

## Updates

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### FCC Reduces Regulatory Barriers to 5G Wireless Deployment

The Federal Communications Commission recently adopted [an order](#) containing sweeping regulatory changes to speed the deployment of advanced wireless services to provide connectivity for innovative Internet of Things, augmented reality, unmanned vehicles, and artificial intelligence-driven devices, services, and systems. The order removes significant regulatory barriers to wireless infrastructure deployment and revises existing processes to expedite environmental and historic preservation review.

The order eliminates the requirements of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) for certain small wireless network facilities (larger, traditional wireless facilities are not exempted by the order). Advanced 5G wireless networks will rely on a high quantity of small antenna systems deployed in close proximity to each other rather than on traditional cell towers or monopoles separated by great distances. This change is expected to expedite the deployment of infrastructure needed for 5G wireless services and could potentially eliminate the need for historic and environmental reviews on tens of thousands of individual small wireless facilities.

Larger wireless facilities remain subject to NEPA and NHPA requirements, but the order streamlines those requirements in three ways by:

1. imposing limits on the lengthy and uncertain process for tribal involvement in the Section 106 consultation process under NHPA;
2. setting a timeframe for FCC processing of environmental assessments under NEPA; and
3. allowing flexibility to use categorical exclusions rather than preparing the more time-consuming environmental assessments (EAs) for certain wireless facilities located in floodplains.

The wireless industry and other stakeholders in advanced wireless technologies strongly supported these new rules—underscoring the need for streamlining to maintain U.S. leadership in the global race to deploy 5G and to bridge the digital divide in rural areas. However, the FCC's two Democratic commissioners dissented because, they argued, the rule changes undermine the tribal consultation process and will remove too many facilities from environmental and historic preservation review.

#### Exception of Small Wireless Facilities From NEPA/NHPA Review

In general, NEPA and NHPA require environmental and historic preservation reviews when a federal agency proposes to take an action to authorize or fund construction of a project. In the case of wireless facilities, there is no statutory requirement for providers to obtain a permit from the FCC before commencing construction. But by regulation, the FCC has required wireless providers to comply with NEPA and NHPA requirements for most wireless facility deployments notwithstanding the absence of an FCC role in issuing construction permits for individual wireless facilities. Specifically, the FCC's rules have required NEPA and NHPA reviews for wireless facilities if they (1) are subject to the antenna structure registration requirements or (2) fall within the "limited approval authority" that is codified in Section 1.1312 of the FCC's rules. FCC approval pursuant to these rules has been treated as federal action for purposes of triggering the requirement for NEPA and NHPA review.

When the FCC adopted the rules requiring NEPA and NHPA review for most wireless facility deployments, cellular networks primarily relied on conspicuous 100- to 200-foot cell towers. By contrast, the new 5G "small cell" systems can often be co-located with existing wireless facilities or placed on existing structures such as

telephone poles or street lamps and do not pose the same degree of environmental or historic disruptions as larger facilities. These small cell facilities typically do not require antenna structure registration, but until the order was adopted, they still fell within the scope of Section 1.1312 and thus required individual environmental and historic preservation reviews.

Responding to extensive evidence submitted by carriers concerning the costs of environmental and historic preservation review of these facilities, the FCC amended its rules to exempt certain small wireless facilities from NEPA and NHPA requirements by eliminating them from the scope of Section 1.1312. The FCC determined that the construction of small wireless facilities would no longer be considered federal actions for purposes of NEPA and NHPA, and thus the predicate for requiring NEPA and NHPA compliance was removed.

To qualify for this new exemption, facilities must meet the following criteria:

- **Height:** The facilities are mounted on structures no more than 50 feet in height including antennae, or are mounted on structures no more than 10 percent taller than other adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater.
- **Volume:** Each antenna associated with the deployment (excluding associated equipment) must not exceed 3 cubic feet, and all other wireless equipment associated with the structure (including equipment associated with the antenna and pre-existing associated equipment) must not exceed 28 cubic feet.

This exemption does not apply to facilities that require antenna structure registration, are located on tribal lands or result in human exposure to radiofrequency radiation in excess of applicable safety standards. Further, this exemption applies only to FCC's own obligations under NEPA and NHPA. Wireless facilities that fall within this exemption may require reviews under NEPA and NHPA by other federal agencies—for example, by a federal land management agency if the wireless facility is located on public lands.

Notably, the order does not provide an "aggregation limit," meaning multiple facilities that each individually meet the small facilities requirements could be placed on the same structure or pole without triggering environmental or historic preservation review.

Also significant is the FCC's statement that this order would not have any preemptive effect on state and local review procedures. The order instead recognized the importance of these procedures, which are "adopted and implemented by regulators with more intimate knowledge of local geography and history," to "reduce[] the likelihood that small wireless facilities will be deployed in ways that will have adverse environmental and historic preservation effects."

#### Actions to Streamline Deployment of Larger Wireless Facilities

The FCC also addressed industry concerns by streamlining the environmental review and tribal consultation process for larger wireless facilities.

- **New Procedures to Add Certainty in the Tribal Consultation Process.** Certain large-scale projects, such as broadcast and wireless communications towers, involve FCC review subject to rules adopted by the Advisory Council on Historic Preservation. Under the order, the FCC entered into two Nationwide Programmatic Agreements and adopted procedures tailored to the types of projects it reviews. The tribal consultation process under Section 106 of NHPA—the process by which tribal authorities review the impact of proposed facilities on culturally significant sites—comes within this framework.

The FCC streamlined this framework to allow an applicant to proceed with construction when tribes do not respond to notification of a proposed construction within 45 days (15 days fewer than the prior rule).

The new procedures require applicants to provide tribes with certain information about proposed construction and specify that applicants are not required to provide additional information unless a tribe has indicated that a historic property may be affected, and it has become a consulting party.

The new procedures also address the fees requested by tribes for reviewing whether a project affects cultural or historic sites. Applicants will not be required to pay up-front fees requested by tribes that have been invited to participate in the consultation process. The FCC recognized that tribes may require fees for consulting services such as identifying historic properties, assessing impacts, mitigation, and monitoring. The FCC also explained that applicants may hire any qualified consultant and are not required to hire any particular person or entity to conduct the review. Further, the FCC clarified that an applicant may negotiate fees with a tribe, and applicants are not required to comply with a tribe's unilateral request for fees. The FCC also established a process to resolve disputes when an applicant and tribe disagree on whether the applicant has made reasonable and good faith efforts to identify historic properties.

- **Revision of Environmental Review Requirements for Facilities in a Flood Plain.** The FCC's rules list several categories of facilities that "may significantly affect the environment" and, accordingly, require preparation of an EA pursuant to NEPA. Historically, this rule required preparation of an EA for any facilities located in a flood plain. The FCC amended the rule to require preparation of an EA for facilities located in a floodplain only if the facility will not be placed at least one foot above the base flood elevation of the floodplain. In effect, this amendment would allow facilities in floodplains that meet the "one foot above the base flood elevation" requirement to proceed under a categorical exclusion unless other factors trigger the requirement for preparation of an EA (e.g., if the facility's construction will involve significant change in surface features).
- **New Timeframe for Processing Environmental Assessments.** Where the FCC prepares an EA and concludes that a new facility will not cause significant environmental impact, it will issue a "Finding of No Significant Impact" (FONSI) that allows applicants to move forward with construction of facilities. The order sets an aggressive 60-day timeframe for FCC staff to review and process EAs and issue a FONSI prepared by applicants. This clock begins to run when a public notice is published or the EA is posted online. Going forward, FCC staff will review EAs for completion and adequacy within 20 days and will notify applicants within 30 days if any additional information is needed to support a FONSI. The order does not require the EA to be placed on public notice where such additional information "is not of a nature that is likely to affect the public's ability to comment on environmental impacts."

## Implications

The adjustments to NEPA and NHPA regulation for the deployment of new wireless facilities is part of a concerted effort by the FCC to substantially reduce impediments to wireless deployment. Allowing carriers to move swiftly toward 5G capacity and to fill gaps in coverage in rural and underserved areas has become one of FCC Chairman Ajit Pai's central initiatives. Exempting small wireless facilities from environmental and historic preservation review was also proposed in the Trump administration's recent plan to improve infrastructure permitting, which we [discussed previously](#).

Further actions to ease deployment burdens, including access to public rights-of-way and state and municipally owned lands, could follow. These changes are intended to facilitate the introduction of advanced consumer and commercial devices, and services and systems that will rely on wireless connectivity, including a wide range of "smart" technologies, unmanned vehicles, Internet of Things, augmented reality and artificial intelligence-driven advancements.

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