

THE FCC NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PROCESS FOR CELL TOWERS AND WIRELESS FACILITIES

What is the FCC's Environmental Review Process For Wireless Facilities?

- All macro and small cell facilities constructed by or for FCC licensees (e.g., Verizon, AT&T) or that must be registered in the FCC's Antenna Structure Registration (ASR) System (mostly tall towers) must comply with Federal Communications Commission (FCC) rules implementing the National Environmental Policy Act (NEPA).

What is NEPA and How Does it Work?

- NEPA imposes obligations on all federal agencies to consider the environment before taking action.
- NEPA outlines a decision-making process for federal agencies to disclose and consider the environmental effects of their major actions, which include authorizing, licensing, and funding activities.
- As a procedural statute, it does not mandate an outcome or prevent a project from moving forward; it is intended to improve decision-making and encourage transparency, public participation, and accountability.
- NEPA defines "effects" broadly to include ecological, aesthetic, historic, social, whether cumulative or indirect.

What Is NEPA's Level of Review?

When an action triggers NEPA review, NEPA has three levels of review, with varying degrees of public input and notice requirements, depending on the potential significance of the activity's environmental effect, which in turn depends on the action's context and intensity:

- Environmental Impact Statement (EIS)—for actions whose impacts will be significant, a detailed analysis and consideration of alternatives.
- Environmental Assessment (EA)—for actions that may have a significant effect, a less detailed analysis but with public participation and alternatives consideration. When, after review, the agency determines no significant effect, it issues a Finding of No Significant Impact (FONSI).
- Categorical exclusions (CE or Cat Ex)—for an action or type of action that the agency has determined normally has no significant impact, individually or cumulatively, so that an EIS or EA is not required. "Extraordinary circumstances," such as the presence of an endangered species, can remove an action from a CE and trigger an EA. CEs are a form of NEPA compliance, not an exemption from NEPA.
- Before applying a CE to an action, agencies must consider extraordinary circumstances. In practice, the FCC categorically excludes almost all of its actions, including its licensing of small cell facilities.



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Who Oversees Agency Compliance With NEPA?

- NEPA implementation is overseen by the Council on Environmental Quality (CEQ), which reviews agency NEPA procedures for compliance with CEQ rules implementing NEPA.
- In 2023, CEQ proposed revisions to its NEPA rules and will likely impose a deadline of 2024 for agencies to revise their procedures to comport to the new rules.



FCC's NEPA Process

Actions that Trigger NEPA

Responsibility for NEPA compliance rests with the FCC. Actions that trigger agency NEPA obligations include registering towers and licensing facilities. Registering devices should also trigger NEPA.

The NEPA Checklist

Unlike other agency rules which list categorically excluded actions, FCC's rules categorically exclude all actions from detailed analysis except those that fall into certain categories:

- Will be in a wilderness or wildlife preserve (generally on federal land);
- Might affect threatened and endangered species or their habitat (Endangered Species Act)
- Might affect properties included or eligible for inclusion in the National Register of Historic Places or Indian cultural or religious sites;
- Will be in a floodplain and not adequately raised;
- Will involve "significant changes in surface features" during construction (e.g., wetland fill or water diversion);
- Will be over 450 feet so might affect migratory birds;
- Involve high intensity lighting in a residential area; or
- Would cause RF emissions exposure in excess of FCC-established limits.

These categories constitute the FCC's "extraordinary circumstances" and are referred to as "the NEPA checklist."

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The FCC's Delegation of NEPA Review to the Applicant

Categorical Exclusion Determination

- FCC has delegated the initial assessment of whether a proposed facility (including antennas, poles, fencing, roads, power and fiber connections, and operation and maintenance) is categorically excluded (and if required, certification to that effect) as well as EA preparation to the applicant or licensee.
- For some facilities (e.g. certain poles in rights of way, certain small cells), applicants are only required to conduct a limited checklist review, of evaluating impacts to historic properties. All facilities, however, must comply with RF standards.
- If, after completing the NEPA checklist (above), the applicant concludes the project is categorically excluded, no documentation or record of the review is submitted to the FCC and the applicant can then build.
- There is no requirement for an assessment of cumulative effects.

Environmental Assessment (EA) Preparation

- If the project falls into any of the categories (or unless impacts are mitigated to a level of no significance for the effect), the applicant must file an EA, which the FCC posts for public comment on ASR; the agency must issue a FONSI before the applicant can build.
- Note: To access the EA, one must go to the ASR website and find the ASR application because EAs are not readily available or searchable on their own website platform.

- The FCC has never done an EIS and in general, considers facilities on an individual basis so that, for example, a deployment with multiple towers are not considered holistically. Segmenting actions into smaller parts to avoid an EA or EIS is illegal.

Challenging a Deployment

When an EA is submitted:

- If an EA is submitted, it is generally attached to an ASR application, which is noticed for 30 days; during that period, the public can file comments on the project and request further environmental review in a complaint.
- The FCC may set up a pleading cycle during which the applicant can respond to the complaint. However, the FCC's burden of proof for establishing environmental effects is high. It rarely finds merit in complaints. It rarely requests documentation from the applicant of the NEPA checklist review. The FCC can also order additional environmental review or mitigation on its own motion but it rarely has ever done so.

When a project is categorically excluded:

- Most 5G small cells, collocations, and associated poles are categorically excluded because they meet certain parameters or the applicant will determine they are categorically excluded by reviewing the checklist or by simply not doing the checklist.
- If the applicant determines that the project is categorically excluded, there is no public notice or timeline for public comment, or record of the review submitted to the FCC.

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Potential Bases for Complaints:

- **Checklist Review:** Complainants may allege that review was not adequately done (so, for example, an EA should have been required) or that significant effects beyond the checklist were not considered. The FCC process places the burden of proving an effect on the complainant.
- **Rule Violations:** An applicant's not reviewing the checklist if required, or beginning or completing construction or operating before completing the review or receiving a FONSI violates FCC rules. Falsely certifying no significant environmental effects in ASR or making false statements to the Commission are also rule violations. Proving the violation requires documentation such as photo evidence. Enforcement, however, is rare and rule violations rarely stop a project.
- **Inadequate EAs:** EAs should include certain elements, such as alternatives (other sites or no action) or ecologically sensitive areas beyond those in the checklist (see 47 CFR §1.1311); both the FCC and the applicant generally ignore these requirements.
- **Segmentation:** Segmentation (e.g. a large project with multiple antennas considered only as individual antennas) could be the basis of a complaint but the complainant must show cumulative impacts and the FCC does not in general consider cumulative impacts.

When Should Complaints be Filed?

- When an EA is submitted: during the 30-day notice period.
- When no EA is submitted or if a project has been categorically excluded: ASAP.
- If construction has begun and/or is completed before environmental review was completed; or if construction was done without review or before a FONSI was issued: ASAP.

Recourse During the Local Process or Post-Construction:

- Members of the public can ask local planning or zoning boards to require that licensees submit documentation of FCC NEPA compliance, including RF studies. The public may also ask for a post-construction RF monitoring requirement in a local permit.
- Once an antenna is deployed, members of the public may obtain measurements of RF emissions and inform the FCC or local authorities of any exceedances. However, FCC follow-up is rare.

