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

In the Matter of	)	
	)	
Amendment of Part 1 of the Commission's	)	WT Docket No. 08-61
Rules Regarding Environmental Compliance	)	WT Docket No. 03-187
Procedures for Processing Antenna Structure	)	
Registration Applications	)	

Petition for Expedited Rulemaking and Other Relief on behalf of American Bird Conservancy, Defenders of Wildlife and National Audubon Society

American Bird Conservancy, Defenders of Wildlife, and National Audubon Society ("Petitioners") respectfully request that the Federal Communications Commission ("FCC" or "Commission") adopt new rules on an expedited basis to comply with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"), Endangered Species Act, 16 U.S.C. § 1531 *et seq*. ("ESA"), and the Migratory Bird Treaty Act, 16 U.S.C. § 701 *et seq.* ("MBTA"), and their implementing regulations, and to carry out the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) ("*American Bird Conservancy*"). This Petition is submitted to WT Docket No. 08-61 (Gulf Coast petition remand) and WT Docket No. 03-187 (effects of communications towers on migratory birds).

The court of appeals ruled in *American Bird Conservancy* that the FCC "should be able to proceed with dispatch on remand to resolve the Gulf Coast petition." 516 F.3d at 1035. Petitioners file this petition pursuant to 5 U.S.C. § 553(e) and 47 C.F.R. § 1.401 *et seq.* to seek rulemaking and other actions by the FCC to resolve the Gulf Coast petition and to address the

full range of issues regarding the impacts of communications towers on migratory birds, which have been before the Commission for more than a decade.

INTRODUCTION AND SUMMARY

Through its Antenna Structure Registration ("ASR") Program, the FCC registers the placement of towers that support radio transmitting antennas, known as antenna structures or communication towers, for use in wireless communications and broadcast services. "The Antenna Structure Registration program allows the FCC to fulfill its statutory duty to require the painting and lighting of antenna structures that may pose a hazard to air navigation." FCC, Antenna Structure Registration, Getting Started, Step 1: PREFILE – Do you need to register?, http://wireless.fcc.gov/antenna/index.htm?job=about_getting_started (last visited April 2, 2009). Antenna structures that meet certain height (> 60.96 m) or location criteria (proximity to an airport) require Federal Aviation Administration clearances before registration with the FCC, 14 C.F.R. pt. 77 & 47 C.F.R. pt. 17, that may require aircraft warning lights, typically steady-burning red lights (L-810) alternating with flashing red lights (L-864). White strobe lights (L-865) have also been used since the 1970s. *See* FAA Advisory Circular (AC) 70/7460-1K, "Obstruction Marking and Lighting" (Feb. 1, 2007), available at https://oeaaa.faa.gov/oeaaa/external/content/AC70_7460_1K.pdf. The location, lighting, height and support system of these communication towers are key factors in the millions of bird kills at towers.

In 2002, concerned by the FCC's failure to act to reduce the impact of communication towers on migratory birds, American Bird Conservancy and other conservation groups petitioned the FCC to comply with NEPA, ESA and MBTA when registering communication towers. American Bird Conservancy et al., Petition for National Environmental Policy Act Compliance

(Aug. 26, 2002) ("Gulf Coast Petition"). Among other claims, the groups sought a programmatic environmental impact statement for antenna structures in the Gulf Coast region, consultation with the Fish and Wildlife Service ("FWS") regarding effects of Gulf Coast towers on threatened and endangered species, and measures to eliminate takes of migratory birds in compliance with the MBTA.

Shortly thereafter, the FCC issued a public notice of its intent to consider the MBTA issue. In Re Effects of Towers on Migratory Birds, *Notice of Inquiry*, WT Docket No. 03-187, 18 FCC Rcd 16938 (2003). Having taken no action toward a rulemaking and after the Gulf Coast petitioners sought review of the FCC's failure to act, the FCC issued an order dismissing the NEPA claim, denying the ESA claims, and deferring consideration of the MBTA claims to the still ongoing Notice of Inquiry ("NOI") proceeding. Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006).

The FCC dismissed the request for a programmatic environmental impact statement ("PEIS") pursuant to NEPA, reasoning that the petitioners had not provided sufficient specific evidence of a significant effect and that there was no consensus as to the impact of towers on birds. *Id.* at 4466 ¶ 11. On appeal, the court vacated this part of the Order and remanded the request for a PEIS back to the FCC, warning the agency that its own NEPA rules require they prepare at least an environmental assessment:

> Based on the record before the court, there is no real dispute that towers "may" have significant environmental impact, and thus that the § 1.1307(c) threshold has been met. Indeed, the *Order*'s emphasis on "conflicting studies" and "sharply divergent views" regarding the number of birds killed confirms, rather than refutes, that towers may have the requisite effect. *Order*, 21 F.C.C.R. at 4466 P 10. Under such circumstances, the Commission's regulations mandate at least the completion of an EA before the Commission may refuse to prepare a programmatic EIS.

American Bird Conservancy, 516 F.3d at 1033-34.

The court also vacated the Gulf Coast ESA claim and remanded it to the FCC to comply with the ESA. *Id.* at 1035. The Commission declined to follow the ESA and its own regulations (47 C.F.R. 1.1307(a)(3)) and consult with the FWS based on its unsupported conclusion that "there is 'no evidence of any synergies' among towers that 'would cause them cumulatively to have significant environmental impacts that they do not have individually.'" *Id.* at 1034-35. The court found the Commission's explanation inadequate. *Id.* at 1035. Finally, the court deferred to the FCC's commitment to address the MBTA issue in the context of its ongoing NOI. *Id.* at 1032.

The first section of this petition summarizes the substantial evidence of the threats communications towers registered by the FCC pose to migratory birds and reasonable mitigation measures available to the FCC to reduce those threats. The petition then explains that NEPA, the ESA and MBTA mandate that the FCC consider these impacts when taking action to register antenna structures and otherwise implement the ASR program. Finally, the petition requests that FCC clarify its NEPA, ESA and MBTA responsibilities so that it may resolve those NEPA and ESA portions of the Gulf Coast Petition again before the agency on remand. Specifically, petitioners request that FCC undertake the following actions:

1) Amend the FCC's NEPA regulations at 47 C.F.R. §§ 1.1301 – 1.1319 consistent with Council on Environmental Quality ("CEQ") regulations and guidance to cure deficiencies in the existing FCC regulations and to ensure that only FCC actions that have no significant environmental effects individually or cumulatively are categorically excluded;

2) Prepare a programmatic environmental impact statement addressing the environmental consequences of its ASR program on migratory birds, their habitats, and the environment;

3) Promulgate rules to clarify the roles, responsibilities and obligations of the FCC, applicants, and non-federal representatives in complying with the ESA;

4) Consult with the FWS on the ASR program regarding all effects of towers and antenna structures on endangered and threatened species; and

5) Complete the proposed rulemaking in WT Docket 03-187 to adopt measures to reduce migratory bird deaths in compliance with the MBTA.

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PETITIONERS

American Bird Conservancy ("ABC") is a 501(c)(3) non-profit organization dedicated to the conservation of wild native birds in the Americas. Founded in 1994, ABC has long been a leader in Partners in Flight and the North American Bird Conservation Initiative and is the only U.S.-based group dedicated solely to overcoming the greatest threats facing native birds in the Western Hemisphere. ABC has 7,000 members, offices in Virginia and the District of Columbia, and staff in California, Indiana, Missouri, Montana, New Hampshire, New York, and Oregon.

Defenders of Wildlife ("Defenders") is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities, with its headquarters in Washington, D.C. Defenders' mission is to preserve wildlife and emphasize appreciation and protection for all species in their ecological role within the natural environment through education, advocacy, and other efforts. Defenders has over one million members and supporters throughout the country and field offices in several states.

The National Audubon Society, Inc., is a not-for-profit corporation organized under the laws of the State of New York. National Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. National Audubon has more than one million members and supporters and a presence in all 50 states, including 23 state offices and more than 450 certified chapters, nature centers, sanctuaries, and education and science programs.

Petitioners and their members are intensely interested and active in the protection and restoration of birds, other wildlife and their habitats. Petitioners' members are concerned with antenna structures authorized by the FCC because these structures are having an enormous adverse impact on migratory birds and other species. As such, their interests are affected by

rules governing the processing of tower applications. The proposed rules will provide opportunities for public involvement and assurance of environmental protections for migratory birds and other species when the FCC administers its ASR program.

STATEMENT OF FACTS

I. Communications Towers Have Demonstrable But Avoidable Adverse Impacts On Migratory Birds

As the record in the dockets open before the Commission makes clear, antenna structures are a significant cause of mortality for migratory and other bird species. The scientific literature documents many examples of avian mortality due to communication towers, going back as far as 1949 with the advent of towers for television. *See generally* Paul Kerlinger, *Avian Mortality at Communication Towers: A Review of Recent Literature, Research, and Methodology* (prep. for FWS, 2000), http://www.fws.gov/migratorybirds/issues/towers/review.pdf; John Trapp, *Bird Kills at Towers and Other Human-made Structures: An Annotated Partial Bibliography 1960-1998* (FWS 1998), http://www.fws.gov/migratorybirds/issues/towers/tower.html. With the exponential growth in communication tower construction that began in the 1990s,[1] there has

[1] The wireless communications industry has required almost entirely new infrastructure, comprising most of the exponential growth in communications towers. Jared O'Connor, Note, *National League of Cities Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Jurisprudence*, 30 B.C. Envtl. Aff. L. Rev. 315, 317 (2003). Industry also expects that the transition to digital television will entail additional tower construction; industry asserts that two-thirds of broadcasters will need new or improved towers, many of them over 1,000 feet tall. In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182, *Notice of Proposed Rulemaking*, 12 FCC Rcd 12504, 12505 ¶ 3 (1997). Even though the FCC does not register all antenna structures, *see* 47 C.F.R. pt. 17, FCC staff estimated at a meeting on July 18, 2008, that the Commission receives 8,000 to 10,000 applications for antenna structure registration per year.

been a dramatic increase in migratory bird deaths at towers, as well as in research into the magnitude and causes of the problem.

The literature includes numerous references to and studies of bird kills, examining single night birds kills, seasonal bird kills, and annual bird kills. Several of these researchers studied one tower while others studied multiple towers with similar findings. One researcher recorded over 42,000 dead birds, representing 189 species, of which the vast majority were night-migrating neotropical migrants, over a 25-year period at a tower in Florida. Robert L. Crawford & R.Todd Engstrom, *Characteristics of avian mortality at a north Florida television tower: a 29-year study*, 72 J. Field Ornithology 380 (2001). Another researcher in Wisconsin collected nearly 121,560 birds representing 123 species over a 38-year period. Charles Kemper, *A Study of Bird Mortality at a West Central Wisconsin TV tower from 1957-1995*, 58 The Passenger Pigeon 219 (1996). This same researcher found an astounding 12,000-plus dead birds in one night at a tower in Wisconsin. Several other researchers have found over 1,000 birds killed in a single night at a lone tower. *See generally* Letter from Albert Manville, Sr. Wildlife Biologist, FWS, to G. Wm. Stafford, FCC (Nov. 7, 2003) (on file in WT Docket 03-187); Letter from Kenneth Stansell, Acting Deputy Dir., FWS, to Louis Paraertz, WTB, FCC (Feb. 2, 2007) (on file in WT Docket 03-187). *See also* Letter from George Fenwick, President, ABC to Marlene H. Dortch, Comm'n Sec'y, FCC, at 48-65 (April 23, 2007) (on file in WT Docket 03-187); Travis Longcore et al., Scientific Basis To Establish Policy Regulating Communications Towers To Protect Migratory Birds: Response to Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions With Communications Towers, WT Docket No. 03-187, Federal Communications Commission Notice of Inquiry (Feb. 14, 2005); Travis Longcore et al., Biological Significance of Avian Mortality at Communications Towers and Policy Options for

Mitigation: Response to Federal Communications Commission Notice of Proposed Rulemaking Regarding Migratory Bird Collisions With Communications Towers, WT Docket 03-187 (April 23, 2007).

A literature review of 47 avian collision tower studies documented 230 bird species killed at communication towers. Gavin G. Shire et al., *Communication towers: A Deadly Hazard to Birds* 5 (American Bird Conservancy 2000), available at http://www.abcbirds.org/newsandreports/towerkillweb.pdf (last visited April 2, 2009). ESA-listed birds, including Red-cockaded Woodpeckers, Spectacled Eiders, Steller's Eiders, Newell's Shearwaters and Hawaiian (Dark-rumped) Petrel, are killed or harmed by towers. *See infra* at p. 36. Birds most frequently killed by towers are birds of the warbler, thrush, and vireo families. According to the FWS, species of conservation concern[2] comprise a high number of those birds killed at towers. Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra*, at 9.

The FWS has estimated that some 4,000,000 to 5,000,000 birds are killed at communications towers each year and that the correct number could be ten times that size. Albert M. Manville, II, *Bird strikes and electrocutions at power lines, communication towers, and wind turbines: state of the art and state of the science – next steps toward mitigation*, Bird Conservation Implementation in the Americas: Proceedings 3rd International Partners in Flight Conference 1051, 1056 (C.J. Ralph and T. D. Rich eds., 2005) [Exhibit A].

These bird losses must be assessed in conjunction with other causes of adverse impacts to migratory and other birds that have a cumulative impact on bird populations. In addition to natural mortality from disease and predation, there are other human activities that factor into

[2] Birds of conservation concern are those migratory nongame birds that, without additional conservation measures, are likely to become threatened or endangered species. *See* U.S. Fish and Wildlife Service, *Birds of Conservation Concern 2002* at 1 (2002), available at http://www.fws.gov/migratorybirds/reports/BCC2002.pdf.

avian mortality. These include building windows (estimated to kill 97,000,000 to 980,000,000 birds each year), vehicular strikes (60,000,000 to 80,000,000 birds annually), wind turbines (40,000 or more birds annually), power line electrocutions, and power line collisions (hundreds of thousands to hundreds of millions of birds). Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 11-12.

The location, lighting, height and support system of communication towers are key factors in bird kills at towers. The impacts – especially for neotropical songbirds – increase with overcast conditions or inclement weather. Robert L. Crawford & R. Todd Engstrom, *Characteristics of avian mortality at a North Florida television tower: a 29-year study*, 72 J. of Field Ornithology 380 (2001). *See also* Joanne M. Lopez, *The Impact of Communication Towers on Neotropical Songbird Populations*, 18 Endangered Species UPDATE 50 (2001). For example, one night during a Kansas snowstorm, 10,000 Lapland Longspurs died in collisions with a 420-foot tower. *Id.* at 52. It is hypothesized that birds lose natural navigating cues and orient with the tower lights, circling the towers and eventually dying of exhaustion or collision with towers or support systems. *Id.* at 53. Birds may also die in collisions with other birds aggregated at the light source.

Aircraft warning lights are also major impediments to bird survival. "Light appears to be a key attractant for night-migrating songbirds, especially when nighttime visibility is poor, cloud ceilings are low, fog is heavy, or various other forms of precipitation are associated with either passing or stationary cold fronts." Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 13. Birds have shown a greater attraction and sensitivity to red flashing plus red solid lights than to white strobes. *See* Sidney A. Gathreaux Jr. & Carroll G. Belser, *Effects of Artificial Night Lighting on Migratory Birds*, *in* Ecological Consequences of Artificial Night

Lighting 67, 85-86 (Catherine Rich & Travis Longcore eds., 2006) [Exhibit B]. *See also* William R. Evans et al., *Response of night-migrating songbirds in cloud to colored and flashing light*, 60 North Am. Birds 476, 487 (2007) (suggesting that flashing lights cause less aggregation than steady-burning lights, keyed by the on-time and length of darkness between flashes); Joelle Gehring et al., *Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions*, 19 Ecological Applications 505, 512 (2009) (finding fatality rates of 3.7 birds at towers with flashing lights versus 13 birds with steady-burning lights per 20-day period).

Avian mortality also increased at towers with guy wires and at taller towers. *See* Travis Longcore et al., *Height, Guy Wires, and Steady-Burning Lights Increase Hazard Of Communication Towers to Nocturnal Migrants: A Review and Meta-Analysis*, 125 The Auk 485, 486 (2008); Joelle Gehring & Paul Kerlinger, *Avian collisions at communication towers: I. The role of tower height and guy wires* 1 (Prepared for the State of Michigan, 2007) (finding that "[n]early 16 times more fatalities were found at guyed towers 116-146 m in height as opposed to unguyed towers of the same height" and that "[t]all guyed towers [>305 m AGL] were responsible for about 70 times as many birds fatalities as the 116-146 m unguyed towers and nearly 5 times as many as guyed towers 116-146 m.").

Ongoing research is demonstrating that tower owners and operators can greatly reduce the number and frequency of avian collisions by employing lighting other than non-blinking lights, by reducing the height of towers and by constructing self-supported towers. *See generally* Longcore, *Height, Guy Wires, and Steady-Burning Lights*, *supra*, at 489 (noting that "enough reliable information is available to implement communication tower guidelines that would reduce existing and future significant adverse effects on birds."); Manville, *Bird strikes*, *supra*, at

1057 (noting that the U.S. Forest Service and U.S. Coast Guard have implemented voluntary guidelines from FWS).

Eliminating steady-burning aviation safety lights (L-810s) could reduce bird deaths by up to 70% without in any way impeding the provision of communication services. *See generally* Gehring, *Communication towers, lights, and birds, supra,* at 512. Indeed, the authors note that:

> By simply removing the L-810 lights from all communication towers nationwide, it is possible that one to two million or more bird collisions with communication towers might be averted each year ….
>
> … Although avian fatalities would not be completely eliminated, the numbers of avian fatalities would undoubtedly be greatly reduced.

Id. at 512-13.

Reducing tower height can also reduce the number of bird deaths. "Our results also support the prediction that many more avian collisions occur at taller towers. Data indicate that 68%-86% fewer fatalities were registered at guyed towers 116-146 m AGL than at towers >305 m AGL." Gehring & Kerlinger, *Avian collisions at communication towers: I. The role of tower height and guy wires, supra,* at 9. Research confirms that using unguyed towers in place of guyed towers of the same height – and of the same lighting – can also reduce bird deaths. Bird kills at unguyed towers using steady-burning lights ranged from 5 to 22 times less than at guyed towers. Gehring, *Communication towers, lights, and birds, supra,* at 511-12, tables 3-4. *See also* Gehring & Kerlinger, *Avian collisions at communication towers: I. The role of tower height and guy wires, supra,* at 9 ("bird fatalities may be prevented by 69% - 100% by constructing unguyed towers instead of guyed towers").

II. Expert Opinion Confirms The Effects of Towers On Migratory Birds

For more than a decade, therefore, Petitioners, along with other conservation organizations, officials of the Fish and Wildlife Service ("FWS") and scientists have been urging

the Commission to address such bird mortality and to comply with NEPA, ESA, and the MBTA in its administration of the ASR program. Petitioners have previously provided complete documentation of these repeated efforts to assist the FCC in fulfilling its statutory duties under NEPA, ESA, and MBTA. *See, e.g.*, Letter from George Fenwick, President, ABC, *supra*; Letter from Kara Gillon, Senior Staff Attorney, Defenders of Wildlife, to the Federal Communications Commission (April 23, 2007) (on file in WT Docket 03-187).

The FWS, in particular, has pressed the FCC to take action to identify and address avian mortality from antenna structures. In 1999, the Director of the FWS urged the FCC to conduct a programmatic environmental impact statement ("EIS") pursuant to NEPA on the tower registration program to examine the extent of avian mortality, the causes, and the solutions. *See* Letter from Jamie Rappaport Clark, Dir., FWS, to William Kennard, Chairman, FCC (Nov. 2, 1999) (on file in WT Docket 03-187). In fact, the FWS Director formally requested that the FCC meet with the FWS to determine those impacts and to identify measures to avoid those impacts. *Id.* While acknowledging the FCC's lack of expertise[3], then FCC Chairman William Kennard denied the request by Director Clark that the FCC prepare a programmatic EIS but assured her that the "FCC will take all necessary action" to take into account impacts on migratory birds

[3] The FCC has often acknowledged that the FWS is the lead federal agency for managing and conserving migratory birds. *See, e.g.,* In the Matter of Effects of Communications Towers on Migratory Birds, *Notice of Inquiry*, WT Docket 03-187, 18 FCC Rcd 16938, 16951 (2003); . Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order*, 21 FCC Rcd 4462, 4467 ¶ 13 (2006) (acknowledging that the FWS – and not the FCC – is "the expert agency" as to the effects of towers on listed species).

once standards are developed by the expert agency. Letter from William Kennard, Chairman, FCC, to Jamie Rappaport Clark, Dir., FWS (March 21, 2000) (on file in WT Docket 03-187).[4]

On September 14, 2000, the FWS issued guidelines that at that time were the "most prudent and effective measures for avoiding bird strikes at towers" to address the "potentially significant impact" on birds protected by the MBTA, many of which are also protected by the ESA and Bald and Golden Eagle Protection Act.[5] Memorandum from Director, FWS, on Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers to Regional Directors 1-2 (Sept. 14, 2000) ("Service Guidance"), available at http://www.fws.gov/migratorybirds/issues/towers/comtow.html. Subsequently, the FWS Director wrote to the FCC Chairman, attaching the Service Guidance and noting that "[w]hile there is a considerable body of research available on bird strikes at towers and the measures which can be taken to avoid them, this knowledge is not widely known outside the

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[4] The Commission may rely on expert agencies and other experts in the field when determining appropriate environmental standards when it lacks expertise to develop such standards on its own. *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, *Report and Order*, 11 FCC Rcd 15123, 15124 ¶¶ 1-2 & n.1, 15134-35 ¶ 28, 15150 ¶ 71 (1996), *on recons., Second Memorandum Opinion and Order*, 12 FCC Rcd 13494 (1997), *aff'd, Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (adopting guidelines based substantially on recommendations of the U.S. Environmental Protection Agency, the Food and Drug Administration, and on criteria published by the National Council on Radiation Protection and Measurements and by the American National Standards Institute/Institute of Electrical Engineers, Inc.).

[5] Under the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. § 668-668d, it is unlawful for a person to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle … [or any golden eagle], alive or dead, or any part, nest, or egg thereof . . . ." 16 U.S.C. § 668(b). The BGEPA defines "take" as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." *Id.* § 668c. FWS developed National Bald Eagle Management Guidelines, available at http://www.fws.gov/migratorybirds/issues/BaldEagle/NationalBaldEagleManagementGuidelines.pdf, to advise landowners, land managers, and others who share public and private lands with bald eagles when and under what circumstances the protective provisions of the BGEPA may apply to their activities. Regulations governing permits to take bald and golden eagles are found at 50 C.F.R. pt. 22.

academic community." Letter from Jamie Rappaport Clark, Dir., FWS, to William Kennard, Chairman, FCC, at 1 (Nov. 20, 2000) (on file in WT Docket 03-187). Director Clark stated that the FWS "believe[s] that widespread use of these guidelines will significantly reduce the loss of migratory birds at towers" and that the guidelines represent "the best measures presently available for avoiding fatal bird collisions." *Id.*; *see also* Longcore, *Height, Guy Wires, and Steady-Burning Lights*, *supra*, at 489 ("avian mortality would be reduced by restricting the height of towers, avoiding guy wires, using only red or white strobe-type lights as obstruction lighting, and avoiding ridgelines for tower sites. These recommendations are included in current guidelines established by the USFWS (2000), and implementing them within an adaptive management approach is advisable").

Two years ago, the FWS reiterated its concerns with the deficiencies in the FCC's regulations and process that allow significant adverse impacts to migratory birds to escape NEPA, ESA and MBTA review:

> Neither the individual impacts of a tower nor the cumulative impacts of all communication towers are included as part of the NEPA review process. The Service first raised this concern in 1999 at a public workshop on avian collisions at towers held at Cornell University (Willis 1999). More recently, we have raised it at all meetings of the Communication Tower Working Group, in a Service briefing for FCC staff, in a Service briefing for the senior legal advisors to the FCC Commissioners, and in the NOI.

Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 21. The FWS again urged the adoption of specific measures regarding tower height, lighting and guy wires to avoid the killing of migratory birds.

During the course of the *American Bird Conservancy* litigation, the FCC pledged to the court of appeals that it was "Moving Expeditiously To Take Action With Respect To Migratory Bird Issues." Brief for Respondent FCC at 20, *In re Forest Conservation Council, Inc.*, Docket

No. 03-1034 (D.C. Cir. filed Apr. 30, 2003). In light of the FCC's pledge, the record before the FCC, the FWS's expert advice, the data and recommendations by independent scientists, and the court's remand in *American Bird Conservancy*, the FCC must act swiftly to promulgate new rules applicable to its ASR program.

Petitioners submit this petition to propose revised and new rules to address the issues presently before the FCC on remand and the FCC's obligation to comply with federal environmental laws including NEPA, ESA and MBTA. We have provided specific changes to FCC regulations, and conforming amendments, in the appendix to this Petition.

ARGUMENT

I. NEPA's Statutory and Regulatory Requirements

In enacting NEPA, Congress "[made] environmental protection a part of the mandate of *every* federal agency and department." *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis added). NEPA therefore requires federal agencies to take a "hard look at [the] environmental consequences" of their proposed actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotation omitted). Section 102(2)(C) of NEPA establishes an "action-forcing" mechanism to ensure "that environmental concerns will be integrated into the very process of agency decisionmaking." *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). The CEQ, which bears statutory responsibility for overseeing NEPA's implementation, has issued comprehensive rules and guidelines to assist federal agencies in complying with NEPA. 40 C.F.R. §§ 1501-1508. CEQ's regulations merit "substantial deference." *Andrus*, 442 U.S. at 358.

Pursuant to that statutory provision, "all agencies of the Federal Government shall ... include in every recommendation or report on … major Federal actions significantly affecting

the quality of the human environment, a detailed statement" known as an environmental impact statement ("EIS") addressing "the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided ..., alternatives to the proposed action," and other environmental issues. 42 U.S.C. § 4332. These requirements serve twin goals: first, "ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," *Methow Valley*, 490 U.S. at 349, and second, "guarantee[ing] that the relevant [environmental] information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.*

The CEQ regulations allow agencies to divide their actions into three categories: (1) actions that ordinarily require an EIS or a programmatic EIS ("PEIS"); (2) actions that require an initial "environmental assessment" ("EA") to determine if an EIS is required; and (3) actions that are "categorically excluded" based on agency findings that those actions do not individually or cumulatively have a significant effect on the human environment. 40 C.F.R. § 1507.3(b)(2). During the NEPA process, action agencies may not take an action which would "[h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives." *Id.* § 1506.1(a).

When evaluating the significance of an action, the agency must measure the context and intensity of the action. *Id.* § 1508.27. Context means that the action and its impacts must be considered in geographical context and in a short and long-term context. *Id.* § 1508.27(a). Intensity refers to the severity of the environmental effects, *id.* § 1508.27(b), including both "direct effects," that are "caused by the action and occur at the same time and place," and "indirect effects," that are "later in time or farther removed in distance, but are still reasonably

foreseeable." *Id*. § 1508.8(a), (b). The definition of "effects" also includes "cumulative effects," *id.* at § 1508.25(c), which the regulations define as the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

Where an EA demonstrates that a proposed action will not have a significant effect on the human environment, the agency may issue a Finding of No Significant Impact ("FONSI"), a determination that obviates the need to prepare a full EIS. *Id*. § 1508.13. When an EA establishes that a proposed action "*may* have a significant effect on the … environment," the federal agency must prepare an EIS. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (emphasis in original).

Under very limited circumstances and subject to procedural requirements, the agency may determine that a category of activities normally does not have significant effects on the environment, either individually or cumulatively, and therefore those activities do not require an EA or an EIS. Agencies must also set forth exceptions to categorical exclusions, such as actions that may have an effect on endangered or threatened species, for which an EA or EIS must be prepared. 40 C.F.R. § 1508.4. Documentation of the creation and application of a categorical exclusion is necessary to demonstrate that the decision is not arbitrary and capricious. For actions "categorically excluded," as the Ninth Circuit ruled in rejecting another agency's categorical exclusion for lack of an evidentiary foundation, an agency "must perform this [cumulative] impacts analysis prior to promulgation of the categorical exclusion." *Sierra Club v. Bosworth*, 510 F.3d at 1027. Moreover, a proper consideration of impacts "is of critical importance in a situation such as here, where the categorical exclusion is nationwide in scope." *Id*. at 1028. Likewise, the agency applying a categorical exclusion "must supply a convincing

statement of reasons why potential effects are insignificant." *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) (citations omitted).

A. The FCC Must Amend Its Regulations To Reflect the Correct NEPA Standards

The courts have concluded that NEPA does not impose substantive environmental mandates but does require federal agencies to establish procedures to account for the environmental effects of certain proposed actions. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). In particular, for "major Federal actions significantly affecting the quality of the human environment," all federal agencies – including the FCC – must examine, among other things, the "environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided" and potential alternative actions. 42 U.S.C. § 4332(2)(C).[6] The CEQ regulations implementing NEPA specifically identify approvals by agencies "by permit or other regulatory decision" as "major Federal actions." 40 C.F.R. § 1508.18(b)(4).

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[6] "[T]he context of the statute shows that Congress was talking about the physical environment." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). Moreover, CEQ regulations broadly define 'human environment' "comprehensively to include the natural and physical environment and the relationship of people with that environment," 40 C.F.R. § 1508.14, and effects to "include[s] ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." *Id.* § 1508.8. There need not be a showing of adverse effects to human interests, such as the observation or research of migratory birds, when evaluating the significance of environmental effects. *See Metro. Edison Co.*, 460 U.S. at 778 (holding that NEPA requires an agency to consider harms that have a "close connection to the *environment*") (emphasis added).

It is well-established that NEPA requires consideration of impacts to birds and other animals. *See Fund for Animals v. Norton*, 281 F.Supp.2d 209 (D.D.C. 2003) (permit authorizing the killing of migratory swans enjoined in part because FWS did not take a hard look at impacts as required by NEPA); *Nat'l Audubon Soc'y v.Butler*, 160 F.Supp.2d 1180 (W.D.Wash. 2001) (upholding challenge to an inadequate EA for permit authorizing killing of Caspian terns and issuing permanent injunction pending completion of EIS).

To ensure the FCC assesses the impact of a tower and the cumulative impact of all towers, Petitioners petition the FCC to adopt revisions to the FCC's NEPA regulations to amend its categorical exclusion to ensure that it encompasses only those antenna structures, if any, that do not have significant environmental effects both individually and cumulatively, and to establish the proper standards for the content of an EA or EIS, for significance, for public participation and for FCC documentation. We also petition the FCC to issue a Notice of Intent initiating the NEPA process for a PEIS regarding its ASR program, in order to address the NEPA claim in the Gulf Coast Petition again before the FCC.

1. NEPA requires that the FCC's categorical exclusion only applies to antenna structures that will have no significant effects

As noted above, CEQ regulations allow federal agencies to establish categorical exclusions only for "actions which do *not* individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (emphasis added). Thus, the CEQ regulations establish the general standard that environmental analysis of agency actions is required except in limited, narrowly defined and justified circumstances. In contrast, FCC's NEPA regulations turn that standard on its head and establish the general standard that environmental analysis is not required except in limited, narrowly defined and justified circumstances. Adopted in 1986, the Commission's current NEPA regulations sweepingly exclude *all* Commission actions, including registration of antenna structures, from environmental review except for certain categories specifically identified in the regulations. 47 C.F.R. § 1.1306(a). The FCC's blanket exclusion of environmental review for its actions is flatly inconsistent with the CEQ regulations, which require an agency to identify particular categories of actions that may be excluded based on the agency's determination that those specific actions do not, individually or cumulatively, have significant environmental impacts. The explosion of towers across the United States since 1986

demonstrates that the FCC's rule and the assumptions on which it is based are obsolete.[7] The Commission must revise its rules in light of 21st century technology to make them consistent with CEQ regulations as well as CEQ's guidance on categorical exclusions.[8]

"Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment." *Alaska Ctr. for the Env't,* 189 F.3d at 859. The court of appeals has already found that communication towers "'may' have significant environmental impact …." *American Bird Conservancy*, 516 F.3d at 1033-34. With this finding, the FCC can no longer demonstrate that its categorical exclusion is a "reasoned decision." *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007) (finding agency CE arbitrary and capricious that was not supported by reasoned decisionmaking based on relevant information). The FCC now must take the next step of limiting the categorical exclusion to towers – if any – that *do not* have a significant impact, individually or cumulatively.

The record before the Commission in the dockets relating to migratory birds confirms that the FCC's ASR program has more than a minor effect on the environment. For example, according to the FWS, communications towers kill between 4 and 5 million birds every year, perhaps exponentially more. Manville, *Bird strikes*, *supra*, at 1056. In its cover letter to the FCC, attaching the Service Guidance, FWS informed the agency that tower construction "creates

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[7] For example, in 1985, there were 599 cell towers in commercial use, a number that grew to over 220,000 sites in 2008. 2008 CTIA Semi-Annual Wireless Industry Survey, available at http://files.ctia.org/pdf/CTIA_Survey_Mid_Year_2008_Graphics.pdf (last visited April 2, 2009).

[8] CEQ issued proposed guidance that gives detailed instructions on establishing and revising categorical exclusions. *See* The National Environmental Policy Act – Guidance on Categorical Exclusions, 71 Fed. Reg. 54816 (Sept. 19, 2006). The proposed guidance describes how an agency should conduct periodic review of its CE, by encouraging "Federal agencies to develop procedures for identifying and revising categorical exclusions that no longer effectively reflect current environmental circumstances or where agency procedures, programs, or missions have changed." *Id*. at 54820. As of this writing, the guidance has not been finalized.

a potentially significant impact on migratory birds." Letter from Jamie Rappaport Clark, Dir., FWS, to William Kennard, Chairman, FCC (Nov. 20, 2000). Birds killed by antenna structures include endangered species and more than 60 species of Birds of Conservation Concern listed by the FWS. The effect of communication towers on many species of migratory birds increases each year as more towers are constructed and many bird populations continue to decline from the cumulative impacts of towers and other sources of mortality. There is no support for the broad categorical exclusion as currently written. The FCC must revise its categorical exclusion at section 1.1306(b) to eliminate the exclusion for antenna structures.

2. NEPA requires that agencies take a hard look at the environmental impacts of their actions

The FCC must also revise its categorical exclusion for antenna structures because the FCC's NEPA rules do not contain the procedural safeguards that ensure the agency will take a "hard look" at the environmental consequences of its proposed actions. The FCC must adopt NEPA rules to ensure compliance for each tower-related action based on its *own review and evaluation*. "NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) (quotations omitted). The FCC must revise its rules to provide that the FCC will conduct its own independent analysis, make explicit and reasoned findings as to the environmental impact of its actions, and inform the public of those findings before undertaking any action. This is not the obligation of the applicant or of other agencies, as current FCC practice would have it. This is the obligation of the FCC.

Current FCC guidance to applicants candidly explains the NEPA review procedures for the agency's ASR program: "FCC Form 854 (Application for Antenna Structure Registration)

contain[s] question 28[9], which asks whether the licensee's proposed action may have a significant environmental effect requiring an EA. *If the licensee indicates "NO" to this question, no environmental documentation is required to be filed with the Commission.*" FCC, Compliance with Commission's Rules Implementing the National Environmental Policy Act of 1969, http://wireless.fcc.gov/siting/npaguid.html (emphasis added) (last visited April 2, 2009).

NEPA regulations do allow applicants or consultants to prepare environmental documents if the agency retains sufficient control of or responsibility for the process. When preparing an EIS, the FCC must "participate actively and significantly." *Sierra Club v. Flowers*, 502 F.2d 43 (5th Cir. 1974). The FCC must also outline what information is required, independently evaluate the information, and take responsibility for its accuracy. 40 C.F.R. § 1506.5(a). This obligation takes on added importance when comments challenge the accuracy of such information. *See Steamboaters v. Fed. Energy Regulatory Comm'n*, 759 F.2d 1382, 1393 (9th Cir. 1984) (vacating permit after finding that agency did not fulfill independent duty to verify permit applicant's information and respond to public comments). These requirements extend to EAs, for when an applicant prepares the EA the agency must "take responsibility for the scope and content" of the EA. 40 C.F.R. § 1506.5(b).

Current FCC rules exempt an applicant from even submitting an EA to the FCC "if another agency of the Federal Government has assumed responsibility for determining whether of [sic] the facilities in question will have a significant effect on the quality of the human environment and, if it will, for invoking the environmental impact statement process." 47 C.F.R. § 1311(e). *See also In re Application of Weigel Broadcasting Company to Modify the Authorized*

[9] It is actually question 38 on FCC Form 854 that asks this critical question. *See* Application for Antenna Structure Registration, http://www.fcc.gov/Forms/Form854/854.pdf (last visited April 2, 2009).

Facilities of WDJT-TV, Milwaukee, Wisconsin, 11 FCC Rcd 17202, 17207 (1996) (dismissing and denying objections to proposed facility for lack of an EA because the applicant submitted an EA to the Corps of Engineers as part of a permit authorization process).

Under certain circumstances, NEPA also allows an agency to adopt an environmental document prepared by another federal agency. *Id.* § 1506.3; *North Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125 (4th Cir. 1992). *See also* 42 U.S.C. § 4332(2) (directing all federal agencies to comply with NEPA); *Calvert Cliffs'*, 449 F.2d at 1122-27 (rejecting agency rule that abdicated NEPA obligations to other agencies' judgments). If an agency adopts another agency's EA, the adopting agency "must independently evaluate the information contained therein and take full responsibility for its scope and content" and must issue its own FONSI. Guidance Regarding NEPA Regulations, 48 Fed.Reg. 34263, 34265-66 (July 28, 1983).

The agency has similar duties to verify, evaluate, and document its reliance on categorical exclusions. *See* 48 Fed. Reg. 34263, 34265 (July 28, 1983) (CEQ guidance "that the agency's administrative record will clearly document that basis for its decision"). *See also Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004) (upholding challenge to CE because "it is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision") (quoting *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002)).

FCC NEPA practice conforms to its ASR NEPA guidance in avoiding the agency's responsibility for environmental review of tower registrations. The FCC has no biologists and no environmental staff capable of independently assessing tower impacts on the environment

and, specifically, on migratory birds. *See, e.g.*, Holly Berland, Office of General Counsel, FCC, *Licensing concerns, NEPA, sitings, Telecommunications Act mandates - the FCC perspective, in* Avian mortality at communication towers (W.R. Evans & A. M. Manville, II eds., 2000), http://www.fws.gov/migratorybirds/issues/towers/berland.html (explaining that "the FCC does not even have an environmental office" and that "[w]hat the FCC does is delegate our environmental responsibilities to our licensees and our applicants" who "kind of check off" whether their own projects have significant environmental effects) (last visited April 2, 2009). Indeed, the FCC has gone to such lengths to streamline the ASR process that it is highly unlikely that an FCC employee will ever even *see* an application unless the rules are changed. *See* In the Matter of Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures, WT Docket No. 95-5, *Memorandum Opinion and Order and Order on Reconsideration*, 15 FCC Rcd 8676, 8676-77 ¶ 2 n.8 (2000) (boasting that the FCC has "deployed software that allows automatic evaluation and grant of most applications without staff processing").

The FCC relies on post-construction enforcement action to remedy NEPA violations that come to its attention, allowing applicants to self-certify whether or not a proposed antenna structure may significantly affect the environment. *See, e.g.*, In the Matter of Public Employees for Environmental Responsibility; Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA, *Order*, 16 FCC Rcd 21439, 21446 ¶ 13. This enforcement scheme, coupled with administrative proceedings and/or penalties, fines or forfeitures, is contrary to the purpose and intent of NEPA for it is not "reasonably calculated to accomplish the [statute's] congressional purpose." *Compare Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d

740, 745 (D.C.Cir. 2001) (where nothing about the language or purpose of the statute delegating regulatory authority to the FCC indicates certification is an inappropriate method of compliance).

The purpose of NEPA is to require a federal agency to consider carefully the environmental consequences of its actions before it acts. The FCC's certification scheme is a flatly inappropriate means of achieving NEPA compliance. NEPA integrates environmental considerations into agency decision-making from the very start. *See, e.g., Calvert Cliffs'*, 449 F.2d at 1112-13 (noting that NEPA integrates environmental priorities into agency's existing mandates). Therefore, an agency must fulfill NEPA's procedural requirements "*before* decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). *See also id.* § 1502.5; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (NEPA "is a procedural statute that requires the Federal agencies to assess the environmental consequences of their actions before those actions are undertaken.").

The FCC's transfer of its NEPA obligations to private applicants must end. "The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it." *Illinois Commerce Comm'n v. ICC*, 848 F.2d at 1258 (NEPA requires federal agencies to weigh the benefits and environmental impacts of each proposal and its alternatives). The FCC must revise its NEPA regulations at sections 1.1306(c), 1.1308 and 1.1311 to provide for its own review and evaluation of categorical exclusions, EAs, and EISs.

3. NEPA requires preparation of an EA or EIS if the action "may" have significant impact

The FCC's misunderstanding of the proper standards for categorical exclusions and EAs also is reflected in its procedures for filing environmental objections. Under the Commission's rules, an "interested person" may allege that a "particular action, otherwise categorically

excluded, will have a significant environmental effect" and can file a petition "setting forth in detail the reasons justifying or circumstances necessitating environmental considerations in the decision-making process." 47 C.F.R. § 1.1307(c). There are flaws in this process that the FCC must remedy by amending its rules to contain the correct burdens and standards of proof.

First, a petitioner need not show that the proposed action "*will* have a significant environmental effect," *id.* (emphasis added), but that it *may* have a significant environmental effect. If any doubt exists as to whether a categorical exclusion applies or extraordinary circumstances are present, an agency is prohibited from applying the exclusion. *See California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) ("At the very least there is substantial evidence that exceptions to the categorical exclusions may apply, and the fact that the exceptions *may* apply is all that is required to prohibit use of the categorical exclusion.") (emphasis in original). The agency must then prepare at least an EA.

By the same token, if it remains uncertain after completion of an EA whether a proposed federal action *may* have a significant effect, the agency is required to examine the effects of the action in a comprehensive EIS. *State of North Carolina. v. FAA*, 957 F.2d 1125, 1131 (4th Cir. 1992) ("An agency's refusal to prepare an [EIS] is arbitrary and capricious if its action *might* have a significant environmental impact.") (emphasis added); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) ("If an EA establishes that the agency's action '*may* have a significant effect on the … environment, an EIS must be prepared.'") (citations omitted) (emphasis in original).

Second, the FCC provision requiring that the request for an EA or EIS be set forth "in detail" places the burden on the wrong party and sets the standard too high. Contrary to NEPA rules and practice, the FCC interprets its requirement to demand a concrete showing of

significant effects with specificity and certainty. This duty rests with the FCC, not with the public; placing it on the public would require a member of the public to undertake the environmental review that he seeks to compel from the agency. As the Supreme Court has recognized, "the agency bears the primary responsibility to ensure that it complies with NEPA …." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978)). *See City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs."); *Maryland-Nat'l Capital Park Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C.Cir. 1973) (the high value placed on NEPA's policies puts the burden of showing that impacts are less than significant on the government). Although the Court has noted that members of the public have a responsibility to structure their participation in the NEPA process in a manner that alerts agencies of their concerns, particularly where they suggest novel alternatives, *see Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 535, 553 (1978), their failure to do so will not shield an agency if it overlooks an environmental issue that it should have recognized. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 765 (noting that "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.").

The level of detail the FCC demands from a member of the public is beyond what NEPA requires. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996) ("'[S]pecifics' are not required. . . . [T]he purpose of public participation regulations is simply 'to provide notice' to the agency, not to 'present technical or precise scientific or legal challenges to specific provisions' of the document in question") (quoting *Adams v. U.S. EPA*, 38 F.3d 43, 52 (1st Cir.

1994)). The FCC improperly shifts to private parties the burden of conclusively demonstrating environmental impacts, a burden that means the FCC may approve towers despite the submission of valid objections. *See Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1258 (D.C.Cir. 1988) (rule that would "rel[y] on private parties to raise environmental concerns" is unlawful).

The standard for determining whether to prepare an EA or EIS is whether a party has alleged facts which show that the project may significantly degrade some environmental resource. The party need not show significant effects will in fact occur, but need only raise substantial questions about whether an action may have a significant effect. "[A]n EIS *must* be prepared if substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor. To trigger this requirement a plaintiff need not show that significant effects *will in fact occur*, raising substantial questions whether a project may have a significant effect is sufficient." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (citations omitted) (emphasis in original); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 849 (9th Cir. 2005) (same); *California v. Norton*, 311 F.3d at 1177 (requiring only "substantial evidence that exceptions to the categorical exclusions *may* apply" to call for an EA) (emphasis added).

The FCC's erroneous interpretation of NEPA is why the Gulf Coast Petition is again before the FCC. The D.C. Circuit remanded the request for a PEIS because the FCC's reasons for dismissing the request "demonstrate an apparent misunderstanding of the nature of the obligation imposed by [NEPA]." *American Bird Conservancy*, 516 F.3d at 1033. The court pointed out that NEPA rules require an EA when an action "may" have a significant environmental effect and concluded that the FCC's demand for evidence of specific significant effects was a more stringent standard that contravenes NEPA. *Id*. Moreover, the court noted, the

FCC's requirement for scientific consensus as to the environmental effects of communication towers would jeopardize NEPA's mandate to consider an action's impacts before undertaking any action. *Id*.

To eliminate any confusion as to the proper standards for preparing an EA or an EIS, the FCC must revise sections 1.1307(c), 1.1308(b), 1.1308(c), 1.1309, and 1.1314(a) of its NEPA rules. To require a definitive showing that significant impacts *will* occur contravenes NEPA. *American Bird Conservancy*, 516 F.3d at 1033-34.

4. NEPA requires consideration of many measures of the significance of environmental effects

When determining whether effects are significant, the CEQ defines significance much more broadly than the FCC does in its short list of actions that may significantly affect the environment. *See* 47 C.F.R. § 1.1307 (listing activities that are located in wilderness areas or wildlife preserves, that may affect listed species, historic areas, or Indian religious sites, that are located in a floodplain, or that cause a significant change in surface features).

The CEQ directs agencies to consider "both context and intensity" when judging significance. 40 C.F.R. § 1508.27. Consideration of the context of the action and its impact requires analysis of local, regional, national and even global effects. *Id*. § 1508.27(a). In assessing the intensity of the environmental impact, CEQ regulations measure significance by additional factors such as the effects on public health and safety, *id*. § 1508.27(b)(2), whether the effects are highly controversial, *id.* § 1508.27(b)(3), whether the action may establish a precedent for future actions, *id.* § 1508.27(b)(6), whether the action will have uncertain, unique or unknown risks, *id.* § 1508.27(b)(5), whether the action may have cumulatively significant impacts, *id*. § 1508.27(b)(7), and whether the action may violate federal law or requirements for the protection of the environment, *id.* § 1508.27(b)(10). NEPA regulations used by the FWS list

additional factors that may indicate a significant impact on the environment, including potential impact on migratory birds. *See* 73 Fed. Reg. 61291, 61319 (Oct. 15, 2008) (to be codified at 43 C.F.R. § 46.215) (listing impacts to migratory birds as an extraordinary circumstance).

The FCC must revise its NEPA implementing regulations at section 1.1307(a) to encompass a broader range of circumstances which may present significant impacts, identified in the appendix at section 1.1307(a)(9)-(15). Doing so will help ensure the agency's findings are supportable.

5. NEPA requires public involvement in agency NEPA compliance

The FCC's NEPA regulations provide very little opportunity for public review and input into their NEPA process, in contrast to CEQ direction. The CEQ has charged agencies, including the FCC, with involving the public in its NEPA processes to the maximum extent practicable. *See, e.g.,* 40 C.F.R. § 1501.4(b). *See also id.* § 1500.1(b) ("public scrutiny [is] essential to implementing NEPA"). CEQ regulations direct agencies to involve the public in implementing NEPA and to provide the public with notice of NEPA-related activities and of NEPA documents, including those who request notice. *Id*. § 1506.6. The FCC must revise its NEPA rules to cure this deficiency by amending its rules to ensure that the FCC provides adequate public notice and involvement in its NEPA processes.

As a general rule, the FCC must ensure that it makes enough information available to allow the public to weigh in with informed comment before the agency decision is made. "An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Corps of Eng'rs*, 511 F.3d 1011, 1026 (9th Cir. 2008).

See also Sierra Nev. Forest Prot. Campaign v. Weingardt, 376 F.Supp.2d 984, 991 (E.D. Cal. 2005) ("[the regulations] require that the public be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA").

Currently, the FCC does not provide notice of individual tower applications until after approval. *American Bird Conservancy*, 516 F.3d at 1035. The court of appeals thus directed the FCC to provide meaningful public involvement in its ASR program pursuant to NEPA. *Id.* at 1035. Petitioners have formally responded to that aspect of the court's opinion in response to the Infrastructure Coalition Petition for Expedited Rulemaking. *See* In the Matter of Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications, *Petition for Expedited Rulemaking*, WT Docket No. 08-61, filed May 2, 2008 (comments of ABC et al.). In brief, petitioners urged that the FCC should not model any notice, comment and approval process on the process for transfer assignment applications and that the FCC should not require that any objection on environmental grounds to an ASR application be filed as a petition to deny. Petitioners recommended that the FCC meet with the CEQ as it develops procedures to facilitate public involvement in NEPA, post ASR applications on its website and allow objections to an application to be filed via either a petition to deny or via informal objections.

Once notice is provided, the FCC may employ one or more methods to involve the public in EAs. The FCC may utilize the scoping process: an "early and open" process for identifying the range of actions, alternatives and significant issues related to the action. 40 C.F.R. §§ 1501.7, 1508.25. The FCC may invite the participation of affected parties and interested

persons, *id.* § 1501.7(a)(1), and hold public meetings or hearings, *id.* § 1506.6. The FCC should also continue to make EAs available for notice and comment.

The FCC, not the applicant, must also provide public notice of the FONSI. 40 C.F.R. § 1501.4(e)(1). In some circumstances, the FCC must also allow for public review of a FONSI for thirty days before the action may proceed. *Id*.; *see also* Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977) (Floodplain Management) (requiring review of proposed activities in floodplains); Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977) (Protection of Wetlands) (requiring review of proposed activities in wetlands).

The FCC must include provisions in its NEPA implementing regulations at section 1.1308(b) and 1.1308(d) for public involvement. By making these changes in the context and distribution of environmental assessments, FCC will be better able to "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing [environmental] assessments." 40 C.F.R. § 1501.4(b).

6. NEPA requires information in an EA and EIS sufficient to support findings

The FCC's NEPA regulations fail to specify all the information necessary for a complete EA. "Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decisionmaking process." *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). The CEQ's regulations dictate that an EA must include "brief discussions of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). The FCC must revise its rules to ensure its EAs contain the analysis essential for demonstrating that the agency has taken a "hard look" at the proposed action and its environmental impacts.

For example, the requirement for analysis of a reasonable range of alternatives, *see* 40 C.F.R. § 1502.14, applies to EAs as well as EISs. *See* 42 U.S.C. § 4332(2)(E); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000). It is also of particular importance that an agency discuss cumulative effects in EAs. *See Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062 (9th Cir. 2002); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). In an EA, as in an EIS, the FCC must respond to public comments, *Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F.Supp.2d 984, 991 (E.D. Cal. 2005), and support its conclusions with adequate information that it also makes available to the public. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).

If the analysis in an EA leads to a FONSI, the FCC must supply a statement of convincing reasons as to why the proposed action will not have a significant impact. 40 C.F.R. § 1508.13. *See also Grand Canyon Trust v. FAA*, 290 F.3d 339, 340-41 (D.C. Cir. 2002) (adding that if the agency finds a significant impact can be reduced to insignificance via mitigation, it must also make a convincing case that impacts will be so reduced).

The FCC should amend sections 1.1308(b), 1.1308(d) and 1.1311(a) to make explicit the requirements of EAs and FONSIs, to clarify that an EA must discuss the purpose and need for the proposed action, alternatives to the proposed action, and direct, indirect, and cumulative effects of the proposed action and its alternatives. These changes will help ensure that the public can make informed comments and the agency, informed decisions.

B. The FCC Must Conduct a PEIS To Assess Impacts of Existing and Foreseeable Future Towers on Migratory Birds Based on the Proper Standards As Set Forth in CEQ Regulations

In *American Bird Conservancy*, the court of appeals ruled that "on remand the Commission shall address Petitioners' request that it conduct a programmatic EIS based on a

threshold for NEPA analysis that is less stringent than the *Order* reflects. …. Pursuant to its own regulations, the Commission may commence such analysis through the preparation of an EA." *American Bird Conservancy*, 516 F.3d at 1034.

Although the FCC may address the court's remand with an EA that will make available "sufficient evidence and analysis for determining whether to prepare an environmental impact statement," 40 C.F.R. § 1508.9(a), on the ASR program in the Gulf Coast region, a more efficient use of agency resources would encompass analysis of the entire ASR program in a PEIS. When describing the agency action(s) subject to NEPA, CEQ directs agencies to "use the criteria for scope," 40 C.F.R. § 1502.4(a), which is determined by the action, alternatives, and effects. *Id*. § 1508.25. Actions may be "(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. . . . (3) Similar actions, which when viewed with other reasonably foreseeable or proposed actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id*. § 1508.25(a).

NEPA prohibits an agency from breaking up a project or program with cumulative impacts into smaller components in order to avoid preparing an EIS. *See Churchill County v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001). *See also* 40 C.F.R. § 1508.27(b)(7) (impact is significant "if it is reasonable to anticipate a cumulatively significant impact on the environment"). Should the FCC prepare only an EA for the Gulf Coast region, it would be vulnerable to charges of segmentation of the ASR program such that the FCC "unreasonably constrict[s] the scope of primordial environmental evaluation" and refuses to engage in a "sufficiently forward looking [PEIS] to contribute to the [FCC's] basic planning on the overall

[ASR] program" in fulfillment of NEPA's purposes. *Churchill County*, 276 F.3d at 1076 (using two-pronged inquiry for determining appropriateness of PEIS).

The evidence before the FCC in the Gulf Coast Petition, WT Dockets 03-187 and 08-61, and briefly summarized at the beginning of this petition is sufficient to demonstrate that the impacts of the ASR program are not limited to the Gulf Coast region but are nationwide, that the impacts on migratory birds may be significant and that there may be significant impacts on other environmental resources. The FCC must assess its ASR program in a PEIS.

As far back as 1999, as noted earlier, the FWS has been urging the FCC to conduct a PEIS. *See* Letter from Jamie Rappaport Clark, Dir., FWS, to William Kennard, Chairman, FCC (Nov. 2, 1999). The FWS Director advised the FCC that the annual killing of migratory birds at communication towers was substantial, and she pointed out the deficiencies in FCC regulations. *Id*. at 1-2. She further noted that "[t]he cumulative impacts of the proliferation of communication towers on migratory birds, added to the combined cumulative impacts of all other mortality factors, could significantly affect populations of many species." *Id*. at 2.

Again, in 2005, the FWS supported the need for a programmatic EIS with data corroborating the biological significance of tower impacts to migratory birds:

> In Section 2.1 of the LPP Report, "Estimate of numbers of birds killed at towers by species," LPP took the list of the top 10 birds killed per year at communication towers, and estimated mortality for each species using the Service's low-end estimate of 4 million and high-end estimate of 40 million birds of all species killed per year. This novel approach, even at the 4-million bird level, results in some telling statistics. Looking only at the top 10 bird species for which mortality has been documented at communication towers, mortality is estimated to range from 490,000 to 4.9 million birds for each of the 10 bird species based on annual mortality estimates developed by FWS! The population impacts to migratory songbirds (and other avifauna) and impacts to their population status are frightening and biologically significant.

Letter from Dr. Albert Manville, Wildlife Biologist, FWS, to FCC, at 2 (March 9, 2005) (citing Longcore, Scientific Basis To Establish Policy Regulating Communications Towers To Protect Migratory Birds, WT Docket No. 03-187, *supra*) (on file in WT Docket 03-187). The FCC has solicited and received overwhelming documentation from Petitioners and others that the registration of thousands of communication towers a year has a significant effect on the environment, especially on migratory birds.

Therefore, we urge the Commission to issue immediately a Notice of Intent to Prepare a Programmatic EIS on its ASR program. We reject the suggestions in the Infrastructure Coalition filing in Docket No. 08-61 that the FCC prepare only an EA that is limited to the Gulf Coast region. The FCC can complete the programmatic EIS expeditiously given the record already built by the FCC in its currently open dockets.

II. ESA's Statutory and Regulatory Requirements

The ESA mandates unequivocal and powerful actions to protect species listed under the ESA. Congress explicitly adopted the ESA "to require agencies to afford first priority to the declared national policy of saving endangered species" and made a "conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184.

Section 7 is one of the primary mechanisms established by Congress to accomplish the ESA's goal of species conservation by requiring that all federal agencies consult with the FWS before authorizing, funding, or carrying out any action that "may affect" an endangered or threatened species or adversely modify or destroy critical habitat for such species. 16 U.S.C. § 1536(a)(2). This consultation process provides the means by which agencies assure compliance

with the basic substantive mandate of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2) – the duty to "ensure" that their actions do not "jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat]." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 790 (9th Cir. 2005). *See also Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 692 (1995) (noting that section 7 is one of the ESA's protections for listed species).

To comply with this mandate, before taking any action that may affect listed species – including the issuance of a federal permit, license, or other approval that may affect listed species, *see* 50 C.F.R. § 402.02 – an agency "must request information from the appropriate federal wildlife service regarding 'whether any species which is listed or proposed to be listed may be present in the area of such proposed action.'" *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006) (citing 16 U.S.C. § 1536(c)(1)); *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1212-13 (11th Cir. 2002) (same). If the wildlife agency responds that listed species may be present in the action area the agency must prepare a Biological Assessment ("BA"). *Forest Guardians*, 450 F.3d at 457 (citing 16 U.S.C. § 1536(c)(1)); *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d at 1213 (same). The BA identifies those listed species and contains an analysis of the effects of the action[10] on species, "including consideration of cumulative effects,"[11] and consideration of "alternate actions considered by the Federal agency for the proposed action." 50 C.F.R. § 402.12(f).

[10] *See* 50 C.F.R. § 402.02 (defining 'effects of the action' as the "direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.").

[11] *See id.* (defining 'cumulative effects' as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur with the action area").

If the BA concludes that a project will not adversely affect any listed species and the FWS concurs in writing, the agency may avoid formal consultation. *Id*. § 402.14(b). The agency may also avoid formal consultation by participating in informal consultation with FWS:

> Informal consultation is an optional process that includes all discussions, correspondence, etc., between the [Fish and Wildlife] Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the [Fish and Wildlife] Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

50 C.F.R. § 402.13(a).[12]

If, on the other hand, an agency finds that a proposed activity may adversely affect listed species, the agency must initiate formal consultation and obtain a Biological Opinion ("BO") from the FWS which details any steps necessary to avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If FWS determines that jeopardy is likely, it "shall suggest those reasonable and prudent alternatives" which it believes would not cause jeopardy. 16 U.S.C. § 1536(b)(3)(A). FWS specifies in the BO whether any "incidental take" of protected species --

[12] Newly promulgated amendments to the ESA rules purport to allow an agency to terminate informal consultation without receiving written concurrence from FWS. *See* 73 Fed. Reg. 76272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402). These new rules have been challenged in court. *See, e.g., Ctr. for Biological Diversity v. Kempthorne*, Complaint, No. CV 08-5466 (N.D. Cal. filed Dec. 11, 2008). On March 3, 2009, President Obama issued a memorandum directing the Secretaries of the Interior and of Commerce to review the new ESA rules, and requesting that federal agencies exercise their discretion under the new rules to continue to seek FWS concurrence on a decision not to consult. 74 Fed. Reg. 9753 (March 6, 2009). In any event, whether the new ESA rules remain in effect or not, the action agency retains an independent duty to insure that its actions avoid jeopardizing listed species. "Consulting with the FWS alone does not satisfy an agency's duty under the Endangered Species Act. An agency cannot 'abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a Service biological opinion must not have been arbitrary or capricious.'" *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (quoting *Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)). *See also* 50 C.F.R. §402.15(a).

"takings that result from, but are not the purpose of, carrying out an otherwise lawful activity" -- will occur. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.02.[13] If the federal action and any incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4)(B), FWS includes in the BO an incidental take statement ("ITS") that specifies the impacts of such take, reasonable and prudent measures to minimize take, and mandatory terms and conditions for implementing those reasonable and prudent measures. *Id.* § 1536(b)(4)(C); *see also* 50 C.F.R. §§ 402.14(g)(7), 402.14(i). The ITS allows federal agencies to take species if done in compliance with the terms and conditions. *See* 16 U.S.C. § 1536(o).

If an action agency ignores or does not follow the requirements of a BO and ITS, the action agency is subject to liability under the ESA. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997) ("action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril"). *Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 511 U.S. 644, 127 S.Ct. 2518, 2526 (2007) ("Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. §1536(e)").

If there are no reasonable and prudent alternatives, the *only* way the action agency may go forward with the action without violating section 7(a)(2) is by obtaining an exemption from its obligation to "insure" that its actions will not jeopardize the species from a special seven-member cabinet level "Endangered Species Committee." 16 U.S.C. §§ 1536(g), (e)(3). In

[13] Section 9 of the ESA prohibits the "take" of any endangered species. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.21. Unless specifically excluded by the FWS, threatened species are also protected by the take prohibition. 50 C.F.R. § 17.31. The term "take" is broadly defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

performing their obligations under Section 7, both the action agency and FWS "shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(d), (g).

A. The FCC Must Revise Its Rules and Practice Regarding ESA Consultation

There is no question that FCC-permitted communications towers have taken and continue to take birds listed under the ESA. For example, endangered Red-cockaded Woodpeckers were killed at one tower. Gavin G. Shire et al., *Communication towers: A Deadly Hazard to Birds* 5 (American Bird Conservancy 2000); Longcore, Scientific Basis To Establish Policy Regulating Communications Towers To Protect Migratory Birds, WT Docket No. 03-187, *supra*. Towers in Alaska have been linked to the killing of Spectacled Eiders and Steller's Eiders, both listed as threatened under the ESA. *See* Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 21. The FWS also has confirmed that nine communication towers in Hawaii are likely to adversely affect two ESA-listed seabirds, Newell's Shearwater and the Hawaiian (Dark-rumped) Petrel. *See* Letter from Patrick Leonard, Field Supervisor, FWS, to Susan Kimmel, Attorney Advisor, FCC, at 5 (March 5, 2007) (on file in WT Docket 03-187).

Because the FCC continues to register antenna structures that may affect listed species and the agency has failed to consult with FWS regarding the impacts of these registrations in accordance with Section 7 of the ESA, FCC is in violation of its obligations to avoid jeopardizing and taking listed species. To address the Gulf Coast Petition on remand from the court, FCC should initiate programmatic consultation with FWS. Moreover, the agency should revise its regulations to make clear how it will meet its ESA responsibilities when registering antenna structures. We are proposing a new section 1.1320 to clarify the roles and responsibilities of the FCC and applicants in carrying out the ESA's mandate and to clarify the

use of NEPA documents in ESA compliance. New regulations will outline the process applicants need to follow in order to prepare the information that the FCC needs for ESA compliance and will assist the FCC and applicants by reducing potential delays associated with incomplete applications and repeated data requests.

1. The rules must clarify the responsibilities of non-federal representatives

The FCC delegates to industry applicants as "non-federal representatives" both the responsibility for determining whether ESA consultation is necessary for a particular antenna structure registration and, if the applicant so chooses, the responsibility for preparing a BA[14] and either participating in informal consultation or providing information for a formal consultation with the FWS. Letter from Susan H. Steiman, Assoc. Gen. Counsel, FCC to Mr. Steve Williams, Dir., FWS (July 9, 2003), available at http://wireless.fcc.gov/siting/endangeredspecies.pdf. The Commission inappropriately delegates this duty to applicants through its NEPA implementing regulations at 47 C.F.R. § 1.1307(a)(3).

The FCC violates the ESA in its failure to provide guidance to applicants on ESA compliance requirements, its failure to independently review applicants' analyses, and, ultimately, its failure to consult with FWS on communication tower registrations that may adversely affect listed species. *See* 50 C.F.R. § 402.08. This approach to compliance with the ESA is impermissible because "compliance with section 7 of the *ESA requires that the agency itself ultimately determine the likely impact* of [the proposed activity] on the listed species." *State*

[14] The action agency may designate the applicant as a non-federal representative who may prepare the biological assessment, but "the action agency takes responsibility for the content of the assessment and for the findings of effect." U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* [hereinafter Section 7 Handbook] 3-11 (March 1998), available at http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm.

of Idaho, et al. v. ICC, 35 F.3d 585, 598 (D.C. Cir. 1994) (emphasis added). *See also* 50 C.F.R. § 402.08; Section 7 Handbook, *supra* note 13, at 2-13.

We propose section 1.1320 to assist the FCC and applicants with ESA implementation by clarifying the roles and responsibilities of each party, ensuring that the FCC and FWS have the information necessary to assess the impacts of towers on birds and protect listed species from the adverse effects of antenna structures.

2. The rules must not rely on inappropriate use of certification to meet ESA obligations

The FCC's rules allow applicants to self-certify whether or not a proposed antenna structure may affect listed species. The FCC cannot rely on its NEPA regulations to "require[] (Applicants) to consider the impact of proposed facilities under the Endangered Species Act (ESA), 16 U.S.C. s. 1531 et seq. … [and] determine whether any proposed facilities may affect listed, threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed threatened or endangered species or designated critical habitats." FCC, Wireless Telecommunications Bureau, Environmental and Historic Preservation Issues, U.S. Fish and Wildlife Service Issues, http://wireless.fcc.gov/siting/environment.html#usfish (last visited April 2, 2009). *See also supra* pp. 17-21 (discussing how the FCC's NEPA rules do not ensure the agency takes a hard look at environmental impacts). Responsibility for that determination rests with the action agency – the FCC – and the FWS. *See, e.g.*, *NRDC v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (agency has an independent substantive obligation to avoid taking actions that jeopardize the survival and recovery of listed species). Applicants do not have the resources, expertise or legal authority to fulfill the FCC's and FWS's duty to avoid jeopardizing listed species.

The FCC relies instead on post-construction enforcement action to remedy ESA violations, should any come to its attention. *See* In the Matter of Public Employees for Environmental Responsibility; Request for Amendment of the Commission's Environmental Rules Regarding NEPA and NHPA, *Order*, 16 FCC Rcd 21439, 21446 ¶ 13. This enforcement scheme, coupled with administrative proceedings and/or penalties, fines or forfeitures, is contrary to the purpose and intent of the ESA for it is not "reasonably calculated to accomplish the [statute's] congressional purpose." *Compare Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740, 745 (D.C.Cir. 2001) (where nothing about the language or purpose of the statute delegating regulatory authority to the FCC indicates certification is an inappropriate method of compliance).

The purpose of the ESA is to require a federal agency to consider carefully the environmental consequences of its actions on threatened and endangered species before it acts. The ESA makes saving endangered species a national policy and every agency's first priority. *Tenn. Valley Auth. v. Hill*, 437 U.S. at 185 (noting that Congress made a "conscious decision … to give endangered species priority over the 'primary missions' of federal agencies"). In addition, once it is determined that an action may affect listed species, neither the agency nor an applicant may "make any irreversible or irretrievable commitment of resources" which may "foreclose[e] the formulation" of any alternative which would violate section 7(a)(2) before consultation is complete, 16 U.S.C. § 1536(d), to "ensur[e] that the status quo will be maintained during the consultation process." *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). In short, the ESA requires the FCC to look before it leaps. *Compare Order*, 16 FCC Rcd 21439, 21446 ¶ 13 (justifying certification procedure because the FCC would revoke a license if post-decision evidence would have caused the FCC not to grant

the license "had it known all the relevant facts"). The use of a certification procedure is a flatly inappropriate means of achieving compliance with the ESA.

The FCC's current rule at section 1.1307(a)(3) improperly shifts ESA duties to the applicant and allows many towers that may take or jeopardize listed species to escape review. There is no justification for the delay in initiating consultation with the FWS on the impacts of towers on listed birds. We propose section 1.1320 to clarify the proper practice and procedure and to eliminate the FCC's reliance on certification, ensuring that the FCC and FWS assess the impacts of towers on birds before towers are approved or constructed.

3. The rules must clarify the use of an EA in ESA compliance

The FCC relies largely on sections 1.1307(a)(3) and 1.1308(b) of its regulations, which require preparation of an EA for antenna structures that may affect listed species or their critical habitats or are likely to jeopardize species proposed for listing or critical habitat proposed for designation, to comply with the ESA. Satisfying NEPA does not relieve an agency from complying with the mandatory consultation process of the ESA. *See* 50 C.F.R. § 402.06.

A BA may be part of an EIS or EA. *See* 16 U.S.C. § 1536(c)(1) ("such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969"); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). This is true so long as the agency meets the time frame and purpose of the BA in the EA or EIS. *See also* 50 C.F.R. § 402.02 (defining biological assessment). As written, FCC NEPA rules do not incorporate the requirements of a BA. These requirements include on-site inspections, surveys for listed species, a review of the literature on the species, analysis of the effects of the action, including cumulative effects, on the species and its habitat, and analysis of alternative actions. *Compare* 50 C.F.R. § 402.12(f).

Lack of clear procedures led to the FCC's failure to comply with the ESA regarding towers in Hawaii, highlighted by the fact that these towers were brought to the attention of the FCC and FWS not via the FCC registration form but via a letter notifying the FCC of intent to sue under the ESA. *See Am. Bird Conservancy v. FCC*, No. 06-15429, 2008 U.S.App. LEXIS 21005, at *4-5 (9th Cir. Oct. 6, 2008). The FWS subsequently wrote to the FCC recommending that the FCC formally consult with the FWS on the impacts of nine Hawaiian towers on listed birds:

> It is our position that these towers do present a collision hazard for listed seabirds. Based on radar studies in other locations on the islands, we expect that listed seabirds are likely to be transiting the tower vicinities. We expect that over the 25-year life of a tower, individual listed seabirds could be injured or killed by colliding with guy-wires at these towers. We recommend the FCC initiate formal consultation for all aforementioned towers.

Letter from Patrick Leonard, Field Supervisor, FWS, *supra*, at 5. *See also* Letter from Patrick Leonard, Field Supervisor, FWS, to James D. Schlichting, Acting Chief, WTB, FCC (Sept. 15, 2008) [Exhibit C]. As of this writing, the FCC still has not entered into formal consultation with FWS.

The FCC's current rule at section 1.1307(a)(3) allows many towers that may take or jeopardize listed species to escape review. There is no justification for the delay in initiating consultation with the FWS on the impacts of towers on listed birds. We propose section 1.1320 to clarify the proper practice and procedure and ensure that the FCC and FWS have the information necessary to assess the impacts of towers on birds.

B. The FCC Must Initiate Consultation on Its ASR Program

In conjunction with a PEIS, we petition the FCC to initiate programmatic section 7 consultation with FWS in order to fulfill its ESA obligations and resolve the remanded ESA claim regarding all effects of communications towers on endangered and threatened species

across the U.S. The overall purpose of a programmatic consultation is similar to that described for early consultation: "to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions," 50 C.F.R. § 402.11(a), thus producing more positive environmental results and increasing the efficiency of the consultation process. *See* Section 7 Handbook, *supra*, at ch.5.

Programmatic consultation is particularly effective and efficient for the FCC because a programmatic consultation can include many individual actions that may adversely affect threatened and endangered species in one consultation rather than consulting on each activity separately. Programmatic consultation may also provide criteria that, if followed, may result in a more efficient tower-specific consultation process.

A programmatic consultation will allow FWS and the FCC to take a broad, comprehensive look at a federal program such as the ASR program, its potential or actual adverse effects on listed species, and appropriate conservation recommendations. The goal of a programmatic consultation should be to address as many adverse effects as possible through programmatic conservation recommendations. Any adverse effect that cannot be addressed through programmatic conservation recommendations will have to be addressed through individual consultation by using existing procedures.

The FCC and FWS should address the ASR program through a programmatic consultation and should address all actions that are part of the program, including reasonably foreseeable actions. The FCC may initiate programmatic consultation on the ASR program in the same manner the agency would initiate consultation on an individual action. *See* 50 C.F.R. pt. 402. FWS may work with the FCC as to the use of programmatic consultation and in the development of the BA.

III. MBTA Requirements

Petitioners, the FWS, and others have repeatedly advised the FCC of its MBTA obligations in filings in WT Docket 03-187, in filings in FCC proceedings on the Gulf Coast Petition, in filings in the U.S. Court of Appeals for the D.C. Circuit, and in repeated meetings with FCC staff and Commissioners over the last nine years.

The court upheld the FCC's deferral of the MBTA claims in the Gulf Coast Petition, *Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006), relying on the FCC's assurances that it would address the MBTA issue in the ongoing proceeding. *American Bird Conservancy*, 516 F.3d at 1032. The court recognized that "collisions of birds and towers occur throughout the United States and the nationwide proceeding was designed to obtain additional relevant information. We thus conclude that the Commission acted reasonably in deferring consideration of this issue." *Id*. Almost three years have elapsed since the April 11, 2006 FCC action on the Gulf Coast Petition. The FCC pledge to act swiftly on the long-open docket rather to support their dismissal of the Gulf Coast Petition has gone unfulfilled.

There should be no dispute that FCC-registered towers kill migratory birds protected under the MBTA and that the MBTA prohibits the "taking" of migratory birds by anyone, including federal agencies, without a permit. 16 U.S.C. § 703(a). We submit that the FCC must act now to address this wrongful take of migratory birds at towers approved by the FCC under its ASR program. *See, e.g.*, Service Guidance at 1 (pointing out that communication towers kill millions of birds every year, "violat[ing] the spirit and intent of the Migratory Bird Treaty Act.").

Addressing the federal agencies' obligations and enforcement authority under the MBTA, the FWS Director stated:

> The Migratory Bird Treaty Act (16 U.S.C. 703-712) prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts,

> and nests, except when specifically authorized by the Department of the Interior. While the Act has no provision for allowing unauthorized take, it must be recognized that some birds may be killed at structures such as communication towers even if all reasonable measures to avoid it are implemented. The Service's Division of Law Enforcement carries out its mission to protect migratory birds not only through investigations and enforcement, but also through fostering relationships with individuals and industries that proactively seek to eliminate their impacts on migratory birds. While it is not possible under the Act to absolve individuals or companies from liability if they follow these [FWS] recommended guidelines, the Division of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals or companies who have made good faith efforts to avoid the take of migratory birds.

Id. at 2. The Acting Deputy Director of FWS stated in no uncertain terms that "the unauthorized taking of even one bird is legally considered a 'take' under MBTA and is a violation of the law." Letter from Kenneth Stansell, Acting Deputy Dir., FWS, *supra,* at 2.

The FCC must act promptly to complete the rulemaking initiated in the NOI so that the agency complies with the MBTA.

CONCLUSION

Petitioners urge the Commission to adopt expeditiously procedural changes in its rules to comply with its NEPA, ESA, and MBTA obligations and to resolve the remand of the court in *American Bird Conservancy v. FCC.*

Respectfully submitted,

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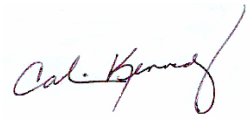

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APPENDIX

Proposed Rule Changes

Sec. 1.1306 Actions which are categorically excluded from environmental processing.

(a) Except as provided in § 1.1307 (c) and (d), Commission actions not covered by § 1.1307 (a) and (b) are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing.

(b) Specifically, any Commission action with respect to any new application, or minor or major modifications of existing or authorized facilities or equipment, will be categorically excluded, provided such proposals do not:

(1) Involve a site location specified under § 1.1307(a) (1)-(7), **(9)-(15),** or

(2) Involve high intensity lighting under § 1.1307(a)(8).

(3) Result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in § 1.1307(b).

…

(4) Involve the construction of a new antenna structure, increase the overall height of an existing antenna structure, or change the lighting and marking of an existing registered structure.

(c) A supporting record is required and the decision to proceed must be documented in a decision memo for the categories of action in paragraph (b) of this section. At a minimum, the project or case file should include any records prepared, such as: The names of interested and affected people, groups, and agencies contacted; the determination that no extraordinary circumstances exist; a copy of the decision memo; and a list of the people notified of the decision. A decision memo is a concise written record of the Bureau or Commission's decision to implement an action categorically excluded from further analysis and documentation in an environmental impact statement or environmental assessment.

*****

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

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (*see* §§ 1.1308 and 1.1311) and may require further Commission environmental processing (*see* §§ 1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) May 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.

NOTE: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(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 part 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 CFR 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.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in a flood Plain (*See* Executive Order 11988.)

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, *see* Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(9) Facilities that may affect public health or safety.

(10) Facilities that may affect such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; national monuments; migratory birds, especially Birds of Conservation Concern; and other ecologically significant or critical areas.

NOTE: The list of migratory birds is contained in 50 CFR 10.13.

(11) Facilities that may have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].

(12) Facilities that may have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

(13) Facilities that may establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

(14) Facilities that may have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

(15) Facilities that may violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

…

(c) If an interested person alleges that a particular action, otherwise categorically excluded, **may** ~~will~~ have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth ~~in detail~~ the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (*See* § 1.1313). The Bureau shall review the petition and consider the environmental concerns that have been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (*see* §§ 1.1308 and .1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

(d) If the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA. The Bureau will review and consider the EA as in paragraph (c) of this section.

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Sec. 1.1308 Consideration of environmental assessments (EAs); findings of no significant impact.

(a) Applicants shall prepare EAs for actions that may have a significant environmental impact (*see* § 1.1307). An EA is described in detail in § 1.1311 of this part of the Commission rules.

(b)**(1)** The EA is a document which shall explain the **need for the proposal, alternatives to the proposal,** environmental consequences of the proposal **and of the alternatives** and set forth sufficient analysis for the Bureau or the Commission to reach a determination **as to whether** ~~that~~ the proposal ~~will or~~ will not have a significant environmental effect. To assist in making that determination, the Bureau or the Commission may request further information from the applicant, interested persons, and agencies and authorities which have jurisdiction by law or which have relevant expertise.

NOTE: With respect to actions specified under § 1.1307 (a)(3) and (a)(4), the Commission shall solicit and consider the comments of the Department of Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation, respectively, in accordance with their established procedures. See Interagency Cooperation--Endangered Species Act of 1973, as amended, 50 CFR part 402; Protection of Historic and Cultural Properties, 36 CFR part 800. In addition, when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe. *See* § 1.1307(a)(5).

(2) The Bureau or Commission must provide for public notification when an EA is being prepared. The Bureau or Commission must, to the extent practicable, provide for public involvement when an EA is being prepared. However, the method for providing opportunities for public involvement is at the discretion of the Bureau or Commission. The Bureau or Commission must consider comments resulting from the notice that are timely received, whether specifically solicited or not. The Commission must notify the public of the availability of an EA and any associated FONSI once they have been completed.

(c) If the Bureau or the Commission determines, based on an independent review of the EA and any applicable mandatory consultation requirements imposed upon Federal agencies (*see* note above), that the proposal ~~will~~ **may** have a significant environmental impact upon the quality of the human environment, it will so inform the applicant. The applicant will then have an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems. *See* § 1.1309. If the environmental problem is not eliminated, the Bureau will publish in the Federal Register a Notice of Intent (*see* § 1.1314) that EISs will be prepared (*see* §§ 1.1315 and 1.1317), or

(d) If the Bureau or Commission determines, based on an independent review of the EA, and any mandatory consultation requirements imposed upon Federal agencies (*see* the note to **sub**paragraph (b)**(1)** of this section), that the proposal would not have a significant impact, it will make a finding of no significant impact **and provide a statement of reasons for the finding**. Thereafter, the application will be processed without further documentation of environmental effect. Pursuant to CEQ regulations, see 40 CFR 1501.4 and 1501.6, the ~~applicant~~ **Commission** must provide the ~~community~~ **public** notice of the Commission's finding of no significant impact.

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Sec. 1.1309 Application amendments.

Applicants are permitted to amend their applications to reduce, minimize or eliminate potential environmental problems. As a routine matter, an applicant will be permitted to amend its application within thirty (30) days after the Commission or the Bureau informs the applicant that the proposal ~~will~~ **may** have a significant impact upon the quality of the human environment (*see* § 1.1308(c)). The period of thirty (30) days may be extended upon a showing of good cause.

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Sec. 1.1311 Environmental information to be included in the environmental assessment (EA).

(a) The applicant shall submit an EA with each application that is subject to environmental processing (*see* § 1.1307). The EA shall contain the following information:

(1) For antenna towers and satellite earth stations, a description of the facilities as well as supporting structures and appurtenances, and a description of the site as well as the surrounding area and uses. If high intensity white lighting is proposed or utilized within a residential area, the EA must also address the impact of this lighting upon the residents.

(2) A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or Federal authorities on matters relating to environmental effect.

(3) A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.

(4) A discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects, and any alternative sites or facilities which have been or might reasonably be considered.

(5) Any other information that may be requested by the Bureau or Commission.

(6) If endangered or threatened species or their critical habitats may be affected, the applicant's analysis must utilize the best scientific and commercial data available, *see* 50 CFR 402.14(c).

(7) The proposal.

(8) The need for the proposal.

(9) The environmental impacts of the proposal and of the alternatives considered.

(10) A list of agencies and persons consulted.

(b) The information submitted in the EA shall be factual (not argumentative or conclusory) and concise with sufficient detail to explain the environmental consequences and to enable the Commission or Bureau, after an independent review of the EA, to reach a determination concerning the proposal's environmental impact, if any. The EA shall deal specifically with any feature of the site which has special environmental significance (e.g., wilderness areas, wildlife preserves, natural migration paths for birds and other wildlife, and sites of historic, architectural, or archeological value). In the case of historically significant sites, it shall specify the effect of the facilities on any district, site, building, structure or object listed, or eligible for listing, in the National Register of Historic Places. It shall also detail any substantial change in the character of the land utilized (e.g., deforestation, water diversion, wetland fill, or other extensive change of surface features). In the case of wilderness areas, wildlife preserves, or other like areas, the statement shall discuss the effect of any continuing pattern of human intrusion into the area (e.g., necessitated by the operation and maintenance of the facilities).

(c) The EA shall also be accompanied with evidence of site approval which has been obtained from local or Federal land use authorities.

(d) To the extent that such information is submitted in another part of the application, it need not be duplicated in the EA, but adequate cross-reference to such information shall be supplied.

(e) **The Commission may adopt an EA prepared by another agency of the Federal Government if the Commission independently reviews the EA and finds that the EA complies with this subpart and relevant provisions of the CEQ regulations.**

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Sec. 1.1314 Environmental impact statements (EISs).

(a) Draft Environmental Impact Statements (DEISs) (§ 1.1315) and Final Environmental Impact Statements (FEISs) (referred to collectively as EISs) (§ 1.1317) shall be prepared by the Bureau responsible for processing the proposal when the Commission's or the Bureau's analysis of the EA (§ 1.1308) indicates that the proposal ~~will~~ **may** have a significant effect upon the environment and the matter has not been resolved by an amendment.

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Sec. 1.1320 Compliance with the Endangered Species Act

(a) *Definitions*. For purposes of this section all terms have the same meaning as provided in 50 CFR 402.02.

(b) *Procedures for informal consultation* – (1) *Designation of non-Federal representative*. The Commission designates licensees, applicants and tower companies as non-Federal representatives for purposes of informal consultations with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) under the Endangered Species Act of 1973, as amended (ESA).

(2) *Consultation requirement*. (i) Prior to the filing of the environmental analysis specified in § 1.1311 or § 1.1314, the non-Federal representative must contact the appropriate regional or field office of the FWS or the NMFS, or both if appropriate, to initiate informal consultations.

(ii) The non-Federal representative must request a list of federally listed or proposed species and designated or proposed critical habitat that may be present in the action area, or provide the consulted agency with such a list for its concurrence.

(iii) The consulted agency will provide a species and critical habitat list or concur with the species list provided within 30 days of its receipt of the initial request or of the species list. In the event that the consulted agency does not provide this information within this time period, the non-Federal representative may notify the Bureau or Commission and continue with the remaining procedures of this section.

(3) *End of informal consultation*. (i) At any time during the informal consultations, the consulted agency may determine or confirm:

(A) That no listed or proposed species, or designated or proposed critical habitat, occurs in the action area; or

(B) That the project is not likely to adversely affect a listed species or critical habitat;

(ii) If the consulted agency provides written determination or confirmation described in paragraph (b)(3)(i) of this section, no further consultation is required.

(4) *Potential impact to proposed species*. (i) If the consulted agency, pursuant to informal consultations, initially determines that any species proposed to be listed, or proposed critical habitat, occurs in the action area, the non-Federal representative must confer with the consulted agency on methods to avoid or reduce the potential impact.

(ii) The non-Federal representative shall include in its proposal, a discussion of any mitigating measures recommended through the consultation process.

(5) *Continued informal consultations for listed species*. (i) If the consulted agency initially determines, pursuant to the informal consultations, that a listed species or designated critical habitat may occur in the action area, the non-Federal representative must continue informal consultations with the consulted agency to determine if the proposed project may affect the species or designated critical habitat. These consultations may include discussions with experts (including experts provided by the consulted agency), habitat identification, field surveys, biological analyses, and the formulation of mitigation measures. If the

consulted agency finds that the provided information demonstrates that the project is not likely to adversely affect a listed species or critical habitat, the consulted agency will provide a letter of concurrence which completes informal consultation.

(ii) The non-Federal representative or Commission must prepare a biological assessment unless the consulted agency indicates that the proposed project is not likely to adversely affect a specific listed species or its designated critical habitat. If the non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the non-Federal representative must verify with the consulted agency the current accuracy of the species list at the time the preparation of the assessment is begun. The biological assessment must contain the following information for each species contained in the consulted agency's species list:

(A) Life history and habitat requirements;

(B) Results of detailed surveys to determine if individuals, populations, or suitable, unoccupied habitat exists in the proposed project's area of effect;

(C) Potential impacts, both beneficial and negative, that could result from the construction and operation of the proposed project, or disturbance associated with the abandonment, if applicable; and

(D) Proposed mitigation that would eliminate or minimize these potential impacts.

(E) Review of the literature and other information.

(F) Analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(G) Analysis of alternate actions considered by the non-Federal representative for the proposed action.

(iii) All surveys must be conducted by qualified biologists and must use FWS and/or NMFS approved survey methodology. In addition, the biological assessment must include the following information:

(A) Name(s) and qualifications of person(s) conducting the survey;

(B) Survey methodology;

(C) Date of survey(s); and

(D) Detailed and site-specific identification of size and location of all areas surveyed.

(iv) The non-Federal representative must provide a draft biological assessment directly to the Commission for review and comment and/or submission to the consulted agency. If the consulted agency fails to provide formal comments on the biological assessment to the project sponsor within 30 days of its receipt, as specified in 50 CFR 402.12, the non-Federal represenative may notify the Bureau or Commission and follow the procedures in paragraph (c) of this section.

(v) The consulted agency's comments on the biological assessment's determination must be filed with the Commission.

(c) *Notification to Bureau or Commission*. In the event that the consulted agency fails to respond to requests by the non-Federal representative under paragraph (b) of this section, the non-Federal representative must notify the Bureau or Commission. The notification must include all information, reports, letters, and other correspondence prepared pursuant to this section. The Bureau or Commission will determine whether:

(1) Additional informal consultation is required;

(2) Formal consultation must be initiated under paragraph (d) of this section; or

(3) Construction may proceed.

(d) *Procedures for formal consultation*. (1) In the event that formal consultation is required pursuant to paragraphs (b)(5)(v) or (c)(2) of this section, the Commission staff will initiate formal consultation with the FWS and/or NMFS, as appropriate, as specified in 50 CFR 402.14. Commission staff will request that the consulted agency designate a lead Regional Office, lead Field/District Office, and Project Manager, as necessary, to facilitate the formal consultation process. In addition, the Commission will designate a contact for formal consultation purposes.

(2) During formal consultation, the consulted agency, the Commission, and the non-Federal representative will coordinate and consult to determine potential impacts and mitigation which can be implemented to minimize impacts. The Commission and the consulted agency will schedule coordination meetings and/or field visits as necessary.

Certificate of Service

I, Kara Gillon, hereby certify that courtesy copies of the foregoing "Petition for Rulemaking and Other Relief on behalf of American Bird Conservancy, Defenders of Wildlife and National Audubon Society" were sent this 14th day of April, 2009, via electronic mail to the following individuals at the addresses below.

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