

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
PETITION FOR DECLARATORY RULING)
FILED BY STOKES ENVIRONMENTAL) WTB Docket No. 05-44
SERVICES REGARDING ENVIRONMENTAL)
ASSESSMENTS FOR PROPOSED FACILITIES)
IN WETLANDS)

To: The Commission

COMMENTS OF PCIA

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COMMENTS OF PCIA

CONTENTS

	Page(s)
Introduction and Summary	1
I. PCIA	3
II. The Relationship Between the Commission’s Regulations and the Corps’ Regulations Pertaining to Wetlands.....	3
A. NEPA	4
B. The Commission’s Regulations Require an Environmental Assessment (“EA”) for Facilities with Impacts to Wetlands.....	5
C. The Corps’ Regulations Require a Corps Permit and NEPA analysis for Facilities that will Impact Wetlands	6
1. The Corps’ Wetlands Permitting Authority	6
2. Individual and Nationwide Permits (“NWPs”).....	8
3. NEPA Compliance and NWPs.....	10
III. Proper Treatment of a Project Covered By a Corps Permit Under Section 1.1307(a)(7) of the Commission’s Regulations.....	12
A. The Corps Assumes NEPA Responsibility Under its Permit Procedures	13
1. NEPA Does Not Require an Additional EA Under Section 1.1307(a)(7) for Projects Covered By a Corps-issued Individual Permit	14
2. NEPA Does Not Require an Additional EA under Section 1.1307(a)(7) for Projects Covered By a Corps-Issued NWP	14
IV. The Corps Should Create an NWP to Expressly Cover Communications Towers	15
V. The Commission Should Consult With the Corps to Streamline and Coordinate NEPA Compliance for Communications Facilities	17
Conclusion	17

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Introduction and Summary

PCIA, the Wireless Infrastructure Association, submits these comments on behalf of its members in response to the Public Notice (“Notice”) released on February 4, 2005 by the Federal Communications Commission (“FCC” or “Commission”) regarding the petition filed by Stokes Environmental Services in this proceeding (“Stokes petition”).

The Stokes petition seeks a declaratory ruling regarding the application of the Commission’s environmental regulations (47 C.F.R. §§ 1.1301 - 1.1319), and particularly the application of provisions relating to wetlands under Section 1.1307(a)(7),¹ to Commission-authorized construction projects in wetland areas, where the project is covered by a permit issued by the U.S. Army Corps of Engineers (the “Corps”).

The Commission has asked for comments on three specific issues: (1) the Stokes Petition generally; (2) the relationship between Section 1.1307(a)(7) and the Corps’ rules, practices, and procedures; and (3) the proper treatment under Section 1.1307(a)(7) of construction projects that

¹ 47 C.F.R. § 1.1307(a)(7).

will impact wetlands but are covered by a specific kind of Corps permit called a nationwide permit (“NWP”).

PCIA and the wireless industry strongly support the streamlining of compliance obligations under the Commission’s environmental regulations, and the elimination of unnecessary, wasteful and duplicative regulatory procedures that may be required for tower projects that may impact wetlands. From the experiences reported by its members, PCIA can confirm the assertion in the Stokes Petition that the compliance requirements under the Commission’s current rules are unclear and confusing for projects impacting wetlands, and therefore it is likely that at least some applications undergo unnecessary and duplicative environmental reviews by both the FCC and the Corps. This confusion and wasteful redundancy seems largely due to lack of coordination or complementary interaction between the respective regulations of the two agencies.

PCIA concludes that projects covered by Corps permits should not require an EA under Section 1.1307(a)(7) of the Commission’s rules. In addition, PCIA notes a secondary problem in that while some NWPs may be interpreted to apply to the construction of communications towers, no existing NWP expressly does so. PCIA believes that some of the regulatory duplication that its members have identified can be remedied, and the goals of the Stokes Petition can be achieved, under the current regulations by administrative changes implemented by either the Corps or the Commission, and by closer cooperation between both agencies.

PCIA urges the Commission to consult with the Corps with the goal of coordinating the regulations and informal guidance from the respective agencies, in order to eliminate duplicative and unnecessary compliance procedures, and to streamline effective and efficient NEPA compliance for both agencies and for the applicants and public that they serve. PCIA also urges

the Commission to work with the Corps to develop an appropriate nationwide permit that would expressly and efficiently cover communications sites and tower projects.

I. PCIA

PCIA, the Wireless Infrastructure Association, is the principal trade association representing the companies that make up the wireless telecommunications and broadcast infrastructure industry. PCIA's members own and manage more than 50,000 telecommunications towers and antenna facilities that support analog, digital and broadband services across the country.

PCIA seeks the advancement of the wireless communications industry through advocacy, technical and marketplace initiatives. As the leading representative of infrastructure providers, PCIA monitors the regulatory obligations imposed on its members and others in the industry. PCIA supports programs and policies that facilitate the rapid buildout of the national wireless networks, and enable the industries that construct and maintain these networks.

II. The Relationship Between the Commission's Regulations and the Corps' Regulations Pertaining to Wetlands

Both the Corps and the Commission have promulgated regulations implementing the National Environmental Policy Act (NEPA)² that require applicants and the respective agencies to assess the environmental impacts that will be caused by the projects that they construct or authorize.³ The regulations of both agencies provide procedures for the consideration of potential impacts to wetlands. Although not identical in approach, there is some overlap between the two agencies' wetlands regulations. Moreover, although the Commission has coordinated its environmental regulations with the Council on Environmental Quality ("CEQ"), it does not

² 42 U.S.C. § 4321 et seq.

³ The Commission's environmental regulations are found at 47 C.F.R. Part 1, Subpart I., the Corps' environmental regulations are found at 33 C.F.R. § 230.

appear that the Commission has previously coordinated its wetlands requirements with the Corps.⁴

The Stokes petition seeks a declaratory ruling that construction projects that have been “reviewed, approved, and permitted” by the Corps should not, based solely on wetlands impacts, require an EA under the Commission’s rules. Currently, Commission procedure is to clear projects located in wetlands upon a showing in the EA that the project has received a permit from the Corps.⁵ Therefore, for projects that have or can show coverage under a Corps permit, the question is whether the entitlement to that permit under the Corps’ regulations is by itself sufficient under NEPA and the Commission’s regulations, to avoid the need to file an EA with the FCC. PCIA believes that the answer is yes, a Corps permit is sufficient to avoid an EA for wetlands impacts, and on that basis PCIA supports the Stokes petition.

A. NEPA

NEPA requires an agency to consider every potentially significant aspect of the environmental impact of a proposed activity. Specifically NEPA requires all federal agencies proposing a “major federal action significantly affecting the quality of human environment” to prepare an environmental impact statement (“EIS”). If, however, the agency is uncertain whether the effect of the activity is “significant” from an environmental standpoint, the agency may elect, prior to performing an EIS, to prepare an environmental assessment (“EA”). An EA

⁴ Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, *Report and Order*, 60 RR 2d 13, 14 (1986). The CEQ regulations encourage federal agencies to cooperate in the implementation of NEPA. See 40 C.F.R. § 1501.6 (“The purpose of this section is to emphasize agency cooperation early in the NEPA process.”).

⁵ See NEPA Deficiency Checklist http://wireless.fcc.gov/siting/ea-deficiency-checklist2_1.pdf at p.5 (“**If the proposed facility would be located in a wetland**, provide a copy of the permit the applicant or its consultant received from the U.S. Army Corps of Engineers permitting the construction of the proposed antenna structure.” Emphasis in the original.).

is an abbreviated version of an EIS that allows the agency to determine whether an EIS is necessary. If, after performing an EA, the agency determines that an activity will not have a significant environmental impact, the agency need not perform an EIS.

NEPA does not mandate specific substantive results, but instead imposes only procedural requirements.⁶ When an agency decides not to prepare an EIS, the EA must supply a “convincing statement of reasons” to explain why a project’s impacts are insignificant.⁷ A court that reviews an agency’s decision that an EIS is unnecessary must be satisfied that the agency has taken a “hard look” at the potential environmental impact of a project.⁸ NEPA requires agencies to study, develop, and describe appropriate alternatives to determine that the proposed project will not cause a more adverse environmental impact than would a practicable alternative.⁹ In addition to practicable alternatives, an EA must include a discussion of the purposes and needs for a project, the environmental impacts of the proposed project and any alternatives considered, and a list of agencies and persons consulted in preparing the EA.¹⁰

B. The Commission’s Regulations Require an Environmental Assessment (“EA”) for Facilities with Impacts to Wetlands

The Commission’s environmental regulations describe the facilities for which applicants must file an EA prior to approval or construction.¹¹ One provision of those regulations, Section 1.1307(a)(7),¹² requires an EA for certain activities that will impact wetlands in a particular way,

⁶ *Laguna Greenbelt, Inc. v. United States Dep’t. of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994).

⁷ *Price Neighborhood Ass’n v. United States*, 113 F.3d 1505 (9th Cir. 1997).

⁸ *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F. 3d 12208, 1211 (9th Cir. 1998); *See also Defenders of the Wildlife v. Ballard*, 73 F.Supp. 2d 1094, 1102 (D. Ariz. 1999) (holding that the Corps. failed to evaluate adequately the cumulative impact of a category of projects on the pygmy-owl).

⁹ 42 U.S.C.S. § 4332(2)(E).

¹⁰ 40 C.F.R. § 1508.9(b).

¹¹ 47 C.F.R. §§ 1.1307 and 1.1308.

¹² 47 C.F.R. § 1.1307(a)(7).

that is, activities that will “significantly change surface features.” Specifically, Section 1.1307(a)(7) requires an EA for “[f]acilities whose construction will involve significant change in surface features (*e.g.* wetland fill, deforestation or water diversion¹³).”

The Commission’s regulations provide no definition of the term “wetland fill” or further guidance beyond the words in the regulation as to what constitutes a “significant change in surface features.” Typically, Commission staff and industry field personnel have read Section 1.1307(a)(7) to require an EA whenever any part of a tower project will be located in an identifiable wetland,¹⁴ notwithstanding the prior existence of a Corps permit or the holding in the *Weigel* case.¹⁵

C. The Corps’ Regulations Require a Corps Permit and NEPA analysis for Facilities that will Impact Wetlands

1. The Corps’ Wetlands Permitting Authority

The Corps is the expert agency to which the FCC looks to determine whether or not a particular communications project proposed for a wetland will appropriately minimize impact to that wetland in accordance with federal law. The Corps has promulgated regulations dealing with impacts to wetlands under the Rivers and Harbors Act of 1899¹⁶ and the Clean Water Act.¹⁷ Under these statutes the Corps has primary authority to evaluate construction projects that will impact the “waters of the United States.” Specifically, Section 10 of the Rivers and Harbors

¹³ PCIA notes that an activity causing water diversion would likely require a Corps permit under Section 10 of the Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act. PCIA limits its comments in this instance to wetlands issues.

¹⁴ Because not all wetlands are identified in official documents, often wetlands must be individually delineated by the applicant.

¹⁵ *Weigel Broadcasting Co., Memorandum Opinion and Order*, 11 FCC Rcd 17202 (1998) (“*Weigel*”). See discussion in Section III, below.

¹⁶ 33 U.S.C. § 401 et seq.

¹⁷ 33 U.S.C. § 1251 et seq.

Act¹⁸ authorizes the Corps to issue, modify, deny, and revoke permits covering the construction, excavation, or deposition of materials in, over, or under waters of the United States.¹⁹ Section 404 of the Clean Water Act²⁰ authorizes the Corps to issue, modify, deny and revoke permits for the discharge of dredged or fill material into waters of the United States.

The Corps' regulations define the term "waters of the United States" to include areas of land, where the land meets the definition of wetlands. The Corps' regulations define wetlands broadly to include swamps, ponds, marshes and the like, but also lands that, although periodically inundated or saturated with water, may appear completely dry much of the time.²¹

The Corps has designed and implemented two basic types of permit, involving four different processes, by which it authorizes construction projects located in, or discharges of dredge and fill materials into, waters of the United States, including wetlands. The two different kinds of permits are individual permits and nationwide permits. For purposes of this comment,

¹⁸ 33 U.S.C. § 403.

¹⁹ The term "waters of the United States" is defined in the statute as "(a) [a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial sea; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition." 33 C.F.R. 328.3.

²⁰ 33 U.S.C. § 1344.

²¹ The Corps defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3.

we will focus our analysis on the nature and extent of individual environmental review that the Corps devotes to projects authorized under these permits. Individual permits involve the most exhaustive individual Corps review.

2. Individual and Nationwide Permits (“NWPs”)

Section 404 of the Clean Water Act provides that the Corps has the authority to regulate the discharge of dredge and fill material into wetlands. Under Section 404, the Corps may issue individual or general permits. Individual permits are issued on a case by case basis. When the Corps considers an application for an individual permit, the Corps undertakes an intensive review of environmental impacts of a proposed project, including an opportunity for public comment, and an analysis of the project’s potential effect on wetlands, fish and wildlife, water quality and historic properties.

Section 404 also authorized the Corps to issue general permits, which cover categories of projects that the Corps has determined have minimal adverse environmental effects. The Corps’ nationwide permits (NWPs) are one form of general permit, and the NWP program is designed to “regulate with little, if any, delay or paperwork certain activities having minimal impacts.”²² In contrast to individual permits, proponents of a project need not “apply” for a NWP.²³ If a project meets the criteria for coverage under a NWP, the proponent may simply proceed with the project without notifying the Corps in advance, unless required to do so under the specific terms of the applicable NWP.²⁴

²² 33 C.F.R. § 330.1(b)

²³ 33 C.F.R. § 330.1(e).

²⁴ Some NWPs require the project proponent to submit a pre-construction notification (PCN). The PCB allows the Corps to evaluate an individual project to determine whether the project indeed has a minimal adverse environmental impact. Some NWPs also require project proponents to submit a request for NWP coverage verification. In either case, the Corps has the

The Corps has 44 NWP's in place,²⁵ and each covers a specific type of activity or a specific location in which activities take place. For example, NWP's cover activities such as minor dredging, construction of single family homes, boat ramps, and residential/commercial/industrial developments such as shopping malls and office complexes. Each NWP is subject to general conditions,²⁶ and each NWP may also be subject to regional conditions that may be developed by the DE to accommodate variations in environmental conditions that may not be accounted for in the general conditions, but for which project-specific conditions are not necessary.²⁷

Each NWP is accompanied by a decision document, which provides the analysis used by the Corps to determine that a particular type of project generally will have a minimal adverse environmental impact. Each decision document is essentially an EA for a particular category of projects, and includes an analysis of NEPA alternatives, a wetlands impact analysis, and a water quality analysis pursuant to Section 404(b)(1) of the Clean Water Act. The decision documents also describe the specific criteria by which applicants can determine applicability of each NWP to a specific project. These criteria include factors such as the amount of land disturbed, additional permitting requirements, distance above-grade, and the type of materials used during the construction process.

opportunity to evaluate some projects for environmental impact on a case by case basis, even if a NWP applies to the project.

²⁵ A list of the 44 NWP's issued by the Corps effective 2002-2007 can be found at <http://www.nao.the Corps.army.mil/Regulatory/2002NWpermits/NWPgrid.htm>

²⁶ These general conditions, for NWP's in effect from 2002-2007, can be found at http://www.the Corps.army.mil/inet/functions/cw/cecwo/reg/2002nwps_cond.pdf.

²⁷ 33 C.F.R. §§ 330.3(h) and 330.4(e).

3. NEPA Compliance and NWPs

When the Corps issues a NWP, it must comply with guidelines promulgated pursuant to Section 404(b)(i) of the Clean Water Act. The Corps has promulgated these guidelines in conjunction with EPA, codified at 40 C.F.R. Part 230. When the Corps considers issuing a NWP, it must set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities that may be covered by the NWP.²⁸ This evaluation must be based on a consideration of water quality standards and threatened or endangered species.²⁹

The Corps must also undertake an evaluation of practical alternatives to the proposed project. Although this requirement mirrors the practicable alternatives analysis required under NEPA, the two are not necessarily coextensive. In some cases, the documentation of alternatives that satisfies NEPA requirements will also satisfy the 404(b)(1) guidelines. In some cases, however, the NEPA documentation may cover a broader range of alternatives than is required under the guidelines. In other cases, the NEPA documentation may not contain sufficient detail on consideration of the alternatives to satisfy the guidelines.³⁰

²⁸ 40 C.F.R. 230.7(b).

²⁹ Specifically, the Corps must make the following factual determinations before it can issue a NWP:

- 1) the nature of degree of effect that the proposed discharge will have on the characteristics of the substrate at the proposed site;
- 2) the nature and degree of effect that the proposed project will have on water current circulation, and downstream flows;
- 3) the nature and degree of effect the proposed project will have on kinds and concentrations of suspended particulate/turbidity;
- 4) the degree to which the material discharged will increase contaminants;
- 5) the nature and degree of effect the project will have on the structure and function of the aquatic ecosystem and organisms.

³⁰ 40 C.F.R. 230.10L(a)(4).

The Corps undertakes an analysis in compliance with the 404(b)(i) guidelines at the time that it promulgates a NWP. At least one court has stated that the 404(b)(i) evaluation fulfills the Corps' obligations under NEPA.³¹ The results of the Corps' analysis of a particular category of activities are published in the Federal Register and are embodied in a decision document. Thus, while projects covered under a NWP do not receive a case-by-case environmental impact analysis, the requisite analysis under NEPA and the CWA is performed at the time the NWP is issued, and no further NEPA evaluation is required.³²

Although some courts have addressed challenges to the validity of NWPs as they apply to particular projects, there appear to be no cases in which the Corps' overall NWP program has been attacked as violating or being inconsistent with NEPA. Instead, the most common challenge to a project covered by a NWP is that the Corps' environmental assessment inadequately considered one aspect of the project's environmental impact.³³ In any case, a court's review of whether the Corps adequately performed an EA is limited to determining whether the Corps took the required "hard look" at the environmental impact of the project, or

³¹ *Utah Council, Trout Unlimited v. United States Army Corps of Engineers*, 187 F.Supp. d 1334, 1341 (D. Utah 2002) ("In the context of NWPs, the [US Army Corps of Engineers or "ACE"] performs the required NEPA analysis for the relevant class of activities at the time the ACE publishes the NWP in the Federal Register.")

³² *Id.*

³³ *See, e.g., Defenders of the Wildlife v. Ballard*, 73 F. Supp. 2d 1094, 1102 (D. Ariz. 1999) (holding that the Corps failed to consider the cumulative impact of a proposed project covered by a NWP on a threatened species of owl); *Alaska Center for the Environment v. West*, 31 F. Supp. 2d 714 (D. Alaska 1998) (holding that the Corps violated NEPA by failing to give adequate consideration to the no-action alternative and concluding that the decision document was therefore not an adequate EA). *Cf. Surfrider Foundation v. Dalton*, 989 F. Supp. 1309 (S.D. Cal. 1998) (holding that the Corps' EA was adequate to support a finding of no significant impact).

category of projects, and that the Corps' decision document adequately supports the Corps' conclusions.³⁴

III. Proper Treatment of a Project Covered By a Corps Permit Under Section 1.1307(a)(7) of the Commission's Regulations

In general, it appears that projects with impacts to wetlands that are covered by the terms of a Corps permit should not be required to file an EA with the Commission. This conclusion can be supported under several different rationales. First, when a project is covered by a Corps permit, under Section 1.1311(e) of the Commission's rules an EA can be avoided because it can be said that "another agency of the Federal government [the Corps] has assumed responsibility for determining whether of [sic] the facilities in question will have a significant effect on the quality of the human environment and, if it will, for invoking the environmental impact statement process."³⁵

This conclusion is supported by the Commission's findings in the *Weigel* case. In that case, the project was covered under two Corps NWP's and the Commission cited Section 1.1311(e) in deciding that "because the Army Corps of Engineers has taken responsibility for determining the environmental effect to the wetlands of the proposed construction of an anchor point in the flood plain, *Weigel* is not required to submit an additional EA to the Commission."³⁶

³⁴ See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F. 3d 1208, 1211 (9th Cir. 1998). At least one court has denied a general challenge to the Corps' NWP program on the grounds that the issuance of a NWP does not constitute "final agency action" sufficient to confer standing. See *Nat'l Ass'n of Home Builders v. United States Army Corps of Engineers*, 297 F. Supp. 74 (D. D.C. 2003) (dismissing the plaintiffs' challenge to the Corps' modification of a NWP because the issuance or modification of a NWP does not constitute final agency action).

³⁵ 47 C.F.R. § 1.1311(e).

³⁶ *Weigel Broadcasting Co., Memorandum Opinion & Order*, 11 FCC Rcd. 17202, 17207 (1998).

Second, where the Corps has determined through its permit process that a given project's impacts to wetlands will be insignificant, the Commission could adopt this determination to support the conclusion that any change in surface features will not be "significant" and therefore will not require an EA, since Section 1.1307(a)(7) only requires an EA where a facility will involve "significant change in surface features."³⁷

Third, this conclusion is consistent with and supported by the Commission's policies regarding the treatment of effects to endangered species and historic properties where an expert agency has confirmed a lack of significant effects. In these other two areas, even where effects to endangered species or historic properties are acknowledged, if the expert agency (that is, the U.S. Fish and Wildlife Service ("USFWS") for endangered species or the State Historic Preservation Officer ("SHPO") for historic properties) has determined that that effect will not be adverse, Commission policy is that EAs are not required. This policy is applied notwithstanding the fact that the plain language of the Commission's rules seems to require an EA whenever any effect to endangered species or historic properties is possible,³⁸ and even though in those cases neither the USFWS nor the SHPO purports to "assume responsibility" for all NEPA compliance.

A. The Corps Assumes NEPA Responsibility Under its Permit Procedures

As discussed above, a proposed project having an impact on wetlands could go through any one of four avenues to obtain Corps approval: (1) an individual permit, (2) a NWP subject to a PCN, (3) a NWP subject to confirmation or (4) a NWP applied by the applicant and not subject to any Corps review. The strength of the argument that these permits equate to the Corps taking full NEPA responsibility must take into account the nature of Corps' involvement with the environmental review of each individual project.

³⁷ 47 C.F.R. § 1.1307(a)(7) (emphasis supplied).

³⁸ See 47 C.F.R. § 1.1307(a)(3) and (4).

1. NEPA Does Not Require an Additional EA Under Section 1.1307(a)(7) for Projects Covered By a Corps-issued Individual Permit

The application and approval process for individual permits under the Corps' regulations carries with it a full NEPA-compliant EA, including a site-specific wetlands impact analysis. These evaluations are undertaken on a case-by-case basis, and the Corps must conclude that an individual project will have an insignificant environmental impact, not just an insignificant impact to wetlands, before issuing the permit. In performing this evaluation, the Corps adheres to procedures and documentation mandated under NEPA.³⁹

Thus, if the Corps has issued an individual permit allowing a construction project to go forward, the Corps has determined, consistent with NEPA requirements, that the project will not have a significant adverse environmental impact. PCIA believes that requiring such a project to undergo a second environmental review before the Commission would be unnecessarily wasteful, not only of the efforts of the applicant, but also of the resources of the Corps and the Commission. Therefore, the relief requested in the Stokes petition is plainly justified for communications projects covered by an individual Corps permit.

2. NEPA Does Not Require an Additional EA under Section 1.1307(a)(7) for Projects Covered By a Corps-Issued NWP

Some projects that are covered by a Corps NWP may receive a project-specific wetlands impact assessment. Depending on the requirements under a particular NWP, the applicant may be required to submit a request for coverage confirmation or a PCN. In either instance, PCIA believes that the Corps' procedures are sufficient to satisfy the environmental assessment requirement under NEPA. Thus, to require a second environmental assessment under Section

³⁹ 33 C.F.R. Part 230 Appendix B. See also 33 C.F.R. § 325.2(a)(4).

1.1307(a)(7) for projects covered by either type of NWP would be unnecessarily duplicative of the Corps' environmental review.

Moreover, even for cases where a tower project would fit within the parameters for a NWP without a requirement for a project-specific review by the Corps, the Commission should not require an EA for impacts to wetlands. As noted above, in the process of approving and issuing an NWP, the Corps determines that impacts to wetlands from a particular type, size, design, or location of project will not be significant, thereby rendering unnecessary the Commission's triggering mechanism for projects with wetlands impacts. Therefore, applying the words of Section 1.1307(a)(7), the relevant expert agency has already determined that the project will not result in a "significant change in surface features."

There appears no legal or logical reason to require a communications project to undergo a second environmental assessment procedure to determine the potential significance of wetlands impacts, where the Corps has already determined, either in the course of issuing an individual permit, or by applying the carefully crafted criteria for coverage under an applicable NWP, that wetlands impacts for the subject project will be negligible and insignificant.

IV. The Corps Should Create an NWP to Expressly Cover Communications Towers

Of course, the application of the analysis above regarding NWPs to communications and tower projects depends on the availability of one or more nationwide permits to cover these types of construction projects. Reviewing the coverage criteria for the forty-four existing NWPs, it appears that none expressly refer to communications projects, cell sites or tower projects, although some describe some elements of such projects and thus may be applicable.

PCIA members report that various Corps district offices have applied NWPs to communications tower projects, on an informal and completely discretionary basis, notwithstanding the lack of explicit language encompassing such projects in the NWPs. For

example, certain Corps districts have apparently sometimes applied NWP #12 (“Utility Line Activities”) to communications projects,⁴⁰ and the *Weigel* case reports that at least one district applied NWPs, #25 (Structural Discharges”),⁴¹ and NWP #33 (“Temporary Construction, Access and Dewatering”) to cover communications tower projects. It also appears that NWP #39 (Residential, Commercial and Institutional Developments) might also be applied at least to the construction of building foundations and building pads in connection with the construction of communications facilities.⁴²

Since most communications and tower projects are very similar in size and scope to activities expressly covered by NWPs, it would seem both appropriate and in the public interest for the Corps to take advantage of its regulations that allow modification of existing NWPs, or adoption of new NWPs,⁴³ and to provide express NWP coverage for FCC-authorized communications facilities, cell sites and tower projects impacting wetland areas. NWP #12

⁴⁰ “Utility line” is defined as “any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The definition includes “foundations for utility line towers” but the definition of “utility line” restricts such towers to those used to support utility lines. NWP #12 covers only those projects that do not disturb more than ½ acre of wetlands. The information in this section was taken from the Decision Document corresponding to the NWP for Utility Line Activities. A copy of that Decision Document can be located at:

<http://www.theCorps.army.mil/inet/functions/cw/cecwo/reg/nw2002dd/NW_12_2002.pdf>

⁴¹ NWP 25 applies to “discharges of material such as concrete, sand, rock, etc. into tightly sealed forms of cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc.” NWP 25 does not have an acreage limit, and applicants generally are not required to submit a PCN to the DE, regardless of its size or location. The Corps has estimated that this NWP will be used to cover approximately 200 projects per year nationwide, with approximately four acres of wetlands affected. [cite]

⁴² NWP #39 applies to “Discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures.”

⁴³ 33 C.F.R. § 330.1(d).

dealing with utility line activities could easily be modified to accomplish this purpose within the general scope and intent of the permit.

PCIA encourages the Commission to approach the Corps to request cooperative action on an NWP initiative for communications facilities, seeking to create a new Corps NWP, or modify an existing NWP, that would expressly cover FCC authorized communications and tower projects, including collocations, site expansions and replacement tower projects. The Commission is uniquely situated to be able to provide, and to solicit industry to help provide, expert guidance to the Corps for developing the appropriate standards and applicability criteria for such a permit.

V. The Commission Should Consult With the Corps to Streamline and Coordinate NEPA Compliance for Communications Facilities

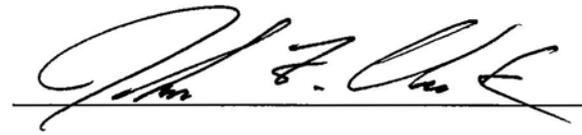
In connection with the issues raised by the Stokes petition and those discussed in this comment, PCIA encourages the Commission to consult with the Corps, to coordinate their respective regulations and informal guidance, to eliminate duplicative and unnecessary compliance procedures for applicants, and to streamline procedures for consideration of impacts to wetlands so as to maximize efficiencies in NEPA compliance for both agencies, and for the applicants and the public that they both serve.

Conclusion

For the reasons set forth above PCIA encourages the Commission to grant the declaratory ruling requested in the Stokes petition. PCIA also encourages the Commission to consult with the Corps to coordinate the interpretation and implementation of their respective environmental regulations with the specific goal of eliminating duplicative and unnecessary compliance procedures, and maximizing efficient NEPA compliance.

Finally, PCIA urges the Commission to request the Corps to modify its nationwide permits, or adopt a new nationwide permit, in order to cover communications tower projects that will impact small areas of wetlands, and that therefore deserve an express NWP in conformance with the policies underlying the Corps' NWP program.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. T. N. Fitch", written over a horizontal line.

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