



NEPA & Section 106

USDA RUS ReConnect Program

Agenda

- Introduction
- Post Obligation Completion of Environmental and Historic Preservation Review; Agency and Applicant Responsibilities for Fulfilling Requirements of 7 CFR 1970 – Rural Development's Environmental Policies and Procedures; and Highlights National Environmental Policy Act Requirements – 7 CFR 1970
 - Presented by Anthony High, Environmental Protection Specialist, RUS Telecom Policy and Outreach Division Engineering Branch (PODEB)
- Highlights: National Historic Preservation Act (NHPA) and 36 CFR Part 800 Requirements
 - Presented by Glenn Stelter, Archeologist, RUS Telecom PODEB
- Environmental Review Amendments
 - Presented by Jim Wetherington, Environmental Protection Specialist, RUS Telecom PODEB
- Q&A

Introduction

- This is not a comprehensive overview of 7 CFR 1970, NEPA or Section 106
- Highlights roles, responsibilities and requirements
- Summarizes:
 - Information needs
 - Common data gaps
- Question and answer session at the end

Post-Obligation Completion of Environmental and Historic Preservation Review



1970.11(b): New Provision of Rural Development's 7 CFR 1970 NEPA Implementation Regulations

- Environmental review process must be completed prior to obligation of funds
- Exception: New provision allows the administrator to obligate funds before the conclusion of the environmental review process prior to any action that would have an adverse effect on the environment or limit the choices of any reasonable alternatives.

1970.11(b): New Provision of Rural Development's 7 CFR 1970 NEPA Implementation Regulations

- Must comply with NEPA, associated laws and authorities, prior to taking an action with adverse effects on the environment or limit the choice of reasonable alternatives
 - Defined as “obligation” in 2016 adoption of 7 CFR 1970
 - Regulatory change adopted in September 2019 to allow RD administrators to approve post obligation completion of environmental reviews on a case-by-case basis
- Requires compliance with 46 laws and authorities (§1970.3)
- The National Historic Preservation Act (NHPA) is the primary focus of the environmental review process due to the nature of Rural Development's projects
 - Nationwide Programmatic Agreement (NPA) allows for post obligation completion of the Section 106 process

The Agency Must Rescind Obligated Funds If:

1. The awardee takes an action prior to completion of the review process that would:
 - Have an adverse effect on the environment; or,
 - Limit the choice of reasonable alternatives prior to completion of the environmental review process, e.g., start of construction before NEPA/Section 106 reviews completed
2. The Agency cannot:
 - Conclude the review process before the end of the fiscal year after the year in which the funds were obligated; or,
 - Proceed with approval based on findings in the environmental review process

Limitations on Actions Pending Clearance [§ 1970.4 (d)]

- The Agency and applicant will ensure the completion of the environmental review process prior to the irreversible and irretrievable commitment of Agency resources in accordance with § 1970.11 – Timing of the environmental review process.
- The environmental review process is formally concluded when the Agency:
 - Reviewed the appropriate environmental document for completeness
 - All required public notices have been published and public comment periods have lapsed; public comments received have been considered and addressed
 - Executes environmental review decision documents
 - Approves (Exhibit D) for Categorical Exclusion (CE)
 - Issues Finding of No Significant Impact (FONSI) for environmental assessment (EA)
 - Issues a Record of Decision (ROD) for environmental impact statement (EIS)

Limitations on Actions Pending Clearance [§ 1970.4 (d)]

Cont.

- The NHPA review process is formally concluded when the Agency:
 - Has resolved any potential adverse effects or other issues raised by consulting parties.
 - Received concurrence on a Determination of No Adverse Effect or No Historic Properties Affected from a State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO) and/or other appropriate consulting parties.
 - The Agency determines they have made a reasonable and good faith effort in identifying the correct consulting parties and provided them the opportunity to participate as consulting parties in the activity.
 - Section 106 Conclusion Memo has been drafted and signed by the agency.

Agency and Applicant Responsibilities for Fulfilling Requirements of 7 CFR 1970

Rural Development's Environmental Policies and Procedures



§ 1970.5 (a) Agency Responsibilities

- The Agency will advise applicants and applicable lenders of their responsibilities to consider environmental issues during early project planning and that specific actions listed in § 1970.12, such as initiation of construction, cannot occur prior to completion of the environmental review process or it could result in a denial of financial assistance
- Mitigation measures described in the environmental review and decision documents must be included as conditions in Agency financial commitment documents, such as a conditional commitment letter
 - Examples of mitigation measures:
 - Applicant must use directional boring or aerial cable on existing poles to avoid impacts to wetland resources and special status species
 - Applicant must elevate proposed structures above the 500-year floodplain elevation
 - Cabinets need to be installed on existing aerial poles, buried vault or handhold small in size, or located outside of wetland

§ 1970.5 (a) Agency Responsibilities Cont.

- The Agency is responsible for all environmental decisions and findings related to its actions and will encourage applicants to design proposals to protect, restore, and enhance the environment
- If the Agency requires an applicant to submit environmental information, the Agency will outline the types of information and analyses required in guidance documents. This guidance is available on the Agency's Web site. The Agency will independently evaluate the information submitted.

Applicant Responsibilities 1970.5(b)

1. Consult with Agency staff to determine the appropriate level of environmental review and to obtain publicly available resources at the earliest possible time for guidance in identifying all relevant environmental issues that must be addressed and considered during early project planning and design throughout the process
2. Where appropriate, contact state and Federal agencies to initiate consultation on matters affected by this part. This part authorizes applicants to coordinate with state and Federal agencies on behalf of the Agency

Applicant Responsibilities 1970.5(b) Cont.

3. Provide information to the Agency that the Agency deems necessary to evaluate the proposal's potential environmental impacts and alternatives
 - Applicants must clearly define the purpose and need for the proposal and inform the Agency promptly if any other Federal, state, or local agencies are involved in financing, permitting, or approving the proposal, so that the Agency may coordinate and consider participation in joint environmental reviews
 - As necessary, applicants must develop and document reasonable alternatives that meet their purpose and need while improving environmental outcomes
 - Applicants must prepare environmental review documents according to the format and standards provided by the Agency. The Agency will independently evaluate the final documents submitted. All environmental review documents must be objective, complete, and accurate in order for them to be finally accepted by the Agency. Applicants may employ a design or environmental professional or technical service provider to assist them in the preparation of their environmental review documents

Applicant Responsibilities 1970.5(b) Cont. 2

4. Applicants must provide any additional studies, data, and document revisions requested by the Agency during the environmental review and decision-making process.
 - The studies, data, and documents required will vary depending upon the specific project and its impacts. Examples of studies that the Agency may require an applicant to provide are biological assessments under the Endangered Species Act (ESA), archeological surveys under the NHPA, wetland delineations, surveys to determine the floodplain elevation on a site, air quality conformity analysis, or other such information needed to adequately assess impacts

Applicant Responsibilities 1970.5(b) Cont. 3

5. Applicants must ensure that no actions are taken (such as any demolition, land clearing, initiation of construction, or advance of interim construction funds from a guaranteed lender), including incurring any obligations with respect to their proposal, that may have an adverse impact on the quality of the human environment or that may limit the choice of reasonable alternatives during the environmental review process. Limitations on actions by an applicant prior to the completion of the Agency environmental review process are defined in the CEQ regulations at 40 CFR 1506.1 and 7 CFR 1970.12

Applicant Responsibilities 1970.5(b) Cont. 4

6. Applicants must promptly notify the Agency processing official when changes are made to their proposal so that the environmental review and documentation may be supplemented or otherwise revised as necessary
7. Applicants must incorporate any mitigation measures identified and any required monitoring in the environmental review process into the plans and specifications and construction contracts for the proposals. Applicants must provide such mitigation measures to consultants responsible for preparing design and construction documents or provide other mitigation action plans. Applicants must maintain, as applicable, mitigation measures for the life of the loans or refund term for grants

Applicant Responsibilities 1970.5(b) Cont. 5

8. Applicants must cooperate with the Agency on achieving environmental policy goals. If an applicant is unwilling to cooperate with the Agency on environmental compliance, the Agency will deny the requested financial assistance

Highlights: National Environmental Policy Act Requirements

7 CFR 1970



What is the National Environmental Policy Act (NEPA)?

- NEPA is the landmark environmental statute enacted in 1970 that established the nation's environmental policy
- Demands a good faith, hard look at environmental impacts of federal projects and disclosure to the public
- Federal projects are defined as permits, approvals, direct loans, guaranteed loans, and grants therefore all Rural Development (RD) projects are subject to NEPA
- Each Agency is required to develop its own NEPA implementing regulations
- RD implementing regulations are [7 CFR 1970](#) and its associated guidance

Complete, Approval Packages are Essential for Expeditious Reviews

- Complete Project Descriptions
- Maps
- Supporting Documentation, e.g.:
 - U.S. Fish and Wildlife Service (USFWS) Official Species List, Special Status Plant and Wildlife Species Tables, and USFWS Concurrence Letters
 - SHPO/THPO Initiation and Concurrence Letters
 - Formally Classified Lands (FCL) Managing Agency Correspondence
 - National Wetland Inventory (NWI) Maps
 - Federal Emergency Management Agency (FEMA) Floodplain Maps
- Specialized Studies, e.g.:
 - Archeology Studies
 - Habitat Surveys
 - Biological Assessments
 - Wetland Delineations

Project Descriptions Are the Point of Departure for Any Review

- They must be complete and accurate, including:
 - Project location
 - Project description
 - Project components

Telecom Program Project Description

- The project description is critical for understanding what we are evaluating
- Location: single location, multiple location?
- Project footprint?
- Activity Type: broadband cable, vaults, huts?
- New or replacement?
- Construction: Length, width, depth?
- Setting: Rural, urban, wilderness, federally managed land, tribal land?
- Staging areas, access roads, spoil storage areas, contractor yards?
- Construction methods (i.e., horizontal drill, open trench, plowing)?
- Tree clearing/trimming needed?
- Time of year?
- Project phasing schedule?
- Linear projects: Keyhole Markup Language Zipped (KMZ) files?

Project Description Supporting Documentation (RD Instruction 1970-A Exhibit C Page 1)

- Project map
- Location map
- Topographic map
- Aerial photos
- Ground-level photos

Maps

- Maps help us determine the existing land use and if environmentally sensitive areas are present
 - Maps must clearly show the specific project location
 - Aerial imagery versus topographic maps
 - For linear projects, use KMZ files
 - Floodplain and wetland maps

Categorical Exclusions under NEPA

- Most ReConnect projects are classified as categorical exclusions under NEPA
- They are subject to 46 laws, authorities and executive orders

Special Purpose Laws

- **Statutes**

- Endangered Species Act
- National Historic Preservation Act
- Farmland Protection Policy Act
- Clean Water Act
- Clean Air Act
- Wild and Scenic Rivers Act
- Safe Drinking Water Act
- Resource Conservation and Recovery Act

- **Executive Orders**

- Floodplain Management
- Wetland Protection
- Environmental Justice

Determining Whether CEs Apply [§ 1970.51(b)]

1. Ensure proposal fits within a class of actions that is listed in § 1970.53, § 1970.54, or § 1970.55;
2. Ensure there are no extraordinary circumstances related to the proposal (§ 1970.52);
3. Ensure the proposal is not “connected” to other actions with potentially significant impacts or related to actions with cumulatively significant impacts

Determining Whether CEs Apply [§ 1970.51(c)]

- A proposal that consists of more than one action may be categorically excluded only if all components of the proposed action are eligible for a CE.

§ 1970.52 (a) Extraordinary Circumstances

- Extraordinary circumstances are unique situations presented by specific proposals:
 - Characteristics of the geographic area
 - Scientific controversy about the environmental effects
 - Uncertain effects or effects involving unique or unknown risks
 - Unresolved conflicts concerning alternate uses of available resources
- In the event of extraordinary circumstances, a normally excluded action will be the subject of an additional environmental review to determine the potential to cause significant adverse environmental effects
- If extraordinary circumstances identified the Agency can require an EA or an EIS

Eligibility for a CE

- For a proposal to be eligible for a CE, the following conditions must be ruled out [§ 1970.52]:
 - Adverse effect to:
 - Historic properties
 - Federally listed threatened and endangered species /critical habitat, candidate species
 - Wetlands
 - Floodplains
 - Formally classified lands, special sources of water, coastal barriers, coastal zone management areas, and coral reefs
 - Contaminated sites or known public health threats
 - When the action will:
 - Result in a violation of a regulation or permit
 - Involve construction/expansion of a RCRA storage or disposal facility
 - Pose the likelihood of uncontrolled/unpermitted pollutants
 - Involve controversy on effect to the environment brought up by a Federal, tribal, state, or local government agency

§ 1970.10 Raising the Level of Environmental Review

- Can always increase but never decrease
- Environmental conditions, scientific controversy, or other characteristics unique to a specific proposal can trigger the need for a higher level of environmental review
- As appropriate, the Agency will determine whether extraordinary circumstances (see § 1970.52) or the potential for significant environmental impacts warrant a higher level of review
- The Agency is solely responsible for determining the level of environmental review to be conducted and the adequacy of environmental review that has been performed

Highlights: National Historic Preservation Act and 36 CFR Part 800 Requirements



Four Steps of the Section 106 Process (36 CFR Part 800)

1. Establish the undertaking and initiation of the Section 106 process
2. Identify historic properties and consulting parties
3. Assess effects and provide consulting parties with assessments
4. Receive concurrence and/or no objection to a finding of effect from consulting parties

Section 106 Highlights

- Proceed through the section 106 process as soon as notified to do so by a RUS staff archaeologist
- Applications may be required to provide additional archeological studies
- Section 106 must be concluded prior to executing construction contracts and starting construction contracts

Information Needs for Defining the Undertaking and Determining the Area of Potential Effects (APE)

- Project Location Information:
 - KMZ and/or SHP files;
 - Detailed maps of the project location on the landscape (not engineering maps)
 - Information about Federal, State and Tribal lands the project crosses or runs adjacent to
- Detailed description of activities involving ground disturbance needed for:
 - Below and above ground (visual) impacts
- Archaeological Literature Review:
 - Should be done by a Secretary of Interior (SOI) Qualified archaeologist/Cultural Resources Management (CRM) firm
 - Helps define APE

Additional Information that may be needed to Define the Undertaking and Determining the Area of Potential Effects (APE)

- Archaeological Literature Review:
 - **Do not** proceed through contracting and drafting a literature review (Also known as Class I, or Desktop Survey) unless specifically directed to do so.
 - Involve the agency archaeologist in the drafting of the literature review with contractor and/or internal staff
 - Should be done by a Secretary of Interior (SOI) Qualified archaeologist/Cultural Resources Management (CRM) firm
 - Helps define APE

Starting Construction Before Conclusion of Section 106 Review

- Starting construction before conclusion of Section 106 review process can result in:
 - **Foreclosure** on the Advisory Council, State Historic Preservation Officer's and Tribes' Opportunity to Comment
 - **Anticipatory Demolition Determination** under Section 110 k of the National Historic Preservation Act (NHPA)
 - **Limits** on the ability of the Agency **to fund** projects under these two sets of circumstances

Delegation of Authority to Conduct Section 106 Review

- RD has issued a blanket delegation authorizing its applicants (awardees) to initiate and proceed through the steps of Section 106 review to a recommended finding of *no historic properties affected* or *no adverse effect*.
- In order to satisfy the requirements of delegated authority, an Agency applicant seeks agreement with, as appropriate, Indian tribes, the State Historic Preservation Office (SHPO) and others on the effect of its proposal on historic properties or cultural resources. Section 106 review proceeds under this delegated authority solely on the basis of agreement reached between the Agency applicant, the SHPO, Indian tribes, and other participants on recommended actions
- This blanket delegation does not empower Agency applicants or their authorized representatives to make any decisions in Section 106 review, such as a finding of effect or determination of eligibility. Rather, Agency applicants are authorized only to make recommendations to support the progress of Section 106 review.

Delegation of Authority to Conduct Section 106 Review Cont.

- If at any point a consulting party (SHPO, THPO, state or federal agency) requests government-to-government consultation, the agency will take over consultation
 - In such a circumstance, the awardee may still be requested to draft or provide documentation. However, said documentation will be reviewed, signed, and delivered by the agency.

Applicant Roles and Responsibilities under Section 106

- An applicant is authorized by the Agency to:
 - Begin Section 106 review with the SHPO, Indian tribes and others as appropriate
 - Proceed through the steps of Section 106 review based on agreement between all participants on recommended determinations (of National Register of Historic Places eligibility) and other actions; and
 - **Recommend** a finding of *no historic properties affected* or *no adverse effect* as a conclusion to Section 106 review

Applicant Roles and Responsibilities under Section 106

Cont.

- The Agency does not authorize an applicant to proceed with Section 106 review whenever:
 - Any participant in Section 106 review proposes that there may be an adverse effect
 - An Indian tribe requests the involvement of the Agency; i.e., *government-to-government consultation*
 - There is a request to withhold information about the location, character or ownership of a historic property, or an Indian tribe declines to share information about the location or character of a historic property of religious and cultural significance
 - There is any disagreement of any kind between the participants in Section 106 review, including an applicant or its authorized representative

Applicant Roles and Responsibilities under Section 106

Cont. 2

- There is an objection filed by a Section 106 review participant, or the public about their involvement in 36 CFR Part 800
- Any participant asserts that the Section 106 regulations have not been correctly followed, such as an allegation of foreclosure or anticipatory demolition
- Any participant demands that the applicant take actions which exceed the requirements of Section 106 review, such as the payment of fees.

Delegation of Authority to Conduct Section 106 Review Addendum

- Though RD has issued a blanket delegation authorizing its applicants (awardees) to initiate and proceed through the steps of Section 106 review to a recommended finding of *no historic properties affected* or *no adverse effect*, **DO NOT** initiate Section 106 consultation until RUS POD staff has given the go-ahead to do so.

Environmental Review Amendments



Environmental Review of Amendments to Completed Applications

- Despite the completion of the environmental review for the project prior to the amendment, an additional review must be completed for any changes to ensure that any “Extraordinary Circumstances” caused by the changes are accounted for. Some form of this process is required for any amendments, regardless of the level of environmental documentation of the original application
- Request Letter
 - Brief Description of the original project
 - Purpose and Need of changes
 - Detailed description of the Amendment (miles, methods, description of changes, construction and installation of cable [buried and/or aerial], and/or the installation of telecommunications transmission facilities including construction of new towers and/or collocations, etc.) – costs – as required.
 - To General Field Representative (GFR) and forwarded as required.

Environmental Review of Amendments to Completed Applications, Cont.

- Attachments
 - .KMZ or zipped .SHP files of routes - Photos of locations if required – drawings, specifications of structures, and figures if required – any other information that may clarify methods , processes, or locations, of the amendment
 - The better, and clearer, this information is, the less complicated the environmental review process.
- SHPO/THPO Correspondence (Section 106): If consultation was previously initiated, notification of amendments and changes MUST be given. RUS must be provided with all documentation and assist with development of any correspondence with the SHPO/THPO, as it pertains to the amendment environmental review. When these letters are sent, RUS needs to be copied on this correspondence.

Environmental Review of Amendments to Completed Applications, Cont. 2

- Official Species List (OSL) / Table (Section 7): If the Information Planning and Consultation (IPaC) OSL is greater than 90 days old or if the new routes are outside of the Proposed Funded Service Area (PFSA), the species list must be rerun to check for changes to the list. If changes are present a new Special Status Plant and Wildlife Species Table must also be completed by the applicant and submitted for review
- NOTE: As previously stated, some form of this process is required for any amendments, regardless of the level of environmental documentation of the original application. Please keep in mind that, no matter how remote, the environmental review documents that were initially issued can change as a result of amendments. This means, that you can go from one level of Categorical Exclusion (CE) to another as well as Environmental Assessment. This is not usual, but it can happen.

Route Changes versus Scope Changes

- Route Changes – refer to a change in the geographic location of telecommunications infrastructure within utility corridors.
- Scope Changes – refer to an agreed-upon change in the scope of a project typically taking place in the execution phase of a project. It can relate to budget, adding or removing certain parts of a project, and more.

Online Resources

- <https://rd.usda.gov/resources/environmental-studies/environmental-guidance>
- <https://www.rd.usda.gov/programs-services/services/environmental-policies-procedures>
- <https://www.achp.gov/>



