ACRA
American Cultural Resources Association

September 18, 2025

Ms. Jennifer Flynn
Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Modernizing the Commission's National Environmental Policy Act Rules (WT Docket No. 25-217)

Dear Ms. Flynn:

The American Cultural Resources Association (ACRA), the trade association specializing in cultural resources management (CRM), appreciates the opportunity to submit comments regarding the Federal Communications Commission's (Commission) notice of proposed rulemaking (NPRM) *Modernizing the Commission's National Environmental Policy Act Rules (WT Docket No. 25-217).*

ACRA member firms undertake much of the legally mandated CRM investigations in the United States and its territories, and employ tens of thousands of professionals, including archaeologists, architectural historians, ethnographers, historians, and an increasingly varied group of resource specialists. To help guide smart, sustainable economic development and safeguard important historic and cultural heritage assets, ACRA members are highly trained and apply specialized research skills within a framework of federal, state, local, and/or Tribal law to facilitate an open dialog where every stakeholder has a voice.

ACRA strongly supports efforts to make the permitting process more efficient. With millions of Americans still on the wrong side of the digital divide, creating a 21st Century information and telecommunications network must continue to be one of our nation's highest priorities. At the same time, our nation's commitment to preserving and protecting our historic and cultural heritage for future generations to understand and enjoy is no less critical. ACRA members demonstrate every day that it is possible to build the modern infrastructure our country needs while continuing to tell our country's story.

With that in mind, ACRA would like to take this opportunity to offer comments on the Commission's NRPM.

Agency Obligations Under the NHPA

Under the National Historic Preservation Act (NHPA), any federal department or independent agency "having authority to license any undertaking" is required to "take into account the effect of the undertaking on any historic property." (54 U.S.C. § 306108; commonly referred to as "Section 106") The NHPA further defines an 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." (54 U.S.C. § 300320)

The NHPA establishes that the federal government has a responsibility in protecting our nation's cultural and historic resources as they are physical manifestations of our nation's heritage. The NHPA also created the Advisory Council on Historic Preservation (ACHP) and gave it the authority to "promulgate regulations as it considers necessary to govern the implementation" of Section 106 "in its entirety." Those regulations can be found at 36 CFR Part 800 (ACHP 800 regulations).

Section 106 and the ACHP 800 regulations provide a clear, consistent roadmap to enable projects to move forward while considering their impact on the country's cultural heritage. They provide a multitude of ways to make the process more efficient, like programmatic agreements and program comments. Consultation is the key to Section 106 as it gives a voice in the process to all interested parties, including State Historic Preservation Officers, the general public, and Tribal Historic Preservation Officers and Tribal nations, to whom the federal government has a government-to-government trust responsibility. The Section 106 process as established in statute and the regulations promotes open collaboration among stakeholders so that any conflicts are addressed early in the process. This early engagement typically results in the swift approval of the majority of infrastructure projects.

Although the National Environmental Policy Act (NEPA) often works in tandem with the NHPA, they are distinct statutes that place specific requirements upon federal agencies. For example, the statutory definition of a major federal action under NEPA (42 U.S.C. § 4336e) is distinct from the NHPA definition of an undertaking. Any changes to the Commission's NEPA regulations do not release it from its obligations under Section 106 of NHPA and its accompanying regulations.

Nationwide Programmatic Agreement (NPA)

As ACRA noted in its April 30, 2025, comments to the Commission regarding the *CTIA Petition for Rulemaking on the Commission's National Environmental Policy Act Rules* (Docket No: RM-12003), the 2004 Nationwide Programmatic Agreement (NPA) (47 CFR Appendix C) is the product of thoughtful and detailed collaboration between the federal government, state governments, Tribes and others to strike the right balance between protecting our heritage and building a better communications network:

> "[The NPA] outlines procedures for public consultation, including Tribes; defines exempt undertakings; establishes processes for documentation, recordkeeping, and reporting; and

> includes other provisions to ensure a balance between the statutory obligation to comply with federal law and the imperative to build our nation's telecommunications infrastructure.
>
> "Adherence to the NPA is more than an academic exercise: the construction and ongoing maintenance of telecommunications infrastructure has the potential to affect Tribal landscapes, heritage resources, and other historic properties. The NPA ensures that the public is consulted on projects and that our nation's historic places are protected. The NPA also includes procedures to amend the document, requiring approval by the FCC, ACHP and NCSHPO. (47 CFR Appendix C (XII))"[1]

We are concerned that the NPRM would, like the CTIA petition, undermine this careful balance and lead the Commission towards actions that violate both the letter and spirit of NHPA.

Impact of NEPA Changes on NHPA

In a series of questions, the NPRM asks, in essence, whether recent changes to NEPA changes or eliminates its current determinations for what constitutes an undertaking under NHPA.[2]

The answer is no. Recent changes to NEPA – whether statutory, through regulation or via court decision – do not affect the statutory definition of an undertaking under NHPA.

The NPRM raises this question in the context of specific project types, including antenna structure deployments, such as those involving geographic area licenses, and Antenna Structure Registrations (ASRs). ACRA would like to address these project types specifically.

Antenna Structure Deployments

The NPRM asks, if a geographic area license is not an MFA, and "applicants cannot be required to consider the significance of environmental effects or applicability of categorical exclusions . . . would that remove the 'limited approval authority' that the D.C. Circuit found sufficient to qualify as an NHPA undertaking?"

[1] ACRA comments to the Federal Communications Commission, April 30,2025

[2] For example, "We first seek comment on the factual circumstances that would transform Commission action into an 'undertaking' triggering NHPA review. Dating back to the 2004 NPA Order and reaffirmed as recently as the 2018 Wireless Broadband Deployment Second R&O, the Commission has determined that an undertaking may exist in the context of wireless deployments in 'two limited contexts.' First, an undertaking may exist if facilities that do not otherwise require preconstruction approval are nonetheless subject to § 1.1312(b) of the Commission's rules and thus must obtain FCC approval of an environmental assessment prior to construction. Second, an undertaking may exist if facilities are subject to the FCC's tower registration and approval process pursuant to section 303(q) of the Communications Act because they are over 200 feet or are near airports. We seek comment on whether the recent changes to NEPA changes or eliminates either or both grounds for an 'undertaking.'"

Again, the answer is clear: NEPA and NHPA are separate statutes. Neither recent statutory changes to NEPA, nor regulatory amendments to NEPA, nor court decisions regarding NEPA, change the NHPA or the regulations that govern it. Furthermore, the legal basis for requiring the Commission to consider such deployments as undertakings comes not from the D.C. Circuit ruling, but from the NHPA and ACHP 800 regulations themselves, as well as via the NPA.

The Commission further asks, "in the event we determine geographic area licenses are not MFAs and/or federal undertakings under federal statues . . . whether the Commission's limited approval authority remains applicable to geographic area licenses because the Commission's stated purpose for retaining its limited approval authority—to ensure compliance with federal historic and environmental statutes—would not be at issue."

In addition the Commission asks whether its rules "regarding buildout requirements (including requisite due dates for meeting buildout milestones) provide a sufficient basis for 'approval' under [the NHPA and ACHP 800 regulations] to constitute a Commission undertaking and, therefore, render projects with these requirements subject to NHPA section 106 review. If so, does that change once the licensee's buildout conditions are satisfied? If a geographic area licensee completes the buildout required under its license but subsequently decides to deploy additional wireless facilities to enhance its coverage with added capacity, would such additional deployments no longer be Commission undertakings?"

ACRA believes that the plain language of NHPA is clear: as long as Commission license or approval is a prerequisite for the buildout of communications infrastructure – even if the Commission is not directing the precise location of that infrastructure, per se – it must remain an undertaking under NHPA.

As the NPRM states, the Commission maintains the "bedrock responsibilities" to ensure the rapid, efficient deployment of communications infrastructure and use of electromagnetic spectrum. However, the Commission – like all federal agencies – also has responsibilities to consider the effects of its actions on historic properties, including those where the action is either funded in whole or in part by the agency, or whether its jurisdiction is direct or indirect.

Antenna Structure Registrations (ASRs).

A similar situation arises with respect to ASRs. As the NPRM notes, the NPA states that "[c]ommission licensees and applicants for authorizations and *antenna structure registrations* are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment ('EA') in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect Historic Properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization ('NHO') that meet the National Register criteria." (Emphasis added.)

It further notes that the D.C. Circuit has upheld this determination, "rejecting the argument that the ASR framework was 'wholly ministerial' and did not create an 'approval' process that would qualify as an undertaking."

The Commission asks whether the "statutory changes to NEPA require reconsideration . . . [i]f the Commission determines that its ASR rules do not qualify as an MFA under NEPA, would that change one of the 'two limited contexts' for an NHPA undertaking?"

As stated earlier, a determination regarding whether an action constitutes an MPA under NEPA does not affect the commission's statutory responsibilities under the NHPA.

The Commission notes that one of the primary considerations in the registration of antenna structure is their impact on aviation safety;

> "The Commission and the FAA each have statutory responsibilities to ensure that antenna structures do not pose a threat to air safety. Section 303(q) of the Communications Act gives the Commission 'the authority to require painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.' That provision also permits the Commission to "require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation." Separately, the FAA has authority under its organic statute to require that persons proposing to erect a structure provide notice to the FAA, when such notice will promote air safety. Title 49 obligates the FAA to "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment" and coordinate with the FCC on tower applications and aeronautical studies."

Because the Commission and the FAA have "materially identical requirements, regulations, and cross-references for the kinds of facilities that trigger special notification," the NPRM asks whether the Commission's ASR rules "non-discretionary" and "in accordance with an agency's statutory authority," which would render them excluded from the definition of an MFA under NEPA. However, this question does not relate to their status as an undertaking under the NHPA, where the non-discretionary exclusion does not exist.

In a similar vein, CTIA's contention that undertakings and MFAs are coterminous and that an agency's involvement in a project must be "substantial" to constitute a NHPA undertaking are belied by the clear language of the statute and corresponding ACHP regulations, which define an undertaking as a "project, activity, or program funded in whole *or in part* under the direct *or indirect* jurisdiction of a Federal agency" (36 CFR § 800.16). (Emphasis added)

Lastly, the NPRM seeks comment on whether a geographic license is "not a " `Federal permit, license or approval' that must be obtained before wireless facility deployment can proceed." ACRA sees nothing in the statute or the regulations that allows federal agencies to decide that a license is not a "license."

Conclusion

ACRA and its members are committed to working with the FCC and all parties to make the regulatory process as effective as possible, enabling us to close the digital divide while keeping faith with the places and properties that tell America's story. We thank the FCC for giving us the opportunity to provide comments on this NPRM.

Sincerely,

Amanda Stratton
Executive Director