

August 4, 2011

**VIA EMAIL AND ECFS**

Austin Schlick, Esq.  
General Counsel  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: *Ex Parte Written Communication*  
WT Docket Nos. 08-61, 03-187

Dear Mr. Schlick:

At your invitation, the Infrastructure Coalition (CTIA–The Wireless Association<sup>®</sup>, the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA–The Wireless Infrastructure Association) and the Conservation Groups (the American Bird Conservancy, Inc., Defenders of Wildlife, and the National Audubon Society) have independently researched the legal significance of the fact that cats, buildings (in particular, their windows), and power lines kill vastly more birds than do communications towers. In this letter, undersigned counsel to the Infrastructure Coalition will address whether significant adverse environmental effects independent of a federal action under consideration can be considered in determining whether the federal action’s significantly lesser effects constitute a significant environmental impact or, alternatively, may be a basis for a finding of no significant impact (“FONSI”).

There is surprisingly little case law bearing directly on this issue. The case law does make clear, however, that agencies may consider the effect of their actions not only on the immediate area affected, but in a broader context. Analysis encompassing this broader context may cause the agency action to be viewed as having a minimal level of impact, in comparison with other environmental effects. Moreover, the standard of review is highly deferential; thus, an agency decision that addresses the record and makes findings consistent with record support should be treated deferentially by the courts and thus have a reasonable expectation of affirmance.

**I. BACKGROUND**

The principal causes of avian mortality are not in dispute, and while the absolute level of mortality due to particular causes is subject to a significant margin of error, the general ranking of human-related causes of avian mortality is fairly well accepted. One study that was cited by

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the FCC in its presentation at its April 1, 2011 PEA workshop,<sup>1</sup> by Erickson *et al.*, found that buildings, power lines, and cats were the three largest causes of avian mortality, responsible for 58.2, 13.7, and 10.6 percent of deaths respectively, while communications towers were responsible for 0.5 percent of avian mortality.<sup>2</sup> In short, the Erickson study found that the three largest human-related causes of avian mortality were responsible for approximately 82.5 percent of avian mortality, which is 165 times greater than the percentage of avian mortality attributed to towers.<sup>3</sup> In fact, the pie chart that was produced by the FCC and provided at the April 1 PEA workshop graphically demonstrates that towers constitute one of the three smallest enumerated sources of avian mortality.<sup>4</sup>

In light of the fact that these figures show that communications towers are responsible, at most, for a minute fraction of human-related bird deaths, and three other human-related sources of avian mortality account for the vast majority of that mortality, the issue arises whether communications towers in general can reasonably be considered a significant source of avian mortality and thus a significant impact on the human environment.

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<sup>1</sup> Wireless Telecommunications Bureau, *FCC Antenna Structure Registration Program PEA Workshop*, at 16 [Cumulative Impact Analysis], available at [http://wireless.fcc.gov/amateur/PEA\\_1April\\_Workshop\\_presentation.pdf](http://wireless.fcc.gov/amateur/PEA_1April_Workshop_presentation.pdf).

<sup>2</sup> Wallace P. Erickson, Gregory D. Johnson, and David P. Young Jr., *A Summary and Comparison of Bird Mortality from Anthropogenic Causes with an Emphasis on Collisions*, USDA Forest Service Gen. Tech. Rep. PSW-GTR-191, at 1039 [Table 2, *Summary of predicted annual avian mortality*] (2005), available at <http://studentaffairs.case.edu/farm/doc/birdmortality.pdf>. The percentage of avian deaths attributed to sources other than towers could have been even higher but for the fact that Erickson *et al.* did not consider certain other human-related causes of avian mortality, including “electrocution, oil spills[,] fishing by-catch[, and] . . . loss of habitat.” *Id.* at 1037.

<sup>3</sup> Researchers cannot agree on concrete percentages or which factors should be ranked first, second or third. For example, some researchers believe that habitat loss is the principal cause of avian mortality, ahead of buildings (and, in particular, their windows). See, e.g., Daniel Klem, Jr., *Avian Mortality at Windows: The Second Largest Human Source of Bird Mortality on Earth*, Proceedings of the Fourth International Partners in Flight Conference: Tundra to Tropics 244-251 (2008), available at [http://training.fws.gov/CSP/Resources/mig\\_birds/handouts/avian\\_mortality\\_at\\_windows.pdf](http://training.fws.gov/CSP/Resources/mig_birds/handouts/avian_mortality_at_windows.pdf). On the other hand, recent literature asserts that the level of avian mortality attributable to cats is considerably higher than previously believed. See Nico Dauphiné and Robert J. Cooper, *Impacts of Free-Ranging Domestic Cats (Felis Catus) on Birds in the United States: A Review of Recent Research with Conservation and Management Recommendations*, Proceedings of the Fourth International Partners in Flight Conference: Tundra to Tropics, 205-219 (2009), available at [http://www.partnersinflight.org/pubs/McAllenProc/articles/PIF09\\_Anthropogenic%20Impacts/Dauphine\\_1\\_PIF09.pdf](http://www.partnersinflight.org/pubs/McAllenProc/articles/PIF09_Anthropogenic%20Impacts/Dauphine_1_PIF09.pdf). This filing uses the Erickson figures cited by the FCC as a convenient representation of the relation of communications towers to the more significant threats for purposes of argument, but does not endorse any particular set of figures.

<sup>4</sup> See *supra* note 1; see also Erickson, *et al.*, *supra* note 2, at Table 2.

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The National Environmental Policy Act of 1969 (“NEPA”)<sup>5</sup> requires federal agencies to prepare an Environmental Impact Statement (“EIS”) if there are substantial issues as to whether a project or program may have a significant environmental impact.<sup>6</sup> Significance is determined by evaluating both the context of the action and the intensity, or severity, of its impact.<sup>7</sup> The Council on Environmental Quality (“CEQ”) has issued implementing regulations which list ten “intensity” factors that an agency must consider in determining what impact a project may have, including potentially significant cumulative impacts.<sup>8</sup>

## II. RELEVANT CASE LAW

There does not appear to be a substantial amount of published case law specifically on how to weigh major, highly significant external sources of adverse environmental impact when considering whether a much less drastic environmental impact of a federal action constitutes a significant impact or not. This may be because government decisions that such an action will have a relatively minor environmental effect are less likely to be challenged than an action with arguably more significant environmental effects. It may also be the result of it being intuitively obvious that a federal action with a relatively minor effect, in comparison with other external effects on the same environmental issue, is an appropriate subject for a FONSI or may not even be worthy of study.

### A. *MAGNITUDE OF EFFECT IS PROPERLY WEIGHED AGAINST THAT OF OTHER EFFECTS IN ASSESSING SIGNIFICANCE*

The relevant case law we found strongly suggests that the magnitude of a federal action’s effect on the environment is properly weighed against the magnitude of other effects on the same environmental issue.

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<sup>5</sup> 42 U.S.C. § 4332(2)(C)(1975).

<sup>6</sup> 42 U.S.C. § 4332(2)(C)(i-v)(1975).

<sup>7</sup> 40 C.F.R. § 1508.27 (2008) (“Significantly” as used in NEPA requires considerations of both context and intensity.).

<sup>8</sup> The intensity factors include: (1) “Impacts that may be both beneficial and adverse”; (2) “The degree to which the proposed action affects public health or safety”; (3) “Unique characteristics of the geographic area”; (4) Whether the environmental effects “are likely to be highly controversial”; (5) Whether the environmental effects “are highly uncertain or involve unique or unknown risks”; (6) Whether the action “may establish a precedent for future actions with significant effects”; (7) “Whether the action is related to other actions with individually insignificant but cumulatively significant impacts”; (8) Whether the action may adversely affect historic places; (9) Whether the action “may adversely affect an endangered or threatened species” or its critical habitat; and (10) “Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.*

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In *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975), the court affirmed the denial of an injunction against regulations that permitted hunting of certain species. The agency had found that habitat was the most important factor with regard to the species' populations, and that mortality due to hunting caused, at most, a short-term reduction in population.<sup>9</sup> Thus, in a year when the survivability of the species was not threatened by habitat considerations, the lesser risk, hunting subject to harvest limits, was permitted.<sup>10</sup> While this decision suggests that a comparison of the relative risks to the environment is appropriate, it did not reach the merits, because it only addressed the propriety of a preliminary injunction, and the decision turned on the court's determination that "[t]o equate the death of a small percentage of a reasonably abundant game species with *irreparable* injury without any attempt to show that the well-being of that species may be jeopardized is to ignore the plain meaning of the word."<sup>11</sup>

In *Heartwood, Inc. v. U.S. Forest Service*, 380 F.3d 428 (8th Cir. 2004), the court upheld the Forest Service's FONSI regarding the effect of allowing clearing and burning of timber in a particular forest area on the population of a certain species of bats. The court noted that the agency found that there were substantial populations of the species in forests 35, 80, and 100 miles away, while there were no known caves or mines in the forest at issue that would be suitable winter habitat. Thus, while there was evidence that the clearing and burning would have an adverse impact on the bat species, the agency found that the effects would be minimal, and issued a FONSI.<sup>12</sup> The court noted that the effects, should they occur, "would not have a significant impact on the species."<sup>13</sup>

We consider these cases relevant and instructive for several reasons. The cases recognize that an agency's analysis must take into account the proportionality of the factor that is being analyzed against the other factors at play. Regardless of the estimates used, there is consensus that towers represent one of the smallest potential factors affecting avian mortality, and that other factors, over which the FCC has no control (cats, buildings, and power lines), dwarf towers as a source of avian mortality. Comparatively speaking, towers are not a statistically significant source of avian mortality: Even if tower-related avian mortality were to increase tenfold, towers would still be one of the three least significant human-related contributors to avian mortality.<sup>14</sup>

#### B. AN AGENCY'S FONSI ANALYSIS IS GIVEN DEFERENCE BY THE COURTS

The case law makes clear that the standard of review of agency FONSI determinations is highly deferential, requiring only a "hard look" at the environmental consequences" and a

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<sup>9</sup> 530 F.2d at 986.

<sup>10</sup> *Id.* at 987.

<sup>11</sup> *Id.*

<sup>12</sup> 380 F.3d at 431-32.

<sup>13</sup> *Id.* at 432.

<sup>14</sup> See FCC pie chart, *supra* note 1; Erickson *et al.*, *supra* note 2, at Table 2.

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“sufficient explanation” of how the agency arrived at its result. *Galveston Beach to Bay Preserve v. U.S. Army Corps of Engineers*, 2010 U.S. DIST. LEXIS 87633, \*7, \*10 (S.D. Tex. 2010) (quoting and citing *Sabine River Authority v. U.S. Department of Interior*, 951 F.2d 669, 676, 678 (5th Cir. 1992)).<sup>15</sup> Thus, when a federal action affects only three percent — “a relatively small percentage” of a particular type of area, “on a regional or statewide scale, these impacts are not considered cumulatively significant.”<sup>16</sup> The court found that the agency’s expressed rationale constituted a “rational explanation” for its finding of no significant cumulative environmental impact.<sup>17</sup>

The *Galveston* case involved a comparison of affected areas vs. areas not affected by the federal action, just as in the present case the comparison is between the source of avian mortality affected by FCC action (*i.e.*, towers) vs. sources not subject to FCC action. In *Galveston*, the agency concluded that when a federal action affects “a relatively small percentage” of the total area, the impact of the federal action, even on a cumulative basis, was not significant, thus justifying issuance of a FONSI. In the case of towers, the percentage affected by agency action is even lower — 0.5%, as opposed to 3% — and thus provides a rational explanation for a finding of non-significance that would be entitled to judicial deference.

Consistent with this deferential standard, in *Save Our Sonoran, Inc. v. Flowers*,<sup>18</sup> the court deferred to an agency explanation that while urban wildlife habitats would be “adversely impacted” by a project, “these impacts are not considered cumulatively significant,” because nearly as many acres of open space would remain undisturbed as would be lost due to the development project at issue.<sup>19</sup> The court concluded that the agency had adequately “considered the relevant factors and articulated a rational connection between the facts found and the choices made.”<sup>20</sup> The court there also affirmed the agency’s decision to consider whether the emissions from the additional traffic resulting from the agency action would have a significant effect by looking at the emissions in the context of cumulative effect on statewide and countywide traffic data, which resulted in the determination that the project would be a “relatively insignificant component” of countywide growth and thus its impacts on vegetation and wildlife.<sup>21</sup> The court

<sup>15</sup> *Accord Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976); *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000); *see also Save Our Sonoran, Inc. v. Flowers*, 2006 U.S. DIST. LEXIS 26185, \*26 (D. Ariz. 2006) (“When an agency decides not to prepare an EIS, ‘the decision not to do so may be overturned only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”) (quoting *Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004)).

<sup>16</sup> 2010 U.S. DIST. LEXIS 87633 at \*12 (quoting agency addendum to environmental assessment).

<sup>17</sup> *Id.* at \*15.

<sup>18</sup> *See supra* note 15.

<sup>19</sup> 2006 U.S. DIST. LEXIS 26185 at \*46-\*47.

<sup>20</sup> 2006 U.S. DIST. LEXIS 26185 at \*47 (quoting *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

<sup>21</sup> *Id.* at \*48-\*49.

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concluded that “the Corps has analyzed the cumulative effects at the State, County and local level and reached the conclusion that those effects would be insignificant. The decision appears fully informed and well-considered, and, thus, the Corps has fulfilled its NEPA obligation in discussing the significance of the proposed federal action.”<sup>22</sup> The court agreed with the agency’s determination that consideration of the effects of the proposed action against other existing activities was consistent with employing the “context” and “intensity” components of “significance.”<sup>23</sup>

*C. RATHER THAN IGNORING AVIAN CONCERNS, THE FCC HAS TAKEN STEPS TO REDUCE AVIAN MORTALITY*

Not only is the effect of towers on avian mortality statistically insignificant, it is undisputed that once the FCC’s Interim ASR Rules become effective, tower-related avian mortality will decrease further. Assuming the FCC follows the suggestions in the Memorandum of Understanding on which the draft rules are (in part) based,<sup>24</sup> the interim rules would contain incentives to collocate and to construct towers not exceeding 450 feet, where practicable. Further, the lighting preferences contained in the proposed rules will disfavor steady burning L-810s, and it is widely expected that the non-usage of such lights could substantially reduce avian related mortality. As a result, the draft Interim ASR Rules, once effective, will reduce a significant portion of the avian mortality that would otherwise have been attributable to towers authorized in the future.

The Coalition is aware that these measures are the product of the concerted efforts of the public and private sectors. The FCC, the Infrastructure Coalition, and the Conservation Groups have each played an important role in impressing upon the FAA the importance of this issue and the FAA is to be commended for the Conspicuity Study it has undertaken to determine that non-usage of steady burning L-810s will not endanger air safety. As a result of all of its efforts, it is reasonable for the FCC to expect that tower related avian mortality, which is already statistically insignificant, will decrease even further.

### III. CONCLUSION

The case law strongly suggests that whenever the adverse factor that an agency is considering is dwarfed in its significance by other factors, a FONSI may be appropriate, and will be afforded considerable deference from reviewing courts. The Coalition is heartened that 99.5 percent of avian mortality is attributable to causes other than communications towers and that the

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<sup>22</sup> *Id.* at \*49.

<sup>23</sup> *Id.* at \*48-\*49.

<sup>24</sup> “Memorandum of Understanding between the Infrastructure Coalition and the Conservation Groups concerning Interim ASR Standards,” Attachment to Letter from William J. Sill and Greer S. Goldman to Marlene H. Dortch, Secretary, WT Docket Nos. 08-61 & 03-187 (May 4, 2010), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020445454>.

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FCC, the Infrastructure Coalition, and the Conservation Groups are attempting to take measures to further reduce that remaining 0.5 percent. However, the numbers speak for themselves, and a finding that towers in general cannot present a significant adverse impact is appropriate.<sup>25</sup> Moreover, in this case, the Commission can issue a mitigated FONSI, based on evidence that its adoption of Interim ASR rules will dramatically reduce the susceptibility of birds to collisions with towers.

Respectfully submitted,

By: /s/ William J. Sill  
William J. Sill  
Michael Deuel Sullivan  
*Counsel for the Infrastructure Coalition*

cc: Office of the Secretary (via ECFS)  
Greer Garson, Esq. (via email)

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<sup>25</sup> We note that if any member of the public is concerned that a particular species at a particular location could be significantly affected by a particular tower, he or she can take advantage of the FCC's proposed procedure for filing a Request for Environmental Processing.