

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband )  
Deployment by Removing Barriers to )  
Infrastructure Investment )

WT Docket No. 17-79

*Comments submitted by:*

Natural Resources Defense Council

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## Statement of Interest

The Natural Resources Defense Council (NRDC) is a non-profit environmental membership organization with hundreds of thousands of members nationwide. NRDC's mission is to safeguard the Earth – its people, its plants and animals and the natural systems on which all life depends. To fulfill this mission, NRDC actively engages in agency rulemakings affecting public health and the environment.

Meaningful public participation and environmental review is at the core of effective environmental protection and wise government decision-making. NRDC regularly seeks way to improve the effectiveness and efficiency of public participation and environmental review. The proposal by the Federal Communications Commission (FCC) to exclude certain licensed activities from coverage under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) eliminates the review process rather than improves it. Such action is contrary to the Commission's statutory obligations.

NRDC members participate in various reviews under both NEPA and the NHPA. The order's changes will limit the ability of NRDC members to influence the siting of small wireless facilities in their communities, as well as on the public lands they own and seek to protect. The exclusion of small wireless facilities from the definition of "major federal action" under NEPA and "undertaking" under the NHPA will allow the siting of numerous facilities without any review or notice to the public. Some of these facilities will have little or no impact. But others may have significant impact either individually or cumulatively. Distinguishing between those with impact and those without is the point of the review process under NEPA and the NHPA. The elimination of such review denies NRDC members both the voice and the protections that Congress has provided them.

Rapid deployment of wireless technology does not require eliminating environmental review and public participation. While Congress has encouraged the rapid deployment of wireless technology, it has mandated that it be done in a way that protects the environment as well as historic and cultural resources. NRDC supports the rapid deployment of wireless technology especially to remote communities which currently lack service. Future progress, however, does not require that we forget our past or sacrifice a healthy, vibrant and secure environment.

The FCC's Wireless Telecommunications Bureau (WTB) has invested significant time and resources in developing NEPA and NHPA processes that address the impacts various wireless facilities may have on the environment as well as historic and cultural resources. Such streamlining efforts include categorical exclusions under NEPA and the use of Programmatic Agreements under the NHPA. These are the appropriate mechanisms to address proposed activities with little or no impacts. Simply excluding activities which the FCC licenses from NEPA and NHPA review as the Commission has proposed is beyond its authority.

## **The Order’s Exclusion of Small Wireless Facilities from the Definition of “Major Federal Action” and “Undertaking” is Unlawful.**

Because the FCC is issuing a license, it must apply NEPA and the NHPA. The plain language of the applicable statutes and regulations includes licensing within the actions covered by NEPA and the NHPA. Courts have consistently treated licensing as both a “major federal action” under NEPA and an “undertaking” under the NHPA. The Commission can adjust the amount of review based on the minimal impacts of a licensed activity, but it cannot avoid review all together.

### **A. The Commission Has Failed to Justify Exclusion of Small Wireless Facilities from NEPA.**

#### **1. Issuing a License is a Major Federal Action Regardless of the Size of the Licensed Activity.**

Where the FCC issues a license or otherwise approves an action, it cannot avoid application of NEPA. As the Commission notes in its order, NEPA applies to all “major federal actions.” Regulations issued by the Council on Environmental Quality (CEQ) implementing NEPA define “major federal action” as “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies.” 40 C.F.R. § 1508.18. While the FCC’s NEPA regulations does not define “major federal action,” they incorporate CEQ’s regulations by reference. 47 C.F.R. § 1.1302. Indeed, the U.S. Supreme Court has long held that CEQ’s NEPA regulations are mandatory and binding on all agencies. *Andrus v. Sierra Club*, 442 US 347, 357 (1979).

Courts have consistently found that the issuance of a license is a “major federal action.” *See, e.g., New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 476 (D.C. Cir. 2012) (issuance or reissuance of reactor license is major federal action); *National Parks and Conservation Ass’n v. Babbitt*, 241 F.3d 722 (9<sup>th</sup> Cir. 2001) (permitting of cruise ships by National Park Service is a major federal action); *American Rivers v. FERC*, 201 F.3d 1186, 1192 (9<sup>th</sup> Cir. 2000) (reissuance of hydropower license is major federal action); *Scientists Institute for Public Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (“NEPA’s impact statement procedure has been held to apply where a federal agency . . . grants licenses or permits to private parties”) (citations omitted); *Davis v. Morton*, 469 F.2d 593, 597-98 (10<sup>th</sup> Cir. 1972) (approving leases on federal lands constitutes a major federal action); *Sierra Club v. Hodel*, 675 F.Supp. 594, 612 (D.Ut. 1987) (“Federal agency approval of state or private action is one form of federal action.”).

In fact, the FCC has applied NEPA to its licensing decisions since it first began implementing NEPA in 1974. *Matter of the Implementation of the National Environmental Policy Act*, 49 FCC 2d 1313 (1974). *See also*, FCC, “Tower and Antennae Siting” (“Building a

new tower or collocating an antenna on an existing structure requires compliance with the Commission’s rules for environmental review.”<sup>1</sup>

## **2. The FCC Licenses the Activities that it Proposes to Exclude from NEPA.**

The FCC makes two changes to its NEPA regulations. First, the FCC’s Order provides that facilities placed in a floodplain will be excluded from NEPA review as long as they are placed at least one foot above the base flood elevation of the floodplain.<sup>2</sup> Previously, any facility located in a floodplain required at least an Environmental Assessment (EA) under NEPA. Second, the FCC’s Order changes the rule requiring an EA to exclude: (1) the construction of mobile stations; and (2) small wireless facilities meeting certain criteria.<sup>3</sup>

The FCC licenses all small wireless facilities. The Commission issues licenses for the use of the electromagnetic spectrum.<sup>4</sup> This spectrum includes small wireless facilities. As described in its own words, the FCC’s Wireless Telecommunications Bureau “develops and executes policies and procedures for fast, fair licensing of all wireless services, from fixed microwave links to amateur radio to mobile broadband services.”<sup>5</sup> The Bureau “oversee[s] nearly two million licenses, conduct[s] auctions to award services licenses, and manage[s] the tower registration process.”<sup>6</sup> While ways exist to streamline the NEPA review, the FCC cannot avoid NEPA altogether for the licenses it issues.

The FCC’s use of a geographic license to authorize small wireless facilities does not waive the application of NEPA. Initially, all FCC licenses conferred authority to operate from a specific site and the Commission issued a construction permit for that site before granting the license. 47 U.S.C. § 319(a). As explained by the FCC in its Notice of Proposed Rulemaking, Congress amended the Communications Act to eliminate construction permits by default in some services and to authorize the Commission to waive the construction permit requirement in other services.<sup>7</sup> Currently, most licenses in the commercial wireless services authorize transmissions over a particular band of spectrum within a wide geographic area without further limitation as to transmitter locations.<sup>8</sup> The FCC does not appear to have completed any NEPA review when it issued geographic licenses. It cannot avoid doing so now.

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<sup>1</sup> Available at <https://www.fcc.gov/general/tower-and-antenna-siting> (last visited March 13, 2018).

<sup>2</sup> FCC, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Second Report and Order* (WT Docket 17-19) (hereafter “*Second Order and Report*”), at Appendix. B, amending 47 C.F.R. § 1.1307(a)(6).

<sup>3</sup> *Id.*, amending 47 C.F.R. § 1.1312.

<sup>4</sup> FCC website, “Licensing” (“The FCC is responsible for managing and licensing the electromagnetic spectrum for commercial users and for non-commercial users including: state, county and local governments.”), available at <https://www.fcc.gov/licensing-databases/licensing> (last visited March 12, 2018).

<sup>5</sup> FCC website, “Wireless Communications”, available at <https://www.fcc.gov/wireless-telecommunications> (last visited March 12, 2018).

<sup>6</sup> *Id.*

<sup>7</sup> FCC, *Notice of Proposed Rulemaking and Notice of Inquiry* (April 21, 2017), at ¶ 26.

<sup>8</sup> *Id.*

### **3. The Lawful Method for Addressing Actions that Neither Individually nor Cumulatively Have Significant Environmental Impacts is through a Categorical Exclusion.**

The lawful approach to addressing activities that by their nature do not have significant impacts on the environment is with a categorical exclusion (CE). CEQ regulations authorize categorical exclusions for any “category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency.” 40 C.F.R. § 1508.4. CEQ has provided agencies guidance for developing and implementing categorical exclusions.<sup>9</sup> Once a categorical exclusion is established for a specific type of federal action, no further NEPA review is necessary. As CEQ’s guidance states, “Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review.”<sup>10</sup>

Agencies must take certain steps to establish a categorical exclusion. Federal regulations require consultation with the public and CEQ whenever a department or agency amends their NEPA procedures. 40 C.F.R. § 1507.3(a). Such changes explicitly include “when they establish new or revised categorical exclusions.”<sup>11</sup> In addition, a department or agency must substantiate its determination that a specific activity is the kind of activity that will not have a significant effect on the environment.<sup>12</sup> Such evidence can come in several forms. Actions that are “reasonably expected to have little impact (for example conducting surveys or purchasing small amounts of office supplies consistent with applicable acquisition and environmental standards) should not require extensive supporting information.”<sup>13</sup> For actions that do not obviously lack significant environmental effects, an agency can support a categorical exclusion based on: (1) assessments of impacts of previously implemented actions; (2) impact demonstration projects; (3) benchmarking against the experience of other agencies; or (4) information from professional staff, expert opinions or scientific analysis.<sup>14</sup>

The FCC’s NEPA regulations provide a broad categorical exclusion. 47 C.F.R. § 1.1306. In fact, this regulation categorically excludes all Commission actions except for a few specifically listed. In its list of activities not categorically excluded from further NEPA review, the FCC includes actions that may have significant effects such as facilities or equipment involving high intensity lighting or would result in human exposure to radiofrequency radiation in excess of the applicable safety standards. 47 C.F.R. § 1.1306(b). Facilities proposed to be located in a wilderness area or a floodplain are outside the scope of the categorical exclusion. 47 C.F.R. § 1.1307(a)(1)&(6). Facilities that “may affect listed threatened or

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<sup>9</sup> CEQ, *Memorandum for Heads of Federal Departments and Agencies: Establishing, Revising and Applying Categorical Exclusions Under the National Environmental Policy Act* (Nov. 23, 2010).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 7-9.

endangered species or designated critical habitats” or “Indian religious sites” or “districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places” are also outside the scope of the categorical exclusion. 47 C.F.R. § 1.1307(a)(3),(4)&(5).

If the FCC wants to change what is categorically excluded and what is not, the Commission must provide the evidence identified in CEQ’s CE guidance to substantiate the exclusion. The Commission has failed to do so for its proposed change to exclude facilities in floodplains that are at least one foot above the base flood elevation of the floodplain. Such elevation may protect the facility from a flood, but it does not mean that such elevated facilities cannot have a significant impact on the environment. One may be small enough to have a minimal impact. But many combined in a small area might have a significant effect. Categorical exclusions are limited to a category of actions which “do not individually *or cumulatively* have a significant effect on the human environment.” 40 C.F.R. § 1508.4 (emphasis added).

Moreover, the exclusion of certain floodplain facilities from NEPA review conflicts with Executive Order 11988 which has been in place for 40 years. The Executive Order provides that each “agency shall also provide opportunity for early public review of any plans or proposals for actions in floodplains.”<sup>15</sup> In addition, the Executive Order mandates the consideration of alternatives: “If an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains.”<sup>16</sup> NEPA review provides a mechanism to address both these agency obligations.

The FCC must also provide the evidence identified in CEQ’s CE guidance to justify the exclusion for small wireless facilities. Here, the Commission has failed to do so. Rather than justify a categorical exclusion for small wireless facilities, the FCC chooses to not apply NEPA at all. Given the federal licensing involved, this is not a choice the FCC has.

#### **B. The Commission Has Failed to Justify Exclusion of Small Wireless Facilities from the NHPA.**

Where the Commission issues a license or otherwise engages in some kind of approval, it cannot avoid the application of the National Historic Preservation Act. Section 106 of the NHPA requires that “the head of any Federal department or independent agency” shall take into account the effect of any proposed undertaking on historic properties. 54 U.S.C.A. § 306108. The Act defines “undertaking” to include “a project, activity or program under the direct or indirect jurisdiction of a Federal agency . . . requiring a Federal permit, license, or approval.” 54 U.S.C.A. § 300320(3).

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<sup>15</sup> President Jimmy Carter, Exec. Order No. 11988, 42 FR 26951 (May 24, 1977), at Sec.2(a)(4).

<sup>16</sup> *Id.* at Sec.2(a)(2).

As explained above, the FCC licenses the small wireless facilities at issue here. While its engagement may be limited at the point a wireless company sites a specific cell or other facility, the FCC previously licensed all such facilities through a geographic license. Nothing indicates that the FCC conducted a Section 106 review then. Consequently, the Commission cannot avoid doing so now.

The definition of “undertaking” is tied to the extent of a federal agency’s involvement not the extent of the anticipated impact. The FCC’s reliance on a court decision upholding its application of NHPA to wireless facilities to justify the Commission’s exclusion of activities it approves is misplaced. *See CTIA-Wireless v. FCC*, 466 F.3d 105 (D.C. Cir. 2006). The Court’s decision in *CTIA* did nothing to limit what is included as an “undertaking” under the NHPA. The D.C. Circuit upheld the inclusion of the FCC’s approval of wireless telecommunication towers as an “undertaking” under the NHPA. The Court was not asked to address what was not included in the meaning of “undertaking.” No court has found that a federal approval or license is outside the meaning of “undertaking.” The plain language of the NHPA includes it. 54 U.S.C. § 300320(3). *See also*, 54 U.S.C.A. § 306108 (“[T]he head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.”).

The Commission does not dispute that it licenses the wireless facilities at issue here. The Commission acknowledges that it at had control over the facilities at some point in time. It has issued geographic licenses for the facilities. *Second Order and Report*, at ¶ 42. The fact that Commission may choose to relinquish control does not erase the fact that it did have control. While the Commission may have some discretion to interpret the meaning of “undertaking,” it cannot adopt an interpretation that conflicts with the plain language of the NHPA.

Numerous stakeholders have documented the importance of Section 106 review for the facilities at issue. These stakeholders include the National Trust for Historic Preservation, the National Conference of State Historic Preservation Officers, the National Association of Tribal Historic Preservation Officers, the National Congress of American Indians, the Inter-tribal Council of Arizona, the California Association of Tribal Governments, the Great Plains Tribal Chairman’s Association, the Midwest Alliance of Sovereign Tribes, the All Pueblo Council of Governors, the Affiliated Tribes of Northwest Indians and the Alaska Federation of Natives. The FCC has failed to address or even respond to many of the issues raised.

As with NEPA, the NHPA provides for limited review where impacts are limited. Regulations issued by the Advisory Council on Historic Preservation (ACHP) provide for programmatic agreements to govern the review and resolution of adverse effects from “certain complex project situations or multiple undertakings.” 36 C.F.R. § 800.14(b). The FCC has developed such agreements. In fact, the FCC’s Nationwide PA and Collocation PA have long been considered models for other agencies seeking programmatic efficiencies for compliance with Section 106 of the National Historic Preservation Act. Just last year, the ACHP adopted a program encouraging other federal agencies to make use of the long-standing success of the



FCC's programmatic approach in order to streamline deployment of broadband infrastructure projects on public lands managed by a whole variety of federal agencies. 82 Fed. Reg. 23,818 (May 24, 2017). Significant engagement and investment has been made in this current program.

The FCC's programmatic agreements should not simply be abandoned for small wireless facilities. Dismantling this entire compliance mechanism would not only create enormous uncertainty and inefficiencies for its own licensees, but would also call into question the compliance of other federal agencies who will now be relying on the FCC's long-standing approach to compliance. Perhaps the PAs could be improved. A process for doing so exists involving both the public and the ACHP. 54 U.S.C.A. § 306108; 36 C.F.R. § 800.14(a). The FCC's proposed order unlawfully circumvents this process.

### CONCLUSION

Accelerating wireless broadband deployment is a goal that NRDC supports. Eliminating environmental review and public participation is not necessary to do so. The Order issued in WT Docket 17-79 conflicts with the FCC's statutory obligations. Whenever the Commission issues a license, it must apply NEPA and the NHPA. The Commission can adjust the amount of review based on the minimal impacts of a licensed activity, but it cannot avoid review all together.

**RESPECTFULLY SUBMITTED:**



Sharon Buccino  
Senior Attorney  
Natural Resources Defense Council  
1152 15<sup>th</sup> St NW, Suite 300  
Washington, DC 20005  
202-289-6868  
[sbuccino@nrdc.org](mailto:sbuccino@nrdc.org)