

2. An archeological survey of a proposed tower site need not be undertaken when:
- a. The slope of the construction site exceeds 45 degrees;
 - b. the depth of previous disturbance exceeds the proposed average construction depth (excluding footings) **[The added language proposed here was a key provision negotiated over many weeks in the TWG, and approved on several occasions by the ACHP]** by at least ~~2 feet, six inches~~ inches
 - c. geomorphological evidence indicates that cultural resource-bearing soils do not occur or may occur within the project area but at depths that exceed ~~2 feet six inches~~ below the average proposed construction depth (excluding footings); or,
 - d. the project site is within an area considered by the SHPO or a qualified professional to be “low sensitivity” or have a low potential to contain NR-eligible.

3. If the SHPO/THPO identifies one or more additional properties pursuant to section VI.C.4., ~~A report substantiating the applicant's findings shall be provided~~ shall provide to the SHPO/THPO and consulting tribes a report on its findings with regard to these additional properties. If the SHPO or the consulting tribes does not object within 15 days to the applicant's findings, the applicant may assume concurrence SHPO or that tribe is deemed to have concurred.

4. Disagreements regarding the applicant's findings shall be referred to the Commission or ACHP for resolution.

5. An archeological survey shall be undertaken if ~~none of the conditions listed in Stipulation VI(D)(2) apply~~ the SHPO/THPO provides good and sufficient reasons for doing so, or if the Commission or ACHP so request. The survey shall be conducted in consultation with the SHPO/THPO and consulting tribes or NHOs in the area of potential effects for direct effects. A person or persons meeting the Secretary's professional qualifications standards shall carry out all such surveys.

6. The applicant, in consultation with the SHPO/THPO or appropriate tribes or NHOs, shall apply the National Register criteria (36 CFR Part 63) to properties identified within the APE that have not previously been evaluated for National Register eligibility. **[If this paragraph intends to add back in those**

properties taken away in paragraph D.1., above, why do it this way?]

E. Dispute Resolution

Where there is a disagreement regarding the identification or eligibility of a property, and after attempting in good faith to resolve the issue, the applicant may submit the issue to the Commission or refer the matter to the ACHP. The Commission or ACHP shall review the matter in accordance with 36 CFR Part 800.4(c)(2).

[The following definitions are offered to help explain some of the provisions above.]

II. DEFINITIONS

A. The following terms are used in this Nationwide Agreement as defined below:

...

... [The following definition is offered as an alternative method of defining the properties that must be considered for visual effects.]

- xx. Identified Eligible Property. For purposes of this Agreement, an Identified Eligible Property is any of the following:
- a. A Historic Property included on the National Register and appearing on the current list of such properties published in the Federal Register;
 - b. A Historic Property determined by the Keeper of the National Register to be eligible for inclusion on the National Register and appearing on the current list of such properties published in the Federal Register;
 - c. A Property whose nomination to the National Register has been filed with the State Review Board;
 - d. A Property that can be readily and clearly identified in the inventory information in a SHPO's office as having been previously determined, by both the SHPO and either a federal agency or an Indian tribe or NHO, to meet the National Register criteria for eligibility; and
 - e. Any Historic Property that clearly meets the National Register criteria of eligibility that a SHPO, Indian tribe or NHO identifies and requests within the 30-day review period to be considered for visual effects from a proposed undertaking. The SHPO, Indian tribe or NHO may request, and the FCC will require, confidential treatment for any

Property where appropriate under the provisions of Section 800.11(c) of the Council's rules (36 C.F.R. § 800.11(c)).

- xx. Physical Effect. Any effect caused directly or indirectly by an undertaking that may or does substantially physically alter, damage or destroy all or part of a Property
- xx. Property. A district, site, building, structure or object that appears to meet the criteria of eligibility for listing in the National Register.
- xx. Visual Effect. Any visible change caused by an Undertaking that alters any characteristic of a Historic Property qualifying that property for inclusion in or eligibility for inclusion in the National Register.

February 8, 2004
The Wireless Coalition to Reform Section 106

**Proposed Amendments
to the
NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF
EFFECTS ON HISTORIC PROPERTIES FOR
CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL
COMMUNICATIONS COMMISSION**

**To Allow Consideration of Visual Effects to Certain Listed Properties
and to
Eliminate Consideration of Visual Effects to
Other Properties Only Potentially Eligible for the National Register**

INTRODUCTION AND SUMMARY

The redline-highlighted language in the sections appearing below are proposed amendments to the Nationwide Programmatic Agreement ("NPA") currently under consideration by the Federal Communications Commission ("FCC"). The amendments are designed to be inserted into the identified sections of the NPA for the purpose of eliminating consideration of visual effects to most properties that are only potentially eligible for the National Register of Historic Places ("National Register").

The amendments would allow full consideration and evaluation of all physical effects to all properties, including potentially eligible properties, exactly as is currently required by the NPA. The amendments also allow consideration of visual effects, as appropriate under the current provisions of the NPA, but limited as follows:

1. Visual effects to a property (including a potentially eligible property) from an undertaking may be considered and evaluated whenever that undertaking will be constructed on or within the boundary of, or will otherwise cause physical alteration or destruction of or damage to, that property.

2. Otherwise, only visual effects to published listed properties (as that term is defined in the amendments) within an undertaking's area of potential effects ("APE") may be considered and evaluated.

Five Types of "Listed Properties". In summary, the proposed amendments define the term "Listed Property" to include the following five categories of property: (1) a property included in the National Register; (2) a property determined eligible by the Keeper of the National Register; (3) a property that has been previously determined, by both a SHPO and either a federal agency or an Indian tribe or Native Hawaiian organization ("NHO"), to meet the National Register criteria for eligibility; (4) a property identified by a SHPO as in the process of nomination to the National Register; and (5) an eligible property that an Indian tribe or NHO identifies and submits to the FCC's Tower Construction Notification System ("TCNS").

Four Publicly Accessible Lists. Under these amendments, the location of all listed properties (except those requiring confidential treatment) will be readily and publicly identifiable without the need for specialized training or qualifications. Properties in the first two categories described above will be publicly accessible on the familiar lists published by the Keeper. Properties in the third and fourth categories will be publicly accessible on a list to be created and published by each SHPO, which will be called the SHPO National Register List, or "SNR List." Properties in the fifth category will be publicly accessible on the TCNS.

Limitation on Identification of Properties. Because all of the properties for which visual effects may be considered will be readily and publicly identifiable on one of the four lists described above, the proposed amendments also eliminate requirements of identification of, and consideration of visual effects to, all potentially eligible properties not physically affected, and not appearing on one of the four lists.

PROPOSED AMENDMENTS

The following are the proposed amendments, identified by the specific section of the NPA into which they would be inserted.

II. DEFINITIONS

- A. The following terms are used in this Nationwide Agreement as defined below:

...

4. Boundary. The boundary of the area of historic significance for purposes of determining the eligibility of a Property for the National Register. For a Property included in or determined eligible for the National Register, the boundary is specified in the Property's nomination, either in a verbal boundary description, a metes-and-bounds description, a map, or some other method of specifically delineating its boundary. For other Properties, the boundary is a line surrounding the Property that encompasses, but does not exceed, the full extent of the significant resources and significant land areas that make up the Property and that retain integrity. A boundary for any Property should be large enough to include all historic features of that Property, but should not include buffer zones or areas not directly contributing to that significance, or peripheral areas of the Property that no longer retain integrity.

...

10. Listed Property. For purposes of this Agreement, a Listed Property is any of the following:

- a. A Historic Property included on the National Register and appearing on the current list of such properties published in the Federal Register;
- b. A Historic Property determined by the Keeper of the National Register to be eligible for inclusion on the National Register and appearing on the current list of such properties published in the Federal Register;
- c. A Property appearing on a current SNR List of properties determined to meet the eligibility criteria for, or that are in the process of nomination to, the National Register; and
- d. Any Property of religious and cultural significance to an Indian tribe or NHO and appearing on either an SNR List or a list of such Properties published on the FCC's Tower Construction Notification System ("TCNS"). A SHPO shall add to its SNR List, and the FCC shall post on the TCNS, any Property that meets the National Register criteria for eligibility for which an Indian tribe or NHO submits a request for listing.

The FCC will accord confidential treatment to any Property listing when appropriate under the provisions of Section 800.11(c) of the Council's rules (36 C.F.R. § 800.11(c)).

12. SHPO National Register List ("SNR List"). A list created and maintained by a SHPO containing the names and identifying information of Properties in its state that: (1) have been previously determined by both the SHPO and either a federal agency or an Indian tribe or NHO as meeting the National Register criteria for eligibility; or (2) that the SHPO identifies as being in the process of nomination to the National Register. The SNR List shall contain each Property's name, its description as either a district, site, building, structure or object, its specific address or location description (or a notice of confidential treatment of this information as provided in Section 800.11(c) of the Council's rules (36 C.F.R. § 800.11(c)), and the date of initial listing. The SHPO shall publish and regularly update the SNR List on the Internet or in some other official state publication.

13. Property. A district, site, building, structure or object that appears to meet the criteria for eligibility for listing in the National Register.

VII. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

B. Definition of the Area of Potential Effects

...

2 Visual Effects

- a. Visual effects from an Undertaking shall only be considered or evaluated under this Agreement: (1) in the case of potential visual effects to a particular Property or Historic Property, where the Undertaking is located on or within the boundary of, or will otherwise physically alter, damage or destroy, that Property or Historic Property; or (2) in the case of potential visual effects to a Listed

Property within the APE of an Undertaking, where the visual effects to that Property meet the criteria for effects to Historic Properties.

...

C. Identification of Historic Properties

...

2. The level of effort and the appropriate 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 current nature of and thoroughness of previous research, studies, or Section 106 review. No identification of any Property is required where the only potential effect to that Property is visual.