

**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)	

**Reply Comments of American Bird Conservancy, Defenders of Wildlife and
National Audubon Society**

American Bird Conservancy, Defenders of Wildlife, and National Audubon Society (“Petitioners”) have reviewed the comments submitted by a range of interested parties in response to the Petition for Expedited Rulemaking and Other Relief by American Bird Conservancy, Defenders of Wildlife and National Audubon Society (“Petition”), WT Docket Nos. 03-187 and 08-61, filed April 19, 2009. *See also* 74 Fed. Reg. 21613 (May 8, 2009). The Petition for Expedited Rulemaking requests the Federal Communications Commission (“FCC” or “Commission”) adopt new rules on an expedited basis to comply with the National Environmental Policy Act (“NEPA”), Endangered Species Act (“ESA”), the Migratory Bird Treaty Act (“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*”).

We are gratified that so many comments submitted on behalf of thousands of individuals and numerous organizations endorsed our Petition. Contrary to the wealth of scientific study or basis in law, comments from the broadcast and telecommunications industry simply repeat the

position they have held for the past ten years on this issue - that there be no regulatory changes by the FCC to improve its antenna structure registration procedures to better protect migratory birds. This is despite the growing body of research documenting the extent of avian mortality caused by communication towers and the published research documenting measures available to mitigate such mortality. The U.S. Fish and Wildlife Service, scientists, and conservationists all have submitted detailed documentation of the scientific basis and legal requirements for the FCC to act in this matter without in any way impeding the build out and operation of this nation's telecommunication services. Regrettably, the industry continues to contest even modest changes to prevent the death of our native birds, a natural resource, held in trust for all current and future generations of Americans.

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SUMMARY

American Bird Conservancy (“ABC”), Defenders of Wildlife (“Defenders”), and National Audubon Society (“Audubon”) appreciate the opportunity to file this reply in support of our Petition for expedited rulemaking filed April 14, 2009. In response to our Petition, concerned citizens, companies, environmental organizations, and professional and trade associations filed extensive comments. Taken together, the commenters represent a broad cross-section of the country, in all fifty states, with diverse points of view. Many thousands of comments were filed in support of our Petition. Many of those who oppose our Petition challenge the scientific basis for our concerns, citing old, studies and ignoring the overwhelming, sound science that supports our Petition. Most fail to recognize that the changes we seek are procedural, to ensure that the Commission’s regulatory process complies with the law. The Petition does not mandate any substantive measures. And most ignore the legal basis for our Petition, arguing for the illegal status quo based on alleged costs of compliance. For the reasons stated in the Petition and in these reply comments, we urge the Commission to act expeditiously, as set forth in the Petition and to issue proposed rules for comment.

I. Contrary To The Industry Claims, The Conservation Petition Is Grounded In Sound Science

Various comments from industry contend that the scientific foundation regarding bird kills at communication towers is not based on “good science” or peer reviewed studies and is instead based on anecdotal evidence. *See, e.g.*, Comment from Maranatha Broad. Co., to the FCC 4 (Apr. 23, 2007) (on file with the FCC); Comment from Verizon Wireless, to the FCC 11 (May 29, 2009) (on file with the FCC). Some further state that the FCC should not act until reliable scientific studies determine a link between communication towers and significant adverse effects on bird populations *and* the efficacy of proposed solutions. *See, e.g.*, Comment from CTIA – The Wireless Ass’n, Nat’l Ass’n of Tower Erectors, Nat’l Ass’n of Broadcasters, & PCIA – The Wireless Infrastructure Ass’n (“Infrastructure Coalition”), to the FCC iv (May 29, 2009) (on file with the FCC) (“The Commission should continue its work in the WT Docket No. 03-187 rulemaking proceeding to address nationwide migratory bird issues based on good science, including peer-reviewed studies, rather than on anecdotal ‘evidence.’”); Comment from Maranatha, *supra*, at 3-4 (“For the foregoing reasons, the FCC should resist pressure to enact into rule any of the proposals in WT Docket No. 03-187, unless and until reliable scientific studies and consultations with expert agencies in the course of implementing the Court’s mandate confirm both (1) the link between communications towers and significant adverse effects on bird populations *and* (2) the efficacy of the proposed solutions.”).

We strongly dispute industry’s contentions regarding the science we cite in our Petition. There is overwhelming peer-reviewed science to demonstrate the significance of tower-caused kills on bird populations. While not specifically addressed in our Petition, we also believe that proposed solutions such as those regarding tower height and lighting have been sufficiently studied to determine their potential for minimizing avian mortality. Industry groups provided no

specific comments or critique of this supposedly “bad” science and therefore their generic, unqualified comments regarding the quality of the science should be dismissed.¹

The available research and data clearly indicate that mortality at the 110,000 communication towers is biologically significant for a number of avian species and that, in any event, the mortality clearly may have a significant impact for bird species under NEPA and may adversely affect migratory bird species listed under the ESA. In comments submitted by the U.S. Fish and Wildlife Service (“FWS”), Dr. Albert Manville states that “[t]he population impacts to migratory songbirds (and other avifauna) and impacts to their population status are frightening and biologically significant.” Comment from Dr. Albert M. Manville, II, U.S. Fish and Wildlife Service, to the FCC 2 (March 9, 2005) (on file with the FCC). The FWS comments supported the analyses of avian mortality by Longcore *et al.*² documenting the deaths of millions of migratory birds by species. The FWS again urged the FCC to adopt the FWS Tower Siting Guidelines. Memorandum from Director, FWS, on Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers, to Regional

¹ The “Data Quality Act” or the “Information Quality Act” (“IQA”) requires the Office of Management and Budget (“OMB”) to issue guidance to federal agencies designed to ensure the “quality, objectivity, utility, and integrity” of information disseminated to the public. Pub. L. No. 106-554, § 515(a), 114 Stat. 2763A-153 (2000). It also required agencies to issue their own information quality guidelines and to establish administrative mechanisms that allow affected persons to seek correction of information maintained and disseminated by the agencies that does not comply with the OMB guidance. Some industry commenters make sweeping generalizations about the quality of the information cited in our Petition. However, neither the IQA nor the OMB guidelines mandate that all information disseminated by an agency be peer-reviewed – an unrealistic standard. In fact, as discussed in the text *infra*, the Avatar study, on which industry relies, was not peer-reviewed. If industry commenters have specific criticisms about specific studies, they should employ the administrative mechanisms of the DQA and its guidelines to address concerns that information does not comply with the guidelines.

² 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)

Directors (Sept. 14, 2000) ("Service Guidance"), available at <http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/towers/comtow.html>. The Longcore *et al.* analyses demonstrate that even at the lowest end of estimated mortality, towers cause the deaths of at least 10,000 birds each of 24 species of FWS Birds of Conservation Concern each year. 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 at Table 3 (April 23, 2007). Two species have very high, conservative estimates of fatalities: Bay-breasted Warbler at more than 150,000 fatalities/year, and Blackpoll Warbler at almost 90,000 fatalities/year. *Id.* More than 60 species of Birds of Conservation Concern are killed at towers. *Id.*

These staggering facts are not lost on the Commission. In a statement on the notice of proposed rulemaking in WT Docket 03-187, then-Commissioner Copps observed:

There is simply no question that bird-tower collisions are a serious problem. The U.S. Fish and Wildlife Service tells us that millions of birds, perhaps as many as 50 million, die each year through such accidents. That is a sobering conclusion coming from the federal agency with the greatest scientific expertise when it comes to wildlife conservation and primary responsibility for protecting migratory birds. The situation imposes a grave responsibility on *this* agency, too, because of our important jurisdiction over tower painting and illumination – a responsibility to make sure that our rules and practices do not contribute to a needless toll of bird deaths.

Statement of Comm'r Michael J. Copps, 21 F.C.C.R. 13,241, 13,278 (Nov. 7, 2006) (emphasis in original).

Despite their request to the FCC to use "good" science, industry groups support the findings of the controversial Avatar report and cite it frequently in their comments. *See, e.g.*, Comment from Infrastructure Coalition, *supra*, at 10, 32; Comment from Verizon Wireless,

supra, at 11, 13. Following the publication of the Avatar report for public comment, leading scientific experts in the field such as Land Protection Partners and Dr. Joelle Gehring as well as the U.S. Fish and Wildlife Service submitted detailed comments criticizing the report's analysis and recommendations. Already part of this docket, we incorporate those comments by reference rather than summarizing them here in detail. We urge the FCC to closely reexamine the comments it received from avian scientists and the FWS on the Avatar report and to acknowledge the significant limitations of that report. These limitations include that it did "not adequately represent the current state of scientific knowledge about bird kills at communication towers in many important respects, and that the recommendations derived from those conclusions are insufficient to address the adverse impacts of communication towers on birds," Longcore, Scientific Basis To Establish Policy Regulating Communications Towers To Protect Migratory Birds, WT Docket No. 03-187, *supra*, at 1, and that it "avoids drawing obvious inferences from the available data to such a degree that it could be interpreted as lacking objectivity." *Id.* at 30. Certainly this report would not withstand peer-review if such a review were undertaken and therefore it is inappropriate for the FCC to rely upon this report as the basis for any determinations it makes on this issue.

Therefore, we strongly oppose recommendations that the FCC contract with Avatar to conduct any such analyses. *See, e.g.*, Comment from Infrastructure Coalition, *supra*, at 10 n.32 (suggesting that an "independent environmental expert" such as Avatar could "provide unbiased scientific analysis"). We also oppose the use of Woodlot Alternatives, which made significant errors in its assessment of the work of Dr. Joelle Gehring in its June 2005 comments that were prepared on behalf of CTIA – The Wireless Association, the National Association of Broadcasters and PCIA – The Wireless Infrastructure Association. *See* Letter from Michael

Altchul, CTIA – The Wireless Ass’n, to Catherine Seidel, Acting Chief, Wireless Telecomm. Bureau (June 24, 2005) (on file with FCC). We would also note here that these industry groups make up three of the four members of the Infrastructure Coalition, which hired Dr. Gehring to serve as the facilitator of meetings between industry and the conservation community to discuss means of solving the avian mortality from communication towers. The hiring of Dr. Gehring by these groups would reasonably be interpreted as demonstrating a level of support for her credibility and integrity and calls into question the validity of their claims that sound science is lacking.

Since the FCC’s last open comment period, several important works dealing with the issue of tower-caused mortality have been published in peer-reviewed journals and were referenced in our Petition. Interestingly, industry did not provide any specific comments on any of these works. These include the work of Dr. Joelle Gehring *et al.*, published earlier this year in the journal *Ecological Applications*, that suggests that avian fatalities can be reduced perhaps by 50–71% at guyed communication towers by removing non-flashing/steady-burning red lights. Joelle Gehring *et al.*, *Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions*, 19 *Ecological Applications* 505 (2009). This study largely forms the basis of the joint request to the Federal Aviation Administration (“FAA”) by industry and conservation groups to conduct a conspicuity study that will determine if the steady burning side lights can be removed without negatively affecting the visibility of towers to pilots. CTIA actively worked with us in support of the FAA conspicuity study. Rather than criticizing the science, industry should be doing more to promote sound science, and we would welcome industry funding for research by independent scientists.

While the FAA study will be important for the FCC to take into account as it implements revised rules, the FCC should not postpone its consideration of new rules until after the publication of the study or any FAA circular thereafter. Instead, the FCC rules can continue to incorporate whatever FAA circular is operative.

II. The Conservation Petition Is Grounded in the Law

We agree with industry commenters that the FCC should act promptly to resolve the court's remand, but more is required to clarify the NEPA and ESA responsibilities of agency and applicant. The rules proposed in the Petition do not impose additional or superfluous environmental requirements on the Commission or the applicant, they merely clarify existing requirements that will assist the Commission in fully complying with NEPA and the ESA. Several of the comment letters illustrate the misunderstanding surrounding the FCC's obligations to implement environmental laws and its performance in doing so. The rules, as procedural safeguards, also do not conflict with the provisions of the FCC's other obligations.

A. The FCC's Legal Obligations Are Not Limited to Addressing the Remand Order in *American Bird Conservancy*

The Commission's responsibilities are not limited to addressing the remand from the court of appeals in the Gulf Coast case. Taken as a whole, the court's opinion underscores the misapplication of NEPA and the ESA to the Antenna Structure Registration ("ASR") program. *See, e.g., American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033 (D.C. Cir. 2008) (describing the Commission's reasons for its refusal to take action pursuant to NEPA as "demonstrat[ing] an apparent misunderstanding of the nature of the obligation imposed by the statute"); *id.* at 1035 (describing as "inadequate" the Commission's explanation for refusing to undertake a programmatic ESA analysis and likening the Commission's standard as requiring

petitioners to perform their own environmental impact statement); *id.* (referring to the Commission’s ongoing practice of providing notice of applications after approval as a “Catch-22” and “a hollow opportunity to participate” that evades the CEQ and its own NEPA regulations). Compliance with the law will require additional steps by the Commission.

When formulating its proposed rules to provide adequate notice of ASR applications and in undertaking a programmatic review of the ASR program, the Commission must recall the purpose and intent of NEPA or the Council on Environmental Quality (“CEQ”) regulations. When devising NEPA rules or implementing NEPA’s requirements, the Commission must accomplish the twin goals of NEPA: first, “ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), 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 Commission’s environmental regulations and the environmental reviews carried out pursuant to those regulations must display a commitment to public participation *and* to taking a hard look at the environmental consequences of its actions.

We believe that the remand is best addressed by promulgating comprehensive, national rules that fulfill the purpose and intent of NEPA and the ESA. Because Petitioners and many of the industry commenters had submitted extensive comments on the notice provisions, our Petition did not delve into detail by proposing specific methods of providing public notice for ASR applications but instead referred to the Infrastructure Coalition’s petition for rulemaking regarding public notice and our comments. *See* Petition, *supra*, at 27 (citing comments of American Bird Conservancy et al. in *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).³ Rather, the Petition noted that the FCC has available to it many methods to involve the public and left it to the agency to choose how best to involve the public as circumstances demand.

Although the Commission may attempt to resolve the court's remand of the claim seeking a programmatic environmental impact statement ("EIS") with an environmental assessment ("EA"), we disagree that preparation of an EA concerned solely with the Gulf Coast region would be an efficient use of the Commission's resources. Both the scope and effects of the ASR program lend the program to a programmatic analysis nationwide in coverage.⁴ A programmatic EIS on a nationwide basis would address both the remand and the need for evaluation of the ASR program's impacts on the rest of the country. An EA limited to the Gulf Coast region would arbitrarily restrict the scope of the EIS by segmenting the ASR program and avoiding a cumulative impacts analysis, all in contravention of NEPA. *See Churchill County v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001) (using two-pronged inquiry for determining appropriateness of PEIS). While a programmatic EA may assist the Commission in determining

³ 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.

⁴ *See* 40 C.F.R. § 1502.4(a) (directing agencies to "use the criteria for scope" in order to define properly the subject of a NEPA document); *id.* § 1508.25 (directing agencies to determine scope by the action, alternatives, and impacts). 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). "Impacts . . . may be: (1) Direct; (2) indirect; (3) cumulative." *Id.* § 1508.25(c).

whether a nationwide programmatic EIS is necessary, it would not be a wise use of agency resources.

Many of the commenters also urge the Commission to continue its work in WT Docket 03-187 in order to address migratory bird issues. We do not disagree. *See, e.g.*, Petition, *supra*, at 44. However, the FCC's pledge to act swiftly on said docket has gone unfulfilled for more than three years and the FCC's published current agenda does not reflect any anticipated rulemaking in this area. *See* Unified Agenda of Federal Regulatory and Deregulatory Actions-Spring 2009, 74 Fed. Reg. 22018 (May 11, 2009) (omitting WT Docket 03-187 and its NPRM from "significant rulemaking proceedings"). That must change. The Commission must re-order its priorities to comply with environmental law.

B. Our Proposed Rules Implement Existing Law

Industry commenters have not offered any compelling legal justification for essentially exempting the ASR program from NEPA. Instead, they say that antenna structures have no impact on birds and that the proposed rules would be burdensome. These commenters benefit from and seek to maintain the FCC's current *laissez faire* approach to environmental law. Contrary to their claims, the rules we propose do not impose any requirement on applicants or the FCC that does not already exist in the law, although not in FCC regulations. Our proposed rules only clarify the obligations of applicants and the FCC in implementing NEPA, in order to ensure the direct, indirect and cumulative effects of antenna structures are fully considered before they are approved.

These commenters misunderstand the basic premise of the NEPA, the ESA and the MBTA: that federal agencies must examine potential environmental impacts before they occur, not wait for proof that such impacts are in fact severe. As the Court of Appeals noted in

American Bird Conservancy, the Commission cannot require “definitive evidence of significant impacts” before complying with NEPA:

The Commission gave two reasons for dismissing the request for a programmatic EIS: (1) “the lack of specific evidence . . . concerning the impact of towers on the human environment,” and (2) “the lack of consensus among scientists regarding the impact of communications towers on migratory birds.” *Order*, 21 F.C.C.R. at 4466 P 11. Neither reason is sufficient to sustain the Commission’s refusal to take action pursuant to NEPA, and together they demonstrate an apparent misunderstanding of the nature of the obligation imposed by the statute.

...

The *Order*’s demand for definitive evidence of significant effects-noting Petitioners’ failure to make a “scientific showing that the population of any specific bird species has decreased as a result of collisions”—plainly contravenes the “may” standard. *Order*, 21 F.C.C.R. at 4466 P 9.

American Bird Conservancy, Inc. v. FCC, 516 F.3d 1027, 1033 (D.C. Cir. 2008).

We seek these rule changes to align FCC practice with that required by NEPA and the ESA and their implementing regulations.⁵ The FCC’s interpretation and implementation of these Acts has been inconsistent with the Acts’ purpose, policy and requirements. As a result, it appears to several commenters who frequently interact with the Commission that the proposed rules are “superfluous,” Comments from Fixed Wireless Communications Coalition, to the FCC 13 (May 29, 2009) (on file with the FCC), or “burdensome new regulations,” *Id.* at 5-6. On the contrary, these rules reflect existing requirements that have not been rigorously performed by the agency and thus appear to be new.

For example, EAs submitted to the Commission regularly fail to consider alternatives to the proposed action as required by NEPA and CEQ regulations. *See* 40 C.F.R. § 1508.9(b)

⁵ The Petition noted changes to the ESA implementing regulations that purported to allow an agency to terminate informal consultation without receiving written concurrence from FWS. *See* 73 Fed. Reg. 76272 (Dec. 16, 2008). The Department of the Interior and Department of Commerce have withdrawn these regulations and returned the regulatory regime to the ‘status quo ante,’ “implement[ing] the regulations that were in effect immediately before the effective date of the regulation issued on December 16, 2008, entitled ‘Interagency Cooperation Under the Endangered Species Act.’” 74 Fed. Reg. 20421 (May 4, 2009).

(dictating 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.”). Applicants have become accustomed to this state of affairs, as one commenter claims that it “makes no sense” to consider alternatives because the EA is supposed to consider only the proposed action and thus alternatives would add no “useful content.” Comments from Fixed Wireless Communications Coalition, *supra*, at 10. 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).

While industry commenters may also take issue with the need for a statement of reasons to support a Finding of No Significant Impact (“FONSI”), *see, e.g.*, Comment from Fixed Wireless Communications Coalition, *supra*, at 10-11, that is what NEPA requires. “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). 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).

Amazingly, one industry commenter argued for continuing the lack of public involvement in the ARS regulatory process based on its concern that a clear commitment to public review and comment would obligate the Commission to consider public comments, “whether solicited or not.” Comment from Fixed Wireless Communications Coalition, *supra*, at

10. The FCC must abandon the status quo and comply with NEPA. Clearly, it must also educate the regulated community.

Industry commenters also misconstrue the purpose and use of categorical exclusions. In our Petition, we acknowledged a role for categorical exclusions under NEPA. Categorical exclusions are not, however, to meet “socially useful” goals – regardless of environmental impacts – but are to streamline environmental assessment for actions which do not affect the environment. Comment from Fixed Wireless Communications Coalition, *supra*, at 8.

Categorical exclusions can save agency time and resources when limited to actions which by their nature do not affect the environment. On the other hand, when there are questions about whether an action’s impacts are significant, the public deserves the opportunity to be part of the process for evaluating potential impacts. In such cases, the FCC should not use a categorical exclusion. To comply with NEPA, a categorical exclusion should be an exception reserved for situations of insignificant environmental impact.

With respect to our proposal for the FCC to do a programmatic EIS for the ASR program, comments from industry reflect that they still have not learned the lesson of the court’s decision in the Gulf Coast case when they oppose a programmatic EIS on the ground that that there is “insufficient broad-based, peer-reviewed evidence for the FCC to conclude that any avian-tower impacts significantly affect the human environment.” Comment from Infrastructure Coalition, *supra*, at 8 n.23. It is for the *agency* to undertake this analysis. An analysis is required if there *may* be significant impacts, and the impacts need not be demonstrated by peer-reviewed evidence. *See American Bird Conservancy*, 516 F.3d at 1033. *See also* Petition, *supra*, at 22 (“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”) (citations omitted); *id.* at 24 (“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.”) (citations omitted).

Lastly, regarding our proposal for ESA rules, industry commenters’ confusion regarding NEPA and ESA compliance is displayed in attempts to conflate NEPA compliance with ESA compliance. The CEQ regulations and FCC implementing regulations are not sufficient to make ESA determinations. *Cf.* Comment from Infrastructure Coalition, *supra*, at 10 (“rather than attempt to define the myriad factual circumstances under which programmatic consultation may be required, the Commission’s better course is to consider, during the preparation of the programmatic EA recommended above, whether ASRs in the Gulf Coast region cumulatively may affect ESA-listed species based upon the standard in the CEQ regulations”). Satisfying NEPA does not relieve an agency from complying with the mandatory consultation process of the ESA. *See* 50 C.F.R. § 402.06. This is further support for our proposed rules, as we specifically explained and proposed rules that would clarify the use of NEPA documents in ESA compliance. *See* Petition, *supra*, at 40-41.

C. Our Proposed Rules Are Not Inconsistent with the Telecommunications Act or Other FCC Obligations

Congress intended NEPA play a critical role in governmental decision-making. In enacting NEPA, Congress has demonstrated “a broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). *See also Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (Congress “[made] environmental protection a part of the

mandate of *every* federal agency and department.”). NEPA “supplement[s]” an agency’s existing authority by requiring it to consider environmental implications. 40 C.F.R. § 1500.6; *see also* 42 U.S.C. § 4335; *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 835 (6th Cir. 1981) (“NEPA supplements the existing goals of agencies and provides that agencies should also consider environmental concerns.”).

Industry commenters baldly assert that NEPA rules would undermine the goals of the American Recovery and Reinvestment Act (“ARRA”). Comment from Verizon Wireless, *supra*, at 7-8; Comment from Infrastructure Coalition, *supra*, at 14-16. Yet they offer no tangible examples of conflict between the two statutes. Congress explicitly considered the potential for conflict between its goals in the ARRA and in NEPA, and found none. Section 1609 of the ARRA states that reviews under NEPA are to be completed “on an expeditious basis and that the shortest existing applicable process under NEPA shall be utilized” and that “[a]dequate resources within this bill must be devoted” to doing so. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Division A, Title XVI, § 1609, 123 Stat. 115.⁶ In any event, it is highly unlikely that any rules will be proposed, promulgated in final form, and take effect before the end of fiscal year 2010, the date by which the Assistant Secretary of Commerce for Communications and Information is to ensure grants under the Broadband Technology Opportunities Program are made. ARRA, Div. B, Tit. VI, § 601(d)(2).

There is also no conflict between the requirements of NEPA and the Telecommunications Act, notwithstanding industry commenters’ vague assertions to the contrary. *See, e.g.*, Comment from Infrastructure Coalition, *supra*, at 11-12. Again, industry comments offer no tangible

⁶ Moreover, the Senate explicitly rejected an attempt to waive NEPA reviews for projects funded via ARRA if not completed within 270 days. *See* Noelle Straub, *Senate defeats measure to curtail NEPA reviews for stimulus projects*, Greenwire (Feb. 6, 2009).

examples of conflict between the two statutes and the Commission can construe both statutes harmoniously to give effect to both.

In short, the rules we have proposed are not in any way inconsistent with the FCC's obligations under environmental laws.

III. Industry's Concerns About The Costs Of Construction, Retrofitting, and Mitigation Are Based On A Misconception Of The Petition, Premature, and Speculative.

Industry commenters' arguments about costs and such matters in support of the status quo are not relevant at this stage. The rules proposed in Petition are procedural in nature, written not to produce any particular result – contrary to commenters' claims – but to ensure a thorough evaluation of the ASR program and ASR applications.

We offered the most recent research on the construction and lighting of antenna structures to inform the Commission as to the variety and type of mitigation measures available to it – should the need arise. The proposed rules do not propose any specific construction, lighting, locating or other requirements on applicants or the Commission.

At bottom, industry concerns about their costs of construction, retrofitting, and mitigation are based on a misconception of our Petition, which does not address the specifics of how existing towers should be altered or new towers should be constructed. Because these issues are not addressed in the Petition, industry's comments relating to the cost of compliance are irrelevant and premature, particularly those dealing with retrofitting, and should not be considered.

IV. The Commission Should Act Expeditiously, Grant The Petition, And Issue A Notice Of Proposed Rulemaking, Including Proposed Rules For Public Comment.

The time is long overdue for the Commission to address the impact of communications towers on migratory birds. As recounted in the Petition, for over a decade, ABC, Defenders, and Audubon, along with other conservation organizations, FWS officials, and other scientists have been urging the Commission to address bird mortality at communications towers and to comply with NEPA, ESA, and the MBTA in its administration of the ASR program. Based on the low end annual estimate for tower-caused bird mortality, more than 40 million birds may have been killed since this issue was brought to the FCC's attention.⁷ After more than a decade of amassing thousands of pages of data and comments on bird impacts in two open dockets, the Commission has accumulated a comprehensive record that calls for expeditious nationwide action to comply with environmental law.

First, the Commission must grant our Petition. The Petition demonstrates that the Commission has violated NEPA by failing to take a hard look at the environmental impact of its actions and by establishing a general standard that environmental analysis is *not* required for approval of antenna structures except in limited narrowly defined circumstances when the proper standard is exactly the opposite: under regulations adopted by the CEQ and applicable to all federal agencies, environmental analysis is required for federal actions except in limited, narrowly defined circumstances. The Petition also demonstrates that the Commission has improperly limited public involvement and has required proof that an action *will* affect the environment when the proper standard is proof that an action *may* affect the environment. The Petition further demonstrates that the Commission has violated the ESA by failing to consult

⁷ The FWS has estimated that some 4,000,000 to 5,000,000 birds are killed at communications towers each year. 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).

with FWS to determine whether any species listed or proposed to be listed may be affected by proposed tower registrations. Finally, as the Petition notes, the MBTA prohibits the killing or other “taking” of migratory birds without a permit and that there can be no dispute that FCC-registered towers kill migratory birds protected under the MBTA. Based on the record before the Commission, the Petition should be granted.

Second, the Commission, after consultation with the FWS and CEQ, must issue a notice of proposed rulemaking to bring the ASR program into compliance with environmental law, including specific proposed rules, for public comment. The time for seeking general comments on possible approaches and outstanding issues has come and gone. Publishing proposed rules will give the public an opportunity to provide focused, meaningful input, which will assist the Commission in its decision-making process.

Petitioners are not alone in calling on the Commission to include in a notice of proposed rulemaking the text of proposed rules for comment. On April 30, 2009, Rep. Joe Barton, ranking member of the House of Representatives Committee on Energy and Commerce, along with Rep. Cliff Stearns, introduced H.R. 2183, “To improve public participation and overall decision-making at the Federal Communications Commission,” H.R. 2183, 111th Cong. (2009), which has been referred to the Committee. Among other things, the bill mandates that the FCC publish proposed rules for comment before promulgating final rules. In his statement on the bill, Rep. Barton explained:

First, the bill would codify the not-so-radical notion that the FCC should let the public see proposed rules before it adopts them, and should provide everyone with a realistic amount of time to comment. . . . Not only will this improve everyone’s confidence in the FCC’s decisions, it will improve the decisions themselves, both because the agency will be forced to exert more rigor in developing policy, and because the public and regulated community can often be the source of the best ideas.

155 Cong. Rec. E1022 (daily ed. Apr. 30, 2009) (statement of Rep. Barton). The Commission should implement this reform on its own now and begin with the rulemaking to comply with environmental law.

Finally, as part of the rulemaking, the Commission should prepare an ASR programmatic environmental impact statement based on the ample record before the Commission.

V. Conclusion

For the reasons stated in our Petition and in these reply comments, we urge the Commission to act expeditiously, issue proposed rules for comment, and grant the other relief requested in our Petition.

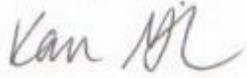
Respectfully submitted,



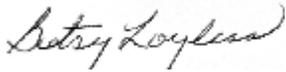
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