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Environmental/Cultural/Historical Hoops Must Be Cleared BEFORE Certification Can Be Made

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Since 2005, pretty much anybody proposing to construct a new tower has had to jump through a lot more hoops before being able to certify that the construction would not entail environmental concerns. Recently, a tower construction company gave us all a good reminder of the need to jump through those hoops *before* checking the “yes” box for that environmental certification. If you have filed an application which involves a new tower, or if you think you may be filing one in the foreseeable future, be alert: the Commission takes the environmental certification seriously.

For those of you who may have missed our articles about the environmental requirements back in the January and February, 2005, *Memos to Clients* (both of which can be found on-line – at http://www.fhhlaw.com/articles_memo_clients.asp), here’s a quick refresher. In submitting a construction permit application to the FCC, an applicant must certify compliance with the environmental and historic preservation requirements. While back in the day that usually meant merely confirming that passers-by near the tower would not be zapped with excessive RF, by 2005 it had come to mean something considerably different. Now, in addition to routine health/safety RF considerations, the applicant has to check to see whether the proposed site might have particular historical, environmental, ethnic or cultural significance. And that generally entails hiring professional consultants with archaeological credentials who will survey the site and contact local historical preservation officials and any native American tribes which have indicated any possible interest in the area.

Only after that process has been completed successfully can the applicant check “yes” in response to the environmental certification question.

Woe be unto you if your certification is false – and a false certification includes checking “yes” without completing all your homework. When that happens, you may be looking down the barrel of a “voluntary contribution” to government and adoption of a compliance plan.

That, at any rate, is what happened to a company which built some towers without first having jumped through the hoops.

The company in question constructed three new towers without first doing diddly relative to the requirements set forth in the *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review*, or “NPARTS106NHPAR” for short. NPARTS106NHPAR is the source of the historical/cultural review requirement which was initiated in 2005.

The company in question was not a complete scofflaw. Apparently, after having constructed the tower, the construction company became aware of the NPARTS10NHPAR requirements and contacted the FCC apparently to fess up to the construction and to determine how to come into compliance. As part of the after-the-fact effort the company hired a consultant to perform the type of detailed site inspection and assessment that should have been done *before* the environmental certification was checked “yes” – and that consultant declared the sites clear of any problems, a conclusion with which the Commission’s staff concurred. So no blood, no foul, right? Wrong. Even though it turned out that the site did not raise environmental problems and that a “yes” response to the environmental certification would have been accurate (if only the applicant had done its homework before so certifying), the fact that the company had certified to that without knowing it to be true warranted sanction in the Commission’s view.

The Feds required the company to institute a Compliance Plan relating to future adherence to the requirements of NPARTS106NHPAR, including such chores as discussing recent FCC developments with their communications counsel and a self-reporting requirement that compels the company to report to the FCC any compliance problems. Oh yeah, and the Commission wrung a \$16,500 “voluntary” contribution to the U.S. Treasury out of the company.

So you have warned (again). Before you certify that your proposal does not raise any environmental concerns, make sure that you have confirmed that you have taken all the necessary steps to comply with environmental and historic preservation requirements. Failure to do so can be dangerous to your bottom line.