

ANN BAVENDER\*  
HARRY F. COLE  
ANNE GOODWIN CRUMP  
VINCENT J. CURTIS, JR.  
PAUL J. FELDMAN  
JEFFREY J. GEE\*  
FRANK R. JAZZO  
M. SCOTT JOHNSON\*  
MITCHELL LAZARUS  
STEPHEN T. LOVELADY\*  
SUSAN A. MARSHALL  
HARRY C. MARTIN  
ALISON J. MILLER  
FRANCISCO R. MONTERO  
LEE G. PETRO\*  
RAYMOND J. QUIANZON  
MICHAEL W. RICHARDS\*  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS  
\*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW  
11th FLOOR, 1300 NORTH 17th STREET  
ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400

FAX: (703) 812-0486

www.fhhlaw.com

RETIRED MEMBERS  
RICHARD HILDRETH  
GEORGE PETRUTSAS  
CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYS  
U. S. AMBASSADOR (ret.)  
OF COUNSEL  
DONALD J. EVANS  
EDWARD S. O'NEILL\*  
ROBERT M. GURSS\*  
EUGENE M. LAWSON, JR.  
WRITER'S DIRECT

**Primer on Compliance with  
National Historic Preservation Act**

**(May, 2005)**

This short primer is intended to outline the steps a licensee or potential FCC licensee must take to comply with the National Historic Preservation Act of 1966, as the FCC administers the Act. Be aware that this Primer does not address FAA, RF hazard, or other aspects of the environmental analysis that must precede a certification of no major environmental action.

**I. General Obligation**

The obligation to comply with the National Historic Preservation Act is imported into the FCC rules through the small aperture of new Section 1.1307(a)(4):

§1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a)\*\*\*

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (*See* 16 U.S.C. 470w(5); 36 CFR 60 and 800.) To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Appendix B to Part 1 of this Chapter, and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Appendix C to Part 1 of this Chapter.

This rule became effective on March 7, 2005. It is presently (May 2005) on appeal to the D.C. Circuit, but only insofar as it applies to sites that are not specifically reviewed and approved by the Commission.

Because the rule is mandatory, applicants must follow the procedures set out in the Collocation Agreement and the Nationwide Programmatic Agreement cited in the rule. While there are a number of points in the process where the applicant or licensee is only required to make “good faith” efforts to establish the lack of adverse impact on historical structures, there are a number of steps along the way that are mandatory. The process is designed to ensure that interested parties particularly affected by new construction or significant modifications have input before construction commences.

## **II. Step I: Initial Determination of Whether Full Historical Preservation Assessment is Required**

The first step in the process is to determine whether the proposed construction or modification is categorically exempt from the historical preservation (“HP”) or “Section 106” review process. There are a wide array of useful exemptions:

### **A. Collocation on an Existing Tower**

Generally, collocation on an existing tower is encouraged and, as you might expect, is presumptively deemed not to have an adverse impact on historical sites. However, there are a number of important elements to consider before collocation exempts you from further analysis.

1. If the existing tower was constructed prior to March 16, 2001, no analysis is necessary unless the new addition to the tower will substantially increase its size (see Item 3 below) or the existing tower has been determined to have an adverse HP effect or has had issues raised about its potential adverse HP effects.

2. If the existing tower was constructed after March 16, 2001, the same exceptions above apply and the tower must have successfully gone through the HP review process. The idea here is that towers constructed after March 2001 should have gone through the review process before you arrived on the scene. You cannot avoid review by piggybacking on a tower that did not comply with the rules when it was constructed. Towers built prior to March 2001 did not have to comply with the HP rules, so the point is inapplicable to older towers.

3. What is a “Substantial Increase”? Generally, an increase in the tower’s size is deemed “substantial” in the following circumstances:

a. Height is increased by the greater of (i) 10% of the height of the existing tower or (ii) the height needed to accommodate an additional antenna array with a 20-foot separation from the nearest existing antenna. Thus, you could add 20 feet to the top of a 200 foot tower or 20 feet plus the height of a new antenna if there is an antenna already at the top of the tower. You may exceed these limits slightly in order to avoid radio interference with existing antennas.

b. More than four new equipment cabinets or one new equipment shelter are being added.

c. The width of the tower (including appurtenances) is being increased by the greater of 20 feet in any direction from the edge of the tower or increased by the existing width of the tower at the level of the appurtenance. So if a tower is 30 feet wide at a point, you can add a 30 foot appurtenance at that point without being “substantial.” These limits may be exceeded if necessary to shield the antenna from weather or to connect the antenna to the tower via cable.

d. Excavation will occur outside the boundaries of the current tower site property (including access or utility easements related to the site).

4. Collocation on a building or other non-tower structure. If you are collocating on an existing non-tower structure, you are not exempt from the process if:

a. the structure is more than 45 years old;

b. the structure is either in a historic district or within 250 feet of a historic district and is visible from normal eye-level anywhere within the district;

c. the structure is itself a National Historic Landmark or is listed or eligible for listing in the National Register of Historic Places; or

d. someone has filed a substantial HP complaint about the proposed collocation.

NOTE: The FCC’s (and, generally, the federal government’s) HP rules only apply to structures which represent, in some sense, a “federal undertaking.” Theoretically a structure built after March 2001 could be built without compliance with the HP process if no FCC antennas were planned for the site. A later antenna proponent could then theoretically assert that the structure is an existing, compliant structure because at the time it was constructed, no HP process was required. This potential loophole has yet to be tested and would very likely run into resistance from the FCC. Any builder of a tall structure could be deemed a “prospective applicant” for an antenna structure registration, which falls within the broad category of “applicants” required to comply with the HP process. This unfortunately means that even if you are locating on an existing post March 2001 structure, you should ascertain whether the HP process was successfully completed. If it was not, either the structure owner must go through a post construction review process to obtain retroactive clearance, or you, the FCC applicant, may not be able to accurately certify compliance.

B. Replacement of an Existing Tower

An existing tower may be torn down and replaced with a new tower without triggering a new HP process as long as there is not a substantial increase in size, as that was defined above. Excavation of the land can occur up to 30 feet outside the existing tower site. As with collocation on existing towers, this exception does not apply if the existing tower was constructed after March 2001 and did not itself undergo the HP process.

C. Temporary Facilities

Temporary towers (those erected for not more than 24 months) need not undergo HP processing so long as there is no excavation on previously undisturbed ground. This includes temporary fixed facilities, “cells on wheels,” STA facilities, and facilities authorized under an experimental authorization.

D. Industrial and Commercial Properties

HP processing is excluded where the construction will occur in areas which are clearly industrial or commercial. This exclusion applies to industrial parks and to commercial strip malls or shopping centers that are more than 100,000 square feet in size. A qualifying tower here would have to be less than 200 feet in height and not within 500 feet of a historic property. This means the proponent must check the National Register and consult with the local State Historical Preservation Office (“SHPO”) and/or Tribal Historic Preservation Office (“THPO”) to determine whether eligible properties are nearby. The proponent must also check with potentially affected Indian tribes or Native Hawaiian Organizations (“NHOs”) which may attach religious or cultural significance to the site.<sup>1</sup> Thus, this exemption requires an abbreviated form of the full HP process.

E. Utility and Communications Rights-of-Way

Construction within 50 feet of a communications or utility right-of-way (such as telephone pole lines or above-ground cable lines) is exempt, so long as the new construction is not a substantial increase in size over the existing power lines or telephone poles. However, the construction may not be within a historic property, and the proponent must check with the local and tribal authorities, as in paragraph D above, to see if the property is eligible for historic property registration. The proponent must also check with pertinent tribes and NHO’s to be sure there is no religious or cultural significance to the site.

---

<sup>1</sup>This process will be discussed further below.

F. SHPO/THPO Designated Areas

SHPOs and THPOs may designate areas as presumptively excluded from the HP process. These agencies may choose to do this in order to avoid having to continually re-assess areas which are known to have no historical or tribal significance. As yet there are few such areas designated.

**III. Step I(a): Establish a Record of the Basis for Your Determination**

Because a conclusion that a property is categorically excluded from HP processing is not immediately reviewed by the FCC or otherwise verified, the FCC requires the determination to be made by a responsible individual within the applicant's organization. Documentation supporting the determination must also be produced to the Commission upon request. The best course is for an FCC licensee (or structure constructor, if he is not a licensee) to create a document for each site identifying the property and explaining on what basis the property has been deemed not to require HP processing (*i.e.*, which exclusion applies). The document should be signed by the officer or manager of the applicant responsible for this determination.

This exercise need only consist of one piece of paper but it has the salutary effect of insuring that someone from the applicant actually thinks about the issue, crystalizes the determination in a paragraph or two, attaches supporting documentation, and takes responsibility for the decision. This document may prove a useful shield against enforcement action if a question about the construction arises later.

**III. Step II: Evaluating a Non-Excluded Site for Historical Preservation Issues**

If the proposed site for a communications structure does not fall within any of the exclusions noted above (and most new construction will not), an applicant is required to go through the following process. The applicant will have to submit an FCC Form 620 "New Tower Submission Packet" to the local SHPO and/or THPO prior to construction.<sup>2</sup> There are a number of important steps which must be taken before the form can be submitted.

A. Contact SHPOs and THPOs

In order to prepare this form, the applicant will have to contact the pertinent SHPO and/or THPO to determine where there are any historical properties within the Area of Potential Effects (see below) which are in the National Register of Historic Places or eligible for inclusion in the National Register. The National Register itself should also be checked. (See Appendix A.)

---

<sup>2</sup>A related form, 621, is used for collocation situations.

#### IV. Step III: Determine Affected Areas

In order to prepare the Form 620, the applicant must identify the Area of Potential Effects (APE) which may be adversely affected by the planned construction. The effects can be either “direct” (the ground excavated or disturbed by the actual construction of the tower) or “visual” (the areas from which the constructed tower would be visible and therefore damaging to the historic ambience).

##### A. Direct Effects

1. The area where ground will actually be excavated and/or existing structures altered or destroyed is the area of direct effects. It is obviously critical that any historic property which would be destroyed by construction must be evaluated. More problematic is the requirement that hidden, underground effects be considered. You do not need to do further analysis if either of the following circumstances pertain: (i) the site has been previously disturbed to a depth of at least two feet below the proposed excavation (excluding footings) as documented by a siting analysis, or (ii) geomorphological evidence indicates that nothing of a historic interest is within the project area (or is more than two feet below the proposed construction). The latter circumstance would apply, for example, if you were building on a site that has solid bedrock just below the surface or a site that was recently created by landfill.

2. If you are not able to meet either of those two criteria, you must have an expert who meets the Secretary of the Interior’s professional qualifications standards<sup>3</sup> assess whether there is a need for a Field Survey, *i.e.*, an actual test of the area to check for historical artifacts. The expert may be able to conclude that the likelihood of historical or cultural material is so small as to not warrant a Field Survey. This conclusion is then sufficient to justify not doing such a survey, but it should be documented in writing by the expert. (It will have to be included in your Form 620.) If the expert cannot so conclude, the expert or someone else will have to take further steps (including a Field Survey) to verify whether the ground can be safely excavated.

If an Indian tribe indicates that there may be historical artifacts in the excavation area, a Field Survey must be done even if the exceptions in paragraph 1 would normally rule out such a survey.

##### 3. Areas of Interest or Visual Effects

The visual effect on the area surrounding the proposed construction must generally be considered within a half mile if the construction is 200 feet or less, three-fourths of a mile if the tower is between 200 and 400 feet, and a mile and a half if the tower is over 400 feet.

---

<sup>3</sup>See Appendix B for information about qualified experts.

(The FCC has the discretion to adjust this radius upward or downward in particular cases. For example, if a tower was on a site which was either very elevated or blocked by terrain features, it would affect the area in which it could be seen.)

Within the Area defined above, a proponent need only identify historic sites which are available at the local SHPO/THPO or at public locations that they direct you to. This is an important limitation because it would otherwise be extremely difficult to identify all historic properties and properties eligible for inclusion in the National Register over so broad an area.

**V. Step IV: Give Notice to Tribes and Others**

A. The applicant must access the FCC's Tower Construction Notification System ("TCNS"). This system permits applicants to register proposed construction sites on line. Those THPOs or NHOs who have expressed interest in the area where construction is to take place will be identified to the applicant, and the tribes will be notified by the FCC that construction is proposed in their area of concern.<sup>4</sup> The FCC will identify those tribes who may then be contacted directly by the applicant or those who must be contacted via the FCC. (Where there is a pre-existing relationship between the applicant and the tribe, the tribe may be approached directly, if that is acceptable to the tribe.) The applicant must inform the interested tribes of the proposed construction and give them 30 days to respond. If they do not respond, the applicant must make a reasonable follow-up effort to try to ensure that the tribe is not interested in the matter. If the tribe expresses interest in the matter, it must be made a "consulting party" for purposes of the Submission Packet.

The Nationwide Programmatic Agreement emphasizes that tribes must be dealt with respectfully as befits sovereign nations. In many cases there are natural areas which have religious or cultural significance to Indian tribes that would not be apparent to a non-Indian. In some cases the locations of the sites are known only to the tribes and are kept confidential, thus complicating the process of understanding where construction may be problematic.

**B. Notification of Local Governments and Others**

The applicant must notify the local land use authorities of the planned construction. The applicant must also provide written notice of the proposal in the manner prescribed locally by zoning or historical preservation rules or by publication in a local newspaper of general circulation. The local SHPO or THPO may have lists of local groups who should also be provided directly with notice of the proposal.

---

<sup>44</sup>Note that in a number of instances the tribe itself is now situated in a different location than its ancestral burial grounds, so the connection of the tribe to the site may not be obvious.

C. Other Interested Parties

In addition to the SHPOs, THPOs, Indian tribes, NHOs and local governments who are entitled to be designated as consulting parties, interested organizations or members of the public may be granted status as consulting parties by either the applicant or the FCC. If so recognized, they are entitled to copies of all submissions and correspondence and have an opportunity to make their views known to the applicant, the SHPOs and THPOs and the Commission.

**VI. Step V: Assess the Effects of Continuation on Historical Properties in the Area**

Once all historic properties in the areas of direct and indirect effects have been identified and input from interested parties has been gathered, a qualified expert must assess whether there will be any adverse effect on historic properties from the proposed construction. Proponents may be able to reach agreements with local SHPOs or THPOs (and other local organizations) whereby everyone agrees that adverse effects will be adequately minimized.

**VII. Step VI: Prepare the Form 620**

A. Contents of Form 620. The Form 620 includes (i) identifying information about the applicant, (ii) identifying information about the applicant's consultants, including their credentials as qualified experts, (iii) data about the site's exact location and the proposed construction. The form must include detailed information about the SHPO's, THPO's, local governments and other consulting parties who have been involved, and the steps which have been taken to inform the public of the proposal. All of this must be documented. The applicant must also describe in detail the areas of direct and visual effects which were considered, list all historic or potentially historic properties within the APE which were evaluated, and indicate with respect to each such property whether there would be an adverse effect. Unless there are no historic properties identified in the area of potential effects, photographs of the entire surrounding area from the tower site must be supplied, as well as photographs of the historic properties in the area, including views of the tower site from the historic properties. 7.5 minute topo maps must be supplied identifying the area of potential effects, the location of the proposed tower and associated access roads, and the location of historic properties considered.

B. File the Form 620 with the SHPO/THPO. Although these organizations would probably have been previously involved in your site assessment, this filing triggers the formal process of reviewing your assessment of the lack of adverse effects on historic sites. The SHPO/THPO generally has 30 days to review the packet of information and either request more time or information or concur or disagree with your assessment. If there is disagreement, the parties are urged to work out a solution satisfactory to all. If disagreement persists, the matter may be presented to the FCC for resolution. The Form 620 Submission Packet is not routinely filed with the FCC unless there is a dispute or unless the SHPO/THPO does not respond at all to a no adverse effect determination within 30 days. In the latter case, the Form must be submitted

to the FCC and if the FCC does not respond within 15 days (if submitted electronically) or 25 days (if submitted on paper), the applicant may assume that the FCC has no problem with the determination.

The preparation of this form is obviously an enormous undertaking which underscores the considerable burden entailed by the new FCC rule. Note that a similar form, Form 621, is used in circumstances where you are collocating on an existing structure, but it would only be necessary in those circumstances where the collocation is not otherwise excluded.

#### **VIII. Step VII: Certify the FCC Radio Application**

Once the applicant has received approval (or no disapproval from the relevant SHPOs or THPOs), it may accurately certify in an FCC application that it has complied with the Section 106 HP process.

#### **IX. Step VIII: Watch Out for Post-Certification Discoveries**

If, after determining that there are no potential adverse effects on historic properties, an applicant later learns that there is such an effect, it must immediately cease construction and notify the affected SHPO/THPO and the FCC. A new evaluation must then be done before construction can proceed. If any human or burial remains are discovered during construction, work must cease immediately and the authorities must be notified.

A complaint can be lodged with the FCC at any point in the process alleging a failure to comply with the rules. If the FCC determines that there is a probable violation, it can order construction activity to cease pending investigation. If the applicant is found to have deliberately adversely affected a historic property, the FCC can institute enforcement actions, including all available fines and forfeitures. Interestingly, the rules do not provide for punishment if an applicant inadvertently affects a historic property. Establishing good faith compliance with the 106 process could therefore very well shield you from a fine. In addition, the rules do not expressly give the FCC the authority to order the dismantling of a structure which was built in non-compliance with the process. Presumably, however, the FCC could forbid the use of the tower for radio transmissions, which would negate any utility of the tower.

**Appendix: Getting Information About Registered Sites**

Accessing the National Register

A useful website for determining whether a particular place is listed in the National Register is [www.cr.nps.gov/nr/index.htm](http://www.cr.nps.gov/nr/index.htm). From that site, administered by the National Park Service, you can get addresses and phone numbers for the State Historical Preservation Offices and some tribal offices. You can also access the database listing more than 78,000 historical places to see if there are any such places registered in the vicinity of your project. It would be very useful if the sites were referenced by latitude/longitude coordinates so that they could quickly be related by proximity to the planned construction site, but that is not yet the case.

## Appendix B: Getting Qualified Experts

Qualified experts must meet the standards established by the Secretary of the Interior as set forth below. The Secretary, however, does not administer a test or otherwise pre-qualify an expert. Many states do license or certify historical preservation experts since this qualification is necessary to serve on certain review Boards and make historic evaluations.

### Professional Qualifications Standards

1. The following requirements are those used by the National Park Service, and have been previously published in the Code of Federal Regulations, 36 CFR Part 61. The qualifications define minimum education and experience required to perform identification, evaluation, registration, and treatment activities. In some cases, additional areas or levels of expertise may be needed, depending on the complexity of the task and the nature of the historic properties involved. In the following definitions, a year of full-time professional experience need not consist of a continuous year of full-time work but may be made up of discontinuous periods of full-time or part-time work adding up to the equivalent of a year of full-time experience.

#### History

The minimum professional qualifications in history are a graduate degree in history or closely related field; or a bachelor's degree in history or closely related field plus one of the following:

1. At least two years of full-time experience in research, writing, teaching, interpretation, or other demonstrable professional activity with an academic institution, historic organization or agency, museum, or other professional institution; or
2. Substantial contribution through research and publication to the body of scholarly knowledge in the field of history.

#### Archeology

The minimum professional qualifications in archeology are a graduate degree in archeology, anthropology, or closely related field plus:

1. At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management;
2. At least four months of supervised field and analytic experience in general North American archeology, and
3. Demonstrated ability to carry research to completion.

In addition to these minimum qualifications, a professional in prehistoric archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the prehistoric period. A professional in historic archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the historic period.

#### Architectural History

The minimum professional qualifications in architectural history are a graduate degree in architectural history, art history, historic preservation, or closely related field, with coursework in American architectural history, or a bachelor's degree in architectural history, art history, historic preservation or closely related field plus one of the following:

## FLETCHER, HEALD & HILDRETH, P.L.C.

1. At least two years of full-time experience in research, writing, or teaching in American architectural history or restoration architecture with an academic institution, historical organization or agency, museum, or other professional institution; or
2. Substantial contribution through research and publication to the body of scholarly knowledge in the field of American architectural history.

### **Architecture**

The minimum professional qualifications in architecture are a professional degree in architecture plus at least two years of full-time experience in architecture; or a State license to practice architecture.

### **Historic Architecture**

The minimum professional qualifications in historic architecture are a professional degree in architecture or a State license to practice architecture, plus one of the following:

1. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or
2. At least one year of full-time professional experience on historic preservation projects.

Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects.

The Department of Interior proposed an upgrading of these qualifications in 1997 but no change in the guidelines has been adopted. Many colleges administer degree programs which qualify graduates to meet these standards..

## Appendix C

### Other Useful Resources

The FCC Order adopting the Nationwide Programmatic Agreement is found at 20 FCC Rcd. 1073 (2004) The Nationwide Programmatic Agreement and the earlier Collocation Agreement are in the appendices to the Report and Order. The Order offers some explanatory background to some of the provisions of the NPA.

There is also an FCC website which is intended to be a tutorial on the Section 106 process: <http://wireless.fcc.gov/siting/npa/npa.html>. I have not found the site that useful, but it does answer some questions.

The rules of the Advisory Council on Historic Preservation are found at 36 CFR Section 800. These rules generally track the agency-specific rules but do explain to some degree what constitutes an adverse effect on a historic property.