



# NEPA & Section 106

USDA RUS ReConnect Program

# Agenda

- Introduction
- Post Obligation Completion of Environmental and Historic Preservation Review
  - Presented by Barbara Britton, Director, Engineering and Environmental Staff, EES
- Agency and Applicant Responsibilities for Fulfilling Requirements of 7 CFR 1970 – Rural Development’s Environmental Policies and Procedures
  - Presented by Barbara Britton, Director, Engineering and Environmental Staff-EES
- Highlights National Environmental Policy Act Requirements—7 CFR 1970
  - Presented by Christine Allen, Sr. Environmental Protection Specialist, EES
- Highlights: National Historic Preservation Act and 36 CFR Part 800 Requirements
  - Presented by Erika Martin Seibert, Federal Preservation Officer, EES
- Q&A

# Introduction

- This is not comprehensive 1970 or NEPA/ Section 106 training
- Highlights roles, responsibilities and requirements
- Summarizes:
  - Information needs
  - Common data gaps
- 15-minute question and answer session at the end

# Post-Obligation Completion of Environmental and Historic Preservation Review



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

- Environmental reviews must be completed prior to obligation of funds
- Exception: New provision allows the administrator to obligate funds before to conclusion of the environmental review process, prior to any action that would have an adverse effect on the environment or limit the choices of any reasonable alternatives.
- Exception approved for all Round 2 Awards

# The Agency Must Rescind Obligated Funds If:

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

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

- The Agency and applicant will ensure the completion of the environmental review process **prior to the irreversible and irretrievable commitment of Agency resources** in accordance with § 1970.11
- The environmental review process is concluded when the Agency approves:
  - Categorical Exclusion Review (Exhibit D)
  - Finding of No Significant Impact (FONSI)
  - Conclusion of Section 106 and Record of Decision (ROD)

# Agency and Applicant Responsibilities for Fulfilling Requirements of 7 CFR 1970

Rural Development's Environmental  
Policies and Procedures



## § 1970.5 (a) Agency Responsibilities

- The Agency will advise applicants and applicable lenders of their responsibilities to consider environmental issues during early project planning and that specific actions listed in § 1970.12, such as *initiation of construction, cannot occur prior to completion of the environmental review process or it could result in a denial of financial assistance*
- Mitigation measures described in the environmental review and decision documents *must be included as conditions in Agency financial commitment documents, such as a conditional commitment letter*

## § 1970.5 (a) Agency Responsibilities Cont.

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

## Applicant Responsibilities 1970.5(b)

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

## Applicant Responsibilities 1970.5(b) Cont.

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

## Applicant Responsibilities 1970.5(b) Cont. 2

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

## Applicant Responsibilities 1970.5(b) Cont. 3

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

## Applicant Responsibilities 1970.5(b) Cont. 4

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

## Applicant Responsibilities 1970.5(b) Cont. 5

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

# Highlights: National Environmental Policy Act Requirements

7 CFR 1970



# Complete, Approval Packages are Essential for Expeditious Reviews

- Complete Project Descriptions
- Maps
- Supporting Documentation, e.g.:
  - U.S. Fish and Wildlife Service ESA IPaC Review
  - SHPO/THPO Initiation and Concurrence Letters
  - NWI Maps
  - FEMA Floodplain Map
- Specialized Studies, e.g.:
  - Archeology Studies
  - Habitat Surveys
  - Biological Assessments
  - Wetland Delineations
  - Flood surveys

# Project Descriptions Are the Point of Departure for Any Review

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

# Broadband Project Description

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

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

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

# Maps

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

# Exclusions from NEPA

- Most ReConnect projects are categorically excluded from NEPA
- They are subject to 46 laws, authorities and executive orders

# Special Purpose Laws

- Statutes
  - Endangered Species Act
  - National Historic Preservation Act
  - Farmland Protection Policy Act
  - Clean Water Act
  - Clean Air Act
  - Wild and Scenic Rivers Act
  - Safe Drinking Water Act
  - Resource Conservation and Recovery Act
- Executive Orders
  - Floodplain Management
  - Wetland Protection
  - Environmental Justice

## Determining Whether CEs Apply [§ 1970.51(b)]

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

## Determining Whether CEs Apply [§ 1970.51(c)]

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

## § 1970.52 (a) Extraordinary Circumstances

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

# Eligibility for a CE

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

## § 1970.10 Raising the Level of Environmental Review

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

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



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

1. Establish the undertaking and initiation Section 106 process
2. Identify historic properties
3. Assess effects
4. Resolve adverse effects

# Section 106 Highlights

- Start Section 106 as early as possible
- Applications may be required to provide for additional archeological studies
- Section 106 must be concluded prior to executing construction contracts and starting construction contracts

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

- Better maps include:
  - KMZ files;
  - Location to determine impacts to historic properties; and
  - Information about Federal and Tribal lands
- Detailed description of activities involving ground disturbance needed for:
  - Below and above ground (visual) impacts
- Archaeological Literature Review:
  - Should be done by an SOI Qualified archaeologist/ CRM firm
    - Helps define APE

# Starting Construction Before Conclusion of Section 106 Review

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

# When to Contact the RUS Federal Preservation Officer

- Awardees must contact the RUS Federal Preservation Officer when:
  - Tribes Request Government to Government Consultation
  - When tribes do not respond within 30 days – the ACHP Covid-19 Tolling Policy applies
  - Disagreements arise with the SHPO and tribes over findings or survey requests
  - SHPO and tribes request additional information
  - Negotiation is necessary with parties on the Section 106 process
  - Agreement documents are necessary, including:
    - Programmatic Agreement
    - Memorandum of Agreement

# Online Resources

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

Q&A



Rural Development

U.S. DEPARTMENT OF AGRICULTURE