COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF EAST KENTUCKY	**)**
POWER COOPERATIVE FOR A	**)**
CERTIFICATE OF PUBLIC CONVENIENCE	**)DOCKET NO.**
AND NECESSITY FOR CONSTRUCTION	**)2005-00207**
OF TRANSMISSION FACILITIES IN	**)**
BARREN, WARREN, BUTLER, AND	**)**
OHIO COUNTIES, KENTUCKY	**)**

MOTION TO DISMISS

Intervenors, Carroll Tichenor, Doris Tichenor, John Colliver, and H. H. Barlow, by counsel, hereby request the Public Service Commission to dismiss the Application of East Kentucky Power Cooperative ("Applicant"). As discussed in the attached Memorandum, the Commission's Staff Consultant, ICF Resources, L.L.C. ("ICF"), upon reviewing the Applicant's proposal, concluded that the Applicant did not adequately consider route options utilizing existing rights-of-way or other easements that would minimize the impact of the proposed project. Also, the Applicant failed to satisfy Section 106 of the National Historic Preservation Act and the full scope of requirements of the National Environmental Policy Act. The application, therefore, fails to satisfy the standards required for issuance of a Certificate of Public Convenience and Necessity. As a result, the application must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served by mailing, first class postage prepaid to the following:

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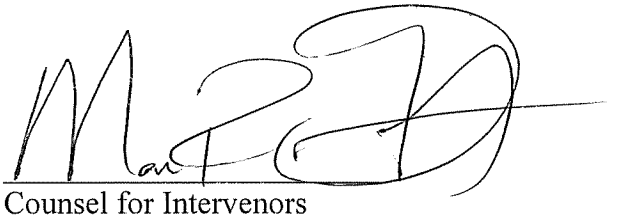
This the 26th day of August, 2005.



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MEMORANDUM OF INTERVENORS CARROLL TICHENOR , DORIS TICHENOR, JOHN COLLIVER, AND H.H. BARLOW IN SUPPORT OF THEIR MOTION TO DISMISS

I. Introduction

This proceeding involves Eastern Kentucky Power Cooperative's ("Applicant") application for a Certificate of Public Convenience and Necessity to construct a 161 kV transmission line with a total length of 97.55 miles. The line is proposed to be constructed in four segments running through Barren, Warren, Butler, and Ohio Counties, Kentucky. The Applicant's proposed project masquerades as a final plan subject to no substantive alternatives. In reality, the plan almost certainly will be substantially altered upon the Applicant's sufficient exploration of its route options and satisfaction of any of several federal laws.

As discussed below, the Commission's Staff Consultant, ICF Resources, L.L.C. ("ICF"), upon reviewing the Applicant's proposal, concluded that the Applicant did not adequately consider route options utilizing existing rights-of-way or other easements that would minimize the environmental impact of the proposed project. The Consultant stated that "[s]uch an analysis would provide valuable insights as to the costs and benefits of avoiding the need for new rights-of-way if compared to the current proposed plan." Technical Appraisal, Prepared by ICF Resources, LLC (Aug. 15, 2005), p. 22.

Also, as discussed below, the Applicant's proposal invokes the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* The Applicant's response to the Intervenors' informational requests makes it clear that the Applicant is obligated but has failed to satisfy the requirements of these federal laws. *See* June 24, 2005 Letter from Paul C. Atchison, Vice President Power Delivery, Eastern Kentucky Power Cooperative, to Doris Tichenor, attached to this Memorandum as Exhibit 1. In fact, the Applicant must submit an Environmental Assessment of the proposed project to the Rural Utilities Service of the United States Department of Agriculture in order to receive the funding that the Applicant has requested for the project. *See* Affidavit of David G. Eames, attached to this Memorandum as Exhibit 2. The Applicant must submit the assessment *concurrent with* the design of the project, i.e, the selection of the transmission line route. *See* 7 CFR Part 1794, attached to this Memorandum as Exhibit 3. The Applicant, instead, completed the project design before engaging in *any* environmental review, contrary to the Rural Utilities Service regulations.

Furthermore, the proposed route crosses Barren County, which is home to one of Kentucky's largest per-county populations of livestock. Documented adverse effects on dairy cattle from the positioning on dairy farms of transmission lines require the Applicant to fully account for its decision to site the proposed line through Barren County farmland. *See* "Environmental Impacts of Transmission Lines," Public Service Commission of Wisconsin, July 2004, p. 10, attached to this Memorandum as Exhibit 4.

As a result, the Commission's standards for granting a Certificate of Public Convenience and Necessity are not satisfied in this case. Not only has the Applicant failed to adequately consider the public interest in avoiding gratuitous adverse environmental impacts, the Applicant

also has not even begun the process of satisfying any of the applicable federal environmental laws. Yet the Applicant submits its proposed project as if it were a final plan. To the contrary, the proposal is not final, and, until the Applicant satisfies its federal law obligations, the proposal is not ripe for this Commission's review. Because the Applicant's proposal is premature and is contrary to the public interest, the application must be dismissed.

II. Factual Background

In its application for a Certificate of Public Convenience and Necessity, the Applicant submitted documentation of engineering, system impact, interconnection, and facility studies, but did not provide detailed routing studies. Only on August 15, 2005, were Intervenors provided any discussion of the Applicant's approach in selecting a route for the proposed project. This discussion was provided not by the Applicant, but by ICF, which filed its Technical Appraisal of the proposed project on that date. The Appraisal discusses, in very broad outline, the Applicant's process in choosing the proposed route and concludes that the proposed route is not supported by sufficient consideration of its environmental impacts.

According to the Appraisal, to determine routing options for the project, the Applicant used the Electric Power Research Institute (EPRI) overhead electric transmission line siting methodology, which assumes a general macro transmission corridor and, applying multiple parameters, chooses possible routes within the corridor according to key factors. Some of the factors considered are proximity to residences, commercial and industrial buildings, forests, wetlands, and line length co-location opportunities with roads and existing transmission lines. The approach then assigns weights to each of these factors and ranks the various routing options to select the best option. Based on this approach, the Applicant selected a final route, which, the

Applicant states, is subject to modification in light of local input and detailed data. Technical Appraisal, at 17.

Significantly, ICF noted that the "single largest opposition to transmission line builds in the continental [United States] has been environmental concerns." *Id.* at 22. It concluded, as a result, that an assessment of a line routing alternative that adds the goal of minimizing the need for new rights-of-way to the extent possible should be considered. "Such an analysis," ICF stated, "would provide valuable insights as to the costs and benefits of avoiding the need for new rights-of-way if compared to the current proposed plan." *Id.* at 22. Without that analysis, ICF found insufficient information available to examine the Applicant's selection of route. *Id.* at 22-23.

In fact, within the proposed route are several blatant obstacles to the Applicant's route selection. For example, the Applicant's proposed project will affect several properties listed on the National Register of Historic Places. Intervenors and Movants Mr. and Mrs. Carroll Tichenor's property alone contains several well-documented historical and archaeological sites. Annis Ferry Farm, the Tichenor's property, which is located in the Big Bend/Logansport community in Butler County, is home to the Annis Mound and Village Archaeological Sites—an area of nine acres—which are significant examples of early Mississippian culture spanning AD 1000-1300. In 1985, the Annis Mound and Village were nominated for the National Register of Historic Places. The nomination stated that "[t]he significance of the Annis site is derived from its historical involvement in the development of archaeology in Kentucky . . . the scientific data which it contains and the relevance of this information to Mississippian period research." Inventory—Nomination Form, Annis Mound and Village Site, Archaeological Sites 15 BT-2, 15 BT-20 and 15 BT-21, Butler County, Kentucky, National Register of Historic Places. The sites

were added to the National Register on December 21, 1985. The sites currently are the subject of study by a Pennsylvania State University archaeology team, and the sites are modeled in the Kentucky History Museum.

The Annis Ferry Farm also contains the historic site known as "Carson's Landing." In 1988, the Carson's Landing site, encompassing 2.2 acres, was listed on the National Register of Historic Places. The nomination described Carson's Landing as "one of the few sites in Butler County that represents the commerce and transportation along the Green River and is a material reminder of the importance of the Green River as an artery for transportation, commerce, and communication for Logansport, Butler County, and Kentucky." The nomination stated, "Because the location, setting, materials, and workmanship have been maintained, Carson's Landing still evokes a sense of past time and place . . . The nominated property has contributed to the development of a larger rural historic landscape and reflects the tradition of the river and culture." Registration Form, Carson's Landing, Annis Ferry Farm/BT-1, National Register of Historic Places.

The proposed transmission line will affect historic property in Warren County, as well. On Keystone Farm, the Applicant proposes to route the line directly through prime timber and open fields that provide a home to wild turkeys, deer, and other wildlife. Keystone Farm contains an historic home and log barn, which have been located on that property since Warren County's earliest days. The historic Keystone Quarry, which provided the limestone used in many of Bowling Green's public buildings as well as the United States Treasury building in Washington, D.C., is in the path of the proposed route. The Farm also contains a cave which, in light of past findings of Native American artifacts in the area, could have archaeological interest. All of these sites are eligible for listing on the National Register of Historic Places.

The proposed transmission line runs squarely through Annis Ferry Farm and Keystone Farm, infringing upon all of these nationally recognized and protected sites. In no way can the historic and cultural values of these sites be maintained if the proposed 161-kV transmission line is constructed.

As a result of the placement of the proposed transmission line, landowners will suffer undocumented costs resulting from a variety of impacts. Stray voltage resulting from the proposed transmission line may adversely affect dairy and livestock production on farms throughout Barren County. On Intervenors and Movants John Colliver's and H.H Barlow's farms alone, the proposed line will affect 183 head of cattle. Also, farms throughout Butler, Barren, Warren, and Ohio Counties whose operations utilize Global Positioning Systems may suffer from the Radio Interference caused by the high voltage lines. Interference by transmission lines with these positioning systems is well-documented, and results can be very damaging. The Applicant has failed to account for these impacts and the resulting costs to landowners.

As a result of the proposed project's impacts on nationally registered properties and other unique characteristics of the land throughout the proposed corridor, the Applicant is required, under the laws discussed herein,[1] to assess the potential environmental impacts, provide documentation to the Commission of their assessments, and consult with federal agencies regarding those impacts.

III. Argument

A. The Commission Must Consider the Proposed Project's Impact on the Land in Deciding Whether to Issue a Certificate of Public Convenience and Necessity

[1]As discussed below, because the Applicant is receiving federal assistance for this project, see Affidavit of David G. Eames (stating that the Applicant proposes to finance this project with a long-term loan from the Rural Utilities Service), the Applicant, vis-à-vis the Rural Utilities Service, must satisfy the requirements of Section 106 of the National Historic Preservation Act and the National Environmental Policy Act.

Issuance of a Certificate of Public Convenience and Necessity is now governed by the requirements of Senate Bill 246, which was enacted by the 2004 General Assembly to provide a forum for the consideration of the environmental impacts of proposed transmission line facilities and to empower local communities and landowners that might be affected by the location of proposed transmission lines. Pursuant to Senate Bill 246, now KRS 278.020(2) and (8) ("the 2004 Amendments"), the construction of transmission lines carrying 138 or more kVs for more than 1 mile in length, formerly matters of extension that were considered to be "in the usual course of business," became matters requiring a Certificate of Public Convenience and Necessity. The clear intent of the statute was to allow for public scrutiny of such line constructions and to require the Commission to consider the resulting impacts on private and public landowners in the corridors.

1. The 2004 Amendments Modify Pre-Existing Agency Practice Concerning Review and Approval of Transmission Lines by Requiring Consideration of Impacts on Landowners and the Public

The 2004 Amendments created three new elements of review: the requirement that a Certificate of Public Convenience and Necessity be issued for the construction of this class of transmission lines, the public's right to a hearing on all issues related to a proposed project, and a corresponding obligation of the utility-applicant to justify its proposal. Where formerly the Commission confined itself to issues of electrical necessity and duplication of services, the 2004 Amendments reflect a clear legislative intent that the concerns of landowners and other interested parties regarding the adverse effects of the routing and construction of these lines be evaluated in determining whether and under what conditions to certify an application. To ensure that electrical cooperatives adequately considered the impacts and alternatives, the 2004

Kentucky General Assembly created a new process for issuance of a Certificate of Public Convenience and Necessity.

The 2004 Amendments were not intended to ratify previous judicial interpretations of KRS 278.020 as it applied to the review and approval of electric transmission lines. Instead, the Amendments were intended to reverse what had been the state of Kentucky law concerning the rights of landowners who might adversely be affected by the siting of transmission lines. Representative of former law was the case of *Satterwhite v. Public Service Commission*, 474 S.W.2d 387 (Ky. 1971), in which the Court considered and rejected the request of landowners that a Certificate issued to Kentucky Utilities be set aside and that the matter be reconsidered at a new hearing in which the petitioners would be entitled to participate. The landowners challenged the right of Kentucky Utilities to condemn their properties for location of a transmission line. The Court rejected the landowners' argument that they were "parties interested" within the meaning of the provision of KRS 278.020, concluding that

> [t]he trouble with this contention is that the question of what particular lands the proposed transmission line would cross was not in issue before the Public Service Commission. The application included a map showing the general course and direction of the proposed lines, but the specific paths the lines might follow were not indicated or suggested, and the order granting the certificate did not purport to fix the specific paths for the lines. The Public Service Commission was not concerned with that detail because it was not relevant to the issue of convenience and necessity. The considerations on that issue were the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the appellant.

Satterwhite, 474 S.W.2d at 387.

The 2004 Amendments enfranchised landowners and elevated issues that the *Satterwhite* Court determined to be outside the scope of consideration. Specifically, KRS 278.020(8) provides "any interested person including a person over whose property the proposed

transmission line will cross" the right to intervene and to request a public hearing. By explicitly including landowners in the review process and by requiring that utilities identify the transmission line route, KRS 278.020(8) nullifies the holding in *Satterwhite*.

It is equally apparent that the 2004 Amendments voided the holding in *Duerson v. East Kentucky Power Cooperative*, 843 S.W.2d 340 (Ky.Ct.App 1992). In *Duerson*, landowners challenged the right of East Kentucky Power Cooperative to condemn rights-of-way for the siting of a transmission line. The landowners argued that the Applicant could not condemn unless it first obtained a Certificate of Public Convenience and Necessity from the Public Service Commission. Rejecting this challenge, the Court concluded:

> [T]he transmission lines are extensions in the ordinary course of business and, under [KRS 278.020(1)], do not require a certificate of convenience and necessity. The statute provides for two exceptions: retail service connections and ordinary course of business extensions. It is our view that a correct interpretation of the statute requires that the latter exception applies to all utilities. There is nothing in the wording to dictate otherwise. As such, the power lines under consideration clearly fall within this latter exception.
>
> In an effort to comply with the statute, the Commission has adopted a regulation defining extensions in the ordinary course of business. That regulation (807 KAR 5:001, § 9(3)) reads as follows:
>
> (3) Extensions in the ordinary course of business. No certificate of public convenience and necessity will be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

> We are of the opinion that the foregoing statute and regulation are designed to protect the public against exorbitant utility rates emanating from unnecessary and duplicitous power facilities. We think it unreasonable to conclude that their purpose lies in protecting landowners from eminent domain.
>
> As we examine the record, there is more than ample evidence supporting the fact that the transmission lines in question comport with the regulation and statute. For that reason, we conclude that the defense that appellee has not obtained as a precondition to condemnation a certificate of convenience and necessity has no merit.

Duerson, 843 S.W.2d at 342.

The 2004 Amendments removed electric transmission line construction from the category of "ordinary extensions of existing systems in the usual course of business." The Amendments now require the utility to obtain a Certificate of Public Convenience and Necessity and explicitly involve affected landowners and other interested parties in the public review process. In so doing, the Amendments strip the application of *Satterwhite* and *Duerson* from this Commission's purview. Now, for the construction of this class of transmission lines, the public interest must support the decision to grant, deny, or condition a Certificate of Public Convenience and Necessity.

The Commission acknowledged as much in its regulations implementing the 2004 Amendments. In the Statement of Consideration relating to 807 KAR 5:120, filed with the Legislative Research Commission on October 15, 2004, the Commission rejected the contention of Big Rivers that the only issues in these cases "are whether there is a need and demand for the service and whether [the line] construction would be a wasteful duplication of facilities." The Commission stated:

> The [Commission] believes that the legislative intent demonstrates that the views of Big Rivers and EKPC are far too limited. This issue in Kentucky has previously been guided by judicial decision. The key cases are *Satterwhite v. Public Service Commission*, 474 S.W.2d 387 (Ky. 1972), and *Duerson v. East Kentucky Power Cooperative, Inc.*, 843 S.W.2d 340 (Ky. Ct. App. 1992). *Satterwhite* decided two issues: (1) that individual landowners whose land was to be crossed by the transmission line are not interested persons and thus are not entitled to intervene because (2) the only issues were whether there is a need and demand for the service and whether its construction would be a wasteful duplication of facilities. In *Duerson*, the court ruled that all transmission lines are extensions in the ordinary course of business and thus, under the exception of KRS 278.010, do not require a certificate. In requiring utilities to file a certificate case for transmission lines of a certain size and length, Chapter 75 (Senate Bill 246) directly overruled *Duerson*. The provision specifying that individually-affected landowners are interested persons who may intervene likewise directly overruled the contrary result in *Satterwhite*. Moreover, the latter provision expanded the issues the PSC may consider when such a landowner intervenes. If the only issues the landowner could raise were the ones delineated in Big Rivers' comments and in *Satterwhite*, allowing individual
>
> landowner intervention would make no sense. In fact, the legislative debate confirms a contrary intent. For example, in his comments in this rulemaking proceeding, Scott Hagan specifically talked about his testimony in committee on Senate Bill 246, and he pointed out, "Every legislator who spoke that day in committee indicated that the passage of this bill was intended for me and every property owner like me who deserves a hearing and an opportunity for an independent body (the Public Service Commission) to review the need for such a dramatic investment and the wisdom of its placement in the community. (Emphasis original). PSC Staff was present and heard similar testimony and legislators' comments indicating an intent to overrule the limited issue requirement in *Satterwhite*.
>
> The PSC believes the proposed regulation allowing individual landowners to intervene and raise their property-specific issues in a transmission certificate case is in furtherance of the legislative intent of the new statutory provisions.

Statement of Consideration Relating To 807 KAR 5:120, 4 (October 15, 2004).

Indeed, the Commission expanded on this interpretation in its recent Order denying this Applicant's proposal to construct a 6.9 mile 138 kV transmission line. *See* Order In the Matter of The Application of East Kentucky Power Cooperative, Inc., For A Certificate of Public Convenience and Necessity to Construct a 138 kV Transmission Line in Rowan County, Kentucky, Case No. 2005-00089 ("Order, Case No. 2005-00089"). The Commission explicitly recognized its obligation to protect against the unnecessary adverse environmental impacts resulting from the proposed siting of the transmission line through Daniel Boone National Forest and Sheltowee Trace Trail.

In executing its duty to guard against the "cluttering of the land with poles and lines," the Commission acknowledged that the degree to which "cluttering" will be acceptable depends in large part on what unique characteristics the land contains. *Id.* at 7. Where the proposed route runs along a highway, for example, the cluttering is relatively manageable. In that instance, cluttering is a relatively weak factor in the evaluation of an application. Where, on the other hand, the proposed route runs through a National Forest or, say, a 300-acre farm containing four historic and protected properties, the cluttering is especially unreasonable. In those cases, as the Commission acknowledged in its Order, Case No. 2005-00089, certification is *especially* subject to the cluttering prohibition. *Id.* at 5 ("East Kentucky Power's proposed route would cut through a part of the Forest that is not now host to any other lines. In addition . . . the proposed route would also cross the Sheltowee Trace Trail. These unique characteristics make the Commission *especially sensitive* to the location of the proposed transmission line.") (emphasis added). In Case number 2005-00089, because the Applicant could choose an alternative route that avoided cluttering the Forest and Trail with poles and lines, the Commission refused to certify the proposal. In this way, the Commission accounted for the unique characteristics of the land, and

guarded against the "cluttering of the land with poles and wires." *See* Order, Case No. 2005-00089, at 7 ("We must recognize the impact to the Forest that this application presents and weigh that impact against the minimally increased cost of an alternative line that would avoid all of most of the Forest and the Sheltowee Trace Trail.").

Clearly, the 2004 Amendments reformed the Commission's certification procedures. According to its own Regulations and Orders, the Commission has adopted the position that *Duerson* and *Satterwhite* are no longer controlling after the legislative amendments to KRS 278.020(2) and (8), and that a broader range of physical and environmental concerns are to be included in determining whether to issue a Certificate. The Commission must apply the required scope of consideration in this case.

2. The Commission Must Carry Out the Legislative Intent

The 2004 Amendments were adopted with a specific legislative intent, and it is the obligation of this Commission to give effect to that intent. Kentucky courts, time and again, have upheld the established rules of statutory construction that "presume that the legislature is aware of the state of the law at the time it enacts a statute," *Shewmaker v. Commonwealth*, 30 S.W.3d 807, 809 (Ky. Ct.App. 2000), including judicial construction of prior enactments. *Button v. Hikes*, 176 S.W.2d 112, 117 (Ky. 1943) ("It is presumed that the legislature is acquainted with the law; that it has knowledge of the state of it upon subjects upon which it legislates; that it is informed of previous legislation, and the construction it has received."); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004); *see also Haven Point Enterprises, Inc. v. United Kentucky Bank*, 690 S.W.2d 393 (Ky. 1985); *Commonwealth v. Fox*, 48 S.W.3d 24 (Ky. 2001). The General Assembly codified this common law principle at KRS 446.080(1), requiring that all statutes are to be liberally construed with a view "to promote their objects and carry out

the intent of the legislature. . . ." The Commission must view the 2004 Amendments in light of these established rules.

As a result, the policy factors historically considered in determining whether to issue a Certificate of Public Convenience and Necessity—such as the adequacy of existing service, the economic feasibility of the proposed facilities, the avoidance of wasteful duplication, and the financial ability of the utility—must now be evaluated alongside public interests factors, including non-electrical impacts. Only by giving equal weight to the historical and public interest factors can the Commission execute its statutory duty to evaluate the "public convenience and necessity" of the proposed transmission line.

To do otherwise would render the 2004 Amendments meaningless, in contradiction of Kentucky law. In *Scoenbachler v. Minyard*, Ky., 110 S.W.3d 776, 783 (2003), the Supreme Court implied into the statute at issue an obligation to file an income statement for domestic support purposes, reasoning that while not explicitly required,

> [n]o rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act. Additionally, [a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[].... And, it is axiomatic that, when interpreting a provision of a statute, a court should not, if possible, adopt a construction that renders a provision meaningless or ineffectual or interpret a provision in a manner that brings about an absurd or unreasonable result.

Id. at 783. Similarly, were the Commission to fail to give due consideration to the public interest factors, it would render meaningless and ineffectual the 2004 Amendments, bringing about an absurd result. To construe KRS 278.020(2) and (8) as leaving unaffected the scope of inquiry in the issuance of the Certificate is to presume that the legislature intended to create a false procedural right in which the public, particularly affected landowners, could participate and

voice their concerns, which actually would not be considered relevant to the decision on the Certificate. This unreasonable interpretation, in light of the Court's holding in *Scoenbachler*, could not be supported.

3. The Commission Must Determine Whether Public Convenience and Necessity, i.e., Public Interest, *Require* the Proposed Project.

In giving equal consideration to the historical and public interest factors involved in evaluating the Applicant's proposal, the Commission is charged with determining whether public convenience and necessity *require* the service or construction proposed. KRS § 278.020(1) (emphasis added). The Commission has no authority to issue the Certificate absent a showing that there "is a demand and need for the service sought to be rendered." KRS § 278.020(4). And any determination as to "convenience and necessity" of and "demand and need" for this project requires consideration of all factors bearing on the public interest. *See, e.g., Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (emphasizing that the duty "to evaluate all factors bearing on the public interest," is part of the "accepted meaning" of the term "public convenience and necessity."); *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945) ("The [Interstate Commerce] Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. . . . Its function . . . [includes a determination] from its analysis of the total situation on which side of the controversy the public interest lies."); *Cascade Natural Gas Corp. v. Federal Energy Regulatory Comm'n*, 955 F.2d 1412, 1421 (10th Cir. 1992) (When making its public convenience and necessity determination, "the Commission must consider all factors bearing on the public interest, not simply those immediately relating to the objects of its jurisdiction.").

One significant public interest factor bearing on this application is the public's interest in avoiding, where possible, adverse environmental impacts. *See Henry v. Federal Power Comm'n*,

513 F.2d 395, 406-07 (D.C. Cir. 1975) ("The FPC's concern in . . . a . . . proceeding to certify [for public convenience and necessity] the critical interconnection facilities, will encompass an evaluation of all the elements of the gasification project. The burden of environmental damage from that overall project is an important part of this total evaluation."). As one example of the factors discussed in more detail below, due consideration is required in this case under Section 106 of the National Historic Preservation Act, which is "designed to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs on historic places as part of the planning process for those properties." *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 278-79 (3d Cir. 1983). Congress has declared that "the historical and cultural foundations of the Nation should be preserved" and that the preservation of historic resources "is in the public interest." 16 U.S.C. § 470(b). It follows that, for an application that completely lacks due consideration of the environmental impacts, no Certificate can issue.

4. The Commission's Standard of Review, Which is the Ordinary Standard For Administrative Agencies, Guards Against the Risk That It Would Certify an Unqualified Project.

The Commission's standard of review, which is the ordinary standard for administrative agencies, guards against the risk that it would certify a project as unqualified as the Applicant's proposed project. The standard requires the Commission to explain the basis of its decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). For projects affecting the environment, the decision must be "reached procedurally without individualized consideration and [with a] balancing of environmental factors—conducted fully and in good faith. . . ." *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1115 (1971). Without sufficient documentation of the impacts on landowners and the environment, there is no basis on which the Commission could support an explanation of the convenience and necessity of the project. It is impossible to

know whether the decision "was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park*, 401 U.S. at 416 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). Particularly in cases involving the National Environmental Protection Act, the Commission must take a "hard look at environmental consequences," in reaching a decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). Were the Commission to approve the application without sufficiently considering the impacts of the proposed project, the Commission would violate its primary responsibility to explain the basis of any decision to issue a Certificate of Public Convenience and Necessity.

As the Commission acknowledged in its Order, Case No. 2005-0089, in performing its obligation under KRS 278.020(1) it must balance all relevant factors, which include the unique characteristics of the land, the availability of an alternative route, and the magnitude of the increased cost of that alternative route. Order, Case No. 2005-0089, at 6. As argued below, absent provision by the Applicant of sufficient information on which to balance these factors, the Commission cannot clearly state the basis for its approval or denial of this application. Therefore, the application must be dismissed.

B. The Applicant Has Failed to Consider or Provide any Documentation of the Unique Characteristics of Properties Along the Proposed Route, and, Therefore, Its Application is Premature

The Applicant's proposed project will affect properties listed on the National Register of Historic Places. Four such properties are contained on Annis Ferry Farm in Butler County alone. Others are contained on Keystone Farm in Warren County. Also, the proposed project may adversely affect livestock populations throughout Barren County, potentially crippling Kentucky's cherished local farm operations. As a result, the Applicant is required, under the laws discussed herein, to assess the potential environmental impacts, provide documentation to

the Commission of the assessments, consult with federal agencies regarding the impacts, and make plans for the mitigation of unavoidable impacts. Only then can the Commission satisfy the scope of consideration required in evaluating whether to issue a Certificate of Public Convenience and Necessity.

1. Application of Section 106 of the National Historic Preservation Act

The Applicant has chosen the route for its proposed transmission line without first inviting the comments and participation of Consulting Parties (see definition below), as required by Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et seq. ("Section 106"). In fact, the Applicant has chosen the route of its proposed transmission line without first identifying historic properties that would be affected by this undertaking. Indeed, the Applicant has indicated that it will initiate an environmental review process, in which it may modify the selected route depending on what potential adverse effects are located during the application process. In effect, the Applicant presumes to satisfy Section 106 in reverse. Such decisionmaking is contrary to the requirements of Section 106.

i. Section 106 Applies In This Case

Section 106 requires federal agencies to examine the adverse effects of the proposed "undertaking" on sites on or eligible for the National Register of Historic Places, and afford the federal Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking before the Commission may approve an application. 16 U.S.C. § 470f. The Section 106 regulations, 36 C.F.R. Part 800, attached as Exhibit 5, define "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 carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or

approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 36 C.F.R.§ 800.16(y). The Applicant is receiving federal assistance for this project from the Rural Utilities Service of the United States Department of Agriculture. *See* Affidavit of David G. Eames, Exhibit 2. Thus, the Applicant, vis-à-vis the Rural Utilities Service, must satisfy the requirements of Section 106 of the National Historic Preservation Act and the National Environmental Policy Act. Also, as a result, the proposed project is an "undertaking" subject to the requirements of Section 106.

ii. Section 106 Obligates the Applicant to Perform Assessments and Consultation

The Section 106 regulations require the Applicant to determine the area of potential effect (APE), *id.* § 800.4(a)(1); identify, through consultation, the National Register-listed or eligible historic properties within the APE, *id.* § 800.4(b); determine whether the undertaking will adversely affect any identified historic properties, *id.* § 800.5; and resolve those adverse effects through avoidance or mitigation as documented in a Memorandum of Agreement. *Id.* § 800.6(b). In accordance with the regulations, "[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id.* § 800.5(a)(1).

The Advisory Council rules implementing Section 106 require that Consulting Parties be identified and given an opportunity to participate in consultation with the private applicant, other Consulting Parties, the State Historic Preservation Officer, the Advisory Council, and the public during each step of the Section 106 process. *Id.* § 800.3(f). "Consulting Parties" include "individuals and organizations with a demonstrated interest in the undertaking [who] may

participate [in the Section 106 process] due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." *Id.* § 800.2.

The Section 106 regulations state how the Applicant can satisfy the consultation requirements:

> The applicant "shall involve consulting parties" in "findings and determinations made during the section 106 process." 36 C.F.R. § 800.2(a)4.
>
> The applicant "should plan consultations appropriate to the scale of the undertakings and the scope of Federal involvement and coordinate with other requirements of other statutes, as applicable, such as the National Environmental Policy Act." *Id.*
>
> The applicant must, "except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." 36 C.F.R. § 800.2(d)(2).
>
> The applicant "shall consult with the SHPO/THPO [State and Tribal Historic Preservation Officers] and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6.
>
> The applicant "shall provide to all consulting parties the documentation specified in Sec. 800.11(e), subject to the confidentiality provisions of Sec. 800.11(c) and such other documentation as may be developed during the consultation to resolve adverse effects." 36 C.F.R. § 800.6(a)(3).
>
> State Historic Preservation Officers, "other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration." 36 C.F.R. § 800.8(a)(2).

> The applicant "should ensure that preparation of . . . an Environmental Impact Statement . . . includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects." 36 C.F.R. § 800.8(a)(3).
>
> The applicant "shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis." 36 C.F.R. § 800.11(a).

Thus, in order to satisfy the consulting requirements of Section 106, the Applicant must provide Consulting Parties with factual information and data necessary to provide for meaningful comment on the Section 106 determinations. Necessary factual information and data include, but may not be limited to:

> A map of the APE with supporting data on how the proposed APE was derived (e.g., direct impact corridor, viewshed analyses, footprint for construction)
>
> Aesthetic and visual quality documentation, including viewshed maps;
>
> Federal prime and unique farmlands analysis;
>
> Report on the elements of community character;
>
> Report on listed or eligible properties identified within the APE, including boundaries of properties, such as historic farms.
>
> Report on any other utilities that may have to be relocated during construction;
>
> An alternatives analysis providing documentation of why corridors have been eliminated from consideration;
>
> Information regarding indirect and cumulative effects on historic properties and resources; and
>
> Information that would allow the Consulting Parties to respond to the scope and adequacy of the archaeological resources evaluation.

All of this information is necessary to provide meaningful comment on the APE, identification of historic properties within the APE, potential effects upon those properties, and proposed measures to resolve (mitigate or avoid) any adverse effects.

Indeed, all of this information is necessary to provide meaningful comment on the application itself. At the very least, the Applicant should have engaged the Consulting Parties prior to and in furtherance of its evaluation of alternatives to the proposed transmission line, including alternative corridors. Not only did the Applicant fail to engage Consulting Parties, it also failed to provide any documentation of the historic obstacles to the siting of its proposed route. As ICF recognized, the Applicant's documentation concerning its route selection was "insufficient." Upon consultation and sufficient provision of documentation in this case, it is very like that the Applicant will have to substantially alter the proposed transmission line to accommodate historical structures.

2. The Proposed Transmission Line May Adversely Affect Local Farm Operations Throughout the Proposed Corridor

Farms throughout Butler, Barren, Warren, and Ohio Counties whose operations utilize Global Positioning Systems (GPS) may suffer from Radio Frequency or Radio Interference caused by the proposed transmission line. This electrical interference may prevent the GPS receiver from successfully tracking the GPS signal. Interference by transmission lines with these positioning systems is well-documented, and results can be very damaging. *See* Gibbings, et al., "Assessing The Accuracy and Integrity of RTK GPS Beneath High Voltage Power Lines," 2001 - A Spatial Odyssey : 42nd Australian Surveyors Congress.

Also, stray voltage resulting from the proposed transmission line may adversely affect dairy and livestock production on farms throughout Barren County. On Intervenors and Movants John Colliver's and H.H. Barlow's farms alone, the proposed line will potentially affect 183 head of cattle. The potential adverse effects of transmission lines on dairy cattle are well-documented. In fact, the Commission's sister agency in Wisconsin warns utilities against the siting of transmission lines on dairy farms. It has stated:

> For the past 20 years, stray voltage has been vigorously studied. Electrical systems are grounded to the earth to ensure safety and reliability as required by the National Electric Safety Code. Because of this, some current flows through the earth at each point where the electrical system is grounded and a small voltage develops. This voltage is called neutral-to-earth voltage (NEV). When NEV is measured between two objects that may be simultaneously contacted by an animal, it is considered stray voltage. Low levels of AC voltage on the grounded conductors of a farm wiring system are a normal and unavoidable consequence of operating electrical farm equipment. Stray voltage often is not noticeable to humans, but may be felt by an animal. For example, a dairy cow may feel a small electric shock when it makes contact with an energized water trough. . . . Dairy cow behaviors that may indicate the presence of stray voltage include nervousness at milking time, increased defecation or urination during milking, hesitation in approaching waterers or feeders, or eagerness to leave the barn. A stray voltage problem may be reflected in increased milking time, in uneven milking, and sometimes with decreased milk production.

"Environmental Impacts of Transmission Lines," Public Service Commission of Wisconsin, July 2004, p. 10. The Public Service Commission of Wisconsin requires applicants to document the potential for such affects, and, where necessary, protect against them by re-routing a proposed line or participating in mitigation practices after a line is constructed. Before any application is certified, the Wisconsin Commission evaluates these effects.

The same is required here. Kentucky farmers have real concerns about the siting of transmission lines across their farms. These concerns can be resolved by this Commission's proper evaluation. Before proper evaluation can be made, the Applicant must submit an assessment of the potential impacts and the alternative routes. Because the application lacks such documentation, it is incomplete, premature, and must be dismissed.

3. The National Environmental Policy Act Obligates the Applicant to Perform Assessments and Consider Alternatives

The National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"), requires that federal agencies take a "hard look" at the environmental consequences of all "major Federal

actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). While the statute applies only to federal actions and imposes obligations only on federal entities, it is well-settled that "federal involvement in a non-federal project may be sufficient to federalize the project for purposes of NEPA." *Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990); *see also Envtl. Rights Coalition, Inc. v. Austin*, 780 F. Supp. 584, 594 (S.D. Ind. 1991) (holding that NEPA provides authority for "constraining, restraining, or detaining non-federal entities pursuant to NEPA" when those entities are "in a partnership or joint venture with or otherwise closely associated with a federal agency."); *Don't Ruin Our Park v. Stone*, 749 F. Supp. 1386, 1387-88 (M.D. Penn. 1990) (observing that a "non-federal entity may be enjoined along with the federal agency pending completion of an EIS" where the former "enters into a partnership or joint venture with the federal government and becomes the recipient of federal funding"). The Applicant's proposed transmission line constitutes a "major federal action" subject to the requirements of NEPA because it is receiving financial assistance for this project from the Rural Utilities Service of the United States Department of Agriculture. See Affidavit of David G. Eames, Exhibit 2. Thus, the Applicant must satisfy the full scope of requirements of this federal law.

The Rural Utilities Service ("RUS") Regulations instruct the Applicant in how to satisfy NEPA, and the Applicant is in violation of those instructions. Before RUS will give any consideration to the Applicant's loan application, the Applicant must initiate the NEPA process by filing with RUS an Environmental Assessment. 7 CFR § 1794.23. Significantly, the Applicant "shall prepare the [Environmental Assessment] *concurrent with* a proposed action's engineering, planning, and design activities." *Id.* § 1794.10 (emphasis added). Planning and design activities, without question, include selection of the transmission line route. Furthermore,

until RUS concludes its review of the Applicant's environmental assessment, the Applicant "shall take *no action* concerning the proposed action which would . . . limit the choice of reasonable alternatives being considered in the [RUS review process]." Id. § 1794.15 (emphasis added). Obtaining a Certificate of Public Convenience and Necessity for the proposed line would necessarily limit the choice of reasonable alternatives to be considered—in that case, only the certified route would be subject to consideration.

The following is a realistic appraisal of all of the tasks ahead of the Applicant in preparing an Environmental Assessment. These are the tasks that the Applicant, according to RUS Regulations, was required to have completed prior to filing any application before the Commission. First, NEPA, 42 U.S.C. § 4331(b)(3), requires the Applicant to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." The Applicant can achieve this goal by satisfying the following requirements. The Applicant must:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . ., which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;
>
> (C) include in [its application] a detailed statement by the responsible official on--
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposals be implemented,
>
> (iii) alternatives to the proposed action,

> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA regulations provide guidance on evaluating the significance of an action's impact. *See* 40 C.F.R. § 1508.27. A determination of the significance of an action's impact requires consideration of both context and intensity:

> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27. "If the proposed actions are environmentally 'significant' according to *any* of these criteria," then the Applicant erred in failing to prepare an environmental impact statement. *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003) (emphasis is original) (citing *Nat'l Parks and Conservation Ass'n v. Babbit* , 241 F.3d 722, 731 (9th Cir. 2000).

Without any documents identifying the environmental impacts of the proposed project, the affected landowners can only guess the context and intensity of such impacts. It can be said without question, however, that the proposed action is "environmentally significant." This is evident from the impact of the proposed line on the historic properties and other unique characteristics of the land discussed above. In total disregard for the environmental significant of the proposed project, the application lacks any documentation, environmental assessment, or

environmental impact statement quantifying or in any way measuring its environmental impacts. As such, the application is blatantly incomplete and, in fact, wrongfully submitted.

C. Issuance of a Certificate in this Case is Prohibited

Despite the inevitable questions that arise regarding the environmental impacts of its proposal, the Applicant did not submit any environmental assessment or any consideration of alternatives to avoid such impacts. The Applicant also failed to submit any assessment of the impact of the proposed project on historic properties, as required under the National Historic Preservation Act. The Applicant states that it is in the process of satisfying the assessments required under NEPA, *see* June 24, 2005 Letter, Exhibit 1, presuming that satisfaction of this law after-the-fact is sufficient to satisfy landowners' concerns. To the contrary, only by satisfying NEPA and the other applicable federal laws can the Applicant accommodate the legally-mandated scope of the Commission's and the public's review of the application. Prior to such satisfaction, its application, as a consequence, is wrongfully submitted and not ripe for this Commission's consideration.

1. By Failing to Perform the Required Assessments and Considerations, the Applicant Violated its Affirmative Obligations Under NEPA

The Applicant violated its affirmative obligation to present the Commission with a proposal that contained a full environmental analysis. This affirmative obligation arises from NEPA's placement of the "primary and non-delegable responsibility" for compliance on the *applicant*, not the public. *I-291 Why? Ass'n v. Burns*, 517 F.2d 1077, 1081 (2d Cir. 1975). NEPA would lose its action-forcing nature if a complete review were absolutely dependent, as it is in this case, on public intervention at each step in an administrative proceeding. "It is, moreover, unrealistic to assume that there will always be an intervenor [before the agency] with the information, energy and money required" to investigate an environmental issue. *Calvert*

Cliffs' Coord. Comm., Inc. v. AEC, 449 F.2d 1109, 118-19 (D.C. Cir. 1971). The Applicant has disregarded its obligations under NEPA to affirmatively raise and evaluate environmental alternatives to the proposed construction of the transmission line, relying on the public to ignore and the Commission to fail to request information in the absence of essential documentation. By submitting the application without documentation of any environmental assessment, the Applicant failed to satisfy its primary responsibilities.

2. The Application Constitutes an Unlawful Prejudicial Commitment of Resources

Because the Applicant has not already completed an Environmental Assessment or Environmental Impact Statement, the application itself is presently in violation of NEPA. The application constitutes a prejudicial commitment of resources to a particular alternative that is prohibited under the federal regulations. Those regulations state:

> § 1506.1 Limitations on actions during NEPA process.
>
> (a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:
>
> (1) Have an adverse environmental impact; or
>
> (2) Limit the choice of reasonable alternatives.
>
> (b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.
>
> (c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

> (1) Is justified independently of the program;
>
> (2) Is itself accompanied by an adequate environmental impact statement; and
>
> (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.
>
> (d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance.

40 CFR 1506.1. The "agency" for these purposes is the Applicant, as a result of the federal assistance it is receiving from the Rural Utilities Service. By submitting the application, the Applicant has taken steps to "limit the choice of reasonable alternatives" to the proposed route. Such action is prohibited under 40 CFR 1506.1(a). Were the Commission to issue a Certificate at this time, it would sanction unlawful action. Surely, instead, the application must be dismissed.

3. NEPA and Section 106 Prohibit Issuance of the Certificate in This Case

NEPA and Section 106 are, primarily, procedural statutes. Just as NEPA represents a declared congressional policy requiring assessment of environmental concerns, Section 106 represents a declared Congressional policy requiring assessment of concerns relating to historical properties: the "congressional purpose" behind Section 106, "expanding over the years, [is] to make certain that federal agencies give weight to the impact of their activities on historic preservation." *WATCH v. Harris*, 603 F.2d 310, 325 (2nd Cir. 1979). The words of courts addressing the informational concerns of NEPA are equally applicable to Section 106: "The purpose of NEPA is to ensure that government agencies act on full information and that interested groups have access to such information. NEPA thus imposes procedural requirements, but not substantive results" on federal agencies. *Sierra Club v. U.S. Forest*, 46 F.3d 835, 837

n.2 (8th Cir. 1995). In addition, "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. . . . Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 1858, 104 L. Ed. 2d 377 (1989).

Though subject to the procedural requirements of NEPA and Section 106, the application lacks any appreciation whatsoever of the environmental significance of the proposed project. In effect, by submitting an incomplete application, the Applicant can be assured that the public and the Commission cannot react to the application in any meaningful way. This result is absolutely contrary to the purpose and spirit of NEPA and Section 106. As a result, the Commission must dismiss the application with allowance for the Applicant to re-file upon satisfaction of all necessary assessments, consultations, and documentation requirements. Only then can the public and the Commission fully evaluate the application and its environmental impacts.

IV. Conclusion

In the Applicant's proposal, ICF found insufficient information available to examine EKPC's selection of path to minimize the need to acquire new rights-of-way. Technical Appraisal, at 22-23. In fact, within the proposed route are several blatant obstacles to the Applicant's path selection. Had the Applicant fulfilled its obligations under Section 106, RUS Regulations, NEPA, and this Commission's standards of review, the Commission and the public would have sufficient information on which to evaluate the Applicant's proposal. In fact, *only* by fulfilling those requirements can the Commission and the public have adequate information on which to evaluate the proposal. Instead, the Applicant's proposal affords no appreciation

whatsoever of the project's impact on landowners and the environment. The application, therefore, must be dismissed.

Respectfully submitted,

Robert W. Griffith by MRO

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Jennifer B. Swyers
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Counsel for Intervenors
Carroll and Doris Tichenor and John Colliver

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served by mailing, first class postage prepaid to the following:

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Aw.turner@ky.gov

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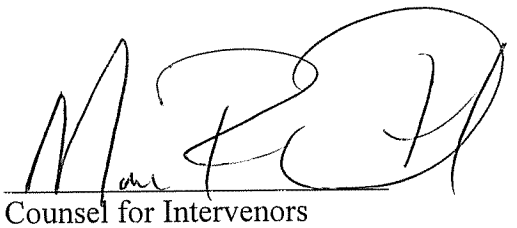
This the 26th day of August, 2005.



Counsel for Intervenors

TI061:000TI:470196:2:LOUISVILLE

EXHIBIT 1

EAST KENTUCKY POWER COOPERATIVE

June 24, 2005

Ms. Doris Tichenor
1086 Annis Ferry RD
Morgantown, KY 42261-8001

Dear Ms. Tichenor,

Thank you for contacting us with your questions about our projects in the Bowling Green area. Since Ms. White had forwarded your request to me and since our subsequent conversation, I have been looking into the information you requested.

I am enclosing a CD that holds a complete copy of the Engineering study (with an addendum) that was conducted to develop a plan for extending East Kentucky Power Cooperative's transmission system into the Warren Rural Electric Cooperative area. This is the document on which the Rural Utilities Services (RUS) loan application was based. The CD also contains the engineering data files that were used to model the transmission system for the study. I regret that we cannot send you the application itself because it is considered a confidential document that contains sensitive information/data unrelated to this specific project.

However, as you may know, we will be submitting our Application for a Certificate of Public Convenience and Necessity to the Kentucky Public Service Commission (PSC) in the next few weeks, and it will contain a great deal of information regarding all aspects of our plan. As an affected landowner, you are entitled to request/receive a copy of the entire Application and I believe it will serve to answer many of your questions. If it does not, the PSC process required to obtain a Certificate of Public Convenience and Necessity includes opportunities for you to participate and pose specific questions if you so desire.

As a rural electric cooperative and a borrower of federal funds, EKPC must meet National Environmental Policy Act requirements, administered by RUS. The environmental work has begun for these projects, but the final report(s) and subsequent review for approval by RUS have not been completed. We will be happy to make the documents available to you when they are submitted for approval.

We understand that our activities are a disruption to you and the surrounding community and we want to make sure you get the information you need about the project(s). This information and the Application, when available, should provide a good start.

Sincerely,

Paul C. Atchison

Paul C. Atchison, Vice President
Power Delivery

PCA:jkr

c: Donna White, Warren RECC

Attachment

4775 Lexington Road 40391
P.O. Box 707, Winchester,
Kentucky 40392-0707

Tel. (859) 744-4812
Fax: (859) 744-6008
http://www.ekpc.coop

(h:Tichenorlettermjw.doc)

A Touchstone Energy Cooperative

EXHIBIT 2

EXHIBIT 7

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF EAST KENTUCKY POWER COOPERATIVE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR FOR THE CONSTRUCTION OF A 161 kV ELECTRIC TRANSMISSION LINE IN BARREN, WARREN, BUTLER, AND OHIO COUNTIES, KENTUCKY	))))))	**CASE NO 2005-00207**

AFFIDAVIT OF DAVID G. EAMES

Comes the Affiant, David G. Eames, and states after first being duly sworn as follows:

1. That the Affiant is employed by the Applicant in the position of Vice President of Finance and Planning, and in that capacity, directs and supervises Applicant's activities related to the Applicant's financial condition including, without limitation, the financing of and the monitoring of all capital outlays for projects such as the Barren, Warren, Butler and Ohio Counties Transmission Line ("the Project").

2. That this Project will initially be funded by the Applicant's available general funds. Subsequently, the Applicant proposes to finance this project with a long-term loan from the Rural Utilities Service.

3. That this project does not involve a sufficient capital outlay to materially affect the existing financial condition of the Applicant.

Further Affiant Sayeth Not

David G. Eames
DAVID G. EAMES

STATE OF KENTUCKY)
)
COUNTY OF CLARK)

Subscribed and sworn before me by Frank J. Oliva on this 30th day of June 2005.

My Commission expires: December 20, 2008

Deri K. Isaacs
Notary Public

EXHIBIT 3

Friday
December 11, 1998

Part VI

Department of Agriculture

Rural Utilities Service

7 CFR Part 1780 and 1794
Environmental Policies and Procedures; Final Rule

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Parts 1780 and 1794

RIN 0572–AB33

Environmental Policies and Procedures

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service (RUS) hereby revises its existing environmental regulations, Environmental Policies and Procedures, which have served as RUS implementation of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) in compliance with the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA. Based on new Congressional mandates, changes in the electric industry, and RUS experience and review of its existing procedures, RUS has determined that several changes are necessary for its environmental review process to operate in a smooth, efficient, and effective manner.

The implementation of this rule has required that certain changes be made to 7 CFR part 1780 regarding environmental compliance. The amendments published in this document consist of those necessary to make the provisions of Part 1780 subject to the environmental requirements of this rule.

EFFECTIVE DATE: December 11, 1998.

FOR FURTHER INFORMATION CONTACT: Gary J. Morgan, Director, or Lawrence R. Wolfe, Senior Environmental Protection Specialist, Engineering and Environmental Staff; Rural Utilities Service, Stop 1571, 1400 Independence Ave., SW., Washington, DC 20250–1571. Telephone (202) 720–1784. E-mail address gmorgan@rus.usda.gov or lwolfe@rus.usda.gov.

This rule and the guidance bulletins described in this rule will be available on the Internet via the RUS home page at www.usda.gov/rus/.

SUPPLEMENTARY INFORMATION:

Classification

This rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. RUS has determined that this proposed rule meets the applicable standards provided in sec. 3 of the Executive Order.

In accordance with the Executive Order and the rule; (1) all state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retro-active effect will be given to the rule; and (3) administrative proceedings are required to be exhausted prior to initial litigation against the Department (7 U.S.C. 6912).

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), RUS certifies that this rule will not have a significant economic impact on a substantial number of small entities. If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The application for financial assistance under the RUS Electric and Telecommunications programs and the application for loans and grants under the RUS Water and Waste program are discretionary; regulatory requirements will, therefore, apply only to those entities which choose to apply for financial assistance or funding.

Information Collection and Recordkeeping Requirements

The recordkeeping and reporting burdens contained in this rule were approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35,) under control number 0572–0117.

National Performance Review

This regulatory action is being taken as part of the National Performance Review to eliminate unnecessary regulations and improve those that remain in force.

Environmental Justice

This rule is subject to the requirements of Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Implementation of these requirements will occur at the time of actions performed hereunder.

National Environmental Policy Act Certification

The Administrator of RUS has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) Therefore, this action does not require an environmental impact statement or assessment.

Catalog of Federal Domestic Assistance

The programs described by this proposed rule are listed in the Catalog of Federal Domestic Assistance programs under numbers 10.850, Rural Electrification Loans and Loan Guarantees, 10.851, Rural Telephone Loans and Loan Guarantees, 10.760, Water and Waste Disposal System for Rural Communities, 10.764, Resource Conservation Development Loans, and 10.765, Watershed Protection and Flood Prevention Loans. This catalog is available on a subscription basis from the Superintendent of Documents, the U.S. Government Printing Office, Washington, DC 20402.

Intergovernmental Review

This rule excludes the Electric and Telecommunications Programs from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. A final rule related notice entitled, "Department Program and Activities Excluded from Executive Order 12372," (50 FR 47034) determined that RUS loans and loan guarantees, and RTB bank loans, were not covered by Executive Order 12372. The Water and Waste Program is subject to the provisions of Executive Order 12372. Consultation will be completed at the time of actions performed hereunder.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandates Reform Act) for State, local, and tribal governments or the private sector. Thus this rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act.

Background

On March 13, 1984, the Rural Electrification Administration (predecessor of RUS) published 7 CFR Part 1794, Environmental Policies and Procedures, as a final rule in the **Federal Register** (49 FR 9544) covering the actions of the Electric and Telecommunications programs. Based on new congressional mandates, changes in the electric industry, and RUS experience and review of its existing procedures, RUS has determined that several changes are necessary for its environmental review process to operate in a smooth, efficient, and effective manner.

The existing 7 CFR part 1794 was designed to implement the requirements of NEPA and the CEQ regulations for RUS Electric and Telecommunications programs. As a result of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103-354, 108 Stat. 3178), the programs of the Rural Electrification Administration, were combined with the Water and Waste program from the former Farmers Home Administration (FmHA) into RUS. Most changes proposed to 7 CFR part 1794 result from the addition of the Water and Waste program to RUS.

For further guidance in the preparation of public notices and environmental documents, RUS has prepared a series of guidance bulletins. Three program specific bulletins are available which provide guidance in preparing the Environmental Report (ER) for proposed actions classified as categorical exclusions and proposed actions which require an Environmental Assessment (EA). Further information on these bulletins is provided in § 1794.7.

This final rule contains a variety of substantive and procedural changes from the provisions of the current rule. Some of these revisions are minor (§ 1794.4, Trivial Violations was deleted) or are merely intended to clarify existing RUS policies and procedures (§ 1794.6, Definitions, was added). Other revisions reflect changes in RUS implementation of the CEQ regulations as outlined below.

The relationship between RUS and its Electric and Telecommunications applicants has changed substantially since RUS issued the final rule in March of 1984. Changes that have occurred in the last 4 years have been particularly dramatic. Historically, RUS provided substantially all of its applicants' capital needs and established a lending relationship reflecting that dominant lending role. However, because of limited annual loan authorization levels, RUS no longer serves such a role. Moreover, in a 1993 amendment to section 306E of the Rural Electrification Act of 1936 (RE Act), as amended (7 U.S.C. 936e), Congress required RUS to abandon its close hands-on control of its applicants and instead follow the practices of private market lenders. RUS has done so through the development of new forms of loan agreements and security instruments and the publication of 7 CFR Part 1717, subpart M, Operational Controls, which reduce or eliminate much of the oversight and control historically exercised by RUS over its Electric applicants.

Reflecting these changes and reforms, RUS has revised § 1794.3 of the rule. Environmental reviews will continue to be required in connection with the approval of financial assistance for applicants and the issuance of rules, regulations, and bulletins by RUS. However, no reviews will be required in connection with approvals provided by RUS pursuant to its loan contracts and security instruments with applicants such as approvals of lien accommodations or the use of general funds by applicants. These approvals are not major Federal actions significantly affecting the quality of the human environment.

Within subpart C of this rule, a classification system defines the level of environmental review required for RUS and applicant proposed actions. In Section 1794.20 RUS has clarified its position for determining circumstances under which an applicant's participation in a project results in a Federal action. Sections 1794.21 through 1794.25 of this subpart are further subdivided when appropriate to differentiate between actions being proposed by RUS and actions proposed by Electric, Telecommunications, and Water and Waste program applicants.

A number of classification changes have been made within subpart C of this rule. These reclassifications involve minor actions proposed by applicants which rarely, if ever, result in significant environmental impact or public interest. RUS believes this rule includes adequate safeguards to identify any unusual circumstances that may require additional agency scrutiny.

RUS has modified the thresholds for acreage (facility sites), and capacity (generation facilities) within § 1794.22(a). In addition to modifying the thresholds for acreage and capacity, RUS has imposed different thresholds for construction of electric generating capacity at new sites versus existing sites within § 1794.23(c). Acreage and capacity threshold changes within § 1794.24, and a capacity threshold change within § 1794.25 reflect changes that have been made in §§ 1794.22(a), and 1794.23(c). No changes were made to the existing thresholds for transmission line length. Capacity thresholds have been eliminated for hydroelectric proposals in §§ 1794.22 and 1794.23. RUS will normally adopt the NEPA document prepared by the Federal licensing agency of hydroelectric projects in which RUS applicants participate.

The thresholds for proposed actions in the Water and Waste program are classified in §§ 1794.21(c) and 1794.22(b). Based on historical experience and a survey of the thresholds established by the Environmental Protection Agency which administers similar programs, RUS has eliminated the two tiered classification for EAs that is contained in 7 CFR Part 1940, Subpart G, the environmental regulation of the former FmHA, and adopted the more traditional classification scheme as outlined in 40 CFR 1508.9. Because RUS co-funds a significant portion of its projects with other Federal and state agencies, a more traditional classification and documentation scheme is thought to be more conducive to minimizing duplicative environmental review efforts.

RUS has modified its procedures in subparts D through G of this part. The EA will be the subject document of the notice of availability requirements in § 1794.42, where previously, the applicant's ER was the subject document. By this change, the notice requirements for all three programs will be consistent for both EA proposals and EA with scoping proposals. This change will encourage more public involvement by allowing public review of EA proposals prior to the issuance of a Finding of No Significant Impact (FONSI).

RUS has also changed its notice requirements for Electric program projects requiring scoping. The timing of RUS **Federal Register** notice for public scoping meetings in § 1794.52(b) has been reduced from 30 days to 14 days prior to the meeting. No appreciable benefit resulted from an earlier notice requirement. The existing regulation allows RUS to adopt the applicant's ER as its EA but requires RUS to prepare its own EA from the applicant's Environmental Analysis (EVAL) where a proposed action requires scoping. RUS has changed this requirement by allowing the EVAL to serve as its EA (see § 1794.53) consistent with 40 CFR § 1506.5(b).

RUS has modified its policy regarding the use of contractor prepared EISs. Under the existing regulation, RUS was required to use agency funds when an independent contractor was chosen by RUS to prepare the EIS. In accordance with the provisions of 7 CFR Part 1789, "Use of Consultants Funded by Applicants" and Section 759A of the Federal Agriculture Improvement and Reform Act of 1996, the draft and final EIS may be prepared by a consultant selected by RUS and funded by the applicant. A new requirement, publication of a notice of availability by RUS and the applicant for a Record of Decision is established in § 1794.63.

Preparation of the Rulemaking

The proposed rule (7 CFR part 1794) was published in the **Federal Register** on November 24, 1997 (62 FR 62527). Public comment was invited for a 60-day period, ending on January 23, 1998.

Eighty-nine written comments were received representing 32 specific organizations and individuals. These included two Federal agencies, eight Federal agency state offices, one regional commission, two electric cooperative associations, and seventeen rural electric cooperatives. All comments were fully considered when revising the proposed rule for publication as a final rulemaking.

Every effort has been made to respond in detail in the preamble to every question raised or suggestion offered. Where commenters pointed out errors in spelling, syntax, and minor technical errors these errors were corrected and not mentioned further in the preamble. In addition, many commenters made similar suggestions or raised similar issues. In the interest of clarity, comments that were similar in nature were grouped and discussed in the most relevant section in the preamble. Some comments pointed out vague and unclear language. Clarifying and explanatory language was added to the rule and preamble as appropriate. The discussion under General Comments responds to general comments and clarification of misunderstandings as to RUS's intent. The statements under Comments on Specific Sections address the more significant comments received on particular provisions and how RUS responded to them.

General Comments

Several comments focused on the background discussion of the preamble to the proposed rule regarding the proposed renumbered § 1794.3, entitled "Actions requiring environmental review." The background discussion explained that, because of changes in law and reforms in the Electric and Telecommunications industry, RUS proposed to revise that section to reflect that RUS would no longer treat as Federal actions subject to environmental reviews, approvals provided by RUS pursuant to its loan contracts and security instruments. The preamble explained that these approvals are "ministerial" and not major Federal actions for the purposes of NEPA. The commenters, who uniformly supported the proposed revision, asked that RUS identify all approvals that would no longer be subject to environmental review or clarify that only the approval of loans and loan guarantees will require an environmental review.

Agency Response: The proposed revision to § 1794.3 deletes reference to "lien accommodations, and approvals provided pursuant to loan contracts and security instruments (e.g., approvals of the use of general funds)." In pertinent part, the revised section identifies as actions requiring environmental review, "the approval of financial assistance pursuant to the Electric, Telecommunications, and Water and Waste Programs." In response to the comments, RUS has added a clarifying sentence to § 1794.3 stating that, "Approvals provided by RUS pursuant to loan contracts and security instruments, including approvals of lien accommodations, are not actions for the purpose of this part and the provisions of this part shall not apply to the exercise of such approvals." RUS believes that, while it is principally the approvals of loans and loan guarantees to which environmental reviews attach, it is possible that other types of discretionary financial assistance could be available under the RUS program, which would trigger environmental reviews. Examples include lien subordinations under § 306 of the RE Act (7 U.S.C. 936). The regulatory text should not limit those actions requiring environmental review to the approval of loans and loan guarantees. Consequently, no other change has been made in response to the comments.

Ten commenters expressed concern about the two-tier classification that was created for "categorically excluded" proposals in §§ 1794.21 and 1794.22, which they believe is overly burdensome and confusing. They further believe that many of the size, voltage, distance, and acreage thresholds have been arbitrarily determined and need to be reevaluated.

Agency Response: RUS established the two-tier classification system for categorically excluded proposals specifically to reduce the burden on applicants without compromising the requirements of NEPA and the CEQ regulations. Categorically excluded proposals listed in § 1794.21 normally do not significantly impact the quality of the human environment. Therefore the submittal of an ER is not required. An ER is required for categorically excluded proposals listed in § 1794.22 to provide for circumstances in which a normally excluded action may have a significant impact (see 40 CFR 1508.4). Prior to issuing the proposed rule, RUS reevaluated the thresholds established in the existing regulation and determined that the revised thresholds included in the proposed rule represent a reasonable delineation consistent with 40 CFR 1508.4.

The commenters also questioned why an environmental report should be required for a proposal that is normally categorically excluded and recommend that where appropriate, proposals listed in § 1794.22 be incorporated into § 1794.21.

Agency Response: The changes proposed by these comments are not consistent with the definition of categorical exclusion in 40 CFR 1508.4. In order to ensure that a proposed action does not significantly affect the quality of the human environment, RUS must conduct an environmental review. The two-tiered classification system for Categorical Exclusions establishes the level of information that must be provided by the applicant for proposals listed in each tier. This information is necessary so RUS can identify extraordinary circumstances in which a normally excluded action may have significant environmental effects.

One commenter recommended incorporating language into § 1794.21 by which RUS could increase the level of environmental review for any categorically excluded project, which had a significant environmental effect. Other commenters point out that proposals in these two categories already must meet the requirements of § 1794.31. Therefore a safeguard already exists whereby RUS can evaluate each project and determine if further environmental review is appropriate.

Agency Response: This rule includes a requirement in § 1794.22(a) by which RUS reserves the right to request environmental documentation for proposals listed in § 1794.21(b) and (c) if significant environmental effects result from the implementation of the proposal. RUS believes that determining whether an ER should be prepared for all categorically excluded proposals on a case-by-case basis would be inconsistent with the CEQ regulations (40 CFR 1508.4) and would extend the RUS environmental review process.

Three commenters assert that the thresholds established to differentiate between projects that require an environmental assessment (EA) with and without scoping (§§ 1794.23 and 1794.24) were also arbitrarily determined and point out that a 1 MW increase in capacity can increase the level of review. The commenters recommend that all § 1794.24 proposals which normally require scoping be incorporated into § 1794.23 and that RUS adopt language allowing the agency to require scoping for projects which are expected to have significant impacts.

Agency Response: RUS has reevaluated the thresholds that were established in the existing regulation for proposed actions listed in §§ 1794.23 and 1794.24. The thresholds accurately delineate the difference between proposed actions which can be adequately reviewed with an EA and those actions which have a higher potential for needing an EIS. The latter required the preparation of an EVAL by the applicant. The EVAL will serve as the RUS EA, (40 CFR 1506.5(b)). Instead of establishing a single classification system for actions normally requiring an EA and determining the need for scoping on an individual basis, RUS agrees some flexibility is needed and has included a provision to modify or waive scoping requirements in § 1794.52 for actions that normally require an EA with scoping.

Two commenters expressed concern with the provisions of the proposed rule that allow the applicant or its consultant to prepare the environmental report (ER) which normally serves as RUS" EA for Water and Waste proposals. These commenters assert that there may be an appearance of a conflict of interest.

Agency Response: Agency responsibility is addressed in 40 CFR 1506.5. The CEQ regulations allow an agency to require an applicant to submit environmental information for possible use by that agency (40 CFR 1506.5(a)). The agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information provided by the applicant and accept responsible for its accuracy. RUS has developed guidance Bulletin 1794A–602 for that purpose. An agency can permit an applicant to prepare an EA provided the agency makes its own evaluation of the environmental issues and takes responsibility for the scope and content of the EA (40 CFR 1506.5(b)).

One commenter recommends that the procedures defined in 7 CFR 1940–G under which RUS reviews information submitted by the applicant and completes the assessment should be used for Water and Waste proposals.

Agency Response: This rule provides for an agency-prepared EA. Section 1794.41 states that the ER will normally serve as the RUS EA. The decision of whether RUS uses the applicant's ER as its EA or prepares the EA from information provided in the ER will be made by the State Environmental Coordinator (SEC).

Another commenter noted that by not allowing RUS employees to complete EAs, the agency is limiting the ability of its employees to provide technical assistance to rural areas.

Agency Response: RUS does not agree with this statement. By improving the efficiency of document preparation, Rural Development staff will have more time to provide meaningful guidance and technical assistance to applicants.

Comments on Specific Sections

Background: One commenter requested clarification of paragraph 9 of the proposed rules Background section that discusses exempting from review approvals provided by RUS pursuant to its loan contracts and security instruments.

Agency Response: This comment is addressed in the response to the first general comment.

Section 1794.2: One commenter questioned whether the item (d) in this section correctly characterized the roles RUS and the applicant play under NEPA and the CEQ regulations. He asserts that the applicant should be responsible for the accuracy of the information contained in environmental documents and the agency should be responsible for compliance with appropriate regulations.

Agency Response: RUS agrees. The text of item (d) has been changed to clarify the role of the applicant. RUS is responsible for compliance with NEPA, including verifying the accuracy of the information it uses in its environmental review (40 CFR 1506.5). The applicant is responsible for compliance with all applicable RUS requirements.

Section 1794.3: Six commenters recommended that this section clearly state that the rule applies only to direct loans and loan guarantee approvals.

Agency Response: This comment is addressed in the response to the first general comment.

Section 1794.5 (now § 1794.4): Two commenters support the proposed format of placing metric units in parentheses following the non-metric equivalents which is the reverse of the current format. Another commenter questioned whether the change in metric system format would be contrary to the national effort to convert to the metric system and not in compliance with Executive Order 12770.

Agency Response: It has been RUS experience that the current format in which metric units are followed by the non-metric equivalents in parentheses has been impractical and has confused readers. This rule's provisions for the use of metric units comply with Executive Order 12770.

Section 1794.7 (now § 1794.6): One commenter suggested adding "the environment" to the definition of Emergency Situation to account for threats to the environment and including a definition of "multiplexing sites."

Agency Response: The words "or to the human environment" have been added to the end of the definition of Emergency Situation and a definition has been included in this section for multiplexing sites.

Another commenter suggested deleting the words "document and" from the definition of ER.

Agency Response: RUS recognizes that the amount of documentation that can be included in an ER can vary for the types of proposals listed in §§ 1794.22 and 1794.23 from a few pages to 100 pages or more. Since the word "document" does not add any significance to the definition of ER, the word has been deleted.

A third commenter thought that the terms ER, EA and Environmental Impact Assessment were confusing and needed further explanation.

Agency Response: RUS agrees and has reverted to the terminology used in the existing rule. RUS has in the past and proposes to continue to differentiate between the documentation submitted by the applicant for proposals that normally require an EA (§ 1794.23) and proposals that normally require an EA with scoping (§ 1794. 24) by titling the former an ER and the later an EVAL. The agency prepared document for proposals listed in §§ 1794.23 and 1794.24 is still titled an EA (40 CFR 1508.9).

One commenter requested that this section be modified so the ER and EA can be stand-alone documents and not a mandatory part of the Preliminary Engineering Report (PER) for Water and Waste proposals. This commenter asserts that such a restriction precludes the use of other resources to complete the preparation of the environmental documentation.

Agency Response: Although RUS intends for the ER to be submitted with the PER for Water and Waste proposals, there is no requirement that the ER be prepared exclusively by the engineering consultant that prepares the PER. The key issue is that environmental concerns be considered at the earliest planning stage of a proposal to ensure that environmental values are given appropriate consideration. The earliest planning stage of a proposal is the PER.

Section 1794.8 (now § 1794.7): Two commenters noted that RUS Bulletin 1780–26 already has been designated for guidance for another purpose.

Agency Response: The designations for the guidance documents referenced in this section have been corrected.

One commenter recommended that a standard format be developed for applicants to follow in the preparation of an ER or EA.

Agency Response: The appropriate bulletins referenced in this section will contain a standard format for preparing an ER; the applicant does not prepare an EA.

The same commenter further recommended that State Directors be able to issue supplements with less than approval by the Administrator.

Agency Response: State Directors have the ability to issue supplements. However, to ensure compliance with environmental laws and regulations and maintain uniformity with neighboring states and within a region, requires Administrator review and approval of supplements.

Six commenters urged RUS to consult with interested parties regarding the referenced electric and telecommunications guidance documents prior to taking final action on this rule.

Agency Response: RUS has considered all comments received on the current versions of Bulletins 1794A–600 and 1794A–601 in preparing the revisions to these two Bulletins. Both Bulletins will be made available to applicants via the Internet prior to the effective date of this final rule.

Two commenters believe that the referenced Water and Waste bulletin (RUS Bulletin 1794A–602) should be published for comment and one commenter requested a 60-day extension to the comment period on the proposed rule following the release of that draft bulletin.

Agency Response: RUS Bulletin 1794A–602 was reviewed by Rural Development staff prior to the effective date of this final rule. RUS does not agree that the comment period on the proposed rule should be extended subject to the release of the draft bulletin.

Section 1794.10: One commenter recommended replacing "under RUS direct guidance and supervision" with "with advise from RUS" instead.

Agency Response: The referenced language has been revised. RUS will assist applicants by outlining the types of information required and provide guidance and oversight in the development of the documentation (40 CFR 1506.5).

This commenter also recommended that the language in §§ 1794.10 and 1794.31(b) be consistent and refer to the SEC or neither.

Agency Response: The language in § 1794.10 applies to all three RUS programs. Therefore, a specific agency official is only identified in § 1794.31(b), which is specific to the Water and Waste program.

Section 1794.13: One commenter recommended that in (a)(3) all comments on Water and Waste proposals be sent directly to the RUS State Office instead of through the applicant.

Agency Response: Applicant notices must state that comments should be sent to the RUS appropriate office for Water and Waste proposals and to the Washington, DC, office for Electric and Telecommunications proposals. However, RUS recognizes that both verbal and written comments on a proposal are sometimes directed to the applicant. This subsection accounts for this possibility by requiring the applicant to submit comments to RUS.

Seven commenters were concerned that the requirement in § 1794.13(a)(4) making all environmental documents and documentation related to the proposed action available in specific locations was too broad and created an overly burdensome and onerous responsibility for the applicant. They recommended that RUS narrow the scope of information that the applicant is required to make available in a public setting and require the applicant to designate a contact person to respond to requests for additional and supporting information.

Agency Response: RUS agrees that the requirement making all environmental documents and documentation available in specific locations creates an overly burdensome and onerous responsibility for the applicant and does not enhance public participation in the environmental process. The language in § 1794.13(a)(4) has been revised. RUS will determine which project related environmental documents will be made available for review at locations convenient for the public. To ensure full public disclosure, a list of all documents not provided for public review will be included. Documents not provided will be available for inspection through a designated RUS or applicant contact person.

Two commenters requested that § 1794.13(a)(5) be expanded to note that public hearings are to be confined to the environmental aspects of a proposed action.

Agency Response: RUS believes that the purpose of the public hearings or meetings has been adequately identified in this section.

One commenter requested that RUS coordinate its meetings with meetings, hearings, and environmental reviews, which may be held and/or required by others.

Agency Response: RUS agrees with this comment and has revised § 1794.13(a)(5) to include coordination of its meetings with the requirements of other interested agencies and groups.

Six commenters questioned why RUS has established differing thresholds for publication of notices in the **Federal Register** with respect to the Electric and Telecommunications programs in § 1794.13(b) and the Water and Waste program in § 1794.13(c). They recommended that the language in § 1794.13(c) be consistent for all three programs.

Agency Response: RUS agrees and has decided to revise the language in §§ 1794.13(b) and 1794.42(b) thereby making the thresholds for publication of notices consistent for all three programs. RUS will provide interested agencies with notification of its FONSI determinations through direct mailings or, at its option, the **Federal Register**, when appropriate.

Section 1794.14: One commenter endorsed the flexibility provided in this section and recommended that this flexibility be more clearly stated. The commenter also suggested that the duties of a cooperating agency are unclear and a brief list should be included.

Agency Response: The duties of a cooperating agency are described in 40 CFR 1501.6 and are incorporated by reference.

Section 1794.17: One commenter questioned whether the mitigative measures would be discussed in the FONSI memo to the file in addition to the FONSI public notice. Two commenters noted that the provisions of (b)(3) appear to expand the responsibilities of field staff beyond that of development specialists. One commenter suggested that a better role for the agency would be to notify the appropriate regulatory agency to enforce the mitigative measures.

Agency Response: Mitigation measures shall be discussed in both the FONSI memo and public notice. The responsibilities of field staff have not been expanded. In the routine process of checking on-site conditions for compliance with relevant loan or grant provisions, it is appropriate for staff to document the applicant's compliance status with regard to mitigation measures that were agreed upon as part of the conditions for the loan/grant. If discrepancies are noted, the agency may need to notify the appropriate regulatory agency for action.

Section 1794.21(a): Six commenters recommended that in addition to defining "emergency situation" this

section be expanded to account for such situations.

Agency Response: RUS has added action (4) to account for emergency situations.

Section 1794.21(b): One commenter questioned why a "detailed description" was required for 12 actions in this category when all actions in this category had to be sufficiently described. That commenter recommended this requirement be deleted.

Agency Response: RUS has determined through experience that the types of proposals contained in this section normally do not significantly affect the quality of the human environment. Thus the submission of an ER is not normally required. However, in order to waive the ER requirement for the 12 actions in this category so designated, the RUS reviewer must have a complete description of what is being proposed, how it will be constructed, and the setting in which the proposed project will be located. Evaluating these 12 actions on a case-by-case basis is more effective than uniformly requiring the mandatory submittal of an ER.

Another commenter was concerned that the submittal of an environmental document was not required for proposed actions described in § 1794.21(b) (4), (8), (14), (15) and (16), which could under certain circumstances provide a hazard to birds.

Agency Response: RUS agrees that under certain circumstances actions described in § 1794.21(b) (4), (8), (14), (15), and (16) could result in significant effects to the human environment, such as presenting a hazard to birds. The description of the facilities to be constructed that must be provided for these actions and others so noted in § 1794.21(b) is used by RUS to determine whether the current level of review is adequate or a higher level of review is warranted.

One commenter expressed concern over the provision in action § 1794.21(b)(18) which require the applicant obtain certification from the utility owner that the facilities to be purchased are in compliance with applicable environmental laws and regulations. This commenter believes that the normal environmental review process should be sufficient to identify and resolve issues that may be encountered.

Agency Response: RUS agrees that obtaining a certification of compliance for the purchase of existing facilities is not the appropriate form of documentation. Upon further review, RUS has determined that establishing two separate levels of review for the purchase of existing facilities, specifically action (18) in § 1794.21(b) and action (7) in § 1794.23(b), is not warranted. Both references to these actions have been deleted from the final rule and replaced by new action (11) in § 1794.22(a). Under the new requirement applicants will have the option of submitting an ER or the results of a facility environmental audit. A higher level of review may be required before RUS approves an applicant's purchase of facilities that are determined to be in violation of Federal, state, or local environmental laws or regulations.

One commenter recommended that the threshold for action described in § 1794.21(b)(21), standby diesel generators, be increased from 1 megawatt (MW) to 2 MW and also be utilized for load management purposes in addition to emergency power.

Agency Response: RUS does not agree. The purpose of this category is to exclude standby diesel generators that would be subject to limited use (i.e. emergency outages). Utilizing such facilities for load management purposes increases the hours of usage and thus increase potential effects to the quality of the human environment.

A commenter asserts that the action described in § 1794.21(b)(24) could create a major change in local air quality.

Agency Response: RUS agrees that wording describing action (24) could be misinterpreted and has added the following statement: "Repowering or uprating that results in an increased fuel consumption or the substitution of one fuel combustion technology with another is excluded from this classification." Because this action does not include an increase in fuel consumption, no change in local air quality is anticipated.

This commenter further recommended that the type of customer facilities covered in § 1794.21(b)(24) include commercial and agricultural.

Agency Response: RUS agrees to add commercial and agriculture facilities to item (24).

Section 1794.22: Three commenters noted that proposals identified in § 1794.22(a)(11) and § 1794.21(b)(20) which discuss facilities that will reduce the amount of pollutants released into the environment are redundant and the reference in § 1794.22 should be deleted.

Agency Response: RUS agrees that the requirements of § 1794.22(a)(11) and § 1794.21(b)(20) are redundant. Accordingly, action #11 in § 1794.22(a) of the proposed rule has been deleted.

One commenter asserted that proposals listed in § 1794.22(b)(3) and (4) have the potential to impact important resources but will be excluded from environmental review.

Agency Response: Applicants are required to prepare and submit an ER for all proposed actions listed in § 1794.22(b). RUS will review the ER to determine whether a normally categorically excluded action may have a significant environmental effect (40 CFR 1508.4).

One commenter suggested that § 1794.22(c) belongs in § 1794.23 which describes EA proposals.

Agency Response: Proposals listed in § 1794.22(c) were so designated to parallel the level of documentation required by the EPA in 40 CFR 6.505(c) for similar proposals. Agencies with similar programs are encouraged by CEQ to consult with each other to coordinate their procedures, especially for programs requesting similar information from applicants (40 CFR 1507.3(a)). RUS believes that these actions are correctly described in § 1794.22(c).

One commenter noted that § 1794.22(c)(1) and (2) only apply to discharges and need to be expanded to include water withdrawals.

Agency Response: RUS agrees and has expanded the discussion in § 1794.22(c) to clarify this issue.

Two commenters requested that "substantial increases" in § 1794.22 (c)(2) be defined and one commenter also questioned how this term applied to a new facility.

Agency Response: The term "substantial increases" has not been defined because its interpretation depends on local conditions and regulatory requirements. RUS agrees that this action should not include new facilities and has revised the language accordingly.

One commenter noted that § 1794.22 (c)(3) stipulates no greater than a 30 percent growth factor whereas § 1794.22 (b)(3) stipulates a modest growth potential and requests consistency within the rule.

Agency Response: The 30 percent growth factor is an established threshold, whereas the term "modest growth" applies to local conditions and regulatory requirements.

Another commenter asserts that the thresholds in § 1794.22(c)(3) need to be changed because it appears that a small system (20–30 EDU's) could be expanded up to 500 EDU's and still be a categorically excluded proposal.

Agency Response: RUS believes the capacity criteria as stated is sufficient for the purposes of classifying an action

as a categorical exclusion. Two other provisions may be applicable to the commenter's point. First, the ER would provide sufficient information to determine if there are any extraordinary circumstances in which a normally categorically excluded action may have a significant environmental effect (see 40 CFR 1508.4). Second, under § 1794.22(b)(2), RUS could determine that the facility improvements are not modest in use, size, capacity, purpose, or location and would require an EA.

Section 1794.23: One commenter recommended that for consistency, this section be titled "Proposals normally requiring an EA without scoping."

Agency Response: RUS disagrees. Early public involvement may be appropriate for any level of environmental review and should not be explicitly dismissed by excluding scoping for certain thresholds.

Section 1794.31: One commenter stated that RUS should not be supervising or giving direct guidance to the applicant. He suggested modifying the wording in (b) to "with advice from RUS."

Agency Response: This issue is addressed in the response to the comment on § 1794.10.

Another commenter noted that the SEC would be unable to devote the time necessary to supervise all applicants.

Agency Response: High volume states have been provided additional environmental specialist positions in anticipation of the increased workload.

Section 1794.32: One commenter wanted clarification in (b) on the criteria used to determine when public notice would be required if important land resources are affected. Another commenter suggested that in (b) reference should be made to § 1794.7 or the RUS Bulletin 1794A–602.

Agency Response: RUS agrees with this suggestion and has referenced the two bulletins that provide guidance in preparing an ER.

Section 1794.33: One commenter noted that this section allows RUS to act on an application without any environmental review.

Agency Response: The commenter's interpretation of § 1794.33 is incorrect. RUS shall conduct an environmental review for all proposed actions covered by this section. Proposals listed in § 1794.21(b) and (c) normally require the submittal of a project description. Whereas, proposals listed in § 1794.22(a) and (b) normally require the submittal of an ER. RUS reserves the right to require additional environmental information on any proposal the agency believes may have significant effects on the quality of the human environment (§ 1794.30).

Section 1794.41: One commenter noted that the typical applicant would need assistance from their consulting engineer in preparing the ER, resulting in a fee increase to the applicant. If the SEC retains approval authority for the ER, another layer of review is added before the ER is accepted.

Agency Response: RUS anticipates that the applicant's engineer will prepare the ER at the same time that project planning is done. RUS further anticipates that any increase in the engineering fee should be modest since the engineer in most projects has been preparing the applicant's environmental information for the agency. The SEC should be the only agency approval official for the ER.

Section 1794.44: Two commenters noted that it appears RUS will take final action on proposals covered by this section without waiting for public input.

Agency Response: Actions listed in § 1794.23 are subject to public input when the EA is made available for review through applicant notice. Normally there is no provision for additional public input when RUS makes a FONSI determination for actions listed in § 1794.23.

These commenters also noted that draft RUS Bulletin 1794A–602 calls for a 15-day review period if significant comments are received on the draft EA.

Agency Response: The reference to the 15-day review period was inadvertently omitted from the proposed rule. Section 1794.44 has been modified to include an opportunity for the public to review the RUS FONSI determination if substantive comments are received on the EA.

Section 1794.51: One commenter noted that no mention is made in (a) where the applicant's notice will be published.

Agency Response: The commenter is correct that § 1794.51 does not state where the applicant's notice will be published. That information is provided in § 1794.13(a)(1) and (2).

Section 1794.61: Two commenters asserted that the cost of an EIS would be prohibitive for nearly all Water and Waste applicants which could result in even high priority projects being canceled due to the inability of the applicant to fund the EIS.

Agency Response: RUS agrees that an EIS can be an expensive document to prepare and has identified certain methods of funding an EIS in § 1794.61(a).

Section 1794.70: One commenter recommends that this section be expanded to allow the adoption of environmental documents prepared by state or local agencies or other parties in accordance with the provisions of § 1794.84 of the existing regulation.

Agency Response: The CEQ regulations in 40 CFR 1506.3 only permit a Federal agency to adopt documents prepared by or for another Federal Agency. In 40 CFR 1506.2, Federal agencies are required to cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements by jointly preparing EAs and EISs. RUS acknowledges that its policy on the incorporation of environmental documents prepared by others was omitted from the proposed rule. This omission has been corrected with the addition of § 1794.74.

One commenter suggested that RUS be more flexible in its adoption procedures and not duplicate another agency's public notice and comment period.

Agency Response: RUS believes that its decisions must be subject to public notification regardless of who prepares the environmental documentation. The preferred strategy to avoid duplication of effort would be for RUS to participate with other agencies in the preparation of the initial environmental documents as stated in § 1794.14.

This commenter also recommended that RUS accept environmental documents prepared by states under the State Revolving Fund (SRF) programs as its own documents or at a minimum adopt the subject documents.

Agency Response: RUS may adopt environmental documents prepared by state agencies administering SRF programs under the Clean Water Act (32 U.S.C. 1251) and the Safe Drinking Water Act (42 U.S.C. 300). Where appropriate, the State Director will enter into an agreement with appropriate state agencies to establish the necessary procedures.

Any environmental document accepted or prepared by RUS prior to the effective date of these regulations may be developed in accordance with RUS environmental requirements in effect at the time the document was accepted or prepared by RUS.

List of Subjects in 7 CFR Part 1780

Business and industry, Community development, Community facilities, Grant programs—housing and community development, Reporting and recordkeeping requirements, Rural areas, Waste treatment and disposal, Water supply, Watersheds.

List of Subjects in 7 CFR Part 1794

Environmental impact statements, Reporting and recordkeeping requirements.

Therefore RUS amends chapter XVII of title 7 of the Code of Federal Regulations as follows:

PART 1780—WATER AND WASTE LOANS AND GRANTS

Subpart B—Loan and Grant Application Processing

1. Section 1780.31 is amended by revising paragraph (e) to read as follows:

§ 1780.31 General.

* * * * *

(e) Starting with the earliest discussion with prospective applicants, the State Environmental Coordinator shall discuss with prospective applicants and be available for consultation during the application process the environmental review requirements for evaluating the potential environmental consequences of the project. Pursuant to 7 CFR part 1794 and guidance in RUS Bulletin 1794A–602, the environmental review requirements shall be performed by the applicant simultaneously and concurrently with the project's engineering planning and design. This should provide flexibility to consider reasonable alternatives to the project and development methods to mitigate identified adverse environmental effects. Mitigation measures necessary to avoid or minimize any adverse environmental effects must be integrated into project design.

2. Section 1780.33 is amended by revising paragraphs (c)(3), and (f) to read as follows:

§ 1780.33 Application requirements.

* * * * *

(c) * * *

(3) The State staff engineer will consult with the applicant's engineer as appropriate to resolve any questions concerning the PER. Written comments will be provided by the State staff engineer to the processing office to meet eligibility determination time lines.

* * * * *

(f) Environmental Report. For those actions listed in §§ 1794.22(b) and 1794.23(b), the applicant shall submit, in accordance with RUS Bulletin 1794A–602, two copies of the completed Environmental Report.

(1) Upon receipt of the Environmental Report, the processing office shall forward one copy of the report with comments and recommendation to the State Environmental Coordinator for review.

(2) The State Environmental Coordinator will consult with the applicant as appropriate to resolve any environmental concerns. Written comments will be provided by the State Environmental Coordinator to the processing office to meet eligibility determination time lines.

* * * * *

3. Section 1780.39 is amended by revising paragraph (b) introductory text and removing and revising paragraph (h).

§ 1780.39 Application processing.

* * * * *

(b) Professional services and contracts related to the facility. Fees provided for in contracts or agreements shall be reasonable. The Agency shall consider fees to be reasonable if they are not in excess of those ordinarily charged by the profession as a whole for similar work when RUS financing is not involved. Applicants will be responsible for providing the services necessary to plan projects including design of facilities, environmental review and documentation requirements, preparation of cost and income estimates, development of proposals for organization and financing, and overall operation and maintenance of the facility. Applicants should negotiate for procurement of professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiations of fair and reasonable compensation. Contracts or other forms of agreement between the applicant and its professional and technical representatives are required and are subject to RUS concurrence.

* * * * *

4. Section 1780.41 is amended by revising paragraph (a)(8) to read as follows:

§ 1780.41 Loan or grant approval.

(a) * * *

(8) Completed environmental review documents including copies of public notices and appropriate proof of publication, if applicable; and

* * * * *

SUBPART C—PLANNING, DESIGN, BIDDING, CONTRACTING, CONSTRUCTING AND INSPECTIONS

5. Section 1780.55 is revised to read as follows:

§ 1780.55 Preliminary engineering reports.

Preliminary engineering reports and Environmental Reports. Preliminary engineering reports (PERs) must conform to customary professional standards. PER guidelines for water, sanitary sewer, solid waste, and storm sewer are available from the Agency. Environmental Reports must meet the policies and intent of the National Environmental Policy Act and RUS procedures. Guidelines for preparing Environmental Reports are available in RUS Bulletin 1794A–602.

6. Section 1780.57 is amended by revising paragraph (a) to read as follows:

§ 1780.57 Design policies.

* * * * *

(a) *Environmental review.* Facilities financed by the Agency must undergo an environmental impact analysis in accordance with the National Environmental Policy Act and RUS procedures. Facility planning and design must not only be responsive to the owner's needs but must consider the environmental consequences of the proposed project. Facility design shall incorporate and integrate, where practicable, mitigation measures that avoid or minimize adverse environmental impacts. Environmental reviews serve as a means of assessing environmental impacts of project proposals, rather than justifying decisions already made. Applicants may not take any action on a project proposal that will have an adverse environmental impact or limit the choice of reasonable project alternatives being reviewed prior to the completion of the Agency's environmental review.

* * * * *

7. Part 1794 is revised to read as follows:

PART 1794—ENVIRONMENTAL POLICIES AND PROCEDURES

Subpart A—General

Sec.

Subpart B—Implementation of the National Environmental Policy Act

Authority: 7 U.S.C. 6941 *et seq.*, 42 U.S.C. 4321 *et seq.*; 40 CFR Parts 1500-1508.

Subpart A—General

§ 1794.1 Purpose.

(a) This part contains the policies and procedures of the Rural Utilities Service (RUS) for implementing the requirements of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321-4346); the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500 through 1508) and certain related Federal environmental laws, statutes, regulations, and Executive Orders (EO) that apply to RUS programs and administrative actions.

(b) The policies and procedures contained in this part are intended to help RUS officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. In assessing the potential environmental impacts of its actions, RUS will consult early with appropriate Federal, State, and local agencies and other organizations to provide decision-makers with information on the issues that are truly significant to the action in question.

§ 1794.2 Authority.

(a) This part derives its authority from and is intended to be compliant with NEPA, CEQ Regulations for Implementing the Procedural Provisions of NEPA, and other RUS regulations.

(b) Where practicable, RUS will use NEPA analysis and documents and review procedures to integrate the requirements of related environmental statutes, regulations, and orders.

(c) This part integrates the requirements of NEPA with other planning and environmental review procedures required by law, or by RUS practice including but not limited to:

(1) Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*);

(2) The National Historic Preservation Act (16 U.S.C. 470 *et seq.*);

(3) Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*);

(4) E.O. 11593, Protection and Enhancement of the Cultural Environment (3 CFR, 1971 Comp., p. 154);

(5) E.O. 11514, Protection and Enhancement of Environmental Quality (3 CFR, 1970 Comp., p. 104);

(6) E.O. 11988, Floodplain Management (3 CFR, 1977 Comp., p. 117);

(7) E.O. 11990, Protection of Wetlands (3 CFR, 1977 Comp., p. 121); and

(8) E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (3 CFR, 1994 Comp., p. 859).

(d) Applicants are responsible for ensuring that proposed actions are in compliance with all appropriate RUS requirements. Environmental documents submitted by the applicant shall be prepared under the oversight and guidance of RUS. RUS will evaluate and be responsible for the accuracy of all information contained therein.

§ 1794.3 Actions requiring environmental review.

The provisions of this part apply to actions by RUS including the approval of financial assistance pursuant to the Electric, Telecommunications, and Water and Waste Programs, the disposal of property held by RUS pursuant to such programs, and the issuance of new or revised rules, regulations, and bulletins. Approvals provided by RUS pursuant to loan contracts and security instruments, including approvals of lien accommodations, are not actions for the purposes of this part and the provisions of this part shall not apply to the exercise of such approvals.

§ 1794.4 Metric units.

RUS normally will prepare environmental documents using non-metric equivalents with one of the following two options; metric units in parentheses immediately following the non-metric equivalents or a metric conversion table as an appendix. Environmental documents prepared by or for a RUS applicant should follow the same format.

§ 1794.5 Responsible officials.

The Administrator of RUS has the responsibility for Agency compliance with all environmental laws, regulations, and EOs that apply to RUS programs and administrative actions. Responsibility for ensuring environmental compliance for actions taken by RUS has been delegated as follows:

(a) *Electric and Telecommunications Programs.* The appropriate Assistant Administrator is responsible for ensuring compliance with this part for the respective programs.

(b) *Water and Waste Program.* The Assistant Administrator for this program is responsible for ensuring compliance with this part at the national level. The State Director is the responsible official for ensuring compliance with this part for actions taken at the State Office level.

§ 1794.6 Definitions.

The following definitions, as well as the definitions contained in 40 CFR part 1508 of the CEQ regulations, apply to the implementation of this part:

Applicant. The organization applying for financial assistance or other approval from either the Electric or Telecommunications programs or the organization applying for a loan or grant from the Water and Waste program.

Construction Work Plan (CWP). The document required by 7 CFR part 1710.

Emergency Situation. A natural disaster or system failure that may

involve an immediate or imminent threat to public health, safety, or the human environment.

Environmental Analysis (EVAL). The document submitted by the applicant for proposed actions subject to compliance with § 1794.24 and under special circumstances § 1794.25.

Environmental Report (ER). The environmental documentation normally submitted by applicants for proposed actions subject to compliance with §§ 1794.22 and 1794.23. An ER for the Water and Waste Program refers to the environmental review documentation normally included as part of the Preliminary Engineering Report.

Environmental review. Any one or all of the levels of environmental analysis described under subpart C of this part.

Equivalent Dwelling Unit (EDU). Level of water or waste service provided to a typical rural residential dwelling.

Important Land Resources. Defined pursuant to the U.S. Department of Agriculture's Departmental Regulation 9500–3, Land Use Policy, as important farmland, prime forestland, prime rangeland, wetlands, and floodplains. Copies of this Departmental Regulation are available from USDA, Rural Utilities Service, Washington, DC 20250.

Loan Design. Document required by 7 CFR part 1737.

Multiplexing Center. A field site where a telecommunications provider houses a device that combines individual subscriber circuits onto a single system for economical connection with a switching center. The combiner, or "multiplexer," may be mounted on a pole, on a concrete pad, or in a partial or full enclosure such as a shelter, or small building.

Natural Resource Management Guide. Inventory of natural resources, land uses, and environmental factors specified by Federal, State, and local authorities as deserving some degree of protection or special consideration. The guide describes the standards or types of protection that apply.

Preliminary Engineering Report (PER). Document required by 7 CFR part 1780 for Water and Waste Programs. A PER is prepared by an applicant's engineering consultant documenting a proposed action's preliminary engineering plan and design and the applicable environmental review activities as required in this part. Upon approval by RUS, the PER, or a portion thereof, shall serve as the RUS environmental document.

Supervisory Control and Data Acquisition System (SCADA). Electronic monitoring and control equipment installed at electric substations and switching stations.

Third party Consultant. A party selected by RUS to prepare the EIS for proposed actions described in § 1794.25 where the applicant initiating the proposal agrees to fund preparation of the document in accordance with the provisions of 7 CFR Part 1789, "Use of Consultants Funded by Borrowers" and Section 759A of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 2204b(b)).

§ 1794.7 Guidance.

(a) *Electric and Telecommunications Programs.* For further guidance in the preparation of public notices and environmental documents, RUS has prepared a series of program specific guidance bulletins. RUS Bulletin 1794A–600 provides guidance in preparing the ER for proposed actions classified as categorical exclusions (CEs) (§ 1794.22(a)) and RUS Bulletin 1794A–601 provides guidance in preparing the ER for proposed actions which require EAs (§ 1794.23(b) Telecommunications only and (c));. Copies of these bulletins are available upon request by contacting Rural Utilities Service, Publications Office, PDRA, Stop 1522; 1400 Independence Avenue, SW; Washington, DC 20250–1522.

(b) *Water and Waste Program.* RUS Bulletin 1794A–602 provides guidance in preparing the ER for proposed actions classified as CEs (§ 1794.22(b)) and EAs (§ 1794.23(b)). A copy of this bulletin is available upon request by contacting the appropriate State Director. State Directors may provide supplemental guidance to meet state and local laws and regulations and to provide for orderly application procedures and efficient service to applicants. State Directors shall obtain the Administrator's approval for all supplements to RUS Bulletin 1794A–602. Each State Office shall maintain an updated Natural Resource Management Guide and provide applicants with pertinent sections or a copy of the current edition thereof.

§§ 1794.8–1794.9 [Reserved]

Subpart B—Implementation of the National Environmental Policy Act

§ 1794.10 Applicant responsibilities.

As described in subpart C of this part, applicants shall prepare the applicable environmental documentation concurrent with a proposed action's engineering, planning, and design activities. RUS shall assist applicants by outlining the types of information required and shall provide guidance and oversight in the development of the documentation. Documentation shall not be considered complete until all public review periods, as applicable, have expired and RUS concurrence, as set forth in the appropriate decision document and associated public notice, has been issued.

§ 1794.11 Apply NEPA early in the planning process.

The environmental review process requires early coordination with and involvement of RUS. Applicants should consult with RUS at the earliest stages of planning for any proposal that may require RUS action. For proposed actions that normally require an EIS, applicants shall consult with RUS prior to obtaining the services of an environmental consultant.

§ 1794.12 Consideration of alternatives.

In determining what are reasonable alternatives, RUS considers a number of factors. These factors may include, but are not limited to, the proposed action's size and scope, state of the technology, economic considerations, legal and socioeconomic concerns, availability of resources, and the timeframe in which the identified need must be fulfilled.

§ 1794.13 Public involvement.

(a) In carrying out its responsibilities under NEPA, RUS shall make diligent efforts to involve the public in the environmental review process through public notices and public hearings and meetings.

(1) All public notices required by this part shall describe the nature, location, and extent of the proposed action and indicate the availability and location of additional information. They shall be published in newspaper(s) of general circulation within the proposed action's area of environmental impact and the county(s) in which the proposed action will take place or such other places as RUS determines.

(2) The number of editions in which the notices should be published will be specified in the Bulletins referenced in § 1794.7 or established on a project-by-project basis. Alternative forms of notice may also be necessary to ensure that residents located in the area affected by the proposed action are notified. The applicant should not publish notices for compliance with this part until so notified by RUS.

(3) A copy of all comments received by the applicant concerning environmental aspects of the proposed action shall be provided to RUS in a timely manner. RUS and applicants shall assess and consider public comments both individually and collectively. Responses to public comments will be appended to the applicable environmental document.

(4) RUS and applicants shall make available to the public those project related environmental documents that RUS determines will enhance public participation in the environmental process. These materials shall be placed in locations convenient for the public as determined by RUS in consultation with applicants. Included with the documentation shall be a list of other project-related information that shall be available for inspection through a designated RUS or applicant contact person.

(5) Public hearings or meetings shall be held at reasonable times and locations concerning environmental aspects of a proposed action in all cases where, in the opinion of RUS, the need for hearings or meetings is indicated in order to develop adequate information on the environmental implications of the proposed action. Public hearings or meetings conducted by RUS will be coordinated to the extent practicable with other meetings, hearings, and environmental reviews which may be held or required by other Federal, state and local agencies. Applicants shall, as necessary, participate in all RUS conducted public hearings or meeting.

(6) Scoping procedures, in accordance with 40 CFR 1501.7, are required for proposed actions normally requiring an EA with scoping (§ 1794.24) or an EIS (§ 1794.25). RUS may require scoping procedures to be followed for other proposed actions where appropriate to achieve the purposes of NEPA.

(b) The applicant shall have public notices described in this section published in a newspaper(s). Applicants shall obtain proof of publication from the newspaper(s) for inclusion into the applicable environmental document. Where the proposed action requires an EIS RUS shall, in addition to applicant published notices, publish notice in the **Federal Register**. In all cases, RUS may publish notices in the **Federal Register** as appropriate.

§ 1794.14 Interagency involvement and coordination.

In an attempt to reduce or eliminate duplication of effort with state or local procedures, RUS will, to the extent possible and in accordance with 40 CFR 1506.2, actively participate with any governmental agency to cooperatively or jointly prepare environmental documents so that one document will comply with all applicable laws. Where RUS has agreed to participate as a cooperating agency, in accordance with 40 CFR 1501.6, RUS may rely upon the lead agency's procedures for implementing NEPA procedures. In addition, RUS shall request that:

(a) The lead agency indicates that RUS is a cooperating agency in all NEPA-related notices published for the proposed action;

(b) The scope and content of the EA or EIS satisfies the statutory and regulatory requirements applicable to RUS; and

(c) The applicant shall inform RUS in a timely manner of its involvement in a proposed action where another Federal agency is preparing an environmental document so as to permit RUS to adequately fulfill its duties as a cooperating agency.

§ 1794.15 Limitations on actions during the NEPA process.

(a) *General.* Until RUS concludes its environmental review process, the applicant shall take no action concerning the proposed action which would have an adverse environmental impact or limit the choice of reasonable alternatives being considered in the environmental review process (40 CFR 1506.1).

(b) *Electric Program.* In determining which applicant activities related to a proposed action can proceed prior to completion of the environmental review process, RUS must determine, among other matters that:

(1) The activity shall not have an adverse environmental impact and shall not preclude the search for other alternatives. For example, purchase of water rights, optioning or transfer of land title, or continued use of land as historically employed will not have an adverse environmental impact. However, site preparation or construction at or near the proposed site (e.g. rail spur) or development of a related facility (e.g. opening a captive mine) normally will have an adverse environmental impact.

(2) Expenditures are minimal. To be minimal, the expenditure must not exceed the amount of loss which the applicant could absorb without jeopardizing the Government's security interest in the event the proposed action is not approved by the Administrator, and must not compromise the objectivity of RUS environmental review. Not withstanding other considerations, expenditures equivalent to up to 10 percent of the proposed action's cost normally will not compromise RUS objectivity. Expenditures for the purpose of producing documentation required for RUS environmental review are excluded from this limitation.

§ 1794.16 Tiering.

It is the policy of RUS to prepare programmatic level analysis in order to tier an EIS and an EA where:

(a) It is practicable, and

(b) There will be a reduction of delay and paperwork, or where better decision making will be fostered (40 CFR 1502.20).

§ 1794.17 Mitigation.

(a) *General.* In addition to complying with the requirements of 40 CFR 1502.14(f), it is RUS policy that a discussion of mitigative measures essential to render the impacts of the proposed action not significant will be included in or referenced in the Finding of No Significant Impact (FONSI) and the Record of Decision (ROD).

(b) *Water and Waste Program.* (1) Mitigation measures which involve protective measures for environmental resources cited in this part or restrictions or limitations on real property located in the service areas of the proposed action shall be negotiated with applicants and any relevant regulatory agency so as to be enforceable. All mitigation measures incorporating land use issues shall recognize the rights and responsibilities of landholders in making private land use decisions and recognize the responsibility of governments in influencing how land may be used to meet public needs.

(2) Mitigation measures shall be included in the letter of conditions.

(3) RUS has the responsibility for the post approval construction or security inspections or monitoring to ensure that all mitigation measures included in the environmental documents have been implemented as specified in the letter of conditions.

§§ 1794.18–1794.19 [Reserved]

Subpart C—Classification of Proposals

§ 1794.20 Control.

Electric and Telecommunications Programs. For environmental review purposes, RUS has identified and established categories of proposed actions (§§ 1794.21 through 1794.25). An applicant may propose to participate with other parties in the ownership of a project where the applicant(s) does not have sufficient control to alter the development of the project. In such a case, RUS shall determine whether the applicant participants have sufficient control and responsibility to alter the development of the proposed project prior to determining its classification. Where the applicant proposes to participate with other parties in the

ownership of a proposed project and all applicants cumulatively own:

(a) Five percent or less of a project is not considered a Federal action subject to this part;

(b) Thirty-three and one-third percent or more of a project shall be treated in its usual category;

(c) More than five percent but less than 33⅓ percent of a project, RUS shall determine whether the applicant participants have sufficient control and responsibility to alter the development of the proposal such that RUS's action will be considered a Federal action subject to this part. Consideration shall be given to such factors as:

(1) Whether construction would be completed regardless of RUS financial assistance or approval;

(2) The stage of planning and construction;

(3) Total participation of the applicant;

(4) Participation percentage of each utility; and

(5) Managerial arrangements and contractual provisions.

§ 1794.21 Categorically excluded proposals without an ER.

(a) *General.* Certain types of actions taken by RUS do not normally require an ER. Proposed actions within this classification are:

(1) The issuance of bulletins and information publications that do not concern environmental matters or substantial facility design, construction, or maintenance practices;

(2) Procurement activities related to the operation of RUS;

(3) Personnel and administrative actions; and

(4) Repairs made because of an emergency situation to return to service damaged facilities of an applicant's system.

(b) *Electric and Telecommunications Programs.* Applications for financial assistance for the types of proposed actions listed in this paragraph (b) normally do not require the submission of an ER. These types of actions are subject to the requirements of § 1794.31. Applicants shall sufficiently identify all proposed actions so their proper classification can be determined. Detailed descriptions shall be provided for each proposal noted in this section. RUS normally requires additional information in addition to a description of what is being proposed, to ensure that proposals are properly classified. In order to provide for extraordinary circumstances, RUS may require development of an ER for proposals listed in this section. Proposed actions within this classification are:

(1) Purchase of land where use shall remain unchanged, or the purchase of existing water rights where no associated construction is involved;

(2) Additional or substitute financial assistance for proposed actions which have previously received environmental review and approval from RUS, provided the scope of the proposal and environmental considerations have not changed;

(3) Rehabilitation or reconstruction of transportation facilities within existing rights-of-way (ROW) or generating facility sites. A description of the rehabilitation or reconstruction shall be provided to RUS;

(4) Changes or additions to microwave sites, substations, switching stations, telecommunications switching or multiplexing centers, buildings, or small structures requiring new physical disturbance or fencing of less than one acre (0.4 hectare). A description of the additions or changes and the area to be impacted by the expansion shall be provided to RUS;

(5) Internal modifications or equipment additions (*e.g.*, computer facilities, relocating interior walls) to structures or buildings;

(6) Internal or minor external changes to electric generating or fuel processing facilities and related support structures where there is negligible impact on the outside environment. A description of the changes shall be provided to RUS;

(7) Ordinary maintenance or replacement of equipment or small structures (*e.g.*, line support structures, line transformers, microwave facilities, telecommunications remote switching and multiplexing sites);

(8) The construction of telecommunications facilities within the fenced area of an existing substation, switching station, or within the boundaries of an existing electric generating facility site. A description of the facilities to be constructed shall be provided to RUS;

(9) SCADA and energy management systems involving no new external construction;

(10) Testing or monitoring work (*e.g.*, soil or rock core sampling, monitoring wells, air monitoring);

(11) Studies and engineering undertaken to define proposed actions or alternatives sufficiently so that environmental effects can be assessed;

(12) Construction of electric power lines within the fenced area of an existing substation, switching station, or within the boundaries of an electric generating facility site;

(13) Contracts for certain items of equipment which are part of a proposed action for which RUS is preparing an EA or EIS, and which meet the limitations on actions during the NEPA process as established in 40 CFR 1506.1(d) and contained in § 1794.15(b)(2);

(14) Rebuilding of power lines or telecommunications cables where road or highway reconstruction requires the applicant to relocate the lines either within or adjacent to the new road or highway easement or right-of-way. A description of the facilities to be constructed shall be provided to RUS;

(15) Phase or voltage conversions, reconductoring or upgrading of existing electric distribution lines, or telecommunication facilities. A description of the facilities to be constructed shall be provided to RUS;

(16) Construction of new power lines, substations, or telecommunications facilities on industrial or commercial sites, where the applicant has no control over the location of the new facilities. Related off-site facilities would be treated in their normal category. A description of the facilities to be constructed shall be provided to RUS;

(17) Participation by an applicant(s) in any proposed action where total applicant financial participation will be five percent or less;

(18) Construction of a battery energy storage system at an existing generating station or substation site. A description of the facilities to be constructed shall be provided to RUS.

(19) Additional bulk commodity storage (*e.g.*, coal, fuel oil, limestone) within existing generating station boundaries. A certification attesting to the current state of compliance of the existing facilities and a description of the facilities to be added shall be provided to RUS;

(20) Proposals designed to reduce the amount of pollutants released into the environment (e.g., precipitators, baghouse or scrubber installations, and coal washing equipment) which will have no other environmental impact outside the existing facility site. A description of the facilities to be constructed shall be provided to RUS;

(21) Construction of standby diesel electric generators (one megawatt or less total capacity) and associated facilities, for the primary purpose of providing emergency power, at an existing applicant headquarters or district office, telecommunications switching or multiplexing site, or at an industrial, commercial or agricultural facility served by the applicant. A description of the facilities to be constructed shall be provided to RUS;

(22) Construction of onsite facilities designed for the transfer of ash, scrubber wastes, and other byproducts from coal-

fired electric generating stations for recycling or storage at an existing coal mine (surface or underground). A description of the facilities to be constructed shall be provided to RUS;

(23) Changes or additions to an existing water well system, including new water supply wells and associated pipelines within the boundaries of an existing well field or generating station site. A description of the changes or additions shall be provided; and

(24) Repowering or uprating of an existing unit(s) at a fossil-fueled generating station in order to improve the efficiency or the energy output of the facility. Repowering or uprating that results in increased fuel consumption or the substitution of one fuel combustion technology with another is excluded from this classification.

(c) *Water and Waste Program.* Applications for financial assistance for certain proposed actions do not normally require the submission of an ER. Applicants shall sufficiently identify all proposed actions so their proper classification can be determined. These types of actions are subject to the requirements of § 1794.31. In order to provide for extraordinary circumstances, RUS may require development of an ER for proposals listed in this section. Proposed actions within this classification are:

(1) Management actions relating to invitation for bids, award of contracts, and the actual physical commencement of construction activities;

(2) Proposed actions that primarily involve the purchase and installation of office equipment or motorized vehicles;

(3) The award of financial assistance for technical assistance, planning purposes, environmental analysis, management studies, or feasibility studies; and

(4) Loan closing and servicing activities that do not alter the purpose, operation, location, or design of the proposal as originally approved, such as subordinations, amendments and revisions to approved actions, and the provision of additional financial assistance for cost overruns.

§ 1794.22 Categorically excluded proposals requiring an ER.

(a) *Electric and Telecommunications Programs.* Applications for financial assistance for the types of proposed actions listed in this section normally require the submission of an ER and are subject to the requirements of § 1794.32. Proposed actions within this classification are:

(1) Construction of electric power lines and associated facilities designed for or capable of operation at a nominal voltage of either:

(i) Less that 69 kilovolts (kV);

(ii) Less than 230 kV if no more than 25 miles (40.2 kilometers) of line are involved; or

(iii) 230 kV or greater involving no more than three miles (4.8 kilometers) of line;

(2) Construction of buried and aerial telecommunications lines, cables, and related facilities;

(3) Construction of microwave facilities, SCADA, and energy management systems involving no more than five acres (2 hectares) of physical disturbance at any single site;

(4) Construction of cooperative or company headquarters, maintenance facilities, or other buildings involving no more than 10 acres (4 hectares) of physical disturbance or fenced property;

(5) Changes to existing transmission lines that involve less than 20 percent pole replacement, or the complete rebuilding of existing distribution lines within the same ROW. Changes to existing transmission lines that require 20 percent or greater pole replacement will be considered the same as new construction;

(6) Changes or additions to existing substations, switching stations, telecommunications switching or multiplexing centers, or external changes to buildings or small structures requiring one acre (0.4 hectare) or more but no more than five acres (2 hectares) of new physically disturbed land or fenced property;

(7) Construction of substations, switching stations, or telecommunications switching or multiplexing centers requiring no more than five acres (2 hectares) of new physically disturbed land or fenced property;

(8) Construction of diesel electric generating facilities of five megawatts (MW) (nameplate rating) or less either at an existing generation or substation sites. This category also applies to a diesel electric generating facility of five MW or less that is located at or adjacent to an existing landfill site and supplied with refuse derived fuel. All new associated facilities and related electric power lines shall be covered in the ER;

(9) Additions to or the replacement of existing generating units at a hydroelectric facility or dam which result in no change in the normal maximum surface area or normal maximum surface elevation of the existing impoundment. All new associated facilities and related electric power lines shall be covered in the ER;

(10) Construction of new water supply wells and associated pipelines not located within the boundaries of an existing well field or generating station site; and

(11) Purchase of existing facilities or a portion thereof where use or operation will remain unchanged. The results of a facility environmental audit can be substituted for the ER.

(b) *Water and Waste Program.* For certain proposed actions, applications for financial assistance normally require the submittal of an ER as part of the PER. These types of actions are subject to the requirements of § 1794.32. Proposed actions within this classification are:

(1) Rehabilitation of existing facilities, functional replacement or rehabilitation of equipment, or the construction of new ancillary facilities adjacent or appurtenant to existing facilities, including but not limited to, replacement of utilities such as water or sewer lines and appurtenances for existing users with modest or moderate growth potential, reconstruction of curbs and sidewalks, street repaving, and building modifications, renovations, and improvements;

(2) Facility improvements to meet current needs with a modest change in use, size, capacity, purpose or location from the original facility. The proposed action must be designed for predominantly residential use with other new or expanded users being small-scale, commercial enterprises having limited secondary impacts;

(3) Construction of new facilities that are designed to serve not more than 500 EDUs and with modest growth potential. The proposed action must be designed for predominantly residential use with other users being small-scale, commercial enterprises having limited secondary impacts;

(4) The extension, enlargement or construction of interceptors, collection, transmission or distribution lines within a one-mile (1.6-kilometer) limit from existing service areas estimated from any boundary listed as follows:

(i) The corporate limits of the community being served;

(ii) If there are developed areas immediately contiguous to the corporate limits of a community, the limits of these developed areas; or

(iii) If an unincorporated area is to be served, the limits of the developed areas;

(5) Installation of new water supply wells or water storage facilities that are required by a regulatory authority or standard engineering practice as a backup to existing production well(s) or as reserve for fire protection;

(6) Actions described in § 1794.21(c)(4) which alter the purpose,

operation, location, or design of the proposed action as originally approved, and such alteration is equivalent in magnitude or type as described in paragraphs (b)(1) through (b)(5) of this section; and

(7) The lease or disposal of real property by RUS, which may result in a change in use of the real property in the reasonably foreseeable future and such change, is equivalent in magnitude or type as described in paragraphs (b)(1) through (b)(5).

(c) *Specialized criteria for not granting a CE for Water and Waste Projects.* An EA must be prepared if a proposed action normally classified as a CE meets any of the following:

(1) Will either create a new or relocate an existing discharge to or a withdrawal from surface or ground waters;

(2) Will result in substantial increases in the volume or the loading of pollutants from an existing discharge to receiving waters;

(3) Will cause a substantial increase in the volume of withdrawal from surface or ground waters at an existing site; or

(4) Would provide capacity to serve more than 500 EDUs or a 30 percent increase in the existing population whichever is larger.

§ 1794.23 Proposals normally requiring an EA.

RUS will normally prepare an EA for all proposed actions which are neither categorical exclusions (§§ 1794.21 and 1794.22) nor normally requiring an EIS (§ 1794.25). For certain actions within this class, scoping and document procedures contained in §§ 1794.50 through 1794.54 shall be followed (see § 1794.24). The following are proposed actions which normally require an EA and shall be subject to the requirements of §§ 1794.40 through 1794.44.

(a) *General.* Issuance or modification of RUS regulations concerning environmental matters.

(b) *Telecommunications and Water and Waste Programs.* An EA shall be prepared for applications for financial assistance for all proposed actions not specifically defined as a CE or otherwise specifically categorized by the Administrator on a case-by-case basis.

(c) *Electric Program.* Applications for financial assistance for certain proposed actions normally require the preparation of an EA. Proposed actions falling within this classification are:

(1) Construction of combustion turbine or diesel generating facilities of 50 MW (nameplate rating) or less at a new site (no existing generating capacity) except for items covered by § 1794.22(a)(8). All new associated facilities and related electric power lines shall be covered in the EA;

(2) Construction of combustion turbine or diesel generating facilities of 100 MW (nameplate rating) or less at an existing generating site, except for items covered by § 1794.22(a)(8). All new associated facilities and related electric power lines shall be covered in the EA;

(3) Construction of any other type of new electric generating facilities of 10 MW (nameplate rating) or less. All new associated facilities and related electric power lines shall be covered in the EA;

(4) Repowering or uprating of an existing unit(s) at a fossil-fueled generating station where the existing fuel combustion technology of the affected unit(s) is substituted for another (*e.g.* coal or oil-fired boiler is converted to a fluidized bed boiler or replaced with a combustion turbine unit);

(5) Installation of new generating units at an existing hydroelectric facility or dam, or the replacement of existing generating units at a hydroelectric facility or dam which will result in a change in the normal maximum surface area or normal maximum surface elevation of the existing impoundment. All new associated facilities and related electric power lines shall be covered in the EA;

(6) A new drilling operation or the expansion of a mining or drilling operation;

(7) Construction of cooperative headquarters, maintenance, and equipment storage facilities involving more than 10 acres (4 hectares) of physical disturbance or fenced property;

(8) The construction of electric power lines and related facilities designed for and capable of operation at a nominal voltage of 230 kV or more involving more than three miles (4.8 kilometers) but not more than 25 miles (40 kilometers) of line;

(9) The construction of electric power lines and related facilities designed for or capable of operation at a nominal voltage of 69 kV or more but less than 230 kV where more than 25 miles (40 kilometers) of power line are involved;

(10) The construction of substations or switching stations requiring greater than five acres (2 hectares) of new physical disturbance at a single site; and

(11) Construction of facilities designed for the transfer and storage of ash, scrubber wastes, and other byproducts from coal-fired electric generating stations that will be located beyond the existing facility site boundaries.

§ 1794.24 Proposals normally requiring an EA with scoping.

(a) *General.* Applications for financial assistance for certain proposed actions require the use of a scoping procedure in the development of the EA. These types of actions are subject to the requirements of §§ 1794.50 through 1794.54. RUS has the discretion to modify or waive the requirements listed in § 1794.52 for a proposed action in this category.

(b) *Electric Program.* Proposed actions falling within this classification are:

(1) The construction of electric power lines and related facilities designed for and capable of operation at a nominal voltage of 230 kV or more where more than 25 miles (40 kilometers) of power line are involved;

(2) Construction of combustion turbines and diesel generators of more than 50 MW at a new site or more than 100 MW at an existing site; and the construction of any other type of electric generating facility of more than 10 MW but not more than 50 MW (nameplate rating). All new associated facilities and related electric power lines shall be covered in any EA or EIS that is prepared.

(c) *Telecommunications and Water and Waste Programs.* There are no actions normally falling within this classification.

§ 1794.25 Proposals normally requiring an EIS.

Applications for financial assistance for certain proposed actions that may significantly affect the quality of the human environment shall require the preparation of an EIS.

(a) *Electric Program.* An EIS will normally be required in connection with proposed actions involving the following types of facilities:

(1) New electric generating facilities of more than 50 MW (nameplate rating) other than diesel generators or combustion turbines. All new associated facilities and related electric power lines shall be covered in the EIS; and

(2) A new mining operation when the applicants have effective control (e.g., dedicated mine or purchase of a substantial portion of the mining equipment).

(b) Proposals listed above are subject to the requirements of §§ 1794.60, 1794.61, 1794.63, and 1794.64. Preparation of a supplemental draft or final EIS in accordance with 40 CFR 1502.9 shall be subject to the requirements of §§ 1794.62 and 1794.64.

(c) *Telecommunications and Water and Waste Programs.* No groups or sets of proposed actions normally require the preparation of an EIS. The

environmental review process, as described in this part, shall be used to identify those proposed actions for which the preparation of an EIS is necessary. If an EIS is required, RUS shall proceed directly to its preparation. Prior completion of an EA is not mandatory.

§§ 1794.26–1794.29 [Reserved]

Subpart D—Procedure for Categorical Exclusions

§ 1794.30 General.

The procedures of this subpart which apply to proposed actions classified as CEs in §§ 1794.21 and 1794.22 provide RUS with information necessary to determine if the proposed action meets the criteria for a CE. Where, because of extraordinary circumstances, a normally categorically excluded action may have a significant effect on the quality of the human environment, RUS may require additional environmental documentation.

§ 1794.31 Classification.

(a) *Electric and Telecommunications Programs.* RUS will normally determine the proper environmental classification of projects based on its evaluation of the project description set forth in the construction work plan or loan design which the applicant is required to submit with its application for financial assistance. Each project must be sufficiently described to ensure its proper classification. RUS may require the applicant to provide additional information on a project where appropriate.

(b) *Water and Waste Program.* RUS will normally determine the proper environmental classification for projects based on its evaluation of the preliminary planning and design information.

§ 1794.32 Environmental report.

(a) For proposed actions listed in § 1794.21(b) and (c), the applicant is normally not required to submit an ER.

(b) For proposed actions listed in § 1794.22(a) and (b), the applicant shall normally submit an ER. Guidance in preparing the ER for Electric and Telecommunication proposals is contained in RUS Bulletin 1794A–600. Guidance in preparing the ER for Water and Waste proposals is contained in RUS Bulletin 1794A–602. The applicant may be required to publish public notices and provide evidence of such if the proposed action is located in, impacts, or converts important land resources.

§ 1794.33 Agency action.

RUS may act on an application for financial assistance upon determining, based on the review of documents as set forth in § 1794.32 and such additional information as RUS deems necessary, that the project is categorically excluded.

§§ 1794.34–1794.39 [Reserved]

Subpart E—Procedure for Environmental Assessments

§ 1794.40 General.

This subpart applies to proposed actions described in § 1794.23. Where appropriate to carry out the purposes of NEPA, RUS may impose, on a case-by-case basis, additional requirements associated with the preparation of an EA. If at any point in the preparation of an EA, RUS determines that the proposed action will have a significant effect on the quality of the human environment, the preparation of an EIS shall be required and the procedures in subpart G of this part shall be followed.

§ 1794.41 Document requirements.

Applicants will provide an ER in accordance with the appropriate guidance documents referenced in § 1794.7. After RUS has evaluated the ER and has determined the ER adequately addresses all applicable environmental issues, the ER will normally serve as RUS' EA. However, RUS reserves the right to prepare its own EA from the information provided in the ER. RUS will take responsibility for the scope and content of an EA.

§ 1794.42 Notice of availability.

Prior to RUS making a finding in accordance with § 1794.43 and upon RUS authorization and guidance, the applicant shall have a notice published which announces the availability of the EA and solicits public comments on the EA.

§ 1794.43 Agency finding.

(a) *General.* If RUS finds, based on an EA that the proposed action will not have a significant effect on the quality of the human environment, RUS will prepare a FONSI. Upon authorization of RUS, the applicant shall have a notice published which informs the public of the RUS finding and the availability of the EA and FONSI. The notice shall be prepared and published in accordance with RUS guidance.

(b) *Electric and Telecommunications Programs.* RUS shall have a notice published in the **Federal Register** that announces the availability of the EA and FONSI.

§ 1794.44 Timing of agency action.

RUS may take its final action on proposed actions requiring an EA (§ 1794.23) at any time after publication of the RUS and applicant notices that a FONSI has been made and any required review period has expired. When substantive comments are received on the EA, RUS may provide an additional period (15 days) for public review following the publication of its FONSI determination. Final action shall not be taken until this review period has expired.

§§ 1794.45–1794.49 [Reserved]

Subpart F—Procedure for Environmental Assessments With Scoping

§ 1794.50 Normal sequence.

For proposed actions covered by § 1794.24 and other actions determined by the Administrator to require an EA with Scoping, RUS and the applicant will follow the same procedures for scoping and the requirements for notices and documents as for proposed actions normally requiring an EIS through the point at which the Environmental Analysis (EVAL) is submitted (see § 1794.54). After the EVAL has been submitted, RUS will make a judgment to utilize the EVAL as its EA and issue a FONSI or prepare an EIS.

§ 1794.51 Preparation for scoping.

(a) As soon as practicable after RUS and the applicant have developed a schedule for the environmental review process, RUS shall have its notice of intent to prepare an EA or EIS (§ 1794.13) published in the **Federal Register** (see 40 CFR 1508.22). The applicant shall have published, in a timely manner, a notice similar to RUS' notice.

(b) As part of the early planning, the applicant should consult with appropriate Federal, state, and local agencies to inform them of the proposed action, identify permits and approvals which must be obtained, and administrative procedures which must be followed.

(c) Before formal scoping is initiated, RUS will require the applicant to submit an Alternative Evaluation Study and either a Siting Study (generation) or a Macro-Corridor Study (transmission lines).

(d) The applicant is encouraged to hold public information meetings in the general location of the proposed action and any reasonable alternatives when such applicant meetings will make the scoping process more meaningful. A written summary of the comments made

at such meetings must be submitted to RUS as soon as practicable after the meetings.

§ 1794.52 Scoping meetings.

(a) Both RUS and the applicant shall have a notice published which announces a public scoping meeting is to be conducted, either in conjunction with the notice of intent or as a separate notice.

(b) The RUS notice shall be published in the **Federal Register** at least 14 days prior to the meeting(s). The applicant's notice shall be published in a newspaper at least 10 days prior to the meeting(s). Other forms of media may also be used by the applicant to notice the meetings.

(c) Where an environmental document is the subject of the hearing or meeting, that document will be made available to the public at least 10 days in advance of the meeting.

(d) The scoping meeting(s) will be held in the area of the proposed action at such place(s) as RUS determines will best afford an opportunity for public involvement. Any person or representative of an organization, or government body desiring to make a statement at the meeting may make such statement in writing or orally. The format of the meeting may be one of two styles. It can either be of the traditional style which features formal presentations followed by a comment period, or the open house style in which attendees are able to individually obtain information on topics or issues of interest within an established time period. A transcript will be made of the scoping meeting.

(e) As soon as practicable after the scoping meeting(s), RUS, as lead agency, shall determine the significant issues to be analyzed in depth and identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review. RUS will develop a proposed scope for further environmental study and review. RUS shall send a copy of this proposed scope to cooperating agencies and the applicant, and allow recipients 30 days to comment on the scope's adequacy and emphasis. After expiration of the 30-day period, RUS shall provide written guidance to the applicant concerning the scope of environmental study to be performed and information to be gathered.

§ 1794.53 Environmental analysis.

(a) After scoping procedures have been completed, RUS shall require the applicant to develop and submit an EVAL. The EVAL shall be prepared under the supervision and guidance of RUS staff and RUS shall evaluate and be responsible for the accuracy of all information contained therein.

(b) The EVAL will normally serve as the RUS EA. The EVAL can also serve as the basis for an EIS, and under such circumstances will be made an appendix to the EIS. After RUS has reviewed and found the EVAL to be satisfactory, the applicant shall provide RUS with a sufficient number of copies of the EVAL to satisfy the RUS distribution plan.

(c) The EVAL shall include a summary of the construction and operation monitoring and mitigation measures for the proposed action. These measures may be revised as appropriate in response to comments and other information, and shall be incorporated by summary or reference into the FONSI or ROD.

§ 1794.54 Agency determination.

Following the scoping process and the development of a satisfactory EA, RUS shall determine whether the proposed action is a major Federal action significantly affecting the quality of the human environment. If RUS determines the action is significant, RUS will continue with the procedures in subpart G of this part. If RUS determines the action is not significant, RUS will proceed in accordance with §§ 1794.42 through 1794.44.

§§ 1794.55–1794.59 [Reserved]

Subpart G—Procedure for Environmental Impact Statements

§ 1794.60 Normal sequence.

For proposed actions requiring an EIS (see § 1794.25), the NEPA process shall proceed in the same manner as for proposed actions requiring an EA with scoping through the point at which the scoping process is completed (see § 1794.52).

§ 1794.61 Environmental impact statement.

(a) *General.* An EIS shall be prepared in accordance with 40 CFR part 1502. Funding, in whole or in part, for an EIS can be obtained from any lawful source (*e.g.*, cooperative agreements developed in accordance with Section 759A, Federal Agricultural Improvement and Reform Act of 1996, Pub. L. 104–127 and 31 U.S.C. 6301). A third-party consultant selected by RUS and funded by the applicant (7 CFR part 1789) may prepare the EIS.

(1) After a draft or final EIS has been prepared, RUS and the applicant shall concurrently have a notice of availability for the document published. The time period allowed for review will be a minimum of 45 days for a draft EIS and 30 days for a final EIS. This period is measured from the date that the U.S. Environmental Protection Agency (EPA) publishes a notice in the **Federal Register** in accordance with 40 CFR 1506.10.

(2) In addition to circulation required by 40 CFR 1502.19, the draft and final EIS (or summaries thereof, at RUS discretion) shall be circulated to the appropriate state, regional, and metropolitan clearinghouses.

(3) Where a final EIS does not require substantial changes from the draft EIS, RUS may document required changes through errata sheets, insertion pages, and revised sections to be incorporated into the draft EIS. In such cases, RUS shall circulate such changes together with comments on the draft EIS, responses to comments, and other appropriate information as its final EIS. RUS will not circulate the draft EIS again, although RUS will provide the draft EIS if requested within 30 days of publication of notice of availability of the final EIS.

(b) *Electric Program.* Where the applicant or its consultant has prepared an EVAL, RUS will develop its draft and final EIS from the EVAL. An EVAL will not be required if a third-party consultant prepares the draft and final EIS.

§ 1794.62 Supplemental EIS.

(a) A supplement to a draft or final EIS shall be prepared, circulated, and given notice by RUS and the applicant in the same manner (exclusive of scoping) as a draft and final EIS (see § 1794.61).

(b) Normally RUS and the applicant will have published notices of intent to prepare a supplement to a final EIS in those cases where a ROD has already been issued.

(c) RUS, at its discretion, may issue an information supplement to a final EIS where RUS determines that the purposes of NEPA are furthered by doing so even though such supplement is not required by 40 CFR 1502.9(c)(1). RUS and the applicant shall concurrently have a notice of availability published. The notice requirements shall be the same as for a final EIS and the information supplement shall be circulated in the same manner as a final EIS. RUS shall take no final action on any proposed modification discussed in the information supplement until 30 days after the RUS notice of availability or the applicant's notice is published, whichever occurs later.

§ 1794.63 Record of decision.

(a) Upon completion of the review period for a final EIS, RUS will have its ROD prepared in accordance with 40 CFR 1505.2.

(b) Separate RUS and applicant notices of availability shall be published concurrently. The notices shall summarize the RUS decision and announce the availability of the ROD. Copies of the ROD will be made available upon request from the point of contact identified in the notice.

§ 1794.64 Timing of agency action.

(a) RUS may take its final action or execute commitments on proposed actions requiring an EIS or Supplemental EIS at any time after the ROD has been published.

(b) For budgetary purposes some financial assistance may be approved conditionally with a stipulation that no funds shall be advanced until a ROD has been prepared.

§§ 1794.65–1794.69 [Reserved]

Subpart H—Adoption of Environmental Documents

§ 1794.70 General.

This subpart covers the adoption of environmental documents prepared by other Federal agencies. Where applicants participate in proposed actions for which an EA or EIS has been prepared by or for another Federal agency, RUS may adopt the existing EA or EIS in accordance with 40 CFR 1506.3.

§ 1794.71 Adoption of an EA.

RUS may adopt a Federal EA or EIS or a portion thereof as its EA. RUS shall make the EA available and assure that notice is provided in the same manner as if RUS had prepared the EA.

§ 1794.72 Adoption of an EIS.

(a) Where RUS determines that an existing Federal EIS requires additional information to meet the standards for an adequate statement for RUS proposed action, RUS may adopt all or a portion of the EIS as a part of its draft EIS. The circulation and notice provisions for a draft and final EIS (see § 1794.61) apply.

(b) If RUS was not a cooperating agency but determines that another Federal agency's EIS is adequate, RUS shall adopt that agency's EIS as its final EIS. RUS and the applicant shall have separate notices published advising of RUS adoption of the EIS and independent determination of its adequacy.

(c) If the adopted EIS is generally available and meets RUS standards, RUS shall have a public notice published informing the public of its action and availability of the EIS to interested parties upon request. If the adopted EIS is not generally available, RUS shall have a public notice published informing the public of its action and will circulate copies of the EIS in accordance with 40 CFR 1502.19 and 40 CFR 1506.3.

§ 1794.73 Timing of agency action.

Where RUS has adopted another agency's environmental documents, the timing of the action shall be subject to the same requirements as if RUS had prepared the required EA or EIS.

§ 1794.74 Incorporation of environmental materials.

RUS may incorporate into its environmental documents, environmental documents or portions thereof prepared by state, or local agencies or other parties for purposes other than compliance with the requirements of NEPA. RUS will circulate the incorporated documents as a part of its EA or draft and final EIS in the same manner as if prepared by RUS.

§ 1794.75–1794.79 [Reserved]

Dated: December 7, 1998.

Jill Long Thompson,

Under Secretary, Rural Development.

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EXHIBIT 4

PUBLIC SERVICE COMMISSION
STATE OF WISCONSIN

Environmental Impacts of Transmission Lines

Introduction

This Overview reviews the environmental issues and concerns raised by the construction of electric transmission facilities. The first part of the Overview provides a general summary of the methods to measure and identify environmental impacts.

The second part of the Overview is an A to Z directory of specific environmental issues and techniques to minimize or mitigate the impacts. The issues include:

- Aesthetics
- Agricultural Lands
- Airports and Airstrips
- Archeological and Historical Sites
- Electric and Magnetic Fields (EMF)
- Endangered/Threatened and Protected Species
- Implantable Medical Devices
- Noise
- Property Owner Impacts
- Radio and Television Reception
- Recreation Areas
- Safety
- Stray Voltage
- Waterways
- Wetlands
- Woodlands

In the final section of this pamphlet, community involvement and the role of the Public Service Commission (PSC) is discussed. PSC regulates transmission line construction so that costs to consumers are minimized, Wisconsin has a safe and reliable electric supply, and environmental and social impacts are limited. This Overview explains the basis for the PSC's environmental analyses of proposed electric transmission line routing and construction. The PSC has other transmission pamphlets reviewing the PSC approval process, easements, underground utilities, and EMF issues. A complete list is included on the back page of this pamphlet or can be viewed on the PSC web site: http://psc.wi.gov.

Measuring and Identifying Environmental Impacts

Quantifying Potential Impacts

The amount of impacts from the construction of a transmission line can be measured in several different ways. Useful methods of quantifying impact are measurements of area (acreage), distance (miles or feet), and the number of poles

In woodlands, where trees must be cleared from a right-of-way (ROW), acreage is a better measure of impact than miles. In other types of areas where ROW clearing is not the primary impact mileage may be a better measure of impact. In agricultural areas, the number of poles crossing a field may be the most significant measure of impact.

Determining the Degree of Potential Impacts

In general the degree of impact of a proposed transmission line is determined by the quality or uniqueness of the environment along the proposed route. The following factors determine the quality of the existing environment:

- The degree of disturbance that already exists
- The uniqueness of the resources
- The threat of future disturbance

The degree of disturbance that already exists in a place is determined by how close the place resembles pre-settlement conditions. For example, an area may have been logged, drained, developed, cultivated, or otherwise substantially altered. Then, the extent of the alteration must be assessed.

Proposed transmission routes are reviewed for species or community types that are uncommon in the region or in the state. Does the resource possess a feature that makes it unique, such as its size or species diversity? Does the resource play a special role in the surrounding landscape?

And finally, will surrounding uses threaten the quality of the resource over time? How is the resource valued by those who own or manage it?

Identifying the Duration of Potential Impacts

There construction of a transmission line involves both long-term and temporary impacts. Long-term impacts can exist as long as the line is in place and include land use restrictions and aesthetic impacts. Temporary impacts occur during construction or at infrequent intervals such as during line repair or ROW maintenance. Temporary impacts during construction can include noise and crop damage.

Choosing Methods to Mitigate Potential Impacts

It may be possible to lessen or "mitigate" potential environmental impacts by adjusting the proposed route, choosing a different type of pole, using different construction methods, or implementing any number of post-construction practices. The PSC can require the transmission construction applicant to use specific techniques to mitigate impacts or require certain mitigation thresholds be met by any reasonable means. Many of these mitigation techniques have become standard utility practices. Common mitigation techniques are shown in Tables 1.

Table 1 Common Mitigation Techniques for Some Vulnerable Resources

Impact	Mitigation
Wetlands	Conduct wetland construction in the winter when the ground may be frozen and use low ground-pressure construction equipment
Soil Erosion	Use erosion control methods recommended by Wisconsin Department of Natural Resources (DNR)
River and Wetland Crossings	Place transmission poles so that the line spans rivers and wetlands. No construction of transmission poles in waterways or banks of waterways.
Mature Trees Located Along Property Boundaries	Share corridors with roads or other utilities to minimize ROW required and cross to other side of road to minimize tree trimming.
Archeological Site in ROW	Use selective pole placement to span archeological site.

Replacing or Upgrading Existing Lines

One way to mitigate impacts during project design is replacing or double-circuiting an existing line rather than building a new line. The environmental advantages of double-circuiting an existing line are:

- Little or no additional ROW clearing, if the new line can be placed in the center of the existing ROW
- Land use patterns may have already adapted to the existing ROW
- Electric and magnetic fields (EMF) may be reduced because new structure designs place line conductors closer together resulting in lower EMF

However, upgrading an existing transmission line from single-circuit to double-circuit can increase the cost by 130 percent or more, depending on the choice of structures and the size of the line. Using an existing transmission line ROW may also not be the best choice when:

- The existing ROW is in a poor location
- New residential areas have been built around the existing line
- Electricity use has grown more in other areas, so using the existing ROW reduces the efficiency of the new line and increases costs
- A wider ROW is needed because the size of the new line is much greater than the existing line

Corridor Sharing

Another common method for mitigating impacts is corridor sharing. Transmission line ROW can be shared with town or county roads, highways, railroads, or natural gas pipelines. Corridor sharing with existing facilities is usually encouraged because it minimizes impacts by:

- Reducing the amount of new ROW required
- Concentrating linear land uses and reducing the number of new corridors
- Creating an incremental, rather than a new impact

In some situations, corridor sharing can have drawbacks. For example, some utility corridors run cross-country for long distances without crossing roadways. Sharing this type of corridor would require additional access roads. If the corridor crosses environmentally sensitive areas, an expanded ROW would have additional impacts to the natural resources of the area. Corridor -sharing with town roads could have aesthetic impacts if the road has a canopy of mature trees and their removal would be required. Landowners who have agreed to an easement for one facility may feel unfairly burdened by the addition of another facility that further limits their rights and use of their property.

Underground Electric Transmission Lines

It is a common practice in residential areas to place low-voltage distribution lines underground. However, placing high-voltage transmission lines underground is less common and can cost two to ten times more than building an overhead line. While this practice may reduce aesthetic and other impacts, it may increase others.

Underground transmission lines can be a reasonable alternative:

- In urban areas where an overhead line can not be installed with appropriate clearances
- When it allows for a shorter route than overhead
- When aesthetic impacts would be significant

Underground transmission lines can have the following disadvantages:

- An increase in soil disturbance
- A complete removal of small trees and brush along the transmission ROW
- Increased construction and repair costs
- Oil-filled underground lines can leak, contaminating surrounding soils

Specific Environmental Issues Associated with Transmission Lines

The following pages describe many of the environmental and social issues vulnerable to impact by the construction and operation of a transmission line. The issues are listed in alphabetical order from A (aesthetics) to W (woodlands).

Aesthetics

The overall aesthetic effect of a transmission line is likely to be negative to most people, especially where proposed lines would cross natural landscapes. The tall steel or wide "H-frame" structures may seem out of proportion and not compatible with agricultural landscapes or wetlands. Landowners who have chosen to bury their electric distribution lines on their property may find transmission lines bordering their property particularly disruptive to scenic views.

Some people however, do not notice transmission lines or do not find them objectionable from an aesthetic perspective. To some, the lines or other utilities may be viewed as part of the infrastructure necessary to sustain our everyday lives and activities. To others, new transmission lines may be viewed in a positive light because it represents economic development.

Aesthetic impacts depend on:

- The physical relationship of the viewer and the transmission line (distance and sight line)
- The activity of the viewer (living in the area, driving through or sightseeing)
- The background, or context, of the transmission line, such as whether the line stands out or blends in

A transmission line can affect aesthetics by:

- Removing a resource, such as clearing fencerows that provide visual relief in a flat landscape
- Degrading the surrounding environment (intruding on the view of a landscape)
- Enhancing a resource (evoking an image of economic strength in a developing business or industrial area)

Mitigation of Aesthetic Impacts

Electric transmission lines can be routed to avoid areas considered scenic. Routes can be chosen that pass through commercial/industrial areas or along land use boundaries.

The form, color, or texture of a line can be modified to minimize aesthetic impacts. The color and construction material of poles can be chosen to blend with or complement the landscape around them. Lines constructed using H-frame poles or on wood rather than steel structures may blend in better with natural surroundings. Stronger conductors can minimize line sag.

ROW management can mitigate aesthetic impacts by planting vegetative screens to block views of the line, leaving the ROW in a natural state at road crossings, creating curved or wavy ROW boundaries, pruning trees to create a feathered effect, and screening and piling brush from the cleared ROW so that it provides wildlife habitat.

In the end, aesthetics are, to great extent, based on individual perceptions. Siting, design, construction, and ROW management can mitigate some of the adverse aesthetic effects of a line. It is in the interest of the applicants and the affected landowners to discuss these measures early in the planning and design process.

Agricultural Land

Transmission lines can affect farm operations and increase costs for the farm operator. Potential impacts depend on the transmission line design and the type of farming. Transmission lines can affect field operations, irrigation, aerial spraying, wind breaks, and future land development. For many transmission lines, state law requires utilities to repair much of the damage that can occur during construction and provide monetary compensation for damages that cannot be easily repaired.

Pole placement in farm fields can:

- Create problems for turning field machinery and maintaining efficient fieldwork patterns
- Create opportunities for weed encroachment
- Compact soils and damage drain tiles
- Result in safety hazards due to pole and guy wire placement
- Hinder or prevent aerial activities by planes or helicopters
- Interfere with moving irrigation equipment
- Hinder future consolidation of farm fields or subdividing land for residential development

Placement of transmission lines along field edges or between fields where windbreaks have been planted can increase erosion of soils, if the windbreaks must be removed.

Mitigation of Agricultural Impacts

The utility should work with agricultural landowners to determine optimal pole heights, pole locations, and other significant land use issues. Problems with pole placement can be addressed by using single-pole structures and placing the line along fence lines or adjacent to roads. If a field must be crossed, larger structures with longer spans can be used to span them. If the structure is not single-pole, it should be oriented with the plowing pattern. Guy wires can be kept outside crop or hay land and have highly visible shield guards.

In areas where aerial spraying and seeding are common, pole height can be minimized and markers on the shield wires above the conductors can be installed.

The potential for soil compaction and erosion by transmission construction and maintenance activities can be lessened. Work in agricultural areas can be performed during the winter months and when soils are not saturated. If compaction has occurred, affected soils can be chisel plowed over successive seasons as needed to break up compacted layers.

The effects of windbreak removal can be mitigated by trimming the windbreak vegetation selectively, replanting lower-growing trees and brushes beneath the line, or creating a new windbreak elsewhere.

USDA Conservation Reserve Program Lands

Some properties in Wisconsin are enrolled in USDA National Resource Conservation Service (NRCS) programs established to preserve wetlands, grasslands, and farmland. These federal easements may have restrictive land uses not consistent with the construction of a transmission line. In these situations, utilities can negotiate with representatives of the NRCS or avoid these properties and find alternative routes for the transmission line.

Airports and Airstrips

Transmission lines are a potential hazard to aircraft during takeoff and landing. To ensure safety, local ordinances and Federal Aviation Administration (FAA) guidelines limit the height of objects in the vicinity of the runways. Utilities can route transmission lines outside of the safety zone, use special low-profile structures, put a portion of the line underground, or place lights or other attention-getting devices on the conductors.

Archeological and Historical Sites

Archeological and historical sites are protected resources. They are important and increasingly rare tools for learning about the past. They may also have religious significance. Transmission line construction and maintenance can damage sites by digging, crushing by heavy equipment, uprooting trees, exposing sites to erosion or the elements, or by making the sites more accessible to vandals. Impacts can occur wherever soils will be disturbed, at pole locations, or where heavy equipment is used.

The Wisconsin Historical Society (WHS) has the primary responsibility for protecting archeological/historical resources. WHS manages a database that contains the records of all known sites. The database is searched

for any sites that might be located along any of the proposed transmission routes. If there is a potential for encountering a site, the PSC must notify the WSC. Archeological surveys might be required in these areas. The results of the surveys are reported to the WHS, and the PSC must ensure that the construction follows all WHS recommendations for avoiding and minimizing impacts to the sites. Route changes are seldom necessary. Judicious transmission pole placement can often be used to span sites and avoid impacts to the sites.

If during construction an archeological site is encountered, the construction at the site is stopped and the WHS and PSC must be notified. Transmission construction applicants must again follow WHS recommendations for managing or minimizing potential impacts to the site.

Electric and Magnetic Fields (EMF)

Health concerns over exposure to EMF are often raised when a new transmission line is proposed. Exposure to electric and magnetic fields caused by transmission lines has been studied since the late 1970s. These fields occur whenever electricity is used. The magnetic field is created when electric current flows through any device including the electric wiring in a home. Every day we are exposed to many common sources of EMF from vacuum cleaners, microwaves, computers, and fluorescent lights.

The research to date has uncovered only weak and inconsistent associations between exposures and human health. To date the research has not been able to establish a cause and effect relationship between exposure to magnetic fields and human disease, nor a plausible biological mechanism by which exposure to EMF could cause disease. The magnetic fields produced by electricity do not have the energy necessary to break chemical bonds and cause DNA mutations.

Reducing EMF Levels of Transmission Lines

Magnetic fields can be measured with a gauss meter. The size of the magnetic field cannot be predicted from the line voltage but is related to the current flow. A 69 kV line can have a higher magnetic field than a 115 kV line. Magnetic fields quickly dissipate with distance from the transmission line.

A common method to reduce EMF is to bring the lines closer together. This causes the fields created by each of the three conductors to interfere with each other and produce a reduced total magnetic field. Magnetic fields generated by double-circuit lines are less than those generated by single-circuit lines because the magnetic fields interact and produce a lower total magnetic field. In addition, double circuit poles are often taller resulting in less of a magnetic field at ground level.

Implantable Medical Devices

Implantable medical devices are becoming increasingly common. Two such devices, pacemakers and implantable cardioverter defibrillators (ICDs), have been associated with problems arising from interference caused by EMF. This is called electromagnetic interference or EMI.

EMI can cause inappropriate triggering of a device or inhibit the device from responding appropriately. Sources of EMI documented by medical personnel include radio-controlled model cars, slot machines, car engines, digital cellular phones, anti-theft security systems, radiation therapy, and high voltage electrical systems and devices. It has been estimated that up to 20 percent of all firings of ICDs are inappropriate, but only a very small percentage of those are caused by external EMI.

Manufacturers' recommended threshold for modulated magnetic fields is 1 gauss which is 5 to 10 times greater than the magnetic field likely to be produced by a high-voltage transmission line. Research shows a wide range of responses for the threshold at which ICDs and pacemakers responded to an external EMI source. The results for each unit depended on the make and model of the device, the patient height, build, and physical orientation with respect to the electric field.

Mitigation of EMI

Transmission lines are only one of a number of external EMI sources. All pacemaker and ICD patients are informed of potential problems associated with exposure to EMI and must adjust their behavior accordingly. Moving away from a source is a standard response to the effects of exposure to EMI. Patients can shield themselves from EMI with a car, a building, or the enclosed cab of a truck.

Endangered/Threatened and Protected Species

Endangered species are species whose continued existence is in jeopardy. Threatened species are likely to become endangered. Species of special concern have some problems related to their abundance or distribution, although more study is required.

The Bureau of Endangered Resources (BER) of the DNR manages the Natural Heritage Inventory (NHI) which lists current and historical sitings of rare plants, animals, and natural communities. The database includes the location and status of these resources.

Construction and maintenance of transmission lines may destroy individual plants and animals or may alter their habitat so that it becomes unsuitable for them. For example, trees used by rare birds for nesting may be cut down or soil erosion may degrade rivers and wetlands that provide required habitat.

Mitigation of Impacts to Protected Species

Impacts to rare and protected species can usually be avoided or minimized by redesigning or relocating the transmission line. When rare plants or animals are known to be present in the project area, the area can be surveyed in order to identify the exact location of species. The PSC has the authority to order transmission construction applicants to conduct surveys and implement mitigation measures. These measures may include the modification of the route, special construction techniques, or limiting construction time to specific seasons.

In some cases, transmission line ROWs can be managed to provide habitat for endangered/threatened resources. An example includes osprey nesting platforms built on top of transmission poles. Close cooperation between the transmission provider, ROW maintenance staff, and the BER is needed to develop an effective management plan.

Noise

Vibrations or humming noise is noticeable most often on older lines. It is usually the result of conductor mounting hardware that has loosened slightly over the years and can be easily repaired by the utility.

The other types of noise are sizzles, crackles, or hissing noises that occur during periods of high humidity and are usually associated with high-voltage transmission lines (345 kV lines). These noises are very weather dependent. They are caused by the ionization of electricity in the moist air near the wires. Though this noise is audible to those very close to the transmission lines, it quickly dissipates with distance and is easily overshadowed by typical background noises.

Property Owner Issues

ROW Easements

Property owner issues are often raised by individuals or communities along proposed transmission line routes. Two common issues are users versus payers and property owner rights versus public good.

There is often a feeling of unfairness between those that use electricity and those that bear the impacts of the facilities required to support that use. The money paid to landowners for ROW easements is meant to compensate them for having a transmission line cross their property. These easement payments are negotiated between the landowner and the utility. Some landowners do not regard the payments as sufficient to truly compensate them for the aesthetic impacts and the loss of full rights to their own land. Also, people who live near the line but not on the ROW may be affected but do not receive an easement payment.

Finally, the policy of corridor sharing favors the placement of new transmission lines within or next to existing infrastructure, causing some landowners to be burdened by multiple easements. These hardships must be balanced against the potential to reduce environmental impacts caused by the development of new transmission corridors.

Property Values

The potential change in property values due to the proximity to a new transmission line has been studied since the 1950s by appraisers, utility consultants, and academic researchers. Data from these studies is often inconclusive and has not been able to provide a basis for specific predictions in other locations for other projects.

A review of the studies indicates that transmission lines have the following effects on property values.

- The estimated reduction in sale price for single-family homes has ranged from 0 to 15 percent.
- Adverse effect on the sale price of smaller properties could be greater than effects on larger properties.
- Other factors, such as schools, jobs, lot size, house size, neighborhood characteristics, and recreational facilities tend to have a greater effect on sale price than the presence of a transmission line.
- Sale prices can increase where the transmission ROW is attractively landscaped or developed for recreation (i.e., hiking, hunting, and snowmobiling).
- Effects on price and value appear to be greatest immediately after a new transmission line is built or an existing ROW is expanded. These effects appear to diminish over time and over generations of property owners.
- Effects on sale price have most often been observed on property crossed by or adjacent to a transmission line, but effects have been observed for properties farther away from a line
- Agricultural values are likely to decrease if the transmission line poles are in a location that inhibits farm operations

Radio and Television Reception

Transmission lines do not usually interfere with normal television and radio reception. In some cases, interference is possible at a location close to the ROW due to weak broadcast signals or poor receiving equipment. If interference occurs because of the transmission line, the electric utility is required to remedy problems so that reception is restored to its original quality.

Recreation Areas

Recreation areas include parks, trails, lakes, or other areas where recreational activities occur. Transmission lines can affect these areas by:

- Repelling potential users of recreational areas who focus on the aesthetics of natural surroundings
- Limiting the location of buildings
- Posing potential safety risks by placement of poles or wires in the path of users, e.g. guy wires over snowmobile trails, or conductors over waterbodies used by sailboats
- Providing paths or better access to previously inaccessible areas for those who snowmobile, ski, bike, hike, or hunt

Some of these effects can be mitigated by locating lines along property edges, using pole designs that blend into the background and reduce aesthetic impacts, or designing recreation facilities to take advantage of cleared ROW.

Safety

Transmission lines must meet the requirements of the Wisconsin State Electric Code which adopts in general, the National Electric Safety Code. The code establishes design and operating standards, and sets minimum distances between wires, poles, the ground, and buildings. Although the code represents the minimum

standards for safety, the electric utility industry's construction standards are generally more stringent than the Wisconsin State Electric Code requirements.

When working near high-voltage transmission lines, electrical contact can occur even if direct physical contact is not made because electricity can arc across an air gap. As a general precaution, no one should be on an object that is taller than 15 to 17 feet under an overhead high-voltage electric line. Individuals with specific concerns about whether it is safe to operate vehicles or farm equipment near transmission lines should contact their electric provider directly.

Fallen Lines

Transmission lines are designed to trip out of service (turn off), if they fall or contact trees. This is not necessarily true of distribution lines. Transmission lines are not likely to fall unless hit by a tornado or truck.

Lightning

Power poles, like trees and other tall objects are more likely to intercept lightning strikes. Transmission lines are therefore usually built with a grounded shield wire at the top of the poles. This protects the transmission line from lightning. Lightning is not more likely to strike houses or cars near the transmission line. Shorter objects under or very near a line may actually receive some protection from lightning.

Induced Voltage

People or animals can receive a shock by touching a metal object located near a transmission line. The shock is similar to that received by touching a television after walking across a carpet. The magnitude and the strength of a charge are directly related to the mass of the ungrounded metal object and its orientation to the transmission line.

Induced current can be prevented or corrected by grounding metal objects near the transmission line. Grounding chains can be installed on tractors. Metal fences can be connected to a simple ground rod with an insulated lead and wire clamp. Electric fences with proper grounding should continue functioning properly even when subject to induced voltage.

Stray Voltage

Causes of Stray Voltage

For the past 20 years, stray voltage has been vigorously studied. Electrical systems are grounded to the earth to ensure safety and reliability as required by the National Electric Safety Code. Because of this, some current flows through the earth at each point where the electrical system is grounded and a small voltage develops. This voltage is called neutral-to-earth voltage (NEV). When NEV is measured between two objects that may be simultaneously contacted by an animal, it is considered stray voltage.

Low levels of AC voltage on the grounded conductors of a farm wiring system are a normal and unavoidable consequence of operating electrical farm equipment. Stray voltage often is not noticeable to humans, but may be felt by an animal. For example, a dairy cow may feel a small electric shock when it makes contact with an energized water trough.

Stray Voltage Impacts

Dairy cow behaviors that may indicate the presence of stray voltage include nervousness at milking time, increased defecation or urination during milking, hesitation in approaching waterers or feeders, or eagerness to leave the barn. A stray voltage problem may be reflected in increased milking time, in uneven milking, and sometimes with decreased milk production. Other non-electrical factors can cause similar symptoms, such as increased mastitis or milk-withholding problems for farms with milking parlors or in barns with milk pipelines.

Measurement of any voltages or current flow in livestock confinement areas can be done using established testing procedures with appropriate equipment.[1] The PSC formed the Wisconsin Rural Electric Power Services program to conduct on-farm investigations and collect data. The PSC ordered the major investor-owned Wisconsin utilities to submit stray voltage findings to the PSC. The Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) provides information to farmers about how to reduce stray voltage if high levels are found on the farm.

Mitigation of Stray Voltage

In 1996, the PSC established a stray voltage "level of concern" of 2 milliamps.[2] The level of concern is a very conservative, below the injury level, below the point where moderate avoidance behavior is likely to occur, and well below where a cow's behavior or milk production would be affected. The PSC and DATCP consider that this level of voltage/current is an amount of electricity where some form of mitigative action should be taken on the farmer's behalf.

If a utility distribution system contributes one milliamp or more to stray voltage on a farm, the utility must take corrective action. If the farm electrical system contributes more than one milliamp, the farmer may want to consider taking corrective measures. Mitigation of any such currents can be achieved through a variety of proven and acceptable means, such as additional grounding or the installation of an equipotential plane, or isolation if necessary.

Waterways

Waterways in the form of creeks, streams, rivers, and lakes are abundant throughout Wisconsin. Many of these rivers have been designated as special resources that have state, regional, or national significance. Construction and operation of a transmission line across these resources may have both short-term and long-term effects.

The DNR is responsible for permitting stream crossings. For navigable streams or specific protected areas the Army Corps of Engineers and/or the US Fish and Wildlife Service might require additional permits and approvals.

Water quality of waterways can be impacted by soil erosion resulting from driving vehicles through streams, by building temporary bridges, or by clearing of brush from the ROW. Clearing overhanging trees and brush near the waterway can result in increased water temperatures, reducing habitat quality for fish and other aquatic species. Overhead transmission lines across major rivers and streams may have a visual impact for river users and pose a potential collision hazard for waterfowl and other large birds, especially when located in a migratory corridor.

Mitigation of Impacts to Waterways

Transmission line impacts in river environments can be minimized by:

- Designing the line to span the river, avoiding the water.
- Directionally boring the line under the river to eliminate the presence of wires over the river or stream.
- Avoiding the placement of poles in or immediately adjacent to river banks to reduce the potential for soil erosion into the stream.
- Using DNR-approved erosion control methods.
- Placing markers on the top (shield) wire to make the wires more visible to birds if the collision potential is high.
- Using bushes to visually screen the line crossing.
- Maintaining shaded stream areas, where possible.
- Prohibiting construction and maintenance vehicles from driving in waterways.

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[1] PSC White Paper Report: Measurement Protocols – Facts and Misconceptions. This white paper is available on the PSC web site.

[2] PSC docket 05-EI-115, established the "level of concern".

Wetlands

Wetlands occur in many different forms and serve vital functions including storing runoff, regenerating groundwater, filtering sediments and pollutants, and providing habitat for aquatic species and wildlife. The construction and maintenance of transmission lines can damage wetlands in the following ways:

- Heavy machinery can crush wetland vegetation and wetland soils.
- Wetland soils, especially very peaty soils can be easily compacted, increasing runoff, blocking flows, and greatly reducing the wetland's water holding capacity.
- The construction of access roads can change the quantity or direction of water flow, causing permanent damage to wetland soils and vegetation.
- Construction and maintenance equipment that crosses wetlands can stir up sediments, endangering fish and other aquatic life.
- Transmission lines can be collision obstacles for sandhill cranes, waterfowl and other large water birds.
- Clearing forested wetlands can expose the wetland to invasive and shrubby plants, thus removing habitat for species in the forest interior.
- Vehicles and construction equipment can introduce exotic plant species such as purple loosestrife. With few natural controls, these species may out-compete high-quality native vegetation, destroying valuable wildlife habitat.

Any of these activities can impair or limit wetland functions. Organic soils consist of layers of decomposed plant material that formed very slowly. Disturbed wetland soils are not easily repaired. Severe soil disturbances may permanently alter wetland hydrology. A secondary affect of disturbance is the opportunistic spread of invasive weedy species such as purple loosestrife. These invasive species provide little food and habitat for wildlife.

Mitigation of Impacts to Wetlands

Techniques that minimize the potential impacts to wetlands include:

- Avoid placing transmission lines through wetlands.
- Span wetlands wherever possible.
- Limit construction to winter months when soil and water are more likely to be frozen and vegetation is dormant.
- Because many wetlands never freeze, use mats and wide-track vehicles when crossing wetlands.
- Carefully clean construction equipment after working in areas infested by purple loosestrife or other known invasive, exotic species.
- Place markers on the top (shield) wire to make the lines more visible to birds if the collision potential is high.

Woodlands

Wisconsin forests provide recreational opportunities, wildlife and plant habitats, and timber. Building a transmission line through woodlands requires that trees and brush be cleared from the ROW. One mile of 100-foot ROW through a forest results in the loss of approximately 12 acres of trees.

This loss of forested habitat increases the number of common (edge) plants and animals that can encroach into what were the forest interiors. Examples of these species include raccoons, cowbirds, crows, deer, and box elder trees. This encroachment can have impacts on the number, health, and survival of interior forest species, many of which are rare. Interior forest species include songbirds, wolves, and hemlock trees.

Opening the forest floor up to sunlight makes it susceptible to the introduction of exotic plant species which may be inadvertently brought in by construction activities. The disturbance caused by construction can encourage these aggressive, invasive species to proliferate. Examples of problematic exotic species are buckthorn, honeysuckle, and garlic mustard. Exotic species, once introduced, have few local natural controls

on their reproduction and easily spread. Their spread can alter the ecology of a forest as they out-compete native species for sunlight and nutrients, further reducing suitable habitat and food sources for local wildlife.

A transmission line ROW can fragment a larger forest block into smaller tracts. Fragmentation makes interior forest species more vulnerable to predators, parasites, competition from edge species, and catastrophic events. The continued fragmentation of a forest can cause a permanent reduction in species diversity and suitable habitat.

A specific risk to forests is the potential for oak wilt disease. Disturbance in the ROW during transmission line construction or maintenance can contribute to its spread. Red oak, black oak, and Northern pin oak trees are especially susceptible and will often die within one year. The cause of the disease is a fungus which is carried by sap-feeding beetles or spread through common root systems. In the upper Midwest, pruning or removal of oaks should be avoided during late spring and early summer, when the fungus most commonly reproduces.

A cleared ROW increases access into a forest which may lead to trespassing and vandalism. It can also provide recreation opportunities such as access for hunting, hiking, and snowmobiling.

Mitigation of Impacts to Woodlands

Impacts to woodlands can be minimized by:

- Avoiding routes that fragment major forest blocks
- Adjusting pole placement and span length to minimize the need for tree removal and trimming along forest edges
- Allowing tree and shrub species that reach heights of 12 to 15 feet to grow within the ROW
- Following the DNR guidelines for preventing the spread of exotic invasive plant species and diseases such as oak wilt

Community Planning

In prior decades, electric transmission lines were constructed from point A to point B in the most direct manner possible without too much regard for communities, crops, natural resources, or private property issues. As these older lines require improvements, they may now be rerouted to share corridors with roads, and to avoid, where possible, community and natural resource impacts. At the same time, a continued growth in energy usage will require new electric substations and transmission lines to be sited and constructed. New and upgraded electric facilities will impact many communities and many property owners.

To meet future growth, communities often draft plans for sewers, roads, and development districts, but few cities, towns, or counties include transmission lines in their plans. Transmission lines are costly to build and difficult to site. Cities, towns, and counties can help reduce land use conflicts by:

- dedicating a strip of land along existing transmission corridors for potential future ROW expansions
- identifying future potential transmission corridors and substation sites in new developments
- defining set-backs or lot sizes for properties adjacent to transmission lines so that buildings don't constrain future use of the ROW

Being an active participant in the decision-making process will improve the ability of communities to manage future growth and protect their resources.

The Role of the Public Service Commission

The PSC of Wisconsin regulates Wisconsin's utilities. A three-member board (the Commission) is appointed by the governor to make decisions for the agency provided with analysis by a technical staff with a wide range of specialties.

The PSC staff analyzes transmission line applications: (1) to see if they are needed and, (2) to determine the potential impacts. The size and complexity of the proposed project determines the PSC review process. The PSC considers alternative sources of supply and alternative locations or routes, as well as the need,

engineering, economics, safety, reliability, potential for individual hardships, and environmental factors when reviewing a transmission project.

An applicant must receive a Certificate of Pubic Convenience and Necessity (CPCN) from the Commission for transmission line projects that are either:

- 345 kV or greater; or,
- less than 345 kV but greater than or equal to 100 kV, over one mile in length, and needing some new ROW.

The CPCN review process includes a public hearing in the affected project area.

All other transmission line projects must receive a Certificate of Authority (CA) from the Commission, if the project's cost is above a certain percent of the utility's annual revenue. The CA review process does not automatically include a public hearing. However, for those case that do hold hearings, members of the public are encouraged to testify to their views and concerns about the project.

The Commission is responsible for making the final decisions about proposed transmission lines. The Commission decides whether the line will be built, how it is designed, and where it will be located. The Commission reviews all hearing testimony from PSC staff, the applicant, DNR staff, full parties, and members of the public. The three Commissioners meet regularly in "open meetings" to decide cases before them. The public can observe any open meeting. At these open meetings, transmission line projects are approved, denied, or modified. The Commission has the authority to order additional environmental protections or mitigation measures.

The Strategic Energy Assessment

The Strategic Energy Assessment (SEA) is issued biennially by the PSC. It identifies new power plants and transmission projects that are planned to begin construction during the following seven years. The SEA report is issued in July of even-numbered years. Copies of the SEA can be obtained by contacting the PSC. Some of the energy issues addressed in the SEA include:

- Adequacy and reliability of the state's current and future electric energy supply
- Identification of new utility generation and transmission
- Adequacy and reliability of purchased generation capacity and energy
- Adequacy of transmission transfer capability
- Projected demand for electric energy
- Identification of activities to discourage inefficient and excessive power use
- Identification of existing and planned facilities that produce energy using renewable resources
- Potential for economic development, public health and safety, environmental protection, and diversification of supply
- Adequacy of the regional bulk-power market
- Contribution of competition to low-cost electricity

PSC Overview Series

The PSC has prepared other pamphlets for important electric issues that can be viewed on the PSC website: http://psc.wi.gov.

- Common Power Plant Siting Criteria
- Electric Energy Efficiency
- Electric Power Plants
- Electric Transmission Lines
- EMF - Electric & Magnetic Fields
- Nuclear Power Plant Decommissioning and Radioactive Waste Disposal
- Power Plants Approval Process
- Public Hearing Guide, Electric Construction Projects
- Renewable Energy Resources
- Right-of-Way and Easement in Electric Facility Construction
- Transmission Line Approval Process
- Underground Electric Transmission Lines

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6010B July 2004

EXHIBIT 5

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Subpart B—The section 106 Process

§ 800.3 Initiation of the section 106 process.

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process

with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with §800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under §800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in §800.2(d).

§800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in §800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to §800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to §800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation,

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research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to §800.6, a programmatic agreement executed pursuant to §800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to §800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance.* (1) *Apply National Register criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree; or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation.* (1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in §800.16(i), the agency official shall provide documentation of this finding, as set forth in §800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available

for public inspection prior to approving the undertaking. If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking or the SHPO/THPO or the Council objects to the agency official's finding under paragraph (d)(1) of this section, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with finding.* Unless the Council is reviewing the finding pursuant to § 800.5(c)(3), the agency official may proceed if the SHPO/THPO agrees with the finding. The agency official shall carry out the undertaking in accordance with § 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) *Disagreement with finding.* (i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraph (c)(3) of this section.

(ii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the finding and request the Council to review the finding pursuant to paragraph (c)(3) of this section.

(iii) If the Council on its own initiative or requests within the 30-day review period, the agency official shall submit the finding, along with the documentation specified in § 800.11(e), for review pursuant to paragraph (c)(3) of this section. A Council decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) *Council review of findings.* When a finding is submitted to the Council pursuant to paragraph (c)(2) of this section, the agency official shall include the documentation specified in § 800.11(e). The Council shall review the finding and notify the agency official of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the agency official. The Council shall specify the basis for its determination. The agency official shall proceed in accordance with the Council's determination. If the Council does not respond within 15 days of receipt of the finding, the agency official may assume concurrence with the agency official's findings and proceed accordingly.

(d) *Results of assessment.* (1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under §800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of §800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with §800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects.* (1) *Resolution without the Council.*

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under §800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in §800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in §800.11(g). If the Council decides to join the consultation, the

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agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with §800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under §800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to §800.7(a)(2).

(2) *Invited signatories.* (i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under §800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council.* (1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination With the National Environmental Policy Act.

(a) *General principles.* (1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies

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(2) *Consulting party roles.* SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106, pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.* (i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or

Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall notify the agency official either that it agrees with the objection, in which case the agency official shall enter into consultation in accordance with §800.6(b)(2) or seek Council comments in accordance with §800.7(a), or that it disagrees with the objection, in which case the agency official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with §800.6(c); or

(ii) The Council has commented under §800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§800.3 through 800.6 will be followed as necessary.

§800.9 Council review of section 106 compliance.

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants.* (1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan

guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) *Information from participants.* Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

§800.10 Special requirements for protecting National Historic Landmarks.

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic

Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 Documentation standards.

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality.* (1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency

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(d) *Finding of no historic properties affected.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of agreement.* When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement. Documentation shall include:*

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

§ 800.12 Emergency situations.

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not

permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries.* (1) *Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

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(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C—Program Alternatives

§ 800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the FEDERAL REGISTER and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the FEDERAL REGISTER.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.*

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and

members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories.* (1) *Criteria for establishing.* An agency official may propose a program or category of agency undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

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(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The agency official shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review a request for an exemption that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The agency official shall publish notice of any approved exemption in the FEDERAL REGISTER.

(d) *Standard treatments.* (1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the FEDERAL REGISTER.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the FEDERAL REGISTER 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the FEDERAL REGISTER of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian

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§800.15 Tribal, State, and local program alternatives. [Reserved]

§800.16 Definitions.

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means 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. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day* or *days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary

of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with §800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

APPENDIX A TO PART 800—CRITERIA FOR COUNCIL INVOLVEMENT IN REVIEWING INDIVIDUAL SECTION 106 CASES

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to §800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns

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raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

PART 801—HISTORIC PRESERVATION REQUIREMENTS OF THE URBAN DEVELOPMENT ACTION GRANT PROGRAM

Sec.

AUTHORITY: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470); Pub. L. 94-422, 90 Stat. 1320 (16 U.S.C. 470(i)); Pub. L. 96-399, 94 Stat. 1619 (42 U.S.C. 5320).

SOURCE: 46 FR 42428, Aug. 20, 1981, unless otherwise noted.

§801.1 Purpose and authorities.

(a) These regulations are required by section 110(c) of the Housing and Community Development Act of 1980 (HCDA) (42 U.S.C. 5320) and apply only to projects proposed to be funded by the Department of Housing and Urban Development (HUD) under the Urban Development Action Grant (UDAG) Program authorized by title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301). These regulations establish an expedited process for obtaining the comments of the Council specifically for the UDAG program and, except as specifically provided, substitute for the Council's regulations for the "Protection of Historic and Cultural Properties" (36 CFR part 800).

(b) Section 110(c) of the HCDA of 1980 requires UDAG applicants to: (1) Identify all properties, if any, which are included in the National Register of Historic Places and which will be affected by the project for which the application is made; (2) identify all other properties, if any, which will be affected by such project and which, as determined by the applicant, may meet the Criteria established by the Secretary of the Interior for inclusion in the National Register (36 CFR 60.6); and (3) provide a description of the effect, as determined by the applicant, of the project on properties identified pursuant to (1) and (2). If the applicant determines that such properties are affected, the Act requires that the information developed by the applicant must be forwarded to the appropriate State Historic Preservation Officer (SHPO) for review and to the Secretary of the Interior for a determination as to whether the affected properties are eligible for inclusion in the National Register.

(c) Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), requires the head of any Federal agency with jurisdiction over a Federal, federally assisted or federally licensed undertaking that affects a property included in or eligible for inclusion in the National Register of Historic Places to take into account the effect of the undertaking on such property and afford the Council a reasonable opportunity to comment. Under the UDAG program, applicants assume the status of a Federal agency for purposes of complying with section 106.

§801.2 Definitions.

The terms defined in 36 CFR 800.2 shall be used in conjunction with this regulation. Furthermore, as used in these regulations:

(a) *Urban Development Action Grant (UDAG) Program* means the program of the Department of Housing and Urban Development (HUD) authorized by title I of the Housing and Community Development Act (HCDA) of 1977 (42 U.S.C. 5318) to assist revitalization efforts in distressed cities and urban counties