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September 12, 2003

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication
National Programmatic Agreement, WT Docket No. 03-128

Dear Ms. Dortch:

This letter is to inform you that on September 12, 2003, Sprint Corporation, through its representative Roger C. Sherman, participated on a telephone conference with Monica Desai and Jason Williams of Commissioner Kevin Martin's office in regard to the above-referenced proceeding.

Sprint provided an overview of its position in the Commission's pending rulemaking regarding Section 106 of the National Historic Preservation Act (NHPA). Specifically, in accord with its filings in this proceeding, Sprint explained its view that NHPA does not apply to the siting of wireless telecommunications facilities. The Company emphasized that the FCC has never explained its regulatory authority to impose NHPA obligations on private parties engaged in antenna siting activities and urged that the Commission address the issue of its authority before proceeding further in this matter. Sprint also stressed that the Commission should consider the importance of tower siting to competition, service quality and public safety.

Sprint noted that the issue of whether tower siting is a "federal undertaking" was recently raised in an analogous context before the U.S. Circuit Court of Appeals for the District of Columbia Circuit in Forest Conservation Council, *et al.* on Petition for a Writ of Mandamus and Relief from Unreasonably Delayed Agency Action. Sprint provided Ms. Desai and Mr. Williams a copy of the Response of Intervenors Cellular Telecommunications & Internet Association *et al.*, attached hereto.

Pursuant to Section 1.126 of the Commission's rules, this letter is being electronically filed with your office. Please associate this letter with the file in the above referenced proceeding.

Respectfully submitted,

Roger C. Sherman

Attachment

cc: Monica Desai
Jason Williams

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
APR 3 0 2003
RECEIVED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1034

IN RE

FOREST CONSERVATION COUNCIL, INC.; FRIENDS OF THE EARTH, INC.;
AND THE AMERICAN BIRD CONSERVANCY, INC.,
Petitioners.

On Petition for a Writ of Mandamus and
Relief From Unreasonably Delayed Agency Action

RESPONSE OF INTERVENORS CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; AND PCIA, THE WIRELESS INFRASTRUCTURE ASSOCIATION

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April 30, 2003

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Cellular Telecommunications & Internet Association ("CTIA"); the National Association of Broadcasters ("NAB"); and PCIA, The Wireless Infrastructure Association ("PCIA") submit the following corporate disclosure statement:

CTIA is a not-for-profit corporation organized under the laws of the District of Columbia. CTIA is the international organization of the wireless communications industry for wireless carriers and manufacturers, and it represents more broadband Personal Communications Services carriers and more cellular carriers than any other trade association. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. Because CTIA is a trade association as defined in Circuit Rule 26.1(b), it is not required to disclose the names of its members.

NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry. NAB has not issued any shares or debt securities to the public, and NAB has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. Because NAB is a trade association as defined in Circuit Rule 26.1(b), it is not required to disclose the names of its members.

PCIA is a non-profit, incorporated association representing the wireless telecommunications and broadcast infrastructure industry. PCIA represents companies that develop, own, manage, and operate towers, commercial rooftops, and other facilities for the provision of all types of wireless, broadcasting, and telecommunications services. of radio and

television stations and broadcasting networks. PCIA has not issued any shares or debt securities to the public, and PCIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. Because PCIA is a trade association as defined in Circuit Rule 26.1(b), it is not required to disclose the names of its members.

RESPONSE OF INTERVENORS

Intervenors the Cellular Telecommunications & Internet Association; the National Association of Broadcasters; and PCIA, The Wireless Infrastructure Association (collectively, "Intervenors") respectfully submit this response to the Petition for a Writ of Mandamus and Relief from Unreasonably Withheld Agency Action ("Mandamus Petition") filed in the above-captioned case.

Petitioners come before this Court seeking a writ of mandamus against the Federal Communications Commission ("FCC") to compel "unreasonably delayed" agency action with respect to the Commission's alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq.*; the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 701 *et seq.*; and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, in connection with the siting of communications towers by private providers of various communications services. Mandamus is, however, "an extraordinary remedy," which "require[s] similarly extraordinary circumstances to be present" before the writ can be granted. *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985); *accord In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999). Petitioners here cannot satisfy this high standard.

At the outset, as set forth at greater length in the response of the FCC, the picture of agency delay and intransigence that Petitioners paint obscures reality. When the Mandamus Petition was filed, the items identified by Petitioners had been pending for just over a year.[1]

[1] As set forth in detail in the FCC's response, the principal relevant matters pending before the FCC are (1) an application for review filed on January 30, 2002 challenging the dismissal of Petitioners' petitions for lack of standing, *see In re Friends of the Earth Inc.*, 17 F.C.C.R. 201 (CWD Jan. 4, 2002), and (2) the petition regarding Gulf Coast towers that Petitioners filed in August 2002. Petitioners seek to extend this period to four years based on the existence of a

Under this Court's precedent, "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). Intervenors are aware of no case in which this Court has granted relief for such delay under the rule of reason in the absence of a statutory deadline to act more quickly, particularly on a policy issue potentially affecting such a broad array of interests. *See, e.g., In re Monroe Communications Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988) (five-year delay not sufficiently egregious to justify mandamus); *cf. United Mine Workers*, 190 F.3d at 546 (eight-year delay held unreasonable); *Nader v. FCC*, 520 F.2d 182, 206-07 (D.C. Cir. 1975) (ten-year delay unreasonable). *See generally* 47 U.S.C. § 154(j) (giving FCC express statutory authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

But Petitioners' argument fails at a more basic level. The core of the Mandamus Petition is the contention that the Chairman of the FCC has failed "to fulfill his mandatory duty" to "comply with" NEPA, the ESA, and the MBTA.[2] Mandamus Petition at 1-2. Put simply, the Mandamus Petition should be denied because, contrary to Petitioners' contention, the NEPA,

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Communications Tower Working Group convened by the U.S. Fish and Wildlife Service. *See* Mandamus Petition at 14. The existence of that group, however, does not constitute a request for FCC action and is thus irrelevant to Petitioners' challenge to "unreasonably delayed agency action" by the FCC.

[2] Petitioners contend that communications towers are responsible for the deaths of "as many as four to five million birds every year." Mandamus Petition at 5. Intervenors vigorously dispute these figures, which are unsupported by any serious scientific study. Moreover, Intervenors note that even the overstated and unsupported figures advanced by Petitioners do not make out a serious problem of avian mortality in the context of the overall bird population. *See, e.g.*, Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting*, 77 Den. L. Rev. 315, 346 (1999) (noting that "a four year study by the University of Wisconsin found that domestic cats killed between 7.8 and 219 million birds each year just in the rural areas of that state"); *see also id.* AT 348 (noting that between 97 million and 970 million birds a year are killed in building window impacts and 57 million are killed by collisions with cars and trucks).

ESA, and the MBTA impose no "mandatory duty" on the Commission arising out of the siting of communications towers.

This is true for at least two reasons. First, the tower siting decisions are the result of purely private actions, with no federal funding, and minimal oversight, control, or participation by the FCC. For most communications towers, the FCC does not even know where the tower is sited, and for the bulk of the towers at issue here, the Commission merely requires registration and certification of compliance with regulations promulgated by the Federal Aviation Administration ("FAA"). The tower siting decisions of these private entities do not constitute "major Federal action" under NEPA, nor are they "agency action" under the ESA. Second, the concerns raised by Petitioners with respect to communications towers involve at most indirect, unintentional incidents of avian mortality. The MBTA does not apply in such circumstances, because it applies only to "physical conduct of the sort engaged by hunters and poachers," and "it would stretch this 1918 statute beyond the bounds of reason" to construe it as prohibiting conduct "that indirectly results in the death of migratory birds." *Newton County Wildlife Ass'n v. United States Forest Service*, 113 F.3d 110, 115 (8th Cir. 1997). Because the statutes Petitioners invoke do not permit the relief Petitioners seek, mandamus relief is inappropriate.

BACKGROUND

Private parties generally control the placement and construction of communications towers, with no federal funding and only the barest Commission involvement. For example, with respect to towers that are used to provide Commercial Mobile Radio Services ("CMRS") such as cellular or personal communications services ("PCS"), a private actor – *e.g.*, Sprint PCS – is authorized by the Commission to provide a particular service within a particular geographic area – for example, PCS service in the Boston area. It is then up to that carrier to decide how

many towers it needs, where those towers should be placed, and even whether to use towers at all. *See, e.g.*, Proposed Rules, Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, 62 Fed. Reg. 48034-01 ¶ 20 (Sept. 12, 1997) (FCC licenses wireless carriers "on a geographic basis only," and its "wireless rules do not provide for the licensing of individual tower or antenna facilities"). Sprint's decisions, of course, are not entirely unconstrained. It must comply, for example, with local zoning requirements, a process that can be time-consuming, as well as with all relevant federal statutes. It must also comply with federal standards governing such things as radiofrequency radiation. *See* 47 C.F.R. § 1.1307(b). But a carrier such as Sprint receives no federal funding for its towers, and it does not generally need approval from the FCC to construct the tower facilities necessary to provide wireless service to that geographic area. Indeed, for the vast majority of CMRS towers, the FCC does not even know where the towers are located. *See* FCC, *National Wireless Facilities Siting Policies*, Fact Sheet No. 2, at 28 (Sept. 17, 1996) ("[T]he Commission does not maintain any technical information on file concerning the majority of PCS licensees' base stations.").

For a subset of CMRS towers – the roughly 15% of communications towers that exceed 200 feet – the FCC requires tower owners to "register" their towers with the Commission. These towers are the principal subject of attack from Petitioners. *See* Mandamus Petition at 7 n.2 (challenging the FCC's "communications tower registration program"). The FCC's registration requirement is an offshoot of 47 U.S.C. § 303(q), which vests the FCC with authority to "require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation." *In re Streamlining the Commission's Antenna Structure Clearance Procedure*, 11

F.C.C.R. 4272, ¶ 3 (1995). The FCC's requirements function together with those of the FAA. Antenna structures that require FAA notification – and only those structures – must be registered with the FCC prior to construction and require a "no hazard" finding from the FAA. *See* 47 C.F.R. § 17.4(a) (limiting structure registrations to an antenna structure "that requires notice of proposed construction to the Federal Aviation Administration"); *id.* at 17.4(b) (requiring filing of FCC Form 854 and "a valid FAA determination of 'no hazard'"). Upon registration, the Commission's rules automatically impose on the tower owner painting and lighting requirements that are "based on the FAA's recommendation as to what painting and/or lighting (if any) is necessary to promote air safety." *In re Streamlining the Commission's Antenna Structure Clearance Procedure*, 2000 WL 253677 (FCC 2000). In short, the "tower registration program" of which Petitioners complain is merely a database for tracking towers subject to FAA requirements. Nothing in the registration process, however, requires or even permits the Commission to engage in any discretionary evaluation of the wisdom, advisability, or feasibility of siting the registered tower in the particular location.[3]

For broadcast communications towers used by radio and television stations, the FCC similarly has only minimal involvement in the tower siting process. Again, there is no federal funding for broadcast towers, and the Commission is not involved in a station owner's initial planning or siting. Unlike CMRS carriers, commercial broadcast stations do have to apply for a construction permit to construct a new facility or modify an old facility by filing FCC Form 301. But the principal purpose of that application with respect to tower siting is to ensure that the proposed broadcast service at that location will not interfere with any other station or other entity

[3] Although environmental assessments are prepared for some towers, *see* 47 C.F.R. § 1.1307, Intervenors contest the FCC's power to impose that requirement under NEPA or the ESA. *See infra* Part I.A. & nn.8-9.

entitled to interference protection under the Commission's rules and will comply with other FCC engineering requirements.[4] The location of the broadcast tower, like the location of the CMRS tower, is thus principally the result of a private – not a federal – decision.

ARGUMENT

Petitioners' mandamus argument is premised on the notion that the FCC has a "mandatory duty" to "comply with" (1) NEPA by "issuing a programmatic environmental impact statement (PEIS) concerning the impact of communications towers registered by the FCC"; (2) the ESA, by consulting with the U.S. Fish & Wildlife Service (FWS) regarding the adverse impacts of its tower registration decisions" on endangered species; and (3) the MBTA, "by taking action to minimize avian mortality caused by registered communications towers." Mandamus Petition at 1-2. With respect to private siting decisions at issue here, however, none of the statutes impose such mandatory duties on the Commission.[5]

I. NEPA and the ESA Do Not Apply Here Because the Tower Siting Decisions at Issue Are the Result of Private Decisions by Private Actors.

A. The FCC's Tower Registration Requirement Does Not Render the Siting of Communications Towers "Major Federal Action" Subject to NEPA

Petitioners' principal complaint is the FCC's alleged failure to prepare an environmental impact statement under NEPA to assess the impact of its "program" of registering communications towers. Contrary to Petitioners' arguments, however, NEPA has no application

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[4] Like CMRS towers, broadcast towers are also subject to the FAA-related registration requirements and the radiofrequency emissions standards.

[5] Petitioners' arguments fail on numerous other grounds, including (for example) that NEPA may not permit post-authorization environmental review. *See, e.g.*, PCIA's Motion to Dismiss the August 27, 2002 Gulf Petition Filed By Forest Conservation Council, *et al.* (filed at FCC Sept. 30, 2002). Intervenors' focus in this response on the absence of any mandatory FCC duty should not be construed by this Court or the FCC as a waiver of those arguments.

to the construction and modification of communications towers, because that construction and modification occurs almost exclusively within the realm of private decisionmaking, without federal funding or substantial participation or oversight of the construction by the FCC. Private actors are authorized to provide service within particular geographic boundaries, and then those private actors decide, consistent with local zoning and relevant statutory requirements, how best to situate their communications towers to ensure the proper level of service to their customers or their audience. Indeed, for the vast majority of communications towers, the FCC has virtually no involvement at all. NEPA, which covers only major Federal actions and not the decisions private actors or state or local governments, thus does not apply to the siting and registration of communications towers.

NEPA is an important but limited statute that "requires that federal agencies consider the environmental consequences of 'major federal actions significantly effecting the quality of the human environment." *Macht v. Skinner*, 916 F.2d 13, 15 (D.C. Cir. 1990).[6] NEPA itself does not impose any substantive requirements on the agency, *i.e.*, it "does not command the agency to favor an environmentally preferable course of action." *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994). Rather, it "simply prescribes the necessary process[ ]" that the agency must follow in its decisionmaking. *Sierra Club v. Marita*, 46 F.3d 606, 623 (7th Cir. 1995). In short, "NEPA merely prohibits uninformed – rather than unwise – agency action." *Sierra Club v. Espy*, 38 F.3d at 802.

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[6] NEPA provides, in relevant part, that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" discussing the effect of the action on the environment. 42 U.S.C. § 4332(2)(C).

The "*sine qua non* of NEPA's applicability" is the presence of "major Federal action." *Foundation on Economic Trends v. Lyng*, 817 F.2d 882, 885 (D.C. Cir.1987). Thus, it is well settled that "the requirements of NEPA do not reach private acts, only 'major federal actions.'" *Save the Bay v. United States Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980); *see also Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990) ("NEPA requires *federal agencies* – not states or private parties – to consider the environmental impacts of their proposed actions") (emphasis in original). A failure to enforce rigorously the requirement that there be "major Federal action" would "needlessly hinder the Government's ability to carry on its myriad programs and responsibilities in which it assists, informs, monitors, and reacts to activities of individuals, organizations, and states, but in which the Government plays an insubstantial role." *Sugarloaf Citizens Association v. FERC*, 959 F.2d 508, 512 (4th Cir. 1992).

Here, Petitioners' NEPA claims must fail because the FCC is insufficiently involved in tower siting to convert private tower-siting decisions into "major Federal actions."[7] Indeed, the core of Petitioners' NEPA argument attacks the Commission's *inaction* – its refusal to insert itself more aggressively in the tower siting process. But no legal alchemy can transform federal inaction to federal action, much less to major federal action. If "the agency decides not to act,

[7] Petitioners sidestep this inquiry entirely by conflating the question whether the private siting decisions of wireless communications companies and broadcasters constitute "major Federal actions" with the question of whether such actions "significantly affect[]" the quality of the human environment. *See* Mandamus Petition at 7-8 (discussing only 40 C.F.R. §§ 1508.7 and 1508.25, both of which relate to the definition of "significantly"). The two questions are quite different. The former seeks to assess the degree of federal involvement, the latter seeks to assess the level of impact on the environment. *See generally New Jersey Department of Environmental Protection and Energy v. Long Island Power Authority*, 30 F.3d 403, 416 n.23 (3d Cir. 1994) (noting the "dual standard" for NEPA, which requires that a court "consider whether a federal action is 'major,' in terms of the level of federal resources and authority committed to it, and whether it 'significantly' affects the environment"); *see also id.* (citing cases). As noted above, *see supra* note 2, Intervenors also dispute that the construction of communications towers "significantly affects" the quality of the human environment.

. . . the agency never reaches a point at which it need prepare an impact statement," because "Congress did not expect agencies to prepare statements if there is to be no action." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244 (D.C. Cir. 1980). As this Court has stated, there is no federal action "where an agency has done nothing more than fail to prevent the other party's action from occurring." *id.* at 1244; *cf. Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 83 n.3 (D.C. Cir. 1997) (agency's decision to refrain from future regulation "may not constitute 'action' at all"); *Sheriden Kalorama Historical Association*, 49 F.3d 750, 755 (D.C. Cir. 1995) (noting, under the analogous standards set forth in the National Historic Preservation Act, that "we are hesitant to conclude that 'failure to disapprove' means 'approve' in this context").

For the same reason, the mere fact that the FCC *could* exercise broader authority over tower-siting decisions is plainly insufficient to require NEPA analysis when the FCC has chosen not to exercise that authority. As this Court has made clear, "[t]he ability to influence the outcome of the project is certainly a necessary condition of 'Federal action,' but it is not a sufficient condition." 627 F.2d at 1245. Indeed, a contrary conclusion would render NEPA unworkable, leaving every agency decision not to regulate to the full extent of its power subject to NEPA analysis. *See, e.g.*, *Cross-Sound Ferry Services, Inc. v. ICC*, 934 F.2d 327, 334 (D.C. Cir. 1991) ("No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so.").

Implicitly conceding the *de minimis* role Commission has in tower siting, Petitioners seek to ground the NEPA requirements in the FCC's decision to require registration and self-certification in order to ensure that towers do not interfere with airplane safety. But this is surely the tail wagging the dog: the Commission's minimal registration and self-certification requirement designed to ensure compliance with FAA regulations does not transform the

Commission's involvement into "*major* Federal action." Indeed, courts have repeatedly rejected efforts to find major federal action in this type of self-certification system. *See Sugarloaf Citizens Ass'n*, 959 F.2d at 513 (NEPA not triggered when agency approval of statutory and regulatory compliance was "merely a ministerial act in which the agency exercised no discretion"); *Mayaguezanos Por La Salud y El Ambiente*, 198 F.3d 297, 301 (1st Cir. 1999) (NEPA not triggered when "the approval did not involve close scrutiny of the action or anything more than notice for safety purposes"); *Long Island Power Auth.*, 30 F.3d at 415 (where party informs federal agency of activity "to facilitate the agency's monitoring of the activities for safety purposes, the agency's review of the plan does not constitute a major federal action").[8]

More broadly, nondiscretionary, ministerial agency actions such as those at issue in the tower registration system are not sufficient to constitute a federal action. *See Sugarloaf Citizens Ass'n*, 959 F.2d at 512; *Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1344-45 (5th Cir. 1979). Indeed, any other conclusion would be directly contrary to the Act's basic purpose of encouraging federal decisionmakers to take the effects of their actions into account. As the Tenth Circuit explained, the environmental assessment "process is supposed to inform the decision-maker. This presupposes he has judgment to exercise." *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477,

[8] When the Commission imposed the registration process, it determined that registering a structure constitutes "'federal action'" under NEPA. *See In re Streamlining the Commission's Antenna Structure Clearance Procedure*, 11 F.C.C.R. 4272 ¶ 41 (1995). With due respect to the Commission, that determination was plainly incorrect. The Commission concluded that application of NEPA was appropriate because "the owner may be proposing to register and construct a structure at a location that significantly affects the quality of the human environment," and because, by requiring owners to assume the responsibility for environmental compliance, "irreparable harm to the environment may be avoided." *Id.* ¶41. But that analysis of the potential effect on the environment is not relevant to the question of whether registration renders tower construction a "federal action," much less to the question whether it renders such construction "major" federal action that would justify application of NEPA.

1482 (10th Cir. 1990); *see also Save Barton Creek Ass'n v. FHA*, 950 F.2d 1129, 1134 (5th Cir. 1992). For these reasons, courts "have considered the usefulness to the federal decision-making process of the information an impact statement would provide . . . in determining whether an impact statement is required at all," *Atlanta Coalition on the Transp. Crisis, Inc.*, 599 F.2d at 1344, and they have declined to find a major federal action where the agency "has no discretion to consider the environmental effects" of a project. *Goos*, 911 F.2d at 1295; *Sugarloaf Citizens Ass'n*, 959 F.2d at 513. By accepting a certification that the FAA has made a "no hazard" determination, for example, the Commission does not exercise any discretion, much less sufficient discretion to render tower registration a "major Federal action."

The Ninth Circuit's decision in *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988), is instructive. In that case, the Bureau of Land Management ("BLM") adopted regulations to govern certain mining on public lands. As part of those regulations, the BLM created a category of "Notice" mines, which covered certain smaller-scale mining operations. Under the BLM regulations, a Notice mine did not require approval by BLM before a miner could commence mining. Instead, prior to starting mining operations, the mine operator had to give BLM notice, informing the agency of information such as the address of the mine, a description the mining activities, and the proposed start date. In addition, the notice had to include a statement that "reasonable measures will be taken to prevent unnecessary or undue degradation of the lands during operations." 857 F.2d at 1309. After BLM had reviewed the notice, it sent the mine operator a letter indicating either that (1) all required information had been provided, or (2) the information was incomplete and the mining could not yet commence. BLM conducted no NEPA review prior to sending the letter that allowed mining operations to commence.

A group of environmental groups challenged the BLM's actions alleging that the "systematic approval" of "Notice" mine operations was major federal action subject to NEPA, thus requiring an environmental assessment for every proposed Notice mine. The Ninth Circuit disagreed, concluding that "BLM's review of Notice mines is only a marginal federal action rather than a major action." 857 F.2d at 1314. The court of appeals noted, among things, that the mines' operators received no federal funding, and that, under the regulations, "BLM cannot require approval before an operation can commence developing the mine." *Id.* Moreover, even BLM's "obligation to monitor compliance with statutory and regulatory requirement to deter undue [soil] degradation is insufficient" to render BLM's treatment of Notice mines a major federal action, particular since an agency's authority to bring enforcement actions does not convert the underlying private action into major Federal action.

The outcome here follows *a fortiori* from *Sierra Club v. Penfold.* The FCC is if anything even less involved in the construction and placement of tower sites than was the BLM in reviewing Notice mines on public lands. The only time the FCC is even aware of the location of a CMRS tower is when FAA regulations are implicated, and even then all that is required of the carriers is registration – FCC approval is not part of the administrative scheme. And for broadcast station towers, the Commission reviews construction permit applications largely to assess potential interference. *See Sugarloaf Citizens Ass'n,* 959 F.2d at 513 (agency's certification that applicant met the size, fuel, and ownership requirements to become a "qualifying facility" under the Public Utility Regulatory Policies Act did not involve major federal action requiring a NEPA analysis). As in *Sierra Club v. Penfold*, the degree of agency involvement is truly "marginal," and NEPA does not apply.

B. The FCC's Tower Registration Requirement Does Not Render the Siting of Communications Towers "Agency Action" Subject to the ESA

For many of the same reasons that Petitioners fail to make out a "mandatory duty" under NEPA, Petitioners cannot make out a "mandatory duty" for the Commission to act under Section 7(a)(2) of the ESA: both statutes regulate the actions of federal agencies, not private entities. As this Court has recognized (albeit in dicta), "if promulgation of the policy constituted 'inaction' [under NEPA], . . . there most probably would have been no 'agency action' to trigger the ESA consultation requirement." *Fund for Animals*, 127 F.3d at 84 n.6.[9]

Like environmental assessment obligations under NEPA, the consultation obligations imposed by the ESA are directed toward federal, not private, actors, and extend only to actions that have significant agency involvement. The ESA provides that federal agencies must consult with the Secretary of the Interior to insure that "agency action" is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). "Agency action" under the ESA is "any action authorized, funded, or carried out by such agency." *Id.* Although the Supreme Court has held that the ESA intended for the term "agency action" to be construed broadly, *see, e.g.*, *TVA v. Hill*, 437 U.S. 153, 173 (1978), the term is not without limit. *See, e.g.*, *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) (advice provided by USFWS was not

[9] That is not to say that absence of agency action under the ESA follows automatically from lack of "major Federal action" under NEPA, particularly since NEPA imposes the added requirement that federal action be "major." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) ("If anything, the case law is more forceful in excusing nondiscretionary agency action or agency 'inaction' from the operation of NEPA"). However, the same factors that point to the absence of major Federal action – the lack of federal funding, control, or oversight – also point to the absence of "agency action." By the same token, the fact that tower operators currently conduct a ESA analysis is not dispositive of the question whether the FCC lawfully imposed that requirement. *See also supra* nn.3, 8.

"agency action" under ESA); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (non-discretionary approval of logging road not "agency action" under ESA").

Here, Petitioners' attempt to extend the ESA to cover the FCC's "tower registration program" exceeds the bounds of agency action. As noted above, the FCC's involvement in the tower registration program is minimal, at best. The fact that private entities must register at the Commission to certify compliance with FAA regulations and file a "no hazard" certificate does not transform private action to agency action. Indeed, the Commission's tower registration requirement is best described as "inaction," and such inaction does not satisfy the requirements of the ESA. *Cf. Fund for Animals, Inc.*, 127 F.3d at 84 n.6.

II. The MBTA Does Not Apply to Unintentional, Incidental Deaths of Birds Resulting from Otherwise Lawful Activity Such As the Construction of Communications Towers

Petitioners' claim under the MBTA fares no better. The MBTA does not apply to the unintentional, incidental deaths of birds resulting from collisions with communications towers, and is instead limited – as numerous federal courts have held – to prohibiting "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." *Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); *see also Newton County Wildlife Ass'n*, 113 F.3d at 115 (holding that the "terms 'take' and 'kill' in 16 U.S.C. § 703 mean 'physical conduct of the sort engaged in by hunters and poachers.'").[10] Contrary to Petitioners' contentions, therefore, it is not a "take" when migratory

[10] *Accord Curry v. U.S. Forest Service*, 988 F. Supp. 541, 549 (W.D. Pa. 1997); *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1573-74 (S.D. Ind.1996); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1509-10 (D. Or.1991); *see also U.S. v. Olson*, 41 F. Supp. 433, 434 (W.D. Ky. 1941) ("The fundamental purpose of the statutes and the regulations thereunder [is] the protection of migratory birds from destruction in an unequal contest between the hunter and the bird."). The FCC has agreed that the MBTA is "primarily a

birds perish in collisions with towers (or in collisions with office buildings, homes, lighthouses, or cars), and it is similarly not a "take" for the FCC to fail to add new regulations to prevent such collisions. Because Petitioners' expansive interpretation of the MBTA is flatly inconsistent with the text and history of the statute, as well as with Supreme Court precedent and the decisions cited above, the FCC has violated no "mandatory duty" with respect to the MBTA.

In relevant part, the MBTA makes it unlawful "at any time, by any means or in any manner, to *pursue, hunt, take, capture, kill, attempt to take, capture, or kill*" any migratory bird. 16 U.S.C. § 703 (emphasis added). The term "take" is not further defined in the statute, but is defined in implementing regulations to encompass "pursue, hunt, shoot, wound, kill, trap, capture, or collect" or attempting any such act. 50 C.F.R. § 10.12.

The narrow scope of the MBTA is evident from the plain text. All of the terms set forth in the statute involve direct and purposeful activities akin to those used by hunters and poachers to kill or capture animals; none can reasonably be interpreted to cover the type of indirect harms that would result from the construction of communications towers, not to mention the construction of office buildings, residences, and virtually every other structure. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) ("'take' in this sense – a term of art deeply embedded in the statutory and common law covering wildlife – describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals)"). The MBTA's implementing regulations are to the same effect. In contrast to the regulations implementing the ESA, for example, nothing in the regulations implementing the MBTA

'hunting' statute." *In the Matter of County of Leelanau, Michigan*, 1994 WL 615753, 9 F.C.C.R. 6901 ¶ 8 (1994).

expands liability to include indirect and unintentional actions. *Compare* 50 C.F.R. § 10.12 (under the MBTA, defining "take" narrowly) *with id.* § 17.3 (under the ESA, defining "harm," as used in the statutory definition of "take," broadly to include indirect killings).

The Supreme Court's decision in *Sweet Home* confirms the narrow reading of the plain text of the statute and regulations. In that case, the Supreme Court addressed whether a regulation that broadly defined the term "take" as used in the ESA to include indirect as well as purposeful actions was consistent with the statute. In upholding the regulation, the Court emphasized that the ESA defined "take" to include the term "harm," and it was that term, according to the Court, that justified the expansion of the statute to cover indirect actions. As the Supreme Court explained, the word "harm" in the ESA definition adds a "sense of indirect causation" to that statute that is not provided by the other ESA terms – including pursue, hunt, shoot, wound, kill, trap, capture, and collect – because "[m]ost of those terms refer to deliberate actions more frequently than does 'harm.'" *Sweet Home*, 515 U.S. at 698 n.11.

Because the MBTA (in contrast to the ESA) does not include the word "harm," and because the regulations implementing the MBTA (unlike the regulations implementing the ESA) do not purport to extend the statute to cover indirect takings, the majority's analysis in *Sweet Home* makes clear that the MBTA does not cover injuries to birds that result from indirect causation" as opposed to "deliberate actions." As the Ninth Circuit explained, "take" is defined under the MBTA as "pursue, hunt, shoot, wound, kill, trap, capture, or collect";

> [u]nder the Endangered Species Act enacted in 1973, in contrast, the word "take" is defined in a broader way to include "harass," and "harm," in addition to the verbs included in the MBTA definition. 16 U.S.C. § 1532(19). The broadest term, "harm," which is not included in the regulations under the Migratory Bird Treaty Act, is defined by ESA Regulation to include habitat modification or degradation. . . . We agree . . . that the differences in the proscribed conduct under ESA and the MBTA are "distinct and purposeful."

Seattle Audubon Society, 952 F.2d at 303.[11]

That the MBTA is inapplicable to non-hunting activity is further demonstrated by the fact that the MBTA is a criminal statute that imposes strict liability on violators, regardless of their knowledge or intent. *See, e.g., United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997). "Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct . . . that indirectly results in the death of migratory birds." *Newton County Wildlife Ass'n*, 113 F.3d at 115. The plaintiffs' proposed interpretation of the statute as applying to non-hunting activities would have harsh – indeed, nonsensical – consequences, particularly given that "the unlawful killing of even one bird" may constitute an offense under the MBTA. *United States v. Corbin Farm Service*, 444 F. Supp. 510, 529 (E.D. Cal. 1978). Estimates suggest, for example, that between 97 million and 970 million birds a year are killed in building window impacts and 57 million are killed by collisions with cars and trucks. *See* Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting*, 77 Den. L. Rev. 315, 348 (1999). "Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense." *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978); *United States v. Rollins*, 706 F. Supp. 742, 744 (D. Id. 1989) (expressing concern about interpretation of statute that

[11] Justice Scalia's dissent, which was joined by the Chief Justice and Justice Thomas, concluded that, notwithstanding the inclusion of the term "harm," the ESA did not extend to indirect killings; the conclusion that the MBTA does not extend to such killings follows for those Justices *a fortiori*. Indeed, the dissent noted expressly that "'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control," and noted that "[t]his is just the sense in which 'take' is used" in statutes such as the MBTA. *See* 515 U.S. at 717 (Scalia, J., dissenting) (expressly citing the MBTA).

would mean that "a homeowner could be pursued under the MBTA if a flock of geese crashed into his plate-glass window and were killed. An airplane pilot could be prosecuted if geese were sucked into his jet engines.").

The legislative history further confirms that the MBTA cannot be extended to cover takings such as those at issue here. Indeed, even the sole case on which Petitioners rely concedes that "the MBTA's legislative history indicates that Congress intended to regulate recreational and commercial hunting." *United States v. Moon Lake Electric Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1080 (D. Colo. 1999); *see also id.* (citing, *e.g.*, 55 Cong. Rec. 4402 (June 28, 1917) (statement of Sen. Smith: "This law is aimed at the professional pothunter, [one who hunts game for food, ignoring the rules of sport]."); 55 Cong. Rec. 4816 (July 9, 1917) (Statement of Sen. Smith: "Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it."); 56 Cong. Rec. 7357 (June 4, 1918) (statement of Rep. Fess); 56 Cong. Rec. 7360 (June 4, 1918) (statement of Rep. Anthony: "[T]he people who are against this bill are the market shooters, who want to go out and kill a lot of birds in the spring, when they ought not to kill them, and some so-called city sportsmen, who want spring shooting just to gratify a lust for slaughter."); 56 Cong. Rec. 7376 (June 4, 1918) (statement of Rep. Kincheloe: "If you want the pothunters to disregard this solemn treaty we made with Canada and kill these migratory birds and stop their propagation, then you want to vote against this bill.")). Moreover, although there was evidence by the late 1800s of avian mortality from birds' colliding with lighthouses, *see* Corcoran, 77 Den. L. Rev. at 351 n.228, Petitioners point to nothing in the legislative history suggesting that Congress thought the MBTA would apply in such circumstances.

In light of this case law and history, Petitioners' proffered interpretation is breathtakingly broad. It would impose liability not only on tower operators (and owners of office buildings and homes, as well as drivers of cars), but also on government agencies that fail to regulate affirmatively to prevent collisions. Although Petitioners note correctly that this Court has held that the MBTA applies to the federal government, *see Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000); *cf. Newton County Wildlife Ass'n*, 113 F.3d at 115 ("[W]e agree with the Forest Service that MBTA does not appear to apply to the actions of federal government agencies."), the government action in *Humane Society* involved the federal government's undertaking a direct and deliberate extermination of an overpopulation of geese, precisely the sort of conduct engaged in by hunters and poachers. That is a far cry from this case, where Petitioners allege that the FCC has committed a "take" by failing to regulate to prevent a private actor from erecting a tower that may some day cause harm to migratory birds.

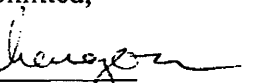
Petitioners' sole authority for this expansion of the MBTA is a lone district court decision. *See United States v. Moon Lake Electric Assoc.*, 43 F. Supp. 2d 1070 (D. Colo. 1999), *cited in* Mandamus Petition at 13. *Moon Lake*, of course, did not involve a challenge to a federal agency's failure to regulate, so it is inapposite. But it is also misguided at a more a basic level. The *Moon Lake* court relied extensively on *Sweet Home*, for example, but ignored the language in both the majority and the dissent making clear that the words other than "harm" applied to only direct actions akin to hunting and poaching. *See Moon Lake*, 45 F. Supp.2d at 1078-79. Similarly, the court placed substantial reliance on cases such as *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), and *United States v. Corbin Farm Service*, 444 F. Supp. 510, 536 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir.1978). Not only did these cases pre-date *Sweet Home*, but they involved situations in which the defendant was engaged in otherwise

unlawful, inherently dangerous activity. In *Corbin Farm Service*, for example, in which the court upheld charges under the MBTA for birds poisoned by pesticides, the defendant was also charged with the crime of using a pesticide in a manner inconsistent with its labeling. The court there noted that "[w]hen dealing with pesticides, the public is put on notice that it should exercise care to prevent injury to the environment and to other persons." *Corbin Farm Service*, 444 F. Supp. at 536. Similarly, *FMC Corp.* presented a situation in which the manufacturer of a highly toxic pesticide had contaminated a pond. The court there relied on the strict liability doctrines of tort law related to "extrahazardous" or "'abnormally dangerous'" activities, *FMC Corp.*, 572 F.2d at 907-08, which have no application to avian mortality resulting from tower collisions. *Moon Lake*, therefore, offers Petitioners no comfort.

CONCLUSION

The Mandamus Petition should be denied.

Respectfully submitted,



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April 30, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2003, I served copies of the foregoing Response of Intervenors Cellular Telecommunications & Internet Association; National Association of Broadcasters; and PCIA, The Wireless Infrastructure Association by causing them to be delivered as indicated:

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