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April 13, 1998

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Secretary Salas:

Enclosed please find an original plus four (4) copies of the Comments of Concerned Communities on the Need for Environmental Impact Statement on Proposed Rule in MM Docket 97-182 and FCC ~~Docket~~ 97-296.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Dale R. Rietberg

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OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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 FCC Docket No. 97-296

COMMENTS ON NEED FOR ENVIRONMENTAL IMPACT STATEMENT ON PROPOSED RULE BY CONCERNED COMMUNITIES CONSISTING OF:

Colorado: City and County of Denver

Michigan: Cities of Detroit and Wyoming

Texas: Cities of Arlington, Cedar Hill, Denton, Lancaster, and Longview

Virginia: City of Chesapeake

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April 13, 1998

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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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 FCC Docket No. 97-296

COMMENTS ON
NEED FOR ENVIRONMENTAL IMPACT STATEMENT ON PROPOSED RULE
BY CONCERNED COMMUNITIES

INTRODUCTION AND SUMMARY

1. Introduction. These comments are submitted by Concerned Communities[1] in response to the Commission's March 6, 1998 Public Notice in this proceeding. The Public Notice requests comments on whether, pursuant to a Petition for Environmental Impact Statement ("EIS"), the Commission must prepare an EIS on its proposed rule.

2. The rule proposed by the Commission in this proceeding would preempt all state or local laws by automatically "deeming granted" any request to a state or local government for any authorizations necessary to construct or modify broadcast transmission towers and facilities (AM, FM and TV) if not acted on within 21 to 45 days of the date of the request. The proposed rule also generally preempts "any State or local land use, building or similar law, rule or regulation that impairs the ability" of broadcasters to place, construct or modify a broadcast tower or transmission facility. Local environmental laws, including those

[1] City and County of Denver, Colorado; Cities of Detroit and Wyoming, Michigan; Cities of Arlington, Cedar Hill, Denton, Lancaster, and Longview, Texas; and City of Chesapeake, Virginia

mandated to implement Federal statutes, are among the laws within the preceding preemption and the automatically "deemed granted" provisions of the proposed rule.

3. One fundamental problem with the Commission's rule -- as pointed out by literally hundreds of filings in this docket -- is that all state and local approvals necessary for broadcast towers are automatically "deemed granted" (within 21 to 45 days of request for them having been made) without regard to whether the substantive requirements of state and local law are complied with. State and local environmental requirements -- and all other requirements -- are thus effectively gutted in many instances. As also shown by the comments received in this docket, the time periods in question are woefully inadequate to deal with the land use, zoning, structural, environmental, permitting and other requirements necessary for ordinary buildings, let alone for broadcast towers which are some of the tallest structures known to mankind and (as discussed below) are preferentially located in environmentally sensitive areas, namely in wetlands and on mountaintops.

4. Similarly, the rule's proposed preemption of all state or local land use buildings or similar laws, rules or regulations "that impair" the construction of broadcast towers will cause significant environmental harm because the Commission's rule allows such state and local rules to stand only if they serve a "clearly defined and expressly stated health or safety objective," but not environmental objectives. And even health and safety objectives can be overridden by the Federal interest in constructing broadcast towers while ignoring the Federal interest in environmental matters, as shown by NEPA, the Migratory Bird Treaty Act, the Federal Endangered Species Act, and Federal statutes protecting wetlands. As is

discussed below (see paragraph 77, page 31), broadcasters have asked that this portion of the Commission's rule be expressly "clarified" to prevent any impairment of the construction of broadcast facilities based upon:

> Any environmental matter involving officially designated wilderness areas, wildlife preserves, threatened or endangered species, wildlife habitats, historical sites listed or eligible for listing in the National Register of Historical Places, Indian religious sites, 100-year floodplains as determined by the Federal Emergency Management Agency ("FEMA"), flood insurance rate maps, significant changes in surface features (such as wetland fills, deforestation or water diversion).

Comments of Named State Broadcasters Associations, Exhibit A, at 2.

5. Pursuant to Section 1.1307(c) of the Commission's rules, the rules (40 C.F.R. Chapter V) of the Council on Environmental Quality ("CEQ") and the National Environmental Policy Act ("NEPA", Public Law 91-190, 42 U.S.C. § 4321 and following) the Commission must prepare an EIS and comply with NEPA (and Commission and CEQ rules implementing NEPA) prior to any adoption of a rule such as those proposed in this proceeding.

6. Disclaimer. This filing is confined to the necessity for the Commission to prepare an EIS if it adopts the rules which the National Association of Broadcasters and the Association for Maximum Service Television (collectively "NAB" or "Petitioners") have requested, in whole or in part. For that reason this filing to a degree takes NAB's claims and proposed rule at face value. Doing so should not be construed as agreement or acquiescence by Concerned Communities that NAB's claims are valid, appropriate or that the Commission has the authority to adopt the rules requested. In fact, the opposite is the case.

LEGAL REQUIREMENTS AND STANDARDS FOR EIS ARE MET

7. National Environmental Policy Act. NEPA is our nation's basic charter for protection of the environment at the Federal level. It requires the preparation of an EIS for Federal actions which may significantly affect the quality of the human environment. NEPA § 102(2)(C) (42 U.S.C. § 4321 and following); 40 C.F.R. § 1508.18, and CEQ comments thereon at 43 Federal Register 55,989 (Nov. 29, 1978). As required by CEQ rules and the courts, among other things:

-- Federal agencies are required to act in fulfillment of the letter and spirit of NEPA. *See e.g.*, 40 C.F.R. §§ 1500.1, 1500.3.

-- Environmental considerations must be taken into account early in the Federal agency decision-making process so as to serve as a practical contribution to agency decision-making, not just as a rationalization after the fact of decisions already arrived at. 40 C.F.R. § 1502.5.

-- A principal goal is to minimize the environmental impacts of Federal agency action. 40 C.F.R. § 1502.1. To this end in particular, Federal agencies must consider conflicts of their actions with state and local government regulations, involve affected state and local governments in the environmental process (*see*, e.g., 40 C.F.R. §§ 1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.6(b)(3)(i)), and to the extent possible remove such conflicts (40 C.F.R. §§ 1502.16(c), 1506.2(d)).

-- To achieve the preceding goals, among other things, Federal agencies must consider taking no action at all. *See e.g.*, 40 C.F.R. § 1502.14.

8. Preempt Environmental Laws. CEQ rules state that "whether the [proposed Federal] action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" is a key factor in determining whether an EIS is required. 40 C.F.R. § 1508.27(b)(10). As is set forth at length below, the Commission's proposed rule is specifically aimed at preempting laws intended to protect the environment. An EIS is required.

9. Cumulative Impact. CEQ rules mandate that Federal agencies look at the cumulative impact an action may have. "Significance exists if it is reasonable to anticipate a cumulatively significantly impact on the environment [from the proposed agency action]. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). The proposed rule is intended to cover all broadcast towers in the United States which, according to the Commission, currently total some 14,000. The Commission must consider the effect of preempting all state and local environmental, environmentally related and public, health and safety laws affecting these towers and their tens of thousands of successors going forward as they are constructed, modified, replaced and relocated. An EIS is required.

10. Health and Safety. Under CEQ rules one key factor which determines whether an EIS is required is "the degree to which the proposed [agency] action affects public health or safety." 40 C.F.R. § 1508.27(b)(2) (emphasis supplied). In other words, an impact on

public health or safety is an environmental impact. As is set forth below, the building codes and setback requirements in state and local law that are applicable to broadcast towers are specifically aimed at protecting public lives, health and safety. They are essential for broadcast towers which, at up to one-half mile in height, are the tallest structures known to man. The Commission's rule would preempt or gut such provisions of state or local law, likely resulting in significant increases in the number of deaths, property damage and harm to public health and safety (in part as is set forth below). An EIS is required.

11. Local Decisions. The several states and municipalities throughout the country are far better situated than an agency in Washington, D.C. to determine and minimize the environmental impact of actions within their borders. To this end, CEQ rules have extensive requirements on involving affected state and local governments in the environmental assessment process (*see e.g.*, 40 C.F.R. §§ 1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.6(b)(3)(i)) with one principal goal being identifying and minimizing potential conflicts of Federal action with state and local government regulations (especially with state and local environmental regulations). (*See e.g.*, 40 C.F.R. §§ 1502.16(c), 1506.2(d)). As this Commission has previously ruled for precisely these reasons, the environmental impacts and land use restrictions of communications towers must be considered at the local level. Such approval is required in addition to any approval from this Commission. See the Commission's NEPA Implementation Order, *infra*, at 1328-1329. The Commission is now proposing to go beyond reversing this policy by effectively preventing the implementation

of state and local environmental laws, while providing no Federal replacements. An EIS is required.

12. Historic Sites. The CEQ rules state that the degree to which Federal action may adversely affect "districts, sites, highways, structures, or objects" listed or eligible for listing in the National Register of Historic Places or may "cause loss or destruction of significant scientific, cultural, or historical resources" are key factors typically requiring an EIS. 40 C.F.R. § 1508.27(b)(8) (emphasis supplied). Many broadcast towers are located immediately adjacent to national historic sites or sites such as those described in the rule. For example, at Lookout Mountain in Denver, Buffalo Bill Cody's grave and the Boettcher Mansion site[2] are located immediately adjacent to several communications towers. The proposed rule would preempt such locational factors and considerations from being taken into account for any broadcast tower in the United States. An EIS is required.

13. Precedential Nature. Agency actions which tend to be "precedential" (individually or cumulatively) on environmental, health, or safety matters require an EIS. *See* CEQ rules at 40 C.F.R. § 1508.27(b)(6) which state that a significant factor in requiring an EIS is:

> "The degree to which the [agency] action may establish a precedent for future actions with significant effects or represents a decision in principal about a future consideration." Id.

---

[2] The Boettcher Mansion is the homestead of Charles Boettcher, one of Colorado's greatest entrepreneurs. It was placed on the National Register of Historic Places in 1984.

See also, 40 C.F.R. § 1508.18(a), (b)(1) which state that agency actions involving adoption of official policies or new or revised policies require an EIS. The key is the effect of the Commission's decision -- it is not exempted from preparing an EIS because it is not itself licensing or permitting new physical facilities.

14. The potential precedential nature of this case is shown by the fact that no party has indicated to this Commission any prior situation where the Federal government has engaged in sweeping (and draconian) preemption of environmentally related laws such as the Commission now proposes. In particular, Concerned Communities are not aware of any other situation where the Federal government has purported to preempt all state and local zoning laws, environmental laws and health and safety laws such as the Commission is proposing here.[3] However, if the Commission's rule is successful it will have a significant precedential effect not only on subsequent preemption decisions by this Commission, but by other Federal agencies and the Federal government in general. An EIS is therefore required.

15. This broad impact of a Commission decision increases the potential severity of its environmental effects. For this reason CEQ rules provide that the broader the "context, such as national" or more severe the effects of an agency action, the more an EIS is required. 40 C.F.R. §§ 1508.27(a), (b). This is particularly the case where the Commission's proposed rule contains the draconian and unheard of remedy of deeming all state and local permissions

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[3] Concerned Communities believe that any such preemption is not authorized by statute, and if so authorized, is unconstitutional, as set forth in numerous filings by municipalities and others already in this docket.

and requests to have been granted if certain time limits are exceeded, but without regard as to whether the substantive requirements of the applicable state or local government law have been met. For this reason an EIS is required.

16. Preempting Environmentally Related Laws Requires an EIS. The Commission's proposed rule is specifically intended to preempt environmental and environmentally related laws, such as state and local laws to protect wetlands. Subsequent sections of these comments describe these laws in more detail, for example, how zoning and land use laws protect the environment by seeing that inappropriate uses are not placed in environmentally sensitive areas (or if they are so placed, have appropriate protections). Preempting all state and local environmental laws in the nation (including those mandated by Federal law) affecting the current 14,000 AM, FM and TV broadcast towers and the thousands of new towers to be built in the future is a significant Federal action affecting the environment. The CEQ rules so provide. An EIS is required.

17. Failure to prepare an EIS or to do so in accordance with applicable law routinely results in Federal court injunctions against the agency action in question.

BROADCAST TOWERS AND THEIR ENVIRONMENTAL IMPACT

18. Towers. The Commission's proposal relates to radio and television towers. These towers are some of the tallest structures known to man with heights equal to or greater than such well-known structures as the Empire State Building, Sears Tower or Eiffel Tower.

19. Such towers are constructed of tons of steel and can be viewed from literally miles away. In many areas they are the dominant feature in the landscape and can be seen from ten, twenty or thirty miles away.

20. Some broadcast towers are self-supporting, in which case they are quite large at the base and taper at the top. Others are guyed with large guy wires running off in several directions to concrete piers located in the ground.

21. Towers for AM broadcasting are typically located in or near wetlands and wet areas because wet areas have high ground conductivity which aids signal propagation. As the Commission has said, "marshy areas are preferred" for AM towers. In re Implementation of National Environmental Policy Act, 49 FCC 2d 1313, 1323 (1974) ("NEPA Implementation Order"). To use plain English, if an AM broadcast station is located in a wet area its signal carries farther than if it's located in a dry, rocky area. In addition, directional AM stations have several (three, seven or more) separate towers located over a large area. Id.

22. To help their signal reach even farther, AM broadcast stations often have an extensive network of large wires buried beneath the ground around the tower. This network of "ground wires" looks like a spider's web with thick radial wires radiating out from the base of the tower and circumferential wires (at varying distances) from the center, running in a circle connecting the various radials together. Id.

23. Due to their large size and locations in and near wetlands and streams, AM broadcast towers can have significant impacts on aesthetics and the environment, each of

which are discussed below. (By contrast, as discussed below, TV and FM antennas are typically located on the highest feature in the landscape (typically a mountain) because they "must provide line of site communication with the service area," Id. and have different environmental impacts).

24. Size. The large size of broadcast towers, compared to other structures in the landscape, is best set forth by comparison with the tallest buildings in the world. For example, the Sears Tower (the world largest structure) is 1,454 feet tall. New York's World Trade Center is 1,368 feet high and the Empire State Building (including its TV tower) is 1,414 feet tall. The Eiffel Tower, by comparison comes just under 1,000 feet, at 984 feet.

25. The heights of all these buildings pale by comparison with broadcast towers. According to the NAB, 40% of broadcast towers are over 1,000 feet high -- taller than the Empire State Building and taller than all but a handful of the largest buildings in North America. NAB Petition, at 7.

26. And broadcast towers can easily be over 2,000 feet high and approach one-half mile in height. This is 50% taller than the world's tallest building, the Sears Tower. Due to their large size broadcast towers can have major impacts on communities, their residents, aesthetics and the environment as discussed below.

27. Safety. Broadcast towers can and do collapse. In 1996 there was a major television tower collapse in the Dallas-Fort Worth area that killed several people. This collapse is partially described in *New York Times*, infra and in Chiles, James "Building Towers to the Sky" *Smithsonian Magazine* (July, 1997) at 44.

28. There have been many other tower collapses since radio stations first went on the air in the 1920's. According to the *New York Times*, seven towers collapsed in the spring of 1997 in Minnesota and North Dakota in a storm. "Crews are Scarce for TV's High Danger Task" *New York Times*, Section 4, p. 1 (May 4, 1997).

29. The recent collapses illustrate the need for a "setback requirement" from adjacent property lines equal to the height of the tower plus an additional safety factor such that if a tower does fall it will not impact adjacent property owners. This concern is particularly the case in the event of high winds (such as occur with hurricanes and tornados) when towers can be shifted laterally significant distances when they fall due to the strong wind patterns that occur in such storms. And even in calm weather collapsing towers can eject items further than their height. When a 1,551 foot tower collapsed last year in Texas, one worker was thrown 1,800 feet from the base of the tower "by the enormous stresses of the collapse." *Smithsonian Magazine*, *supra*, at 50.

30. As is apparent, if such towers are placed in an inappropriate location there is significant potential for harm to life or property from such towers being blown over by strong winds or otherwise collapsing. The proposed rule also would preempt building codes. Building codes are adopted by state and local governments to set forth structural requirements so as to protect public health and safety. To put it most simply, building codes are the laws that set forth the structural requirements to ensure that structures such as buildings and towers do not fall down either generally or under the most extreme weather conditions applicable to the area in question. In northern climates building codes typically

set forth the forces that structures must withstand under maximum predicted ice conditions concurrent with maximum wind forces. In southern climates building codes more typically would be oriented towards ensuring that towers withstand the forces present in typical maximum hurricanes.

31. Failure to comply with such requirements are dramatic -- structures collapse. A somewhat analogous example came from Quebec this past winter with vivid photographs of large steel electric transmission towers that had collapsed under extreme wind and ice conditions. To repeat, building codes set forth the extreme conditions which structures must be designed to meet so as to ensure that such collapses do not occur.

32. Building codes may also contain setback requirements, lighting requirements and the like. They also may specify design features so that if a tower collapses it does minimum harm.

33. The state and local laws that the Commission is preempting protect public health, life and safety as just indicated. An EIS is required.

34. Environmental Effects. Broadcast towers can have substantial environmental effects. AM towers in particular are built in or near streams, wetlands or other protected areas.[4] As the Commission should be aware, wetlands and streams are generally environmentally protected areas. Streams are protected in part due to their role as sources of water, such as for drinking purposes, their role as fisheries (e.g., bass, trout or salmon

[4] This is particularly true of AM radio stations for the reasons discussed above.

streams) and for other reasons. Wetlands and wet areas are protected under many State and local laws (as well as some Federal laws) due to their role in nurturing key plants and animals in the food chain and their role in delaying and filtering runoff from adjacent lands.

35. As a result, there are strict State and local rules, regulations and permits related to construction in or near streams and wetlands, or which otherwise may impact them. Often a major concern addressed by such laws is the destruction of wetlands and harm to streams (such as erosion or the discharge of silt or sediments -- due to construction or operation near streams -- which can smother fisheries and riveine habitat). As discussed below, zoning laws also address such concerns by restricting development in and near environmentally sensitive areas.

36. FM and TV broadcast towers are located at or near the tops of mountains or on other high ground (to gain height and allow their signal to travel farther). Examples include the television transmitters located on top of Mount Washington, New Hampshire and Mount Mansfield, Vermont, which are the highest mountains in those two states. The climate at these elevations is often harsh, with plant and animal life being tenuous and fragile and soil cover being thin, sparse and delicate. These conditions are often exacerbated by recent stressors -- such as the change in habitat at higher elevations in the eastern U.S. attributed to acid rain. Particularly in the Southwest such high ground often is an ecological "mountain island" of alpine or tundra habitat left from the last Ice Age and contain plant and animal species which are unique, and often threatened. Environmental laws and land use laws may restrict construction so as to protect rare or endangered species. Examples include

legislation designed to protect the small habitats utilized by small (and disappearing) species of plants and animals.

37. Inappropriate location or construction of broadcast towers in such areas can have major environmental impacts on such plants, animals and soils. This is due not only to the tower itself, but due to the all weather access roads and utility lines that have to be built to the site, plus living quarters for manned locations. In addition, access roads, once built, attract additional users, who may further harm the environment.

38. As a result, many States and local governments have appropriate restrictions on locating facilities in these high areas, and on the construction that can occur there. Some areas have been purchased outright by State or local governments or may be part of State or local parks or wilderness areas. In such areas construction is severely limited, if allowed at all. And where construction is allowed, special permits and construction techniques may be required.

39. Impact on Birds. Towers by themselves, if inappropriately situated in major "flyways" for migratory birds can have a major impact on wildlife. As the Commission is aware, in many areas there are highly localized areas -- often involving high ground such as is preferred for FM and TV stations -- where thousands or millions of birds, including rare or endangered species, migrate through each year. The Commission itself has previously stated in its original implementation of NEPA that "in the case of antenna towers exceeding 500 feet in height, the impact of the structure on migratory birds is a matter of concern."

NEPA Implementation Order at 1328. The Commission then went on to discuss the bird problem as follows:

> "We would expect an applicant for authority to construct a tall tower to seek out, consider and report such information concerning local migratory patters as is available. Maps of the flyways of some species, particularly waterfowl, cranes and other larger birds, can be obtain from the Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Washington, D.C. However, the usefulness of such maps in siting an antenna structure is limited. For the most part, sufficiently detailed information concerning local migratory patterns particularly for small birds, can be obtained only from ornithologists located at State universities or at other institutions within the area, if at all. The hazard is principally to the smaller song birds, some species of which characteristically fly at night and at lower altitudes than other species. The detection of nocturnal flight patterns involves the use of techniques (notably specially equipped aircraft and/or radar systems) which are not available to the causal bird watcher. (See Bellorse, Frank C., "The Distribution of Nocturnal Migrants in the Air Space," The Auk, Vol. 88, p. 397, April 1971.) The availability of information concerning such patterns varies a great deal from one area to another, depending on the intensity of scientific investigation within the area.
>
> We would also expect the applicant to avail himself of such techniques as may be devised to minimize the hazard of tall towers to migratory birds. Evidence exists, for example, that birds are attracted to, rather than warned by, the usual tower lighting; and we would expect the applicant to utilize a modified lighting system, should one be approved by the FAA which had been demonstrated to be a lesser hazard. It is possible, but by no means certain, that the increasing use of strobe lights will lessen this problem."

NEPA Implementation Order at 1328, footnote 14.

40. The presence of large towers with their antenna arrays, large numbers of guy wires and lighting has the potential to be significantly harmful to such migratory flocks. The proposed rule would prevent the implementation of state and local laws designed to prevent towers from harming wildlife and would thwart the implementation of such Federal statutes and treaties as the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and following; the Endangered Species Act, 16 U.S.C. §§ 460*l*-s and following; and the Bald and Golden Eagle Protection Acts, 16 U.S.C. §§ 668, P.L. 87-884, 76 Stat. 1246. An EIS is required.

41. Land Use and Zoning Regulations are Environmental Legislation. Land use and zoning regulations are one of the primary State and local regulations protecting the environment, and in particular protecting the mountainous areas (for FM and TV) and low lying areas (for AM) that are preferred for broadcast towers. In general, one principal goal of zoning and land use laws is to keep inappropriate uses outside environmentally sensitive areas. In addition, if construction is to be allowed in such areas zoning and land use laws provide mechanisms for inserting appropriate conditions to see that environmental harm is minimized or prevented. Such provisions are generally present in zoning and land use laws.

42. In addition, zoning laws and regulations commonly have unique requirements tailored to the individual environmental requirements of each community. This is because zoning laws and regulations are directly drafted to reflect the terrain and environment of the community in question. They thus typically have special requirements -- often in addition to regular zoning regulations -- to protect environmentally sensitive areas such as mountainous areas, high areas or wetlands.

43. For example, it is common in zoning and land use laws in some States to have special so-called "overlay districts" for wetlands, or areas in or near streams which substantially restrict the types of allowable uses from those otherwise allowed to protect the area and the environment. Such overlay districts impose additional setback requirements (beyond those that would otherwise apply) from streams, wet areas and waterways to prevent structures from being located near them and to prevent construction from occurring near such areas.

44. Mountainous areas have analogous land use and zoning restrictions as "natural beauty areas" or due to the steep slopes, unstable soils or to protect a "natural view corridor." Again, the zoning restrictions which are applicable to such areas to protect the environment typically are in addition to those that otherwise apply. They, too, appropriately restrict the structures that may be erected in such areas and the types of construction that may be allowed.

45. In addition, even where structures are allowed, the additional zoning requirements (overlay districts or otherwise) that are often applicable to mountainous areas or peaks or low lying areas may have significant restrictions on the construction that may be allowed and the steps that must be taken to protect the natural environment. These may take into account, for example, steep slopes, unstable soils, or the silting of streams.

46. Also, in some areas (particularly in California and the West) there is a high risk of fire danger. In such "high fire" areas construction may be prohibited altogether by land use or zoning laws or only limited to certain relatively wet times of year. As the Commission

can appreciate, forest fires sweeping through an area are a major hazard to life, property and the environment. As the Commission may recall, there have been substantial fires in the West and particularly in Southern California in recent years which have caused loss of life, substantial damage to property and significant environmental harm. The Commission's proposed rule would preempt state and local statutes intended to protect such fires.

47. Finally, this Commission should be aware that many of the land use and zoning restrictions applicable in or near wetlands are imposed at the request or directive of the Federal government. This is particularly true as to flood plain regulations where under the direction of the Federal Emergency Management Administration (FEMA) localities are required to prohibit development in flood plains.

48. Similarly, as to wetlands, pursuant to Federal statutes protecting them, States and localities have been directed to adopt wetland protection statutes. Again, these both promote Federal interests as well as local interests.

49. An EIS is required before the preceding types of zoning and land use laws can be preempted.

50. Aesthetics. Broadcast towers are not things of beauty. Under zoning ordinances they are not appropriate for certain areas, such as parks, residential areas or natural or historic areas. As the Commission should appreciate, towers are particularly inappropriate for high ground that has been designated a wilderness area or is part of a State or local park or is subject to zoning restrictions that have a similar effect. The Commission knows this because the Commission discussed it at length in its initial NEPA Implementation

Order, the aesthetic and visual impacts of broadcast towers are one of their primary impacts. NEPA Implementation Order at 1324, 1325, 1327-1329 (set forth *infra*). For this precise reason the Commission has always required that state and local environmental zoning approvals be obtained in addition to any FCC approvals. Id.

51. Zoning ordinances commonly address such matters in a number of ways. For example, some cities limit the height of structures so as not to detract from public monuments or the beauty of an area. Washington D.C. provides a good example of this where, as the Commission is well aware, buildings are specifically limited in height so as to, among other things, not compete with, obscure or detract from major public monuments such as the Washington Monument. These are clearly legitimate goals which the Commission's proposed rule places in jeopardy (without explanation).

52. Zoning ordinances similarly can address aesthetics by limiting development to less obtrusive structures and, for example, by designating certain areas as "view corridors" where construction cannot inhibit the view of natural objects. Again the Commission's rule, without explanation, would attempt to preempt such requirements.

53. The Commission ruled in its NEPA Implementation Order that the visual impacts of towers are one of their primary environmental effects and must be ruled on by states and localities. CEQ rules similarly list aesthetic effects as one of the environmental impacts that must be considered in an EIS. 40 C.F.R. § 1508.8(b). The Commission's proposed rule would prevent or gut states and localities from considering the visual and aesthetic effects of broadcast towers. An EIS is required.

LOCAL ZONING AND ENVIRONMENTAL DETERMINATIONS

54. In 1974 the Commission adopted its initial order implementing NEPA. It examined at great length the various activities of the Commission and discussed broadcast towers at length. Of particular interest are the Commission's statements regarding the primacy of local determinations on zoning and environmental matters. These sections are set forth verbatim below.

55. The Commission started by noting and describing the significant visual and aesthetic impacts of tall towers such as broadcast towers.

> "[T]he principal factor of environmental significance is the visual impact of the completed structure, which depends on its physical characteristics and its location. A tall tower can of course be seen from a considerable distance. At most locations in a built-up area, however, nearby buildings and trees are likely to block it from view."
>
> "The visual impact of an antenna structure on the immediate site is more likely to be significant. Here, local zoning and planning authorities have an important role. Their approval as well as the Commission's is required; their disapproval of a site on the basis of land use considerations is conclusive. The roles of land use authorities and the Commission are discussed *infra*, at paragraphs 39-41."
>
> "32. We do not think we can make a blanket preliminary judgment concerning the probable aesthetic effect of tall antenna towers in areas devoted to uses other than heavy industry or agriculture. Our main concern here would be with residential areas and with scenic, recreational, historic and other comparable areas of special environmental significance."

NEPA Implementation Order, at 1324-1325.

56. The Commission then went on to note the primacy of state and local zoning, land use and environmental decisions in dealing with tall towers. The Commission's statements in this regard are squarely on point and are set forth at length below.

> "39. Traditionally, in authorizing the construction of communications facilities, the Commission's concern with the physical plant has been limited to its communications efficiency. Other considerations relating to the physical facilities or to their construction have been the concern of local building, zoning and planning agencies and State and Federal land use authorities. Where they have jurisdiction, their approval as well as the Commission's is required. If comprehensive land use legislation is enacted by the Congress, moreover, State and regional controls will be extended to areas not currently regulated at the local level. (See, e.g., S. 268, 93rd Cong., 1st Sess., introduced by Senator Jackson on January 9, 1973.) Local, State and regional land use authorities and Federal agencies responsible for the management of Government land are obviously better situated than the Commission—by location, experience, and awareness of local values—to deal with land use questions. Commission interference with common land use determinations traditionally made at the local level would under most circumstances place a considerable strain on our concept of the Federal system. Where local land use authorities have authorized the use of a site for communications facilities, we think that the Commission's role under NEPA should be narrowly construed. In such circumstances, we will proceed with caution and with due respect for the role and qualifications of local authorities. Deference will be accorded to their rulings and their views, particularly in matters of aesthetics and when the record demonstrates that environmental issues have been given full and fair consideration. This is not to say, however, that we can defer entirely to State and local determinations. Although State and local authorities often take environmental factors into consideration, they do not function under NEPA, and their rulings do sometimes go to matters in which the Federal Government has a legitimate interest. Thus, their approval of a project cannot be accepted as conclusive and does not absolve the Commission of its statutory responsibilities.