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## **AM Array Approved After Eight-Year Environmental Battle**

*Davina Sashkin*  
703-812-458  
*sashkin@fhhlaw.com*

Note to self: don't build in a flood plain.

If last month's article about possible monetary penalties didn't convince you that careful site selection and environmental compliance is of the utmost importance for new tower construction proposals (*see* the May, 2008 *Memo to Clients* at page 2), maybe this will: after *more than eight years*, a full Environmental Assessment (EA), multiple amendments and supplements, dozens of informal objections, as well as local litigation, on May 30, the Commission finally granted the application for a minor modification of the facilities of Station KRKO(FM), Everett, Washington.

Filed March 8, 2000 (barely a month into the Bush II Administration), the application proposed to relocate KRKO's facilities to a new site and increase power from 5 kW to 50 kW unlimited time, using a four-tower array. The application was subsequently amended to ratchet the daytime power down to 34 kW (while keeping nighttime at 50 kW), and to lower the height of the daytime nondirectional tower (10.4 meters above ground level *versus* the original plan of 129.5 meters; the other three directional towers are 59.4 meters).

The applicant's biggest problem may have been that it proposed to build these towers in a flood plain. Flood plain proposals automatically trigger a full EA and mandatory consultation with expert agencies under the Commission's rules implementing the National Environmental Policy Act of 1969 (NEPA). A full EA is no small matter. It requires, first, that the applicant undertake a detailed assessment of an extensive panoply of environmental, cultural, historical and other factors. The Commission then conducts an independent review of the EA and any comments received to determine whether the proposed facility is worthy of a Finding of No Significant Impact (FONSI) on the environment. If the Commission concludes that a FONSI is in order, then the application can be granted.

Or perhaps the applicant's problem was proposing to build not four but *eight* towers (as it revealed in the EA – but only four of those were to be used by KRKO) in the Snohomish River Valley, Washington, home of the wily native activist citizen as well as numerous migratory birds and endangered fish. From 2001 into 2007, individuals and citizen groups peppered the Commission with informal objections to the application, primarily citing environmental impacts. The initial wave of complaints apparently focused on wildlife concerns – it was said that the proposed towers would whack migratory birds, bald eagles and various other threatened species of birds and fish. Somebody claimed the towers' proximity to a private airfield was a problem. Others worried about the effect of the towers on the complainants' property values. Later complaints echoed these themes, and also suggested that the construction would pose "health risks" to children nearby, and might also create flooding. One guy even claimed that the RF would hurt migrating salmon.

It also appears that the FCC's application processing may have been put on hold for several years while a zoning dispute between the applicant and these citizens played out in the local county government and courts.

To counter the wildlife complaints, the applicant hired consultants to perform a "Biological Assessment" and a separate "Avian Risk Assessment". Those were in turn sent to the U.S. Fish and Wildlife Service (FWS) for its review. The FWS took a couple of years to think about it and, ultimately, gave the project the thumbs up – even though the FWS recognized that, birds being birds, it was likely that at least some birds would be killed by the towers.

The applicant also had to retain a professional to conduct a field survey to determine any possible adverse effects on nearby historical sites. That professional did double duty, providing a separate review and analysis of any potential effect on religious sites of significance to Native Americans in the area. Separate notices of the proposal were also sent to various tribes through the FCC's notification processes.

Even after the EA (based on all these studies and more) indicated that the proposal would not cause problems, and even after the local land use authorities signed off on everything (based on extensive local proceedings), the Commission still had to invite further public comment on the EA in 2007, and sure enough, a local community group responded. (Their response was late, and the FCC was not inclined to give them an extension of time since the group obviously knew about the proposal and the deadline for comments – but in the end, the Commission elected to consider their comments anyway.)

The result was a 20-page, single-spaced letter, containing more than 100 footnotes, in which the Commission's staff concluded that the applicant had jumped through all the

right hoops the right way. And so, more than eight years after the application was filed, it was granted.

While this case ultimately worked out well for the applicant (at least we assume so – its application was granted, after all), it provides another sobering reminder of the seriousness of environmental compliance and the difficulties that can befall an applicant whose proposed site is subject to this kind of challenge. In some instances, of course, an applicant may have no choice – the only available and suitable site may be one that is bound to generate this kind of controversy. But if there is any choice at all, prudence dictates that the non-controversial alternative may be the best way to go, even if it has its own drawbacks. The effort, expense, delay and uncertainty inherent in the EA review process constitute factors which can weigh heavily against even the most desirable of sites.