

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
NORVADO, INC.)	ASR App. No. A0812667
)	
Application for)	
Antenna Structure Registration,)	
Cable, WI)	
)	

ORDER ON RECONSIDERATION

Adopted: February 7, 2014

Released: February 7, 2014

By the Deputy Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Order on Reconsideration*, we deny a petition for reconsideration, filed by Mr. Harry M. Wirth (Mr. Wirth), of the Spectrum & Competition Policy Division's (Division) March 14, 2013 denial of his request for further environmental review of the Antenna Structure Registration (ASR) Application filed by Norvado, Inc. (Norvado) for a new antenna tower in Cable, Wisconsin (Tower). We note that the National Park Service (NPS) also initially filed a request for environmental review based on the proposed tower's effects on scenic resources of the Namekagon River, part of the St. Croix National Scenic Riverway (Riverway), under the Wild and Scenic Rivers Act (WSRA),¹ but has withdrawn that request based on Norvado's proposal to reduce the tower's height and leave it unlit.²

II. BACKGROUND

2. On January 18, 2013, Norvado filed its partially completed ASR Application for the Tower. Norvado provided local notice of the Application, and the Commission placed it on national environmental notice as required by our rules.³ Mr. Wirth filed a request for further environmental review of the Application (Request) on the grounds that: it would cause visual and light pollution and ruin the beauty of the area; a Native American Chief had resided in the area in the nineteenth century; and it would be visible from Namekagon Lake, the headwater of the Namekagon River, which he alleges has been designated a Wild River and which is part of the St. Croix National Scenic Riverway.⁴

¹ 16 U.S.C. § 1271 et seq.

² Letter from Matthew Jacobsen, Acting Superintendent, National Park Service, St. Croix National Scenic Riverway, to Mania Baghdadi, FCC, dated January 16, 2014 (NPS January 2014 Letter).

³ 47 C.F.R. § 17.4(c).

⁴ Mr. Wirth's Request was uploaded into the ASR database on January 18, 2013. The Namekagon River is a tributary of the St. Croix River and is part of the Riverway, which is protected under the Wild and Scenic Rivers Act, as noted above. See <http://www.nps.gov/sacn/planyourvisit/index.htm>, visited January 16, 2014. See also http://www.dnr.state.mn.us/waters/watermgmt_section/wild_scenic/wsrivers/classification.html, visited January 16, 2014.

3. Norvado, through its environmental consultant, timely submitted an Opposition to Mr. Wirth's Request on February 21, 2013.⁵ The Opposition notes that the proposed lighting is in compliance with the Federal Aviation Administration's (FAA) Determination of No Hazard to Air Navigation for the Tower.⁶ While acknowledging that the Tower will be visible from open areas with little to no vegetation, the Opposition states that the shorelines of the nearby lakes are mostly wooded, limiting visibility to openings along shorelines and to certain areas within the lakes.⁷ The Opposition notes that since Chief Namakagon's residence in the area from the early 1830's through 1886, the area has been reshaped with resorts, roads, bridges, and utility areas, and argues that the significance of Chief Namakagon's residence in the area will not be affected by the Tower.⁸ The Opposition notes that no sites that are listed or have been identified as eligible for listing on the National Register of Historic Places are located within the Tower's direct or visual area of potential effects. Finally, the Opposition states that, based on its distance from the two rivers, Norvado does not anticipate that the proposed Tower will have an adverse effect on the St. Croix Riverway.⁹

4. On March 14, 2013, the Division denied Mr. Wirth's Request (March 14 Decision).¹⁰ The Division noted:

The request for further environmental review of the above-referenced Antenna Structure Registration application is denied. The requester's general assertions regarding visual pollution do not present a sufficient showing to require an Environmental Assessment under Section 1.1307 of the Commission's rules. The requester's assertions regarding effects on a Wild River are properly addressed by the U.S. Forest Service and other expert agencies under the Wild and Scenic Rivers Act. The requester's concerns with respect to Native American resources are speculative and will be addressed as part of the review process under Section 106 of the National Historic Preservation Act. The application will not be granted until Section 106 historic preservation review, including an opportunity for Tribal participation, has been completed in accordance with the Commission's rules.

5. Mr. Wirth timely filed a Petition for Reconsideration (Petition) of the Division's denial of his Request.¹¹ In his Petition, Mr. Wirth argues that an environmental impact study is necessary because

⁵ Under 47 C.F.R. § 17.4(c)(5), the Opposition must be filed within 10 days after the expiration of the 30-day national notice period, which is the final date for filing Requests.

⁶ Norvado, Inc., Request for Environmental Review—Opposition—Proposed Tower Namakagon, Cable, Bayfield County, Wisconsin, submitted February 21, 2013 (Opposition) at 1-2.

⁷ *Id.* at 2.

⁸ We note that the river and lake are spelled "Namekagon" but the Chief's name is spelled in the record as "Namakagon," as is the name of the township.

⁹ Opposition at 2-3. Mr. Wirth filed a response to the Opposition, which we received on March 27, 2013, after the Request for environmental review was denied. The Division dismissed the response as untimely under 47 C.F.R. § 17.4(c)(5)(i) (Replies to the Opposition must be filed no later than 5 days after the time for filing Oppositions has expired). See Email from Mania Baghdadi to Timothy E. Welch, *et al.*, dated April 8, 2013.

¹⁰ Email from Mania Baghdadi to Harry M. Wirth, Tracy L. Drunasky, and Timothy E. Welch, dated March 14, 2013.

¹¹ Mr. Wirth filed numerous pleadings and photos. These were uploaded into the ASR database on April 14, 2013; April 16, 2013; and April 19, 2013. Taken together, we consider these as Mr. Wirth's Petition. We note that Mr. Wirth's pleadings do not conform to the page limits set forth in 47 C.F.R. § 1.106(f) and not all of them were submitted in accordance with 47 C.F.R. § 1.106(i). Nonetheless, we consider these pleadings on our own discretion. In the *Environmental Notification Order*, the Commission stated that it would eschew overly formal pleading requirements in the environmental review process in order to encourage participation by members of the public who may lack the legal sophistication or the financial wherewithal to participate formally, as we rely on members of the

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the Tower would affect the Namekagon River and the St. Croix National Scenic Riverway, the birthplace of Chief Namakagon, and the 22 lakes in Namakagon Township. Mr. Wirth also states that the Tower would affect several species, including elk, spruce grouse (which he states is a Wisconsin State Endangered Species), trumpeter swans, saw-whet owl, and another State Endangered Species that he states has a “nesting” habitat in the area.¹² Mr. Wirth also reiterates that the Tower would cause light pollution, would be highly visible, and would adversely affect the pristine rural nature of the area. Finally, Mr. Wirth states that Norvado has not completed the Tribal participation process required under the Commission’s rules, argues that the consultant's report submitted by Norvado is flawed,¹³ and states that 40 local residents have signed a petition asking that the Tower be sited in an alternative location.¹⁴

6. Norvado timely filed its Opposition to the Petition for Reconsideration on April 23, 2013. Norvado argues that the Petition contains new facts and arguments, and that Section 1.106(c) of the Commission’s rules limits the introduction of new matter unless the petitioner shows good cause why those facts and arguments could not have been raised earlier in the proceeding through proper diligence.¹⁵ Norvado also argues that many of Mr. Wirth’s arguments are not relevant to the Commission’s review of the Application under the National Environmental Policy Act (NEPA)¹⁶ and Section 106 of the National Historic Preservation Act,¹⁷ as incorporated in Section 1.1307 of the Commission's rules.¹⁸ With respect to the issues raised by Mr. Wirth regarding species affected by the Tower, Norvado notes that most of these species were not identified by the Wisconsin Department of Natural Resources (WDNR) as endangered within or around the Tower area. Norvado adds that it is taking precautions with regard to one state-protected species, as required by WDNR,¹⁹ but that WDNR has not sought to prevent construction of the Tower.²⁰

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public to alert the Commission to proposed facilities that may pose significant environmental effects. National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, *Order on Remand*, 26 FCC Rcd 16700, 16728 ¶ 70 (2011) (*Environmental Notification Order*); see also 47 C.F.R. § 1.1313(b) (allowing for informal objections to applications based on environmental considerations).

¹² We do not name this species in order to avoid making its location public. See note 20 *infra*.

¹³ While arguing generally about the merits of the consultant's report in his various pleadings, Mr. Wirth does not point to any errors in the findings or conclusions in the report that would affect our consideration of environmental effects under Section 1.1307 of the rules, and we do not address these allegations.

¹⁴ Mr. Wirth also attaches a blank copy of the petition.

¹⁵ See 47 C.F.R. § 1.106(c).

¹⁶ 42 U.S.C. § 4321 *et seq.*

¹⁷ 16 U.S.C. § 470f.

¹⁸ 47 C.F.R. § 1.1307.

¹⁹ WDNR requires that there be no disturbance to the site from March 1 through June 30 as one of two permitted options to protect the state-protected species. See Norvado, Inc., Opposition to Petition for Reconsideration (Opposition to Petition), Attachment 1 at 2.

²⁰ See Opposition to Petition at 6-7. On April 25, 2013, the Division requested that Norvado submit a redacted version of the Letter from the WDNR, dated January 31, 2013, referred to in its Opposition. Email from Mania Baghdadi to Harry M. Wirth, Tracy L. Drunasky, and Timothy E. Welch, *et al.*, dated April 25, 2013. On April 29, 2013, Norvado submitted a redacted version of the WDNR Letter. Email from Timothy E. Welch to Mania Baghdadi, dated April 29, 2013, submitting Letter from Lori Steckervetz, Endangered Resources Program, Wisconsin Department of Natural Resources, to Tracy Drunasky, Edge Consulting Engineers, Inc., dated January 31, 2013 (WDNR Letter). Norvado had requested that it be permitted to redact the WDNR Letter in order to avoid

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7. On May 8, 2013, in a letter originally submitted outside of the reconsideration proceeding, NPS asked for environmental review on the grounds that the “tower would be visible from the upper reaches of the Namekagon River,” would add an unnatural feature to the landscape, and would thus have an adverse impact on the scenic resources that the Riverway was established to protect.²¹ NPS asked for an examination of alternatives, including different locations, shorter towers, or stealth designs that might minimize the scenic impacts of the Tower.²² On June 28, 2013, the Division sent a letter to Norvado directing it to refrain from any work on the proposed Tower pending consideration of the NPS Letter.²³

8. On December 20, 2013, Norvado submitted an Emergency Motion to Direct the Staff to Take Immediate Action, Motion to Supplement Response, Notice of Tower Height Reduction, and Notice of Intent to Seek Emergency Appellate Relief (Norvado Motion). Norvado alleges that the Division has unjustifiably delayed addressing the ASR Application; that Norvado is precluded from building the Tower because of the Stop Work Order; and that, based on the distance from the proposed Tower to the Namekagon River, the Tower would not be visible from the River.²⁴ Nonetheless, Norvado proposes to

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publicly disclosing precise species locations. Opposition to Petition at 7 n. 7; WDNR Letter at 1 (specific locations of endangered species may not be released in publicly disseminated documents).

²¹ See Letter from Christopher E. Stein, Superintendent, St. Croix National Scenic Riverway, National Park Service, to Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, dated May 8, 2013 (NPS Letter).

²² See *id.* at 1. Norvado opposed the NPS Letter and asked the Commission to dismiss it as untimely, repetitious, and otherwise procedurally defective. Norvado, Inc. Response to National Park Service Letter, submitted May 21, 2013 (Norvado Response). On May 22, 2013, Norvado submitted an Erratum. On May 24, 2013, Mr. Wirth supported NPS’s request for a more thorough environmental review of the proposed Tower and also alleged that Norvado had not provided adequate local notice of the Tower’s construction. Email from Tina Rundell, on behalf of Harry Wirth, to Mania K. Baghdadi, *et al.*, dated May 24, 2013 (May 24 Email). We have placed this email into the record of the proceeding. NPS responded to Norvado. Letter from Nancy Sanchez for Christopher E. Stein, Superintendent, St. Croix National Scenic Riverway, National Park Service, to Ramon Williams, FCC, dated May 31, 2013 (NPS Reply). Mr. Wirth submitted an additional email on June 10, largely repeating assertions he had made earlier. Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated June 10, 2013. On June 12, 2013, Norvado filed a Motion for Leave to Respond to this letter. In light of the decision we reach in this Order, we do not need to address Norvado’s June 12 pleading nor the issues raised in the Norvado Response about the timeliness or procedural validity of the NPS Letter.

²³ Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, FCC, to Timothy E. Welch and Dan Anderson, dated June 28, 2013 (Stop Work Order). In subsequent correspondence, some local parties expressed support for the proposed Tower, arguing that additional cell phone coverage is needed to address issues relating to public safety, healthcare, and tourism, and that the Tower would not affect the River based on the Tower’s distance from it. Email from James Bolen, Executive Director, Cable Area Chamber of Commerce to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated September 10, 2013; Email from Mary Behrends, President, Cable Area Chamber of Commerce to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated September 13, 2013 (Behrends email). See also Email from Thomas L. Rushfeldt to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated September 10, 2013 (nearby homeowner supporting the need for cell phone service). Mr. Wirth responded to the Behrends email, noting that Ms. Behrends had been a longtime employee of Norvado, disputing her assessment of the Tower’s impact on the Namekagon River, and alleging that an alternative site is available to bring cell phone service to the Town of Namakagon. Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated October 2, 2013. We do not rely on these submissions in reaching our decision, and, accordingly, we need not consider Mr. Wirth’s response.

²⁴ Norvado Motion at 1-3. Norvado attaches the results of a balloon test, conducted November 15, 2013, purporting to show that a 400-foot tower would not be seen from the Namekagon River or the waters that lead into it. Norvado Motion at 4 & Attachment 4. Norvado also attaches a July 2013 photographic simulation purporting to show that the Tower would not be visible from the Namekagon River. Norvado Motion at 4 & Attachment 3.

reduce the height of the Tower to 199 feet and to install no lights.²⁵ On January 6, 2014, the Division invited the parties to comment on the Norvado Motion.²⁶ Mr. Wirth opposes the Norvado Motion, stating that there is no emergency and that another site is available for cell phone service that would, in his view, have less environmental impact.²⁷ NPS, however, concludes, based on a viewshed analysis of Norvado's revised proposal, that under a worst case scenario, the proposed 199-foot tower would "have very limited visibility from the Namekagon River and from within the Riverway boundary." Accordingly, NPS states that it has no further comment on the proposed Tower.²⁸

III. DISCUSSION

9. *NEPA Process.* Sections 1.1307(a) and (b) of the Commission's rules identify those types of communications facilities that may significantly affect the environment and for which applicants must always prepare an Environmental Assessment (EA) for the Commission to evaluate as part of its decision-making process.²⁹ These include, among others, facilities that may affect threatened or endangered species or critical habitats and facilities that may affect districts, sites, buildings, structures or objects that are listed, or eligible for listing, in the National Register of Historic Places.³⁰ Thus, Commission licensees and applicants must ascertain, prior to construction or application for Commission authorization or approval, whether their proposed facilities may have any of the specific environmental effects identified in these rules.³¹

10. Actions not within the categories for which EAs are required under Sections 1.1307(a) and (b) of the Commission's rules "are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing ... [e]xcept as provided in Sections 1.1307(c) and (d)."³² Under Sections 1.1307(c) and (d), the agency shall require an EA if it determines that an otherwise categorically excluded action may have a significant

²⁵ Norvado Motion at 5.

²⁶ Email from Mania Baghdadi to Timothy E. Welch, *et al.*, dated January 6, 2014.

²⁷ Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated January 13, 2014 (no emergency); Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated January 16, 2014 (asserting availability of another site for a cell phone tower that would not be visible from Garden Lake or the Namekagon River and would not affect wildlife); Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated February 2, 2014 (availability of another location that would not affect wildlife). Norvado responded, noting that Mr. Wirth has not pointed to any statutory or rule violation concerning the Norvado Motion, that its balloon study and simulated tower viewshed study are undisputed, and that the availability of another tower site is irrelevant to the Commission's analysis. Email from Timothy E. Welch to Mania Baghdadi *et al.*, dated January 22, 2014. Mr. Wirth responds that he was never notified of Norvado's balloon study, and that his lack of comment on it should not be seen as tacit approval. Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated February 2, 2014. We do not consider the results of the balloon test and the photosimulation in reaching our decision given Norvado's proposal to reduce the height of the Tower and leave it unlit.

²⁸ NPS January 2014 Letter.

²⁹ 47 C.F.R. § 1.1307(a), (b).

³⁰ 47 C.F.R. § 1.1307(a)(3), (4).

³¹ 47 C.F.R. § 1.1308. *See also* 47 C.F.R. § 1.1312 (requiring Commission applicants and licensees to complete preconstruction environmental review of proposed actions that do not otherwise require preconstruction authorization); *Environmental Notification Order*, 26 FCC Rcd at 16705-06 ¶ 12.

³² 47 C.F.R. § 1.1306(a).

environmental impact.³³ The purpose of the Commission's environmental notification process for ASR applications is to effectuate fully the opportunity for interested persons to allege that an Environmental Assessment is required under Section 1.1307(c) for ordinarily categorically excluded actions.³⁴

11. The assertions made by Mr. Wirth address in part effects that are within categories covered under Section 1.1307(a) of the Commission's rules and in part effects that fall outside those categories and are not routinely considered by the Commission. To the extent that the assertions address effects that are included under Section 1.1307(a), we focus on whether the criteria set forth in Section 1.1307(a) are met. To the extent that the allegations are outside of the categories set forth in Section 1.1307(a), we ask whether the record establishes that there may be a significant environmental impact under NEPA. We also address procedural issues raised by the record below.

12. *Chief Namakagon's Residence/Tribal Participation.* In his Request and in his Petition, Mr. Wirth notes that Chief Namakagon, a Native American Tribal Chief, inhabited the area around the proposed Tower in the mid-nineteenth century. In his Petition, Mr. Wirth also alleges that Norvado has not completed the required process for inviting the participation of Tribal Nations.³⁵ In response, Norvado states that it evaluated potential effects to sites listed or eligible for listing in the National Register of Historic Places in its report to the Wisconsin State Historic Preservation Office (SHPO), and that the SHPO has concurred with Norvado's findings that Chief Namakagon's residence in the area is not considered eligible for listing on the National Register and that no other listed or determined eligible properties exist within the area of potential effects for direct or visual effects.³⁶ In addition, Norvado notified potentially interested Tribal Nations of the proposed construction using the Commission's Tower Construction Notification System (TCNS), and all notified Tribal Nations have concurred that no consultation is necessary.³⁷

13. In denying Mr. Wirth's Request, the Division found that Mr. Wirth's concerns with respect to Native American resources were speculative and would be addressed as part of the review process under Section 106 of the NHPA. That review is now complete. The SHPO has agreed with Norvado's finding that no historic properties will be affected by the proposed Tower, and all Tribal Nations with interests in the area have concurred that no consultation is necessary. We therefore deny Mr. Wirth's request that we reconsider the March 14 Decision on these grounds.

14. *National Scenic Riverway.* Mr. Wirth argues that further environmental processing is necessary because the Tower as originally proposed would affect the Namekagon River and the St. Croix River, which are protected under the WSRA.³⁸ However, since Mr. Wirth filed his Petition, Norvado has

³³ See 47 C.F.R. § 1.1307(c), (d); Public Employees for Environmental Responsibility, *Order*, 16 FCC Rcd 21439, 21441 ¶ 3 (2001). These provisions satisfy Section 1508.4 of the Council on Environmental Quality's rules, 40 C.F.R. § 1508.4, requiring that "[a]ny [categorical exclusion] procedures shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."

³⁴ *Environmental Notification Order*, 26 FCC Rcd at 16719 ¶ 50.

³⁵ Email from Tina Rundell to Diane Dupert, *et al.*, dated April 14, 2013.

³⁶ Opposition to Petition, Attachment 1 at 1-2; Email from Timothy E. Welch to Mania Baghdadi *et al.*, dated June 28, 2013 (attaching February 7, 2013 SHPO concurrence with Norvado's finding that no historic properties will be affected by the proposed Tower); Opposition to Request for Environmental Review at 2-3.

³⁷ Opposition to Petition, Attachment 1 at 2; Email from Timothy E. Welch to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, WTB, *et al.*, dated June 5, 2013.

³⁸ Email from Tina Rundell, on behalf of Harry M. Wirth, to Diane Dupert, *et al.*, dated April 14, 2013; NPS Letter at 1. The National Wild and Scenic Rivers System was created by Congress in 1968 (Public Law 90-542; 16 U.S.C. 1271 *et seq.*) to preserve certain rivers with outstanding natural, cultural, and recreational values in a free-flowing condition for the enjoyment of present and future generations. The Act safeguards the special character of these

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proposed to reduce the height of the Tower to 199 feet and to leave it unlit.³⁹ NPS, the expert agency charged with administering the Riverway,⁴⁰ has withdrawn its concerns about the visibility of the Tower, noting that, based on its viewshed analysis, “the proposed 199-foot tower would have very limited visibility from the Namekagon River and from within the Riverway boundary, even under a worst case scenario.”⁴¹ Since Mr. Wirth’s and NPS’s original concerns were about the visibility of the tower from the waterway, the reduction in height and lack of lighting moot those concerns. While Mr. Wirth notes that an alternative site he is exploring would not be visible from the Namekagon River and alleges that the proposed Tower would be visible from Garden Lake,⁴² he does not allege that the revised proposal would affect the Riverway, and there is no evidence in the record to show that the Tower may have a significant environmental effect on the Riverway.

15. *Other Visual Effects.* In addition to his arguments about Chief Namakagon and the impact of the Tower on the Riverway, Mr. Wirth generally alleges that the Tower will have adverse visual effects on the surrounding rural area, including 22 lakes. He particularly emphasizes the effects of light pollution.⁴³ We affirm the March 14 Decision finding that Mr. Wirth did not provide a sufficient showing to require an EA based on these allegations. In general, in the absence of specific protected resources such as historic properties protected under the NHPA, the Commission defers to local authorities to consider visual effects in their exercise of land use jurisdiction.⁴⁴ The record here is insufficient to cause us to depart from that course. In addition, Norvado has proposed to lower the height of the Tower and eliminate the lighting. Although Mr. Wirth continues to argue that the shorter Tower may have visual impacts,⁴⁵ he provides no support for this argument and no reason why any such impacts cannot be fully addressed by local authorities.

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rivers by limiting dam construction and other instream activities that would harm the rivers’ free-flowing condition, water quality, or outstanding resource values, while also recognizing the potential for their appropriate use and development. See <http://www.rivers.gov/wsr-act.php>, visited May 5, 2013. Under the WSR, National Scenic Riverways are designated, in descending order of protection, as wild, scenic, or recreational. See 16 U.S.C. § 1273(b). Although Mr. Wirth in his pleadings refers to the Namekagon River as “wild,” see, e.g., Letter from Harry M. Wirth to Mania Baghdadi and Ramon Williams, dated March 19, 2013, at 5, in fact the relevant portions of the Riverway are designated scenic under the WSR. See <http://www.rivers.gov/documents/rivers-table.pdf>, visited August 30, 2013.

³⁹ Norvado Motion at 5.

⁴⁰ We note that although the Bureau of Land Management, NPS, FWS, and USFS generally share responsibility for administering the WSR, see <http://www.rivers.gov/agencies.php>, visited May 5, 2013, the Wisconsin portion of the St. Croix National Scenic Riverway is administered by NPS and the WDNR. See <http://www.rivers.gov/rivers/st-croix.php>, visited May 5, 2013.

⁴¹ NPS January 2014 Letter.

⁴² See Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated January 16, 2014; Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated February 2, 2014.

⁴³ Email from Tina Rundell to Diane Dupert, *et al.*, dated April 14, 2013.

⁴⁴ See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, 60 RR 2d 13, ¶ 12 (1986); Final Programmatic Environmental Assessment for the Antenna Structure Registration Program, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312921A1.pdf (WTB March 13, 2012) at 5-27 § 5.4.5 (Residential neighborhoods and other local land uses are typically governed by local comprehensive plans that specify the allowable types and locations of future land use, and new towers continue to be subject to review by local jurisdictions).

⁴⁵ See Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated January 16, 2014 (revised Tower would be visible to all 25 Garden Lake owners on the north side of Garden Lake). See also Email from Tina Rundell, on behalf of Mr. Harry Wirth, to Mania Baghdadi, *et al.*, dated February 2, 2014 (stating that

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16. *Threatened and Endangered Species.* In his Petition, Mr. Wirth for the first time alleges that the Tower will have an effect on elk, which are “prevalent on all four sides of the proposed cell tower site;” spruce grouse, which he alleges is a Wisconsin State Endangered Species; trumpeter swans, which he alleges nest every year on Chippewa Lake, two miles away; saw-whet owls, which are allegedly present within one-half mile of the proposed Tower site; and another Wisconsin State Endangered Species which, according to Mr. Wirth, has a “nesting” habitat at the site. In response, Norvado states that it has consulted with WDNR, and that elk, spruce grouse, trumpeter swans, and saw-whet owls either are not tracked in WDNR’s database due to their lack of endangered status or are not present within or around the Tower site area. Norvado adds that it is taking precautions with respect to one state-protected species, but WDNR has not sought to prevent construction of the Tower.⁴⁶ Norvado notes that “to avoid impacts to this one species, there will be no disturbance to the site from March 1st through June 30th.”⁴⁷

17. Mr. Wirth's allegations concerning the Tower's potential effects on protected species are new allegations, and Mr. Wirth has not met the standard of Section 1.106 of the Commission's rules by demonstrating that the new facts either relate to events which have occurred or circumstances which have changed since his last opportunity to present such matters to the Commission; or that these facts or arguments were unknown to him until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.⁴⁸ Therefore, we dismiss these allegations as untimely under Section 1.106

18. As an independent and alternative basis for rejecting these arguments, we reach the merits and rule against the petitioner because these allegations are inadequate to warrant reconsideration or to require Norvado to prepare an EA.⁴⁹ Under Section 1.1307(a)(3), an EA is required for facilities that: “(i) [m]ay affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.”⁵⁰ None of the species identified by Mr. Wirth are federally listed or proposed as endangered or threatened.⁵¹ While Norvado and WDNR identified a state-endangered species in the vicinity, Norvado states that it is taking precautions to protect that species in accordance with WDNR’s Letter. Accordingly, no EA is necessary to consider potential effects on endangered species.⁵² We condition the grant of antenna structure registration on Norvado’s compliance with WDNR’s time limit on construction.⁵³

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Mr. Wirth was not notified or aware of the Norvado balloon test and that his proposed alternative site would not have visual impacts on the neighborhood and the Namekagon River).

⁴⁶ See Opposition to Petition at 6-7.

⁴⁷ *Id.*, Attachment 1 at 2.

⁴⁸ See 47 C.F.R. § 1.106(c)(1), (b)(2).

⁴⁹ We have discretion to consider these arguments if such consideration is in the public interest. 47 C.F.R. § 1.106(c)(2).

⁵⁰ See 47 C.F.R. § 1.1307(a)(3).

⁵¹ See Letter from Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, to Michael J. Pearson and Jenna Metzник, 27 FCC Rcd 8043, 8044 (WTB SCPD 2012) (*Pearson*) (finding that a lengthy list of non-endangered species within the vicinity of a proposed tower did not meet the requirement under Section 1.1307(c) that an interested party set forth in detail the reasons necessitating an EA for an ordinarily categorically excluded action).

⁵² *Pearson*, 27 FCC Rcd at 8044. We note that WDNR also recommends strict erosion and siltation controls during the entire construction period to avoid impacts to any neighboring water bodies and wetlands. To avoid impact on

(continued...)

19. *Other Issues.* Together with his Petition, Mr. Wirth also submitted two complaints from other residents of the area stating concerns that the Tower and its lighting would affect their views as well as aesthetic and real estate values. We dismiss these complaints because they were untimely filed and the complainants did not indicate why they could not have participated earlier in the proceeding.⁵⁴ As an independent and alternative basis for rejecting these arguments, we rule against petitioner on the merits and reject these complaints because general allegations about visual pollution, aesthetic values, and real estate values do not state a claim for requiring an EA under Section 1.1307(c), which requires “a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision making process.” Further, as noted above, the proposed Tower as revised will be reduced in height and unlit.

20. Mr. Wirth in several filings alleges that alternative sites are better suited for a tower than the proposed site. In support of his claim, he submits a blank copy of a petition that he states received 40 signatures as of April 14, 2013, and over 270 signatures (over 40% of the 673 Namakagon Township residents) as of June 10, 2013.⁵⁵ The availability of alternative, potentially more suitable sites for a tower is not probative of whether the proposed facility at a selected site may have a potentially significant environmental impact for which an EA must be prepared under Section 1.1307 of the Commission’s environmental rules. While the consideration of alternative sites that have been, or might reasonably be, considered must be included in an Environmental Assessment,⁵⁶ it is not required in determining whether the proposed tower may have a significant environmental impact and therefore whether an EA is required. Moreover, while public opposition and controversy is a factor in determining whether an EA is necessary under CEQ’s rules,⁵⁷ “[i]t is well established that mere opposition to a proposed tower does not create a significant ‘controversy’ within the meaning of NEPA unless the effects on the quality of the human environment are likely to be controversial.”⁵⁸ The term “controversial” refers to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the mere existence of opposition to a use.⁵⁹ The petition offered by Mr. Wirth does no more than restate in very conclusory terms the same objections to the Tower that Mr. Wirth has argued and that we have already rejected. It therefore does not establish grounds for an EA.

(...continued from previous page)

snakes, it further recommends netting that contains biodegradable thread with the "leno" or "gauze" weave. WDNR Letter. WDNR states these as recommendations, not conditions, and we encourage Norvado to consider these measures.

⁵³ See ¶¶ 16, 24.

⁵⁴ See 47 C.F.R. § 1.106(b)(1).

⁵⁵ Email from Tina Rundell to Diane Dupert, *et al.*, dated April 14, 2013; Email from Tina Rundell to Mania Baghdadi, *et al.*, dated June 10, 2013. Mr. Wirth did not submit these signatures into the record. The June 10, 2013 Email also contains other arguments that we dismiss as repetitious. In addition, we dismiss as repetitious an email Mr. Wirth submitted on May 16, 2013, which simply repeats earlier arguments. See Email from Tina Rundell to Mania Baghdadi, *et al.*, May 16, 2013. We also dismiss as repetitious and irrelevant an email Mr. Wirth submitted on July 29, 2013 and corrected on July 31, 2013. See Email from Tina Rundell to Mania Baghdadi, *et al.*, July 29, 2013; Email from Tina Rundell to Mania Baghdadi, *et al.*, July 31, 2013.

⁵⁶ 47 C.F.R. § 1.1311(a)(4).

⁵⁷ See 40 C.F.R. § 1508.27(b)(4).

⁵⁸ In the Matter of SCI Towers, LLC, Application for Antenna Structure Registration, Tyrone, Georgia, *Memorandum Opinion and Order*, 28 FCC Rcd 6448, 6451-52 ¶ 16 (WTB SCPD 2013).

⁵⁹ In the Matter of Application of S-R Broadcasting Co., Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 11499, 11500 n.4 (2012). See In the Matter of T-Mobile and the Pierce Archery Proposed Antenna Tower, *Memorandum Opinion and Order*, 18 FCC Rcd 24993, 24996 & n. 22 (WTB SCPD 2003).

21. Finally, Mr. Wirth argues that notice of the Tower was deficient because Norvado did not provide direct notice to NPS, large landowners, and other members of the public. He argues that local newspaper notice and a notice on the bulletin board at the Namakagon Town Hall are insufficient to inform summer residents of the Township (over 50% of the population).⁶⁰ We dismiss Mr. Wirth's allegations concerning the inadequacy of local notice as they were untimely raised and Mr. Wirth does not delineate why they could not have been raised earlier.⁶¹ As an alternative and independent basis for our action herein, we reach the merits and rule against the petitioner. Norvado has demonstrated that it complied with the Commission's rules as to notice,⁶² and Mr. Wirth points to no support for his allegations that large landowners should have been and were not directly notified. Nor does he point to any reason why Norvado was required to directly notify NPS.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by Harry M. Wirth IS DISMISSED to the extent provided herein and is otherwise DENIED.

23. IT IS FURTHER ORDERED that the Antenna Structure Registration application will not be granted until Norvado amends the application in conformance with the representations it has made in its Motion.

24. IT IS FURTHER ORDERED that Norvado shall not engage in construction activities at the Tower that involve earth disturbance between March 1 and June 30 of any year.

25. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey S. Steinberg
Deputy Chief, Spectrum & Competition Policy Division
Wireless Telecommunications Bureau

⁶⁰ Email from Tina Rundell to Mania Baghdadi, *et al.*, dated May 24, 2013.

⁶¹ See 47 C.F.R. § 1.106(c)(1); 47 C.F.R. § 1.106(b)(2).

⁶² 47 C.F.R. § 17.4(c)(3), (4). See Norvado Response, at Attachment 1.