NEW FCC NEPA RULES ELIMINATE COMMUNICATION TOWERS NOT REQUIRING ANTENNA STRUCTURE REGISTRATION FROM THE DEFINITION OF MAJOR FEDERAL ACTION (MFA)

You read that right! However, isn't the devil always in the details? Here are the key takeaways:

1. The Commission has decoupled National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) procedures. The definition of federal Undertaking under NHPA is not altered by the Commission's MFA definition or new rules. Section 106 and tribal consultation procedures set forth in the relevant Programmatic Agreements (NPAs) remain intact as they relate to tower construction, replacement towers and poles, and "small cell" and DAS deployments.

2. For FCC NEPA, the FCC has concluded that Antenna Structure Registration (ASR) authority to grant or withhold an ASR establishes substantial federal control for the registration to constitute a Major Federal Action (MFA). Therefore, antenna structures requiring involuntary ASR filing (structures over 200 feet overall and shorter structures near air navigation facilities) remain MFAs. Specifically, antenna structure owners must submit FCC Form 854 and an FAA determination of "no hazard" before the Commission will grant an ASR. The national ASR environmental notice is still required, but the local notice has been eliminated.

3. Recent amendments to NEPA have narrowed the pool of Commission Actions that qualify as MFAs, however, the range of Actions subject to other federal environmental statutes has not narrowed. Compliance with other federal statutes is a separate question from whether NEPA applies to a particular Action.

For instance, consultation with the Fish and Wildlife Service (FWS) for evaluation of federally threatened and endangered species and critical habitats is required for all Actions, not just MFAs. Additionally, nothing in the new FCC NEPA rules absolves applicants, licensees, or registrants of legal obligations under the Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act, the Clean Water Act (Wetlands and Waters), the Clean Air Act, or other federal, state, or local environmental laws that exist independently of NEPA. Violation of any of these environmental laws could result in enforcement.

NHPA compliance procedures are not altered by the new FCC rules.

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4. MFAs will require documentation that no extraordinary circumstances exist. For nearly half a century, the Commission's NEPA compliance procedures have implemented broad Categorical Exclusions (CEs) that have resulted in most antennas and antenna support structures being constructed without an Environmental Assessment (EA) filing. The new rules should result in an outcome to which we are accustomed - that a vast majority of deployments will not require an EA.

For mandatory ASR filings, applicants must certify this determination to the Commission under the revised rules. Supporting NEPA documentation, including the applicable checklist, must be retained for six (6) years when it is not otherwise submitted to the Commission. Although the rules require six-year retention, ECA recommends retaining these records for the operational life of the facility.

5. The Commission's RF exposure rules apply to all Actions that are not otherwise MFAs..

In summary, federal, state, and local environmental laws exist independently of NEPA. ECA believes that applicants, licensees, and registrants should continue to use site-specific pre-construction compliance checklists in a form appropriate to their use to ensure compliance with environmental and cultural resource laws within the jurisdictions where deployment is planned. ECA believes that most of the items that have been historically and customarily used should be included in this new form. The approach should be familiar and recognizable, as the existing checklist already provides an appropriate framework to identify extraordinary circumstances.

ECA has completed natural and cultural resource evaluations for tens of thousands of macro, DAS, and small cell facilities. For questions or assistance, please contact Kelly Golden of ECA at kelly.golden@eca-usa.com or (770) 833-8128.

ECA is an environmental, cultural resources, and geotechnical consulting and engineering firm with a 35-year track record of excellent service to clients throughout the United States. ECA attributes its success to providing timely and innovative services and solutions with a persistent focus on the objectives of clients.

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