

**Responses to Questions for the Record**

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**House Energy and Commerce Committee**  
**Subcommittee on Communications and Technology**  
**“Breaking Barriers: Streamlining Permitting to Expedite Broadband Deployment”**  
**April 19, 2023**

## **Q1 from the Honorable Russ Fulcher**

**When deploying on previously disturbed federal lands, do providers still need to submit environmental and historical preservation reviews?**

### **Answer from Michael Romano**

The deployment and upgrade of broadband networks can be severely delayed due to federal environmental reviews required pursuant to the National Environmental Policy Act (“NEPA”). This can even be the case when the installation of wireline or wireless communications facilities takes place entirely on previously disturbed federal lands. The same is true for the historic preservation/Tribal consultation processes required by the National Historic Preservation Act (“NHPA”) for these same actions. Importantly, this can also be true when a project does not touch federal lands: a federal grant given to a provider by the Rural Utilities Service, for example, is subject to NEPA as a “major federal action” and to NHPA due to being a “federal undertaking.”

That said, federal agencies can adopt what are called “categorical exclusions” (or “CEs”) from NEPA. Pursuant to 40 CFR § 1501.4, federal agencies can adopt a CE for certain “categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.”<sup>1</sup> A CE for a project that involves installation of broadband facilities entirely in a previously disturbed right-of-way (“ROW”), for example, is one possible example. Applications of CEs, however, are not as simple as they may appear at first for several reasons.

First, pursuant to the regulation mentioned above, CEs are only applicable to NEPA. Thus, a provider can utilize the CE to streamline the NEPA process but still be required to comply with NHPA processes even for previously disturbed lands. NTCA members have indicated that NHPA processes are often more time-consuming and expensive to complete than the NEPA reviews, meaning that NHPA review requirements can effectively moot any timing benefits that might otherwise be realized through a CE from NEPA review.

Second, CEs are a *streamlined* review process, and thus should not be seen as freeing providers from reviews altogether. Indeed, an agency will initially still need to review a project to determine if it fits within the CE.

Third, NEPA regulations explicitly state that if “an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.”<sup>2</sup> This means that a deployment project planned by a provider and conceived of in a way to utilize a CE may nonetheless be subjected to an environmental

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<sup>1</sup> 40 CFR § 1501.4(a).

<sup>2</sup> *Id.*, §1501.4(b).

assessment or environmental impact statement if agency staff determine that extraordinary circumstances<sup>3</sup> mean the project will indeed have an impact on the environment.

### **Q2 from the Honorable Russ Fulcher**

**I appreciate that you support my bill, the Reducing Barriers to Broadband on Federal Lands Act. You noted my concerns over the amount of landlocked federal land that can be an obstacle to getting broadband to people. As you note, correct, we are also trying to put “puzzle pieces” together where we are crossing federal land with a “private right-of-way,” then some infrastructure and so on.**

**Can you expand upon your testimony and background that tells us the “footprint” won’t generally be as heavy, given these projects are often upgrades of existing networks? Is it simply a matter of tracking previous wire that’s been laid, or something along these lines?**

### **Answer from Michael Romano**

It is correct that placing facilities in previously disturbed earth and ROWs should have little to no impact on the environment or lands subject to NHPA, particularly when there is no increase in the size of, or expansion of, the facility within the ROW. Nonetheless, NTCA members have reported being required, for example, to undertake NEPA and NHPA reviews to install fiber alongside a recently upgraded and expanded federal highway. It would seem that a broadband provider trenching fiber adjacent to a recent highway project should be unlikely to damage anything of significance that NEPA and/or NHPA would be designed to protect. Of course, certain remediation steps are necessary (replanting grass, for example), but given their proximity to major highway construction efforts, these certainly would not seem to rise to the level of the types of longer-term impacts to the environment or historically or Tribally significant areas.

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<sup>3</sup> As one example, NTIA recently proposed to adopt several CEs for the broadband provisions of the 2021 Infrastructure Investment and Jobs Act. The CEs would not apply if a proposed project fell within several broadly defined “extraordinary circumstances.” Those can see be seen on page 19094 of this document: <https://www.federalregister.gov/documents/2023/03/30/2023-06575/national-environmental-policy-act-procedures-and-categorical-exclusions>.

### **Q3 from the Honorable Russ Fulcher**

**In response to RAY BAUM’s Act, a bipartisan law that this Committee passed unanimously in 2018 (Division P of the Consolidated Appropriations Act of 2018) the National Telecommunications and Information Administration has published a report that provides recommendations on how Federal agencies can improve or streamline their processes for reviewing broadband installation applications.**

**In May 2022, the Biden administration submitted the final version of this report, which in part identified that since the Biden administration, Federal agencies are now taking steps to quote, “prioritiz[e] or streamlin[e] construction permits in previously disturbed rights-of-way. . . . It goes on to state that Federal property-managing agencies apply “categorical exclusions” to streamline and expedite environmental reviews in areas that the agency has determined do not have a significant impact on the environment.**

**Do you agree with the Biden administration and with the Republicans on this Committee that we should streamline the environmental review processes in these previously disturbed areas, and if so, why?**

### **Answer from Michael Romano**

In my testimony, I provided several examples of the kinds of delays that NTCA members have faced with respect to NEPA and/or NHPA reviews. Many of these delays – some of which can persist for a year or longer – were associated with projects within previously disturbed areas. As I observed at the hearing, it appears that Federal agencies and other permitting offices are overcome by the requests and applications before them now, leading to the kinds of delays I referenced.

Without proactive planning and concrete action, issues of this kind could become more severe and the problems exacerbated in coming years. Particularly as private investment ramps to meet ever-increasing broadband demand, and as the largest broadband deployment funding program in our nation’s history launches to amplify and augment these industry efforts, we are at a critical juncture in terms of our ability to meet the needs of unserved and underserved communities by processing permits in a timely and efficient manner. If we cannot avoid delays of a year or more for projects in previously disturbed areas, we are unlikely to see the fruits of upcoming funding programs in the timeframes that Congress likely intended.

#### **Q4 from the Honorable Russ Fulcher**

**With respect to the National Historic Preservation Act review exemption, can you provide any insights on the care used and maintained when locating broadband infrastructure near historic sites?**

#### **Answer from Michael Romano**

After further inquiry with NTCA members and engineering and consulting firms that work with them on broadband deployment projects, I provide below a few examples of the level of care with which NTCA members approach construction efforts in Tribally significant areas that are subject to NHPA protections.

- In South Dakota, a prehistoric site was identified in the ROW prior to construction. The site included archeological work that could have been affected by the deployment. Rather than using a static plow that could have disturbed these archeological materials, the provider instead agreed to bore under the location for approximately 150 feet. A meeting was set up with the state department of transportation, an archeologist engaged by the provider, and the local Tribal preservation officer to determine site boundaries and boring locations, both of which were flagged in the field. An archeologist and Tribal member were both present during the construction process to ensure that no artifacts were found in the bore holes.
- In Minnesota, a federally funded project went through robust environmental and historical preservation review. No archeological sites were identified in the state record, but when the Tribal review period was conducted, a local Tribe raised concerns about the auditory levels of construction because of proximity to local spiritual sites. The Tribe and the provider worked together to identify appropriate and agreeable times for construction so that the ceremonies at the sites would not be disturbed while the deployment schedule would stay on track.