

Section 106 and NEPA Review Process Q&A

Effective July 2, 2018, the FCC made changes to streamline and clarify aspects of the Section 106 Tribal consultation process for construction projects located off Tribal lands, and to the requirements for NEPA review. This document briefly summarizes those changes and provides answers to some common questions.

Section 106

- *Process Changes.*
 - *Required Information.* Applicants must provide all potentially affected Tribal Nations and Native Hawaiian Organizations (NHOs) with a Form 620 (new towers) or Form 621 (collocations) submission packet in cases where the applicable form is prepared for the SHPO following the requirements established in the Wireless Facilities NPA.

In instances where no Form 620/621 submission packet is otherwise prepared, applicants must provide Tribal Nations and NHOs with information adequate to fully explain the project and its location. At minimum, this alternative submission must include contact information for the applicant, a map of the proposed location of the facility, coordinates of the proposed facility, a description of the facility to be constructed including all proposed elements (such as, for example, access roads), and a description of the proposed site, including both aerial and site photographs.
 - *Timeframe for Response.* The 30-day period for a Tribal response provided in the Wireless Facilities NPA will begin to run on the date that the Tribal Nation or NHO can be shown to have received or may reasonably be expected to have received the Form 620/621 submission packet (or the alternative submission where no 620/621 packet has been prepared).
 - There is a 45-day process for moving forward with construction in cases in which Tribal Nations or NHOs do not respond after having been given the opportunity to review a Form 620/621 submission packet or alternative submission.
- *Upfront Fees.* Consistent with longstanding ACHP guidance (*see <http://www.achp.gov/regs-fees.html>*), Applicants have no legal obligation to pay up-front fees when providing Tribal Nations and NHOs with an opportunity to comment on proposed facility deployments.
- *Other Fees.* When additional consultant services are needed in order to satisfy an applicant's obligations, an applicant may negotiate and contract with a Tribe for such services, but is not obligated to hire a Tribe to perform such consultant services or to accede to Tribal requests for fees in the absence of an agreement. The applicant may generally hire any properly qualified consultant or contractor when expert services are required.

NEPA

- When NEPA review is required, it is no longer necessary to file Environmental Assessments (EAs) solely due to the location of a proposed facility in a floodplain if the proposed structure and associated equipment will be at least one foot above the base flood elevation of the floodplain. The Commission also will be subject to new timeframes for acting on EAs – for an uncontested application, within 60 days from placement on notice unless additional information is required; for a contested proceeding, within 90 days from the completion of the pleading cycle and the filing of all information the Commission requested.

Questions and Answers

Tribal Process

- 1. May an applicant use TCNS to contact Tribal Nations and NHOs about proposed facility deployments before submitting the required FCC Form 620/621 submission packet (or alternative submission)?**

Yes, and we encourage early communications – through TCNS or otherwise – to help expedite the review process. A Tribal Nation or NHO is under no obligation to respond to a notification, however, until it receives a Form 620/621 submission packet (or alternative submission).

- 2. If a Tribal Nation has already disclaimed interest in a proposed facility (for instance, in response to an initial TCNS notification), does an applicant still have to provide the Tribal Nation with a Form 620/621 submission packet (or alternative submission)?**

No. While a Tribal Nation or NHO is not obligated to respond to an applicant until it receives a Form 620/621 submission packet (or alternative submission), a Tribal Nation or NHO may affirmatively disclaim interest in a proposed project at any time. If all Tribal Nations and NHOs receiving a notification disclaim interest in reviewing a proposed project, the applicant will have completed its Tribal outreach obligations and will not be required to provide Form 620/621 submission packets (or alternative submissions).

- 3. When may an applicant use the alternative submission instead of a Form 620 or 621?**

Applicants may use the alternative submission only in cases in which a Form 620/621 submission packet is not required to be prepared for the SHPO because the construction is excluded from SHPO review under Section III.D or III.E of the [Wireless Facilities NPA](#).

- 4. What information must an applicant provide in an alternative submission?**

At minimum, the alternative submission must include contact information for the applicant, a map of the proposed location of the facility, coordinates of the proposed facility, a description of the facility to be constructed including all proposed elements (such as, for example, access roads), and a description of the proposed site, including both aerial and site photographs.

- 5. How should an applicant determine whether to send information electronically or by mail?**

Applicant contact and communications with a Tribal Nation or NHO should be made in accordance with preferences expressed by the Tribal Nation or NHO in TCNS. Where the Tribal Nation or NHO is notified by email that a Form 620/621 submission packet has been submitted, the submission packet is presumed to have been received on the day the submission packet is provided. Where the applicant sends

the notification through the mail, the Commission will presume that the packet may reasonably be expected to have been received by no later than the fifth calendar day after the date it is sent.

6. What if the FCC Form 620/621 submission packet (or alternative submission) information provided by the applicant is inadequate? How does this affect the review clock?

Applicants must provide all required information in their Form 620/621 submission packets (or alternative submissions) to Tribal Nations and NHOs. The information they provide must be accurate and complete, and it must include a specific and correct site address or a detailed description of the location of proposed facilities if no address is available, as well as a complete description of all elements of a proposed facility.

If the information an applicant provides is inaccurate or incomplete, the time period for Tribal response shall be restarted. If a Tribal Nation or NHO examines an applicant's submission and determines that it is incomplete, the Tribal Nation or NHO should promptly notify the applicant in the first instance. If the applicant disagrees with the determination, the Tribal Nation or NHO should notify the FCC. Failure to challenge the submission as incomplete within the 30-day notice period may result in the submission being treated as complete regardless of any deficiencies.

7. What if a Tribal Nation or NHO fails to respond after it receives information from an applicant?

If an applicant does not receive a response within 30 calendar days of the date the Tribal Nation or NHO can be shown or may reasonably be expected to have received notification that the Form 620/621 submission packet (or alternative submission) is available for review, the applicant can refer the matter to the Commission for follow-up.

Upon receiving a referral, the Commission will contact the Tribal Nation's or NHO's designated cultural resource representative by letter and/or email to request that the Tribal Nation or NHO inform the Commission and applicant within 15 calendar days of the date of the letter and/or email of its interest or lack of interest in participating in the Section 106 review. If the Tribal Nation or NHO does not respond within 15 calendar days, the applicant's pre-construction obligations are discharged with respect to that Tribal Nation or NHO and the applicant may move forward with construction.

8. What may a Tribal Nation or NHO enter into the Additional Details Box in TCNS?

The Additional Details Box in TCNS may be used to provide guidance for applicants. For example, a Tribal Nation may wish to indicate that it has no interest in reviewing proposed facilities on previously disturbed ground, certain types of proposed facilities, or proposed facilities in certain parts of the geographic area for which the Tribal Nation has expressed interest.

Requests for mandatory upfront fees or requests that applicants pay upfront fees voluntarily are not permitted and will be removed from the Additional Details Box. In addition, a Tribal Nation or NHO may not use the Additional Details Box to request that applicants provide additional information beyond that required in the Form 620/621 submission packet (or alternative submission).

While a Tribal Nation or NHO may use the Additional Details Box to express a preference that an applicant use a third-party website for communication with the Tribal Nation or NHO, that preference may not be contingent upon the assessment of a fee to use that website. In the absence of an alternative contact preference, the applicant should contact the Tribal Nation or NHO via TCNS.

9. Can a Tribal Nation still request monitoring of the construction process?

Yes. Section IV of the NPA requires that, if a Tribal Nation or NHO indicates that a historic property of religious or cultural significance to it may be affected by a proposed facility, the applicant must invite the

Tribal Nation or NHO to become a consulting party. In the context of its participation as a consulting party, a Tribal Nation may request monitoring. If a Tribal Nation makes a generalized request for monitoring without identifying a concern about a historic property, the applicant should evaluate the request, and if it disagrees that monitoring is warranted, it should refer the request to the Commission.

10. If an applicant needs to hire a consultant, is the applicant required to hire a Tribal Nation as the consultant?

Applicants are not obligated to hire a particular person or entity to perform consultant services. Rather, they are obligated only to hire a properly qualified consultant or contractor when such expert services are required. The appropriate qualifications will depend upon the work to be performed. For example, different qualifications may be needed to confirm the presence or absence of archeological properties during a site visit, to apply traditional knowledge in assessing the significance of above-ground features, or to monitor construction.

11. Can Tribal Nations charge fees for performing consultant services?

A Tribal Nation or NHO must be compensated for fulfilling its role as a consultant or contractor where there is an agreement in place between the Tribal Nation and the applicant to perform a compensable service. Without such an agreement, the applicant has not undertaken to engage the Tribal Nation or NHO, and it is not compelled to comply with a unilateral request for fees.

12. What should a TCNS applicant do if it receives a request for upfront fees from a Tribal Nation or NHO?

Applicants have no legal obligation to pay up-front fees. If a Tribal Nation or NHO purports to condition its response to an applicant's TCNS contact on the receipt of up-front compensation, the FCC will treat its position as a failure to respond, and the applicant will be able to avail itself of the process discussed above for when a Tribal Nation or NHO fails to supply a timely response (*see* Question 7).

13. How should an applicant determine whether to send information electronically or by mail?

The NPA (Section IV.F) instructs that, "Applicants' direct contacts with Indian tribes and NHOs, where accepted by the Indian tribe or NHO, shall be made in a sensitive manner that is consistent with the reasonable wishes of the Indian tribe or NHO, where such wishes are known or can be reasonably ascertained." Such preferences may be expressed by the Tribal Nation or NHO in the Notice of Organizations generated by TCNS or otherwise, and may require submission by email, postal service, or both.

14. What if a Tribal Nation or NHO fails to respond after it receives information from an applicant?

The applicant can refer the matter to the Commission for follow-up *if* it does not receive a response within 30 calendar days of the date that the Tribal Nation or NHO, consistent with its indicated preferences (see Question 5), either received TCNS notification that the Form 620/621 submission packet (or alternative submission) is available for review; or can be shown or may reasonably be expected to have received the submission packet itself. The applicant is responsible for ensuring that a Tribal Nation or NHO has the applicant's submission packet for at least 30 calendar days, counted as described below, before a referral is made.

For purposes of allowing referral via TCNS, the system calculates the notice period based on the date that the information is uploaded to E-106 (Form 620 or Form 621) or in TCNS (Alternative Submission

Packet), adjusted by an additional five calendar days to account for delivery time for Tribes preferring postal delivery of TCNS notifications. TCNS is not currently programmed to take into account instances where a Tribe's TCNS notification preference differs from their preferred means of receiving Submission Packets to review. As a result, TCNS may allow for referrals as a technical matter when referral is not yet appropriate. *We therefore emphasize that even when TCNS allows a referral, the applicant is responsible for providing Tribes a minimum of 30 days from receipt or expected receipt of the submission packet to review complete submittals prior to referring within or outside the system.*

NEPA Process

- 1. If the proposed facility is in a floodplain, does an applicant have to provide anything to the Commission to demonstrate that the structure will be at least one foot above ground, or can it self-certify?**

There is no need for an applicant to make any showing to the Commission unless one or more other criteria trigger the requirement to file an EA under the Commission's rules.

- 2. For facilities that will still require the submission of an EA for reasons other than their proposed location in a floodplain, do applicants have to provide documentation that the proposed structure will be at least one foot above ground?**

Yes. Although modified, the requirement to consider the effects of facilities located in floodplains remains part of the Commission's rule identifying when an EA is necessary, *see* 47 CFR § 1.1307. When an EA is submitted, it must document that the proposed facilities will not have a significant effect for any of the other triggers for EA identified by the Commission's rules. Therefore, for facilities that still require the submission of an EA for reasons other than their location in a floodplain, applicants will need to provide documentation that the proposed structure and associated equipment will be at least one foot above the base flood elevation (*e.g.*, local building permit or construction plans).

- 4. What needs to be elevated and how?**

In addition to antenna structures generally, and consistent with previous staff guidance, all cabinets and equipment must be elevated by being raised above the floor or being placed on a platform. Poles, however, do not need to be elevated.