

---

# Telecommunications & Electronic Media

---

## MODERNIZING THE TRIBAL CONSULTATION PROCESS FOR WIRELESS INFRASTRUCTURE SITING

By Jonathan S. Adelstein & J. Wade Lindsay

### Note from the Editor:

This article discusses barriers to establishing wireless infrastructure, particularly with respect to tribal consultation, and proposes reforms to the current processes.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at [info@fedsoc.org](mailto:info@fedsoc.org).

- Comments of The National Association of Tribal Historic Preservation Officers, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC (June 15, 2017), <https://ecfsapi.fcc.gov/file/10615136916587/NATHPO%20June%2015%202017.pdf>.
- Gabriel S. Galandra, *Advancing the State-Tribal Consultation Mandate*, INDIAN COUNTRY TODAY (Oct. 17, 2012), <https://indiancountrymedianetwork.com/news/opinions/advancing-the-state-tribal-consultation-mandate/>.
- *Tribal Consultation: Selected Resources*, CDC, <https://www.cdc.gov/phlp/docs/tribalconsultation-resources.pdf>.

---

### About the Authors:

Jonathan S. Adelstein is the President & Chief Executive Officer of WIA—The Wireless Infrastructure Association. He served as Commissioner of the FCC from 2002 to 2009. In 2009, Mr. Adelstein was appointed to serve as the Administrator of U.S. Department of Agriculture's Rural Utilities Service. Wade Lindsay has been a partner with Wilkinson Barker Knauer, LLP since 1998, and has over 20 years of experience in telecommunications, energy, natural resources, and administrative law.

Expeditious and efficient wireless infrastructure deployment is essential to support the wireless broadband services that are essential to the United States' economy and future. These services support people in their work and education, support critical government services, and enable individuals to stay connected with family and friends. More than 4.6 million Americans have jobs that depend directly or indirectly on the wireless industry.<sup>1</sup> The mobile industry overall generates more than \$400 billion in total U.S. spending<sup>2</sup> and is expected to make a value-added contribution of \$1 trillion to the North American economy by 2020, representing 4.5 percent of GDP by the end of the decade.<sup>3</sup> These trends can be expected to accelerate in the years to come with the anticipated deployment of the Internet of Things (IoT), smart communities, and next-generation 5G wireless networks. 5G technologies are expected to produce new innovation and investment across the mobile ecosystem, with unparalleled data speeds, a massive increase in IoT devices, and entirely new services and applications.<sup>4</sup> Supporting this wireless revolution is a projected \$275 billion in industry investment, which stands to inject \$500 billion into the U.S. economy and create three million jobs.<sup>5</sup> Deployment of such 5G services, however, will require wireless service providers and infrastructure developers to build much more dense wireless networks, with hundreds of thousands of new small cells, and to expand backhaul and transport facilities to provide the needed capacity and coverage.

A clear, predictable, and efficient infrastructure siting process would ensure that wireless service providers and infrastructure developers are able to deploy the dense wireless networks 5G technologies require in a timely, cost-effective manner. But instead they face significant regulatory hurdles and challenges

- 
- 1 Roger Entner, *The Wireless Industry: Revisiting Spectrum, the Essential Engine of US Economic Growth*, RECON ANALYTICS, at 18 (Apr. 2016), <http://www.ctia.org/docs/default-source/default-document-library/entner-revisiting-spectrum-final.pdf>.
  - 2 Coleman Bazelon & Giulia McHenry, *Mobile Broadband Spectrum: A Vital Resource for the American Economy*, THE BRATTLE GROUP, at 19 (May 11, 2015), [https://www.ctia.org/docs/default-source/default-document-library/brattle\\_spectrum\\_051115.pdf](https://www.ctia.org/docs/default-source/default-document-library/brattle_spectrum_051115.pdf).
  - 3 Press Release, GSMA, *Mobile Industry to Add \$1 Trillion in Value to North American Economy by 2020, Finds New GSMA Study* (Nov. 1, 2016); *The White House Hosts American Leadership in Emerging Technology Event*, Whitehouse.gov (June 29, 2017), <https://www.whitehouse.gov/blog/2017/06/29/white-house-hosts-american-leadership-emerging-technology-event> ("By encouraging the advancement of emerging technologies, and by ensuring that our scientists and tech entrepreneurs can build their greatest innovations here at home, we can continue to drive American prosperity for decades to come.")
  - 4 Thomas K. Sawanobori, CTIA, *The Next Generation of Wireless: 5G Leadership in the U.S.*, CTIA (Feb. 9, 2016), [https://www.ctia.org/docs/default-source/default-document-library/5g\\_white-paper\\_web2.pdf](https://www.ctia.org/docs/default-source/default-document-library/5g_white-paper_web2.pdf).
  - 5 Accenture Strategy, *How 5G Can Help Municipalities Become Vibrant Smart Cities*, at 3 (Jan. 12, 2017), <https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>.

in deploying infrastructure, not only from local governments, but also in connection with the Federal Communications Commission's (FCC or Commission) environmental and historic preservation review processes mandated by the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act (NHPA).<sup>6</sup> The costs and delays inherent in these review processes are detrimental to broadband deployment, even as experience over the past few decades confirms that wireless facilities raise few environmental or historic preservation concerns.<sup>7</sup> This is especially the case with respect to small wireless facilities such as those needed for 5G deployment, which are typically designed to be attached to existing structures, leaving no new environmental footprint in surrounding property and creating minimal visual impact.

One of the primary sources of the cost and delay associated with the FCC's review under Section 106 of the NHPA is the process for the FCC's consultation with Indian Tribes and Native Hawaiian Organizations (Tribes). There is a broad recognition in public comments filed with the FCC that the Commission's Section 106 tribal consultation process is inefficient and requires updating. The current process enables Tribes to become de facto gatekeepers that determine when and if projects move forward. As a result, a growing number of Tribes have the power and incentive to press for exorbitant fees beyond those charged for contributing their expertise, and to expand their participation in the consultation process in order to extract additional revenue. The results are inefficiency, delay, and additional costs, none of which significantly benefits the preservation of historic sites of religious or cultural significance to Tribes.

With the leadership of FCC Chairman Ajit Pai, Commissioner Brendan Carr has been spearheading an initiative to review and overhaul the Commission's communications infrastructure policies in three companion matters—the *Wireless Infrastructure NPRM/NOI*,<sup>8</sup> *Wireline Broadband Deployment NPRM/NOI*,<sup>9</sup> and the *Small Cell Infrastructure PN*.<sup>10</sup> The reforms contemplated include eliminating up-front fees, clarifying the approach to tribal consultations, and adopting a clear time period for providers to deploy in cases where Tribes do not

respond.<sup>11</sup> On March 22, the Commission will vote on an order to, among other things, modernize the Section 106 tribal review process for wireless infrastructure deployments. The Commission should approve this order and establish enforceable standards and procedures that improve efficiency, accountability, and predictability for all stakeholders.

## I. TRIBAL CONSULTATION UNDER SECTION 106 OF THE NHPA

### A. Identifying Wireless Facilities That May Affect Sites of Religious or Cultural Significance

Section 106 requires federal agencies to “take into account the effect of the undertaking on any historic property.”<sup>12</sup> In carrying out this responsibility, federal agencies are required to consult with Tribes to identify any such “federal undertaking” that may affect sites of religious and cultural significance to a Tribe and to assess that effect, if any.<sup>13</sup> This tribal consultation requirement applies regardless of whether the historic property in question is located on or off tribal lands.<sup>14</sup> Section 106 of the NHPA acknowledges a Tribe or Tribes' right to consult on projects located off tribal lands because those non-tribal lands may be the ancestral homelands or historical paths of a Tribe or Tribes, and thus may contain historic properties of religious and cultural significance to them.<sup>15</sup>

The FCC fulfills its Section 106 obligations with respect to wireless infrastructure by directing licensees and applicants to follow the consultation procedures developed by the Advisory Council on Historic Preservation (ACHP)<sup>16</sup> as modified by two Nationwide Programmatic Agreements between the FCC and the ACHP that took effect in 2001 and 2005.<sup>17</sup> The NPA sets out a detailed Section 106 consultation process for wireless infrastructure projects. This process covers, among other things, consultation with Tribes regarding proposed wireless projects to be

6 54 U.S.C. § 306108. This is despite the fact that the FCC has a statutory mandate to ensure the timely deployment of communications networks.

7 Kristina Alexander, U.S. Congressional Research Service, *A Section 106 Review Under the National Historic Preservation Act (NHPA): How it Works*, at 3, R42538 (May 16, 2012), [https://digital.library.unt.edu/ark:/67531/metadc808663/m2/1/high\\_res\\_d/R42538\\_2012May16.pdf](https://digital.library.unt.edu/ark:/67531/metadc808663/m2/1/high_res_d/R42538_2012May16.pdf). Notably, more than 99 percent of all tribal consultations under Section 106 of the NHPA resulted in a finding of no historic property or no adverse effect to an historic property.

8 See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3343-44 ¶ 35 (2017) (“*Wireless Infrastructure NPRM/NOI*”).

9 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3266 (2017) (“*Wireline Broadband Deployment NPRM/NOI*”).

10 *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, 31 FCC Rcd 13360 (WTB 2016) (“*Small Cell Infrastructure PN*”).

11 See Remarks of FCC Commissioner Brendan Carr at the Consumer Technology Association's 5G Day, *Ensuring the United States is 5G Ready* (Feb. 28, 2018), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-349499A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-349499A1.pdf).

12 54 U.S.C. § 306108. For purposes of this article, we put aside the question of the extent to which wireless facilities siting is a “federal undertaking” for purposes of Section 106 of the NHPA. For example, the same antennas at the same locations do not go through Section 106 review if used in connection with Wi-Fi networks.

13 *Id.* § 306131; 36 C.F.R. § 800.2.

14 36 C.F.R. § 800.2(c)(2)(ii) (“This requirement applies regardless of the location of the historic property.”); see also ACHP, CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK, at 8 (June 2012) (hereinafter ACHP Handbook) (“[T]he regulations require that agencies make a reasonable and good-faith effort to identify Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the undertaking, even if tribes are now located a great distance away from such properties and undertakings.”).

15 ACHP Handbook at 6.

16 36 C.F.R. Part 800.

17 See 47 C.F.R. § 1.1307(a)(4); FCC, *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 47 C.F.R. Part 1, App. B (hereinafter Collocation NPA); FCC, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, codified at 47 C.F.R. Part 1, App. C (hereinafter NPA).

located on non-tribal lands. Licensees and applicants are required to use reasonable and good faith efforts to identify and contact any Tribes that may attach religious and cultural significance to historic properties that may be affected by an undertaking.<sup>18</sup>

### *B. Tribal Consultation Implemented Through the NPA and the TCNS System*

To facilitate this process, the NPA permits FCC applicants or licensees to use the FCC's Tower Construction Notification System (TCNS) to notify Tribes of proposed construction within geographic areas that the Tribes have identified as potentially containing historic properties of religious and cultural significance.<sup>19</sup> The NPA tribal consultation process is intended to work as follows: (1) Tribes indicate in TCNS their "areas of interest," i.e., the areas for which they would like to be notified of wireless infrastructure projects; (2) licensees or applicants enter proposed projects into the TCNS, which then notifies the Tribes that have called the proposed project locations their "areas of interest"; (3) Tribes then notify the applicants if they would like to consult on the project;<sup>20</sup> (4) applicants provide consulting Tribes with substantial information about the project; (5) Tribes then have an opportunity to comment to the applicants regarding whether the proposed projects may affect historic property of cultural or religious significance; and (6) the Tribes' comments (together with the comments of other consulting parties) are included in the applicants' final submissions to the relevant State Historic Preservation Officers (SHPO) and, where the record so warrants, the SHPOs issue findings of concurrence with proposed "no properties" or "no effect" findings.<sup>21</sup>

This consultation process is designed to ensure that Tribes may participate as "consulting parties" in connection with the Section 106 review of wireless infrastructure projects proposed off tribal lands. As a consulting party, a Tribe has the right to identify potential sites of cultural or religious significance, advise on identification and evaluation of historic resources, comment on potential effects, and participate in the resolution of any adverse effects.<sup>22</sup> In other words, Tribes are entitled to have their views considered, but they do not have explicit power to block or veto a wireless infrastructure project located off tribal lands.

## II. SECTION 106 TRIBAL CONSULTATION IS BROKEN

### *A. Section 106 Tribal Consultation Impedes Wireless Infrastructure Siting*

The NPA consultation process has been in operation for more than a decade, and it is clear that tribal consultation improperly and unnecessarily impedes wireless infrastructure siting. Indeed, recent public comments to the FCC demonstrate

<sup>18</sup> NPA, §§ IV.B, IV.C.

<sup>19</sup> NPA, § IV.B.

<sup>20</sup> See 36 C.F.R. § 800.16(f).

<sup>21</sup> *Id.* § 800.2(c).

<sup>22</sup> *Id.* §§ 800.2(c)(2)(ii)(A) and (a)(4); *id.* § 800.16(f) (defining consultation as "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" (emphasis added)).

broad agreement that the FCC's tribal consultation process imposes undue delay, costs, and burdens on wireless infrastructure projects without meaningfully promoting the preservation of sites of religious and cultural significance to Tribes. Stated broadly, these public comments show that:

- The average time required for completing the tribal consultation process is 110 days. More than 30 percent of all requests take more than 120 days to complete, 11.5 percent take more than 180 days, and 1.2 percent take more than 365 days. The longest project took more than four years.<sup>23</sup>
- Tribes are charging fees of \$1,000 to \$2,000 per project before they will even engage in the Section 106 consultation process.<sup>24</sup> Such tribal fees rapidly become exorbitant when multiple Tribes are assessing fees on the same project. Commenters report spending at least \$2,500 in tribal fees on average per site, with one spending as much as \$6,300.<sup>25</sup>

Even more troubling, however, is that these costs and burdens on wireless infrastructure siting are not serving to benefit the preservation of tribal cultural and religious resources. Evidence presented to the FCC shows that only 0.33 percent of tribal reviews of wireless infrastructure projects result in a finding that deployment of a wireless facility will have an adverse effect on historic sites of religious and cultural significance to a Tribe.<sup>26</sup> Other commenters noted that, based on an analysis of 17,000 infrastructure projects, more than 99 percent of Section 106 reviews resulted in a no adverse effect finding.<sup>27</sup>

### *B. The Consultation Process Gives Tribes Incentive and Leverage to Delay Wireless Infrastructure Projects In Order to Secure Improper Fees*

The cause of these delays and costs can be tied directly to the lack of enforceable timelines and standards in the tribal consultation process. The FCC's Section 106 process hinges on assumptions about the Tribes' role: they will reasonably define their "areas of interest"; they will respond to an initial contact made through the TCNS system within a reasonable period (i.e.,

<sup>23</sup> See Joint Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79, at 11 (filed June 15, 2017) (hereinafter Joint Association Comments).

<sup>24</sup> *Id.* at 17; Comments of the Association of American Railroads, WT Docket No. 17-79, at iii (filed June 15, 2017) (hereinafter AARR Comments); *Clearing the Path for America's Wireless Future: Addressing Hurdles to Meet the Pressing Need for Our Nation's Wireless Infrastructure*, COMPETITIVE CARRIERS ASSOCIATION, at 2 (June 8, 2017), attached to Letter from Rebecca Murphy Thompson, EVP & General Counsel, CCA, to Marlene Dortch, Secretary, FCC, WT Docket Nos. 17-79 & 15-180, WC Docket No. 17-84 (filed June 8, 2017); Comments of Crown Castle International Corp., WT Docket No. 17-79, at 34 (filed June 15, 2017); Comments of Sprint Corporation, WT Docket No. 17-79, at 14-15 (filed June 15, 2017); Comments of Verizon, WT Docket No. 17-79, at 47-49 (filed June 15, 2017).

<sup>25</sup> AARR Comments at iii.

<sup>26</sup> Joint Association Comments at 6, 39.

<sup>27</sup> AARR Comments at 15.

30 days); they will act in their role as consulting parties when they respond to a notification through the TCNS; and they will complete their review of a proposed facility within a reasonable time (again, 30 days). The NPA *assumes* that Tribes will act in a timely fashion, but it does not impose consequences if they fail to do so.

Furthermore, as noted, for facilities to be located on non-tribal lands, Tribes merely serve as “consulting parties” under Section 106, and do not have legal authority to veto wireless infrastructure projects.<sup>28</sup> However, Tribes can improperly interfere with and delay project development simply by declining to act on a timely basis. By doing so, the Tribes force wireless service providers and infrastructure developers to escalate the matter to the FCC for the agency to intervene with the non-responding Tribes,<sup>29</sup> adding time, cost, and uncertainty to each project. Even a single non-responding Tribe can exert a disproportionate effect on the timeline for deploying a wireless facility. For example, in one instance, it took 525 days for the applicant to complete tribal review for the construction of a proposed monopole because a single tribal representative for one Tribe was on extended leave and was unavailable to complete review of the proposed project.<sup>30</sup> In another instance, it took 293 days for the applicant to complete tribal consultation for a collocation on an existing building, involving no ground disturbance, because two Tribes failed to timely respond.<sup>31</sup>

In fact, evidence presented to the FCC suggests that at least some Tribes view the Section 106 consultation process less as a means of protecting tribal cultural and religious resources and more as an additional source of revenue. Tribes routinely require wireless service providers and infrastructure developers to pay fees *before* the Tribe will respond to the TCNS notification and before any potential cultural or religious resources have been identified. At least 95 Tribes are now known to charge fees for new construction of wireless infrastructure projects on non-tribal lands.<sup>32</sup> Further, “the average cost per Tribal Nation charging fees increased by 30 percent and the average fee for collocations increased by almost 50 percent between 2015 and August 2016.”<sup>33</sup> Indeed, fees have become an incentive for some Tribes to participate in the tribal consultation process in the first place or to expand their participation in the process. The FCC notes that “the average number of Tribal Nations notified per [wireless] project increased from eight in 2008 to 13 in August 2016 and 14 in March 2017.”<sup>34</sup> Further, the FCC has identified 19 Tribes

that claim 10 or more states in their entirety as their “areas of interest” in TCNS, and three Tribes that claim 20 or more full states in addition to select counties as their “areas of interest.”<sup>35</sup>

One commenter before the FCC describes a situation in which the Little Traverse Bay Band of Odawa Indians significantly expanded their areas of geographic interest in 2015 from 29 to 154 counties of interest in the TCNS, specifically to generate additional income.<sup>36</sup> Comments before the FCC also describe a tribal council meeting of the Delaware Tribe of Indians at which the Tribe expressly discussed the advantages of charging fees coupled with expanding its areas of interest in TCNS.<sup>37</sup> Six days after this discussion, the Tribe adopted a new fee schedule, and over the next several months, the tribal council also adopted an investment plan for the FCC fee revenue that redirected 70 percent of the fee revenue to non-Section 106 activities.<sup>38</sup>

### III. A PATH FORWARD TO PROTECT SITES OF RELIGIOUS AND CULTURAL SIGNIFICANCE TO TRIBES WHILE SPEEDING WIRELESS INFRASTRUCTURE DEPLOYMENT

The FCC has acknowledged that the current situation is untenable. The FCC should therefore establish clear and enforceable standards coupled with better agency oversight of the tribal consultation process. Negotiated agreements and general best practices are not an adequate substitute for a concrete, enforceable process. Without establishing a finite procedural timeline, the Commission risks continuing and exacerbating the delays and concerns associated with the current tribal consultation process.

First and foremost, the FCC should resolve the delays associated with tribal consultation, including by setting a finite and enforceable timeline for completing tribal consultation. For instance, the Commission should establish specific deadlines for Tribes to respond to requests for consultation and, if a Tribe has not responded by the deadline, the Tribe should be deemed to have no interest, and the applicant should be permitted to proceed with the project with the understanding that it has completed the tribal consultation process with respect to that non-responding Tribe. Second, the FCC should make clear that Tribes are not authorized to charge fees for their participation in Section 106 review process generally. But the FCC should acknowledge that professional contracting services from Tribes may be appropriate

28 See *supra* Section II.B.

29 See *Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092 (2005); *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3343-43 ¶ 31.

30 See Joint Association Comments at 15.

31 *Id.*

32 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3343-44 ¶ 35.

33 *Id.*

34 *Id.*

35 *Id.*

36 See Joint Reply Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79, at 7 (filed July 17, 2017) (“Joint Association Reply Comments”) (citing Little Traverse Bay Band of Odawa Indians, THPO Work Log, 2d Quarter 2015 (entry for May 4, 2015); Little Traverse Bay Band of Odawa Indians, THPO Work Log, 3d Quarter 2015 (entries for July 29, Sept. 30, 2015)).

37 See Joint Association Comments at 18-19 (citing Minutes August 4, 2015 Regular Tribal Council, submitted by Nicky Kay Michael, PhD, Tribal Council Secretary, <http://delawaretribe.org/wp-content/uploads/council-2015-08-04.pdf>).

38 See Joint Association Comments at 19 (citing A Resolution of the Tribal Council of the Delaware Tribe of Indians to Adopt an Investment Plan for the (THPO) historic preservation section 106 consultation fees for one year, *available at* <http://delawaretribe.org/wp-content/uploads/Res-2016-23.pdf>).

in specific circumstances, and that charging fees for such professional services would be appropriate. Third, the FCC should promote transparent and efficient information sharing between Tribes and wireless service providers and infrastructure providers in order to expedite the process of identifying and differentiating between areas that do not require Section 106 review and those that may require review.

These modifications are simple, straightforward administrative matters that can be accomplished without impinging upon tribal sovereignty or limiting tribal consultation rights under Section 106 of the NHPA. Because the Section 106 tribal consultation process discussed in this article relates to projects located off tribal lands, the FCC has a general tribal trust responsibility that is fulfilled by “compliance with general regulations and statutes.”<sup>39</sup> In short, the Commission has broad discretion to administer and structure the Section 106 tribal consultation process to promote predictable, efficient, and effective consultation with Tribes.

By establishing enforceable standards and providing clear guidance and oversight, the Commission can preserve the positive aspects of the Section 106 tribal consultation process while remedying the inefficiencies, delay, and additional costs that plague the process. Providing additional guidance and clarity in these ways will be a win for the Commission, Tribes, applicants, the preservation community, and the public, as an improved process will result in more rapid and efficient deployment of the wireless infrastructure and more meaningful protection of historic sites of religious and cultural significance.

---

<sup>39</sup> ACHP Handbook at 2; *see also* *Confederated Tribes of the Goshute Reservation*, 177 IBLA 171, 2009 WL 1649149 (Apr. 30, 2009) (stating that BLM’s tribal trust obligations were met by complying with standard NEPA requirements); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (stating that, under the general trust relationship an agency should not afford a tribe “greater rights than they otherwise have under the [governing statute] and its implementing regulations”).

