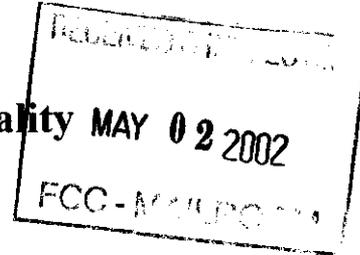


BEFORE THE

**Federal Communications Commission**  
WASHINGTON, D.C.

AND THE

**Council for Environmental Quality**  
WASHINGTON, D.C.



**ORIGINAL**

In the Matter of	)	
Public Employees for Environmental Responsibility	)	
	)	
Request for Amendment of the Commission's	)	<b>RM-9913</b>
Environmental Rules	)	
	)	
Regarding NEPA and NHPA	)	

*To the Chairman, Council on Environmental Quality and  
Secretary, Federal Communications Commission:*

**Amended Petition for Reconsideration  
and Second Evidentiary Supplement**

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Public Employees for Environmental Responsibility (PEER)  
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Its General Counsel and Attorney  
District of Columbia Bar No. 455369

April 25, 2002

No. of Copies rec'd 0+7  
List ABCDE

## INTRODUCTION

Pursuant to Sections 1.106 of the Commission's rules and Section 1507.3 of the Council's rules, Public Employees for Environmental Responsibility ("PEER") hereby supplements -- through this second evidentiary filing -- its petition for reconsideration (filed January 3, 2002) of the Commission's PEER Order, released December 5, 2001. See In the Matter of Public Employees for Environmental Responsibility ("PEER"), Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA, Order (FCC Dkt. No. RM-9913) (Dec. 5, 2001). Compare 47 C.F.R. § 1.106 with 40 C.F.R. § 1507.3.

The Petition for Reconsideration dated January 3, 2002, seeks a revision of the Commission's environmental rules to:

(1) Revise Rule 1.1307 to ensure that subjective, essential government functions required to ensure compliance with the Endangered Species Act of 1973 are not unlawfully delegated to non-government entities such as telecommunications carriers and fiber-optic cable laying companies, 47 C.F.R. § 1.1307(a)(3);

(2) Revise Rule 1.1307 to ensure that subjective, essential government functions required to ensure compliance with the National Historic Preservation Act of 1966 are not unlawfully delegated to non-government entities such as telecommunications carriers and fiber-optic cable laying companies, 47 C.F.R. § 1.1307(a)(4);

(3) Revise all Rules to remove any and all categorical exemptions or exclusions now granted for the federal action known as "wireless and broadcast spectrum auctions and/or construction permits", and to subject the same to environmental review; see e.g. 47 C.F.R. § 1.923 (self-certified wireless telecommunications applications); 47 C.F.R. § 5.53 (station authorization, experimental radio service, other than broadcast); 47 C.F.R. § 21.3 (station authorization for domestic public fixed radio service); 47 C.F.R. § 27.11 (miscellaneous wireless services, initial authorization); 47 C.F.R. § 63.18 (contents for applications for

international common carriers); 47 C.F.R. § 74.112 (supplementary statement with application for construction permit for experimental broadcast stations); 47 C.F.R. § 78.15 (contents for applications, cable television relay service); 47 C.F.R. § 90.129 (private land mobile radio service); 47 C.F.R. § 95.206 (radio control (R/C) radio service); 47 C.F.R. § 95.406 (citizen band (CB) radio services); 47 C.F.R. § 101.525 (24 GHz system operation, fixed microwave service); 47 C.F.R. § 101.1009 (system operation, local multipoint distribution services); 47 C.F.R. § 1329 (EA station license, modifications in the fixed microwave services);

(4) Revise all Rules to remove any and all categorical exemptions or exclusions now granted for the federal action known as "Communications Antennae Registration and/or Modification", and to subject the same to environmental review; see e.g. 47 C.F.R. § 1.61 (special aeronautical study); 47 C.F.R. § 17.4 (antenna structure registration);

(5) Revise all Rules to remove any and all categorical exemptions or exclusions now granted for the federal action known as "Section 214 Authority", and to subject the same to environmental review; see 47 C.F.R. § 63.

(6) Revise all Orders to remove any and all categorical exemptions or exclusions now granted for the federal action known as "submarine cable laying", and to subject the same to environmental review; 47 C.F.R. § 1.767 (cable landing licenses).

(7) Revise all Rules to remove 'self-certifications' and replace that regulatory option with a system of disclosure presenting all environmental resources endangered by any of the Commission actions, supra.

## Statement of Evidence

The Commission has cited lack of a docketed evidentiary basis as the grounds for the initial rejection of the PEER Petition. PEER then filed for Reconsideration, requesting, in part, a statement of the standard of review for such a rejection and the application of that standard to the facts in this case. PEER now files the attached second submission of supplemental evidence as proof that a resource protected by the National Environmental Policy Act of 1969 is being systematically degraded and significantly impacted by major federal actions of the Commission:

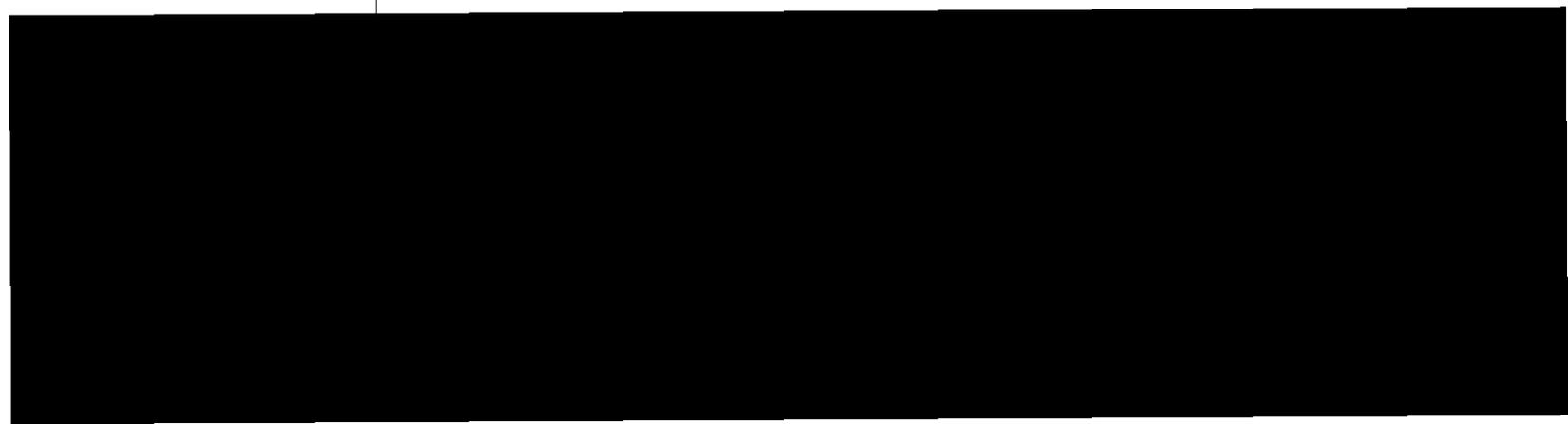
- 1) Submarine Cable Licensing/Nearshore Coral Reefs. Microsoft PowerPoint presentation by the Staff of the Florida Department of the Environment (FDEP) to Deputy Secretary Robert Ballard, FDEP. Attached as Exhibit A.
- 2) Spectrum Auction, and Registration of Tower Erection and Modification/Designated Wilderness Areas. Correspondence with Death Valley National Park Superintendent James T. Reynolds, outlining the remaining Department of Interior and FCC compliance problems at Mormon Peak, California. Attached as Exhibit B.
- 3) Registration of Tower Erection and Modification/Nationwide. Public statement by Bush Administration official partially concurring with PEER that the moment has come to rewrite the FCC's environmental rules for wireless actions. Attached as Exhibit C.
- 4) Registration of Tower Erection and Modification/Designated Wilderness Area. Series of articles indicating a potential problem similar to the existing one at Mormon peak, but at Joshua Tree National Park in California.

The materials are hereby filed as evidence of significant environmental impact occurring due to the FCC's failure to conduct required environmental assessment and review. PEER renews its Petition for Reconsideration, and requests the FCC conduct

**Exhibit A: Evidence of significant environmental impact on nearshore coral reefs by major federal actions of the Federal Communications Commission.**

# **Cable/Coral Damage Reports for Atlantica**

---

- **Segment 1: crosses 1,600 linear feet of coral reef**
    - unreported damage to soft corals and sponges occurred within ~ 3-ft on either side of cable
    - 7.2 square feet of Type 1 - 5 impacts to stony corals
  - **Segment 2: crosses 1,150 linear feet of coral reef**
    - unreported damage to soft corals and sponges occurred within ~ 3-ft on either side of cable
    - 12.1 square feet of Type 1 - 5 impacts to stony corals
- 
- 

# Cable/Coral Damage Reports for AT&T Hollywood

---

- **Americas-II:** 135 colonies with Type 1-5 impacts for a total of 14.8 square feet
- **Columbus-III:** 148 colonies with Type 1-5 impacts for a total of 12.1 square feet
- **Mac 1:** 30 colonies with Type 3 & 5 impacts
- **Mac 2:** 8 colonies Type 3 & 5 impacts
- **Maya-I:** 22 Type 3 & 5 impacts
- \*Note: Coral colony size, soft corals, and sponge damage not reported.

# **Cable/Coral Damage Reports for AT&T**

---

- **Americas-II: crosses 6,250 linear feet of coral reef**
- **Columbus-III: crosses 6,250 linear feet of coral reef**

# Hard or Stony Coral Impacts are reported

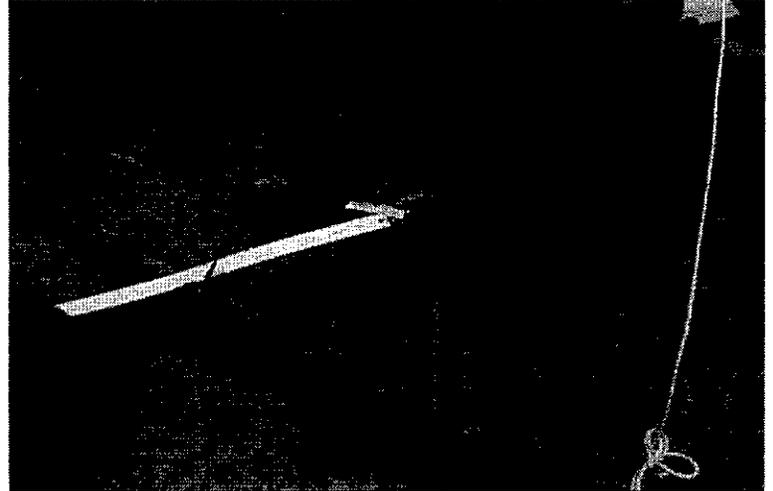


- Stony Coral Species Impacted include:
  - Great Star Coral
  - Boulder Brain Coral
  - Grooved Brain Coral
  - Starlet Coral
  - Smooth Star Coral
  - Maze Coral
  - Elliptical Star Coral

# Restoration Efforts

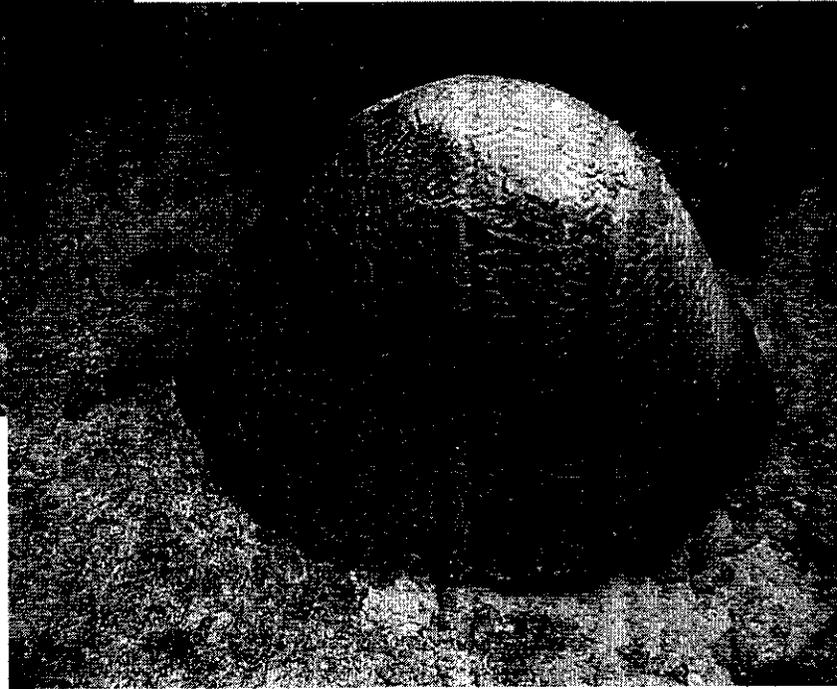
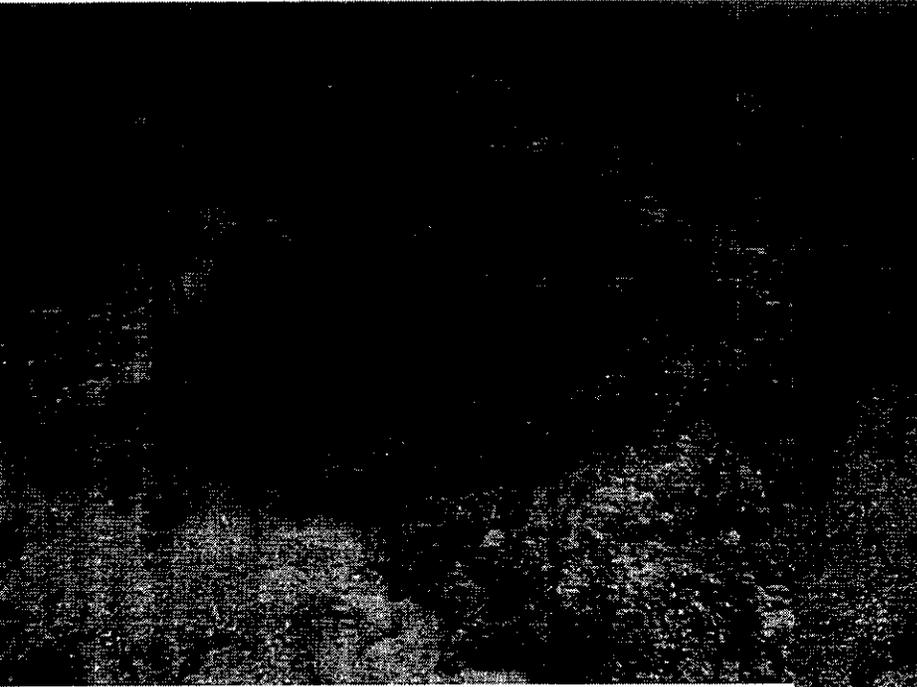
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- Divers adjust cables in an attempt to free pinned soft corals.
- Severed or abraded stony corals are tagged for repair or relocation.
- Repair and monitoring reports are sent to FDEP



Corals are repaired using Type II  
Portland cement.

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# Recovery Rates by Community used in HEA Analysis

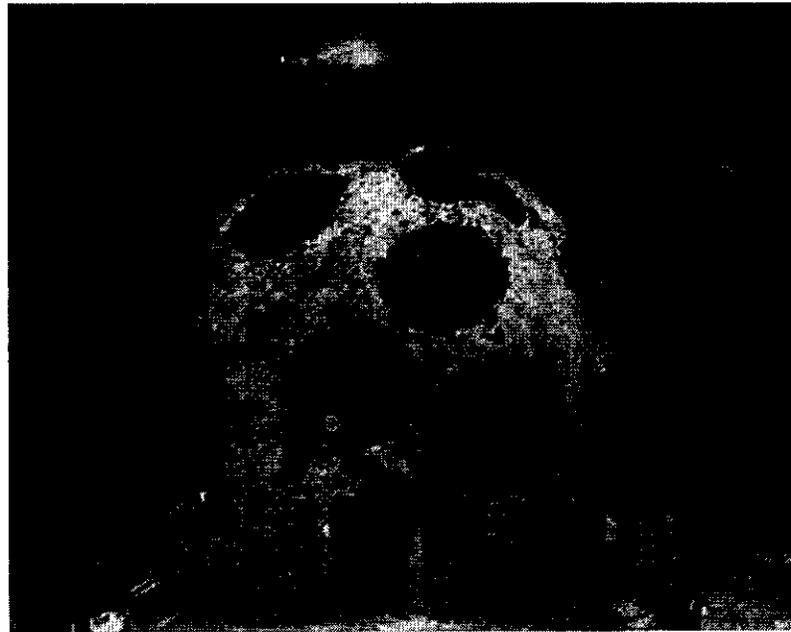
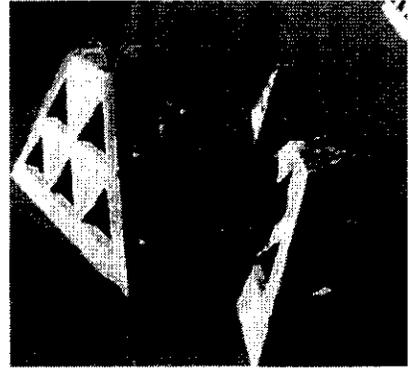
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- Hard Corals- 35 years
- Soft Corals- 10 years
- Sponges- 7 years
- Algae- 2 years
- Hardbottom- 1 year
- \*Assuming growth occurs starting in year one.

# Mitigation

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- Artificial reef modules or limestone rocks are deployed on sandy bottoms and are monitored for recruitment success.



# HEA Analysis

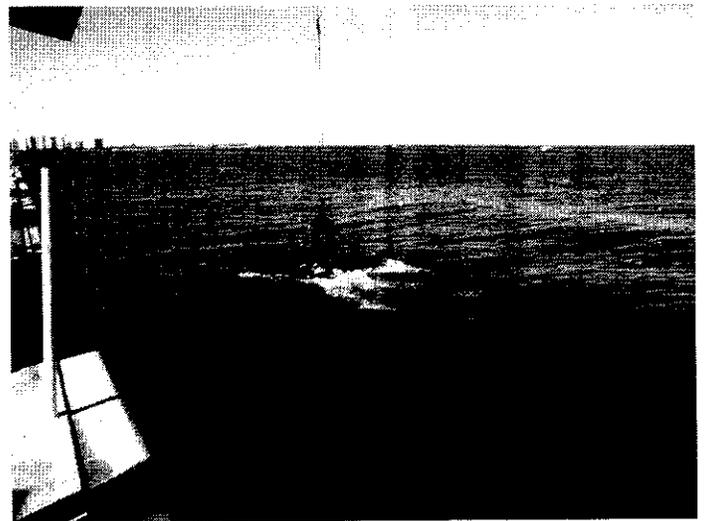
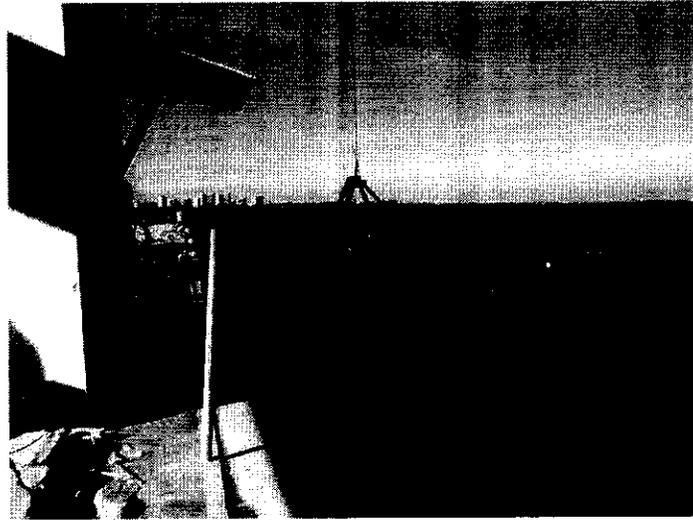
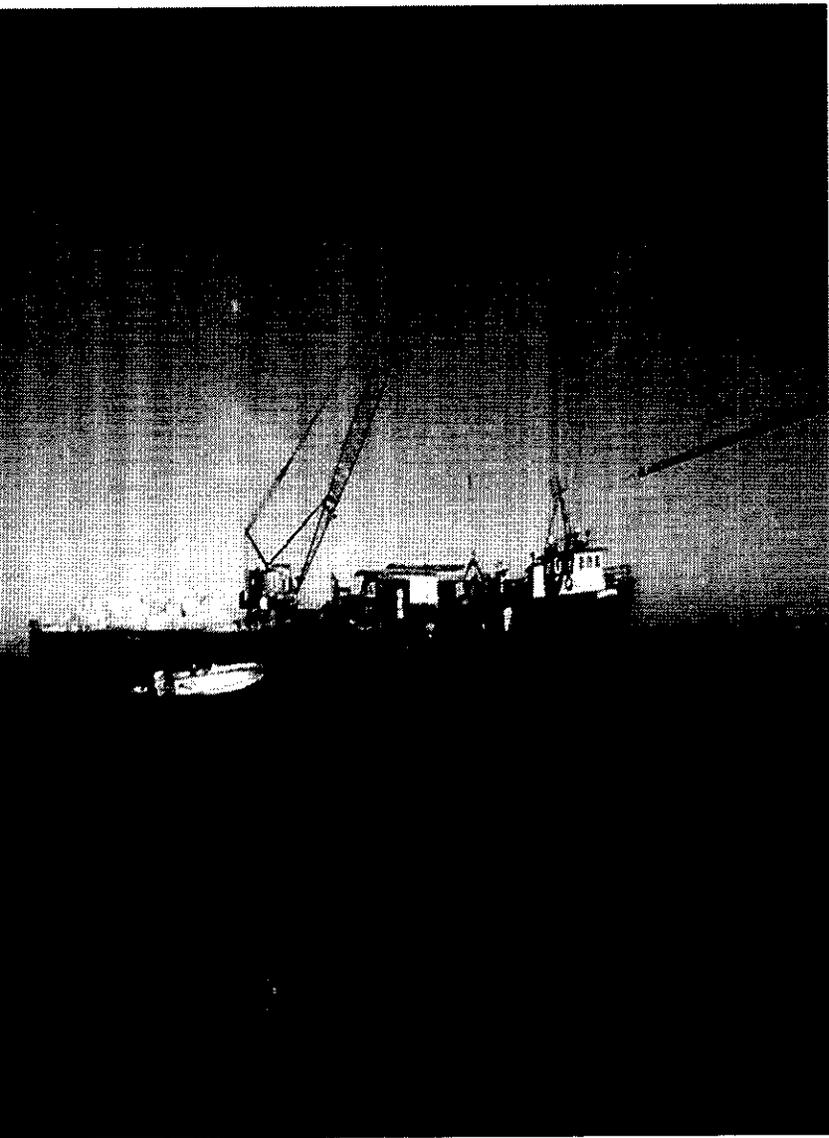
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- **As indicated in the technical approach, the Habitat Equivalency Analysis (HEA) was used to determine adequate compensation for impacts to stony corals. HEA is used in natural resource damage assessments (NRDAs). restoring the environment after injury**
- **HEA is one of the methods available to determine the appropriate compensation for the interim loss of natural resources. The concept behind HEA is to provide an equivalency between the ecological functions ("services" that the ecological system provides to mankind and the ecosystem) lost due to the injury and the ecological functions provided by the replacement project.**



PBS

DB



TB

# AT&T Monitoring Reports

## Hollywood Site

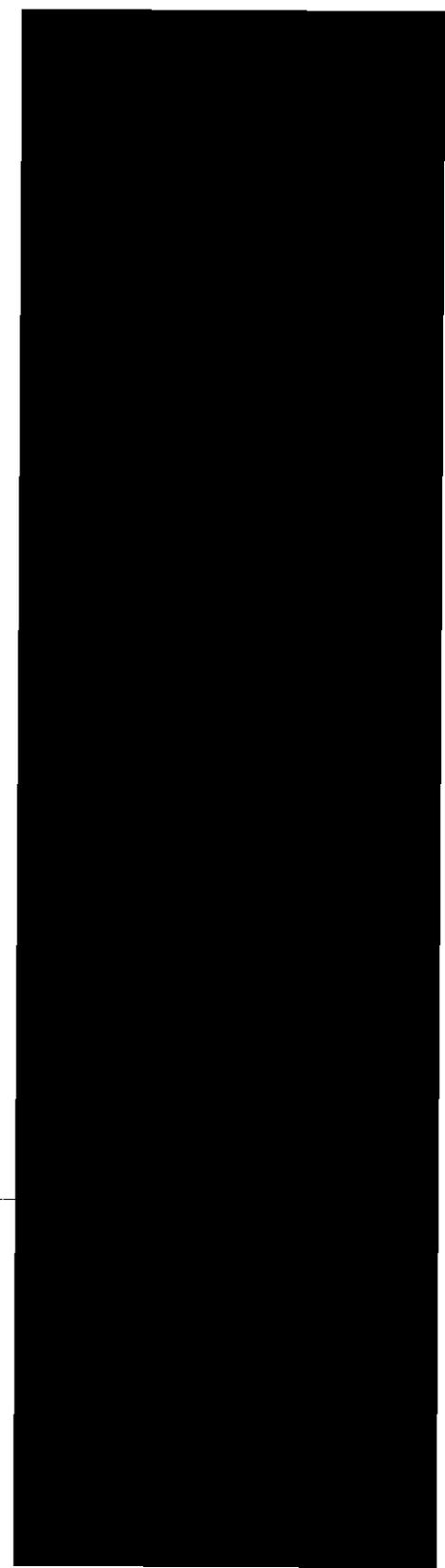
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### ■ The 6 Month Monitoring reports show

- repaired corals are exceeding the 95% survivorship test
- artificial reef mitigation modules after six months have a green algal film and some epibiotal growth on the surface. Fish and motile invertebrates were noted using the modules.



**Exhibit B: Evidence of significant environmental impact on designated wilderness areas by major federal actions of the Federal Communications Commission**



April 24, 2002

Mr. James T. Reynolds, Superintendent  
Death Valley National Park  
U.S. National Park Service  
Death Valley, CA 92328

VIA FIRST CLASS MAIL

*Subj: Resolution of Outstanding Environmental Review Matters on Mormon Peak*

Dear Superintendent Reynolds:

The Public Employees for Environmental Responsibility (PEER) is pleased that the National Park Service (NPS) has not issued a new right-of-way to PacBell for a microwave tower in the wilderness of Death Valley National Park. The NPS wrote to PacBell on July 24, 2000 promising that the NPS would issue a new right-of-way until 2012 with a right of renewal at that time. The issuance of a new right-of-way by the NPS would have violated section 4(c) the Wilderness Act (16 U.S.C. 1133(c)) and explicit NPS Management Policies at 6.4.8.

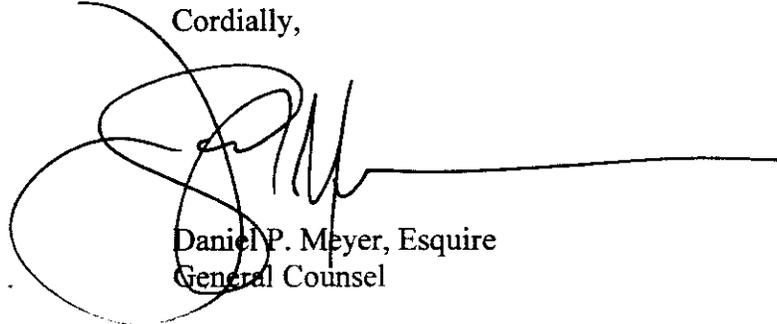
PEER believes that the right-of-way issued by the Bureau of Land Management (BLM) in 1982 expired by its own terms when Congress designated the area as wilderness in the California Desert Conservation Act, Pub. L. No. 103-433, 108 Stat. 4471 (1994) (codified as amended at 43 U.S.C. § 1781 (1994)). It appears that the NPS received the casefile on the Mormon Peak tower in July 1995 and did not closely review that file until PacBell sought permission to modify the tower in 2000. The Federal Communications Commission (FCC) appears also to have neglected its required environmental review of its own actions at the tower site. Only then did it come to light that the right-of-way issued in 1982 was only temporary and contingent on congressional action to designate the area as wilderness. Even former superintendent Richard Martin must have recognized that the PacBell right-of-way expired because he promised them a new right-of-way. That step would have been totally unnecessary if the BLM right-of-way remained in existence until 2012.

Because of the history of this issue, the NPS confronts the difficult situation of a structure, engaged in commercial enterprise, within park wilderness and without any current private existing right or agency authorization. PEER understands that the tower provides all essential telephone services to the Furnace Creek areas of the park. Neither PEER nor the NPS can wave a magic wand and move the tower to a nonwilderness location overnight. The NPS would have been better served had its peer agency, the FCC, conducted the environmental review required of it by law; but that review has not been forthcoming.

PEER would like to work with the NPS in having the tower relocated in a reasonable amount of time. Such relocation may involve the preparation of an environmental assessment (EA) to determine the alternatives for relocation and the impacts to the environment associated with each. Preparation of an EA requires time for issue development and public comment. The NPS would then need to give PacBell reasonable time to construct new and remove old facilities. It is reasonable to believe that it may require two (2) years or so to effect removal of the tower and relocate its function elsewhere so as to not disrupt telecommunications in the park. Indeed, it is almost two years since we first notified the NPS and the FCC of the tower's questionable legal status and we have made no progress.

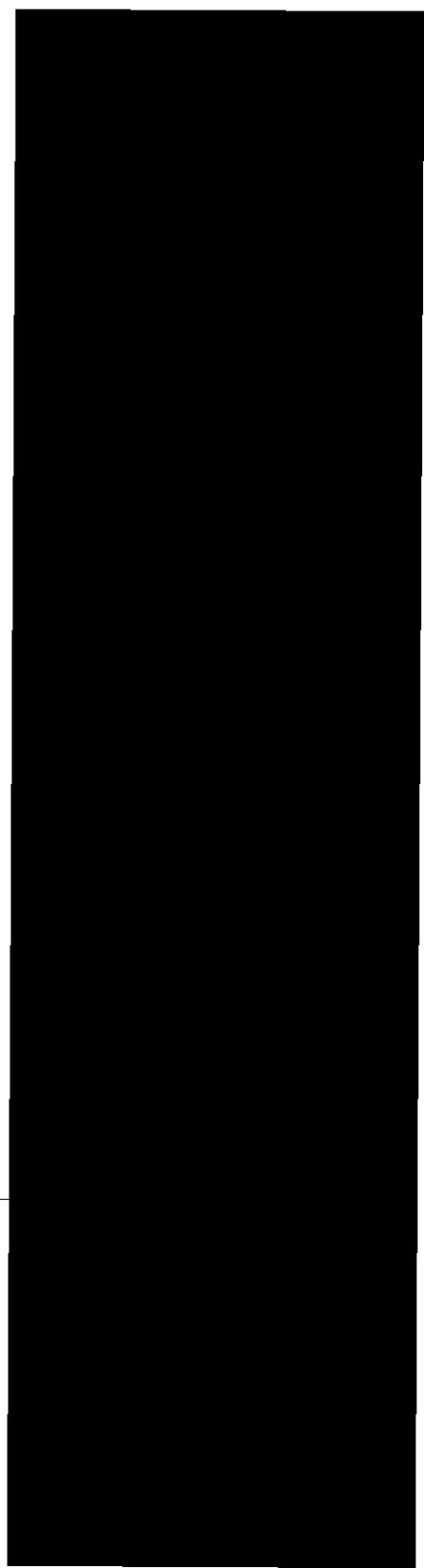
Please tell us what the NPS proposes to do about relocating the microwave tower away from Mormon Peak and the timeframe you may envision. PEER will consider supporting a plan that remedies the situation in a reasonable time and that does not threaten any further violations of the Wilderness Act or NPS Management Policies. In the end, both our members and the NPS wish to improve the quality of the wilderness in Death Valley National Park by removing the tower from Mormon Peak.

Cordially,

A handwritten signature in black ink, appearing to read 'D. Meyer', is written over a horizontal line. The signature is stylized and somewhat abstract.

Daniel P. Meyer, Esquire  
General Counsel

**Exhibit C: Evidence of partial CEQ concurrence  
with PEER's observation that it is  
time for the FCC to revise its  
environmental rules**



RCR Wireless News

January 28, 2002, Monday

SECTION: Pg. 11

LENGTH: 620 words

HEADLINE: White House lawyer: FCC should revise tower-siting environmental rules

BYLINE: HEATHER FORSGREN WEAVER

BODY:

ALEXANDRIA, Va.-A lawyer for President George W. Bush who specializes in environmental issues suggested last Wednesday that the Federal Communications Commission may need to revise its regulations regarding tower-siting compliance with the National Environmental Policy Act.

'I do think at this point in time-enough time has passed, there have certainly been plenty of new developments-the intensity and focus of the FCC's permitting activities has shifted and that it is time to take a comprehensive look at this regulation. ... I am certainly not suggesting that everything in the FCC's NEPA regulations needs to be changed, but I do think that the character of what is being done has changed enough and there have been some new developments in case law. (These changes could) offer further guidance and amplification on the kinds of analyses that are not addressed in a robust manner by the FCC's procedure-for example, the role of social and economic analysis in the NEPA process,' said Dinah Bear, general counsel for the Council on Environmental Quality.

CEQ is a White House agency that advises the president on environmental issues and also was given responsibility for NEPA implementation and compliance.

The FCC did not seem surprised by Bear's comments, but the prospects for a new rule making on NEPA tower-siting compliance does not seem to be on a fast track.

'Some have suggested it might be necessary to review our environmental regulations. ... We are interested in thoughts as to whether a major rule making is appropriate,' said Jeffrey Steinberg, deputy chief of the commercial division of the FCC's Wireless Telecommunications Bureau. The FCC could fine-tune some rule changes, he said, adding, 'The commission does not have any kind of a time line. There certainly has not been the kind of decision made to undergo either a fundamental look at the rules or a narrower fine-tuning. ... These issues continue to be under consideration. Whether the commission will do anything or when is one of the issues.'

Bear and Steinberg were luncheon speakers at a tower-siting conference

The last time the FCC did a comprehensive review of its NEPA regulations was 1979 when it issued a notice of proposed rule making. Final rules were not adopted until 1986.

The FCC is making a concerted effort to clear the backlog of NEPA-related tower registration cases, said Dan Abeyta, senior attorney in the wireless bureau's commercial wireless division.

'Effective today, the wireless bureau's policy is to resolve all NEPA matters within six months,' said Abeyta, noting that the goal is to have eliminated the backlog (cases more than one year old) by the end of 2002.

Under the new procedures, the wireless bureau will review NEPA cases monthly. When a case is six months old, the applicant will receive a letter from the bureau notifying the applicant it has 45 days to resolve the NEPA issue. Applicants will be required to come back to the FCC with a timetable for resolving the issue if it goes beyond 45 days.

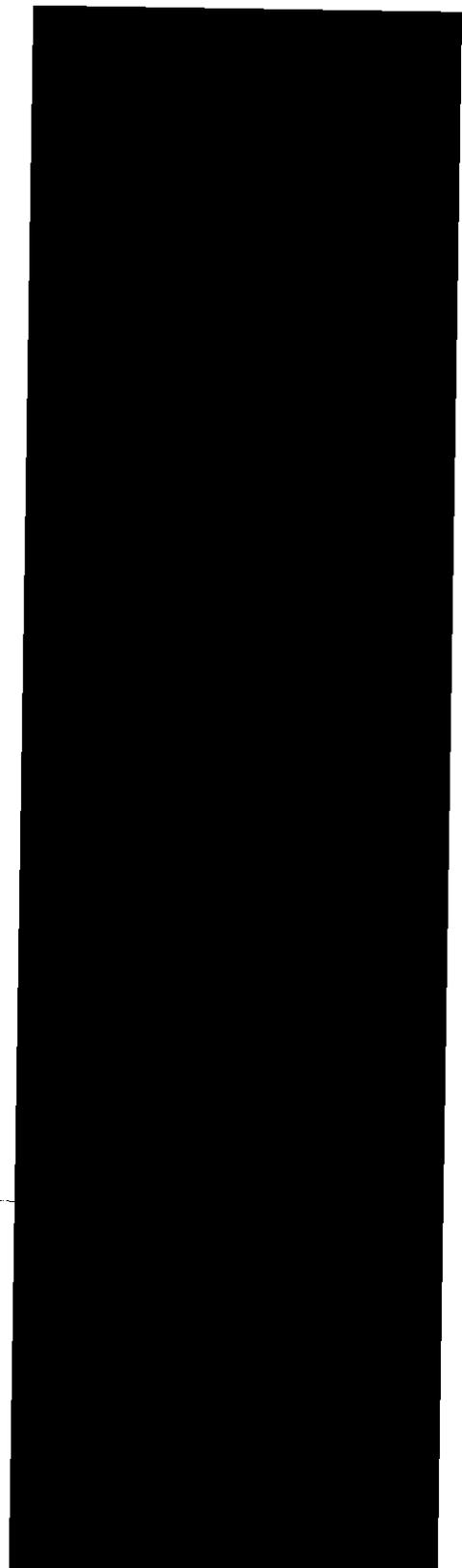
Six months is a generous amount of time, Abeyta said, noting CEQ believes all NEPA issues should be resolved within three months.

A matter becomes a NEPA case when the FCC receives a letter from a state historic preservation officer saying the tower could have an adverse impact on an historic property or the agency receives a complaint letter from the public.

Recently, the FCC changed its policy to alert tower owners when it opens a case rather than its former policy of informing licensees or carriers-several of which may be on an individual tower.

LOAD-DATE: January 30, 2002

**Exhibit D: Evidence of that a regulated entity knowingly and willingly maintained a radio communications tower in a designated wilderness area**



Federal Document Clearing House Congressional Testimony

April 11, 2002 Thursday

SECTION: CAPITOL HILL HEARING TESTIMONY

LENGTH: 835 words

COMMITTEE: HOUSE RESOURCES

HEADLINE: LANDS BILLS

BILL-NO: H.R. 3718                      Retrieve Bill Tracking Report  
   Retrieve Full Text of Bill

TESTIMONY-BY: TODD MARKER, , GENERAL MANAGER,

AFFILIATION: RM BROADCASTING

BODY:

Statement of Todd Marker, General Manager, RM Broadcasting

Written Statement of Proposed Testimony in Support of H.R. 3718

"Little San Bernardino Mountains Right- of-Way Act"

April 11th. 2002

RM Broadcasting, a California corporation, owns and operates two FM radio broadcast stations in Palm Springs California, KPLM and KJJZ. These two stations, another FM radio station, KMRJ, and the University of Southern California's Classical Music/National Public Radio FM station, KPSC, transmit their broadcast signals from a radio tower facility on land which RM Broadcasting owns in an area called Indio Hills located in the Little San Bernardino Mountains. This site is accessed by a road, a portion of which (approximately 7/10ths.of a mile) crosses into The Joshua Tree National Park zoned Wilderness Area. RM Broadcasting is seeking permission to continue using this short portion of the road because:

- the area is remote and inhospitable to the extent that it is not utilized by the public
- permission has previously been granted by the Park Service to use the road subject to certain conditions which were fulfilled
- no harm has been done or is being done to the environment
- the road has been used without other complaints, difficulties or problems for nearly twenty years
- the road is used by the National Park Service, the Imperial Irrigation

- the incursion is insignificant in length

- no further incursion into the Wilderness Area will occur - elimination of the incursion is not possible due to unsuitable terrain.

The RM Broadcasting tower site along with its access road have been used by KPLM since the station was put on the air in 1983. The site and access road were built by KPLM's original owner, RTC Broadcasting. In 1986 KPLM was acquired by the R Group Management Company. In 1987 the original road was improved by the R Group Management Company. At that time, National Park Service Superintendent Rick Anderson, since retired, notified R Group Management that the road was trespassing on the Wilderness Area. R Group Management subsequently agreed that there was trespass but was able to negotiate an agreement with former Superintendent Anderson (exhibits A, B, C). This agreement stated that R Group Management would be able to continue to use the road subject to the conditions that a gate and fence be constructed and maintained, that grading would be contoured to appear as natural as possible, and that Public Service Announcements for the National Park Service would be broadcast by KPLM. R Group Management complied with these conditions and RM Broadcasting (the present owner of KPLM and the tower site property) has continued to maintain the road, gate and fence and continues to broadcast Public Service Announcements for the National Park Service.

This is where matters stood until March of 1997 when RM Broadcasting was notified by the new Superintendent of the National Park Service's Joshua Tree Office, Mr. Ernest Quintana, that he was reopening the issue of the tower site access road's incursion into the Wilderness Area. Mr. Quintana's position was that the road needed to be removed and that access through the Wilderness Area could only take place on foot or by mule.

Unfortunately, accessing the tower site on foot or by mule are not practical. Distances involved on either side of the contested area, the weight of necessary equipment, and the need to get to the site quickly and on short notice preclude these options. Reworking the road to avoid Wilderness Area land would require construction on unsuitable terrain which the local zoning authority would not permit.

For these reasons, RM Broadcasting, saw no other solution than to respectfully ask

Congresswoman Mary Bono (44th. Congressional District), in whose district RM Broadcasting maintains its offices, to intercede on its behalf. Congresswoman Bono, after carefully considering the situation, agreed that it would be onerous and unreasonable for RM Broadcasting to discontinue using the disputed portion of the tower site access road. Congresswoman Bono then arranged a meeting between the principal parties in the matter.

On August 27th., 2001, in her Palm Springs Office, the co-owners of RM Broadcasting, Robert Rivkin and Todd Marker, met with Mr. Ernest Quintana, Mr. John Reynolds, the regional director of The National Park Service, Congresswoman Bono, and her staff. After all parties were heard and after carefully considering the situation, Mr. Reynolds recommended that Congresswoman Bono sponsor a bill which would allow RM Broadcasting to continue to use the access

This is the bill, H.R. 3718 which is now before you for your vote. RM  
Broadcasting hopes that you will allow it to continue to enjoy the use of the  
tower site access road as it has in the past.

LOAD-DATE: April 17, 2002

THE PRESS-ENTERPRISE (RIVERSIDE, CA.)

April 12, 2002, Friday

SECTION: LOCAL; Pg. B06

LENGTH: 374 words

HEADLINE: Bill may allow wilderness road: JOSHUA TREE: The dirt path to two radio towers was created illegally in the early 1980s.

BYLINE: JENNIFER BOWLES; THE PRESS-ENTERPRISE

BODY:

JOSHUA TREE

It's just a dirt road, not even a mile long.

But what happens to the path that snakes up a mountain in Joshua Tree National Park will take an act of Congress.

A bill sponsored by Rep. Mary Bono, R-Palm Springs, would allow a broadcasting company to travel through landscape designated with the highest protection given to public land. The designation also bans motorized vehicles.

Environmentalists fear passage of the bill will send a dangerous message.

"It defeats the whole idea of wilderness," said Frank Buono of Public Employees for Environmental Responsibility and one-time assistant park superintendent at Joshua Tree.

The bill would allow Palm Springs-based RM Broadcasting to drive vehicles up the steep terrain to service two transmission towers used by FM radio stations KPLM and KJJA.

Todd Marker, RM's general manager, said there is no other way to get to the towers.

The National Park Service supports the bill since "construction of a new road outside the park would further impact the surrounding environment and encumber RM Broadcasting," the federal agency's deputy director, Randy Jones, said. He testified Thursday before the subcommittee on National Parks, Recreation and Public Lands.

Bono testified that although she doesn't believe in creating roads through wilderness, RM Broadcasting officials "have been good stewards of this land and have every intention to continue in this same spirit."

The company will do a land swap or pay the Park Service to continue to use the road, according to testimony.

owners of the radio towers, and a former park superintendent wrongly gave the company a permit to continue to use it, said Ernie Quintana, superintendent of Joshua Tree National Park.

Five years ago, when it was brought to his attention, "I said, 'Whoa, we can't allow the road to continue.' I blocked it off," Quintana said. "You can only walk up it or use horseback because it's wilderness."

Quintana said several options were looked at but said repairing the road would create a "huge scar."

"We're trying to make the best out of a very bad situation," he said.

NOTES:

Staff writer Claire Vitucci contributed to this report.

GRAPHIC: MAP

LOAD-DATE: April 12, 2002

Communications Daily

April 12, 2002, Friday

SECTION: COMM DAILY NOTEBOOK

LENGTH: 434 words

BODY:

Telecom Right-of-Way (TelROW) Coalition urged House Resources Committee panel to move legislation (HR-3258) by Rep. Cubin (R-Wyo.) that would establish market-based fee criteria for fiber projects crossing federal lands. TelROW Exec. Dir. Eric Myers told the Parks, Recreation & Public Land Subcommittee Thurs. bill would ensure federal agencies charged right-of-way (RoW) fees based on fair market value of land, rather than value of infrastructure being deployed. Bureau of Land Management (BLM) and Forest Service had considered modifying their respective policies, but since have backed away from implementing fee schedule based on factors such as number of fiber strands in telecom projects. Myers suggested federal govt. apply "cost or impact-based methodology" to private sector use of public land, similar to how govt. determines payment when it acquires privately held land: "Since there is no true market in federal land, overall valuation, as well as the cost of the land impact, must be estimated." He said that approach was "universal methodology" used to determine payments for RoWs "obtained from private parties in condemnation proceedings." Peter Culp, BLM's asst. dir.-Minerals, Realty & Resources, said Cubin bill wouldn't "allow for fair market rates of return for [RoWs] on public lands." He said it would "delay, rather than expedite, the processing of RoWs" since bill would "require a time-consuming, multiple appraisal process for every RoW before issuance or renewal." Culp said HR-3258 would increase, rather than stabilize, RoW assessment costs: "For lengthy, linear RoW projects, it will be especially problematic to determine the current values of the multiple parcels of land that a RoW crosses. The costs of these additional appraisals inevitably will be passed on to RoW applicants as part of the federal government's costs in processing a RoW." Panel also was scheduled to hear testimony on bill by Rep. Bono (R-Cal.) that would grant RoW to RM Bcstg. Co. in Joshua Tree National Park in Cal. Public Employees for Environmental Responsibility (PEER) said hearing didn't include representation from parks conservation community. PEER Counsel Dan Myer said Bono bill (HR-3718) concealed fact that RoW provided under bill would give RM Bcstg. access to illegal road company built in protected wilderness: "Never has Congress enacted a law to grant a right- of-way across already designated wilderness. Mary Bono may not know that her seemingly modest proposal is precedent-setting. More disturbing still, this bill would reward illegal conduct."

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