

COURT OVERTURNS FCC ORDER THAT REMOVED SMALL CELLS FROM NEPA AND NHPA REVIEW



The FCC is required to consider the environmental and historic preservation impacts of major Federal actions, as defined by the National Environmental Policy Act (NEPA), and Federal undertakings as defined by the National Historic Preservation Act (NHPA). All major Federal “actions” trigger environmental review under NEPA, just as Federal “undertakings” trigger historic preservation review under NHPA.

In its Second Report and Order, effective July 2, 2018, the FCC amended Section 1.1312 of its environmental rules to clarify that the deployment of certain small wireless facilities by private parties does not constitute either a Federal undertaking within the meaning of NHPA or a major Federal action under NEPA. However, on August 9, 2019, the United States Court of Appeals for the District of Columbia Circuit reached a decision that in its Second Report and Order, the FCC did not adequately address possible harms of deregulation. The court vacated portions of the order pertaining to the wholesale deregulation of small wireless facilities, stating that the Order’s deregulation of small cells was arbitrary and capricious.

WHAT DOES THE DECISION MEAN?

Once again, FCC applicants must conduct pre-construction NEPA and NHPA review for all small wireless facilities to determine whether a significant environmental impact or adverse effect to Historic Properties or sites of significance to Native Americans would result from construction and operation of each small wireless facility.

NHPA EXCLUSION FOR NEW AND REPLACEMENT POLES

Some small cell facilities would be excluded based on categorical exclusions of NEPA and/or Programmatic Agreements under NHPA, but tribal involvement and consultation is required for setting any new, non-replacement pole constructed for the purpose of supporting wireless antennas. This requirement holds in utility rights-of way AND in all other areas of the US, including all private, public, and tribal lands. The payment of upfront tribal review fees is voluntary and not required by the FCC.

There are specific criteria for a pole to be considered an excluded replacement pole. All poles not meeting the exclusion criteria are considered “new” poles and subject to NHPA review provisions. For more on the exclusion criteria for replacement poles, [READ HERE](#).

Whether or not NHPA Section 106/SHPO Review (in addition to tribal consultation) is required for new or replacement poles will depend on the facility size, proximity to Historic Properties listed in or eligible for listing in the National Register of Historic Places, and their location relative to utility rights-of-way, industrial parks, commercial strip malls, or shopping centers.

NEPA EXCLUSION FOR NEW AND REPLACEMENT POLES

Many, but not all, new and replacement poles within utility rights-of-way continue to be excluded from NEPA, but not from NHPA. The applicant is required to screen each facility to determine whether a NEPA exclusion is available.

COLLOCATIONS

Collocations on existing infrastructure (buildings, utility poles and lines, light poles, traffic signals, billboards, etc.) are generally exempt from NEPA review, but must undergo NHPA Section 106 Review unless the collocation meets one of the stipulations contained within the Collocation Nationwide Programmatic Agreement (Collocation NPA), amended 2016. Criteria for meeting exemptions depend on a number of factors, including size, appearance, and mounting methods, as well as the proximity of the collocation to Historic Properties listed in or eligible for listing in the National Register of Historic Places. For more on the amended Collocation NPA, [READ HERE](#).

Tribal involvement and consultation is required for setting any new, non-replacement pole constructed for the purpose of supporting wireless antennas.

Many, but not all, new and replacement poles within utility rights-of-way continue to be excluded from NEPA, but not from NHPA.

ECA has completed NEPA and NHPA evaluations for thousands of macro, DAS, and small cell facilities. For NEPA and NHPA compliance for wireless facilities, please contact Marvin Webster of ECA at marvin.webster@eca-usa.com or (770) 667-2040 x 101.

ECA is an environmental, cultural resources, and geotechnical consulting and engineering firm with a 30-year track record of excellent service to wireless customers. ECA attributes its success to providing timely and innovative services and solutions with a persistent focus on the objectives of customers.