

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
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In re AMERICAN BIRD CONSERVANCY  
and FOREST CONSERVATION COUNCIL,  
Petitioners.

No. 05-1112

**PETITION BY AMERICAN BIRD CONSERVANCY AND  
FOREST CONSERVATION COUNCIL FOR WRIT OF MANDAMUS  
AND RELIEF FROM UNREASONABLY DELAYED AGENCY ACTION**

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## **GLOSSARY OF ACRONYMS AND ABBREVIATIONS**

<b>ABC:</b>	American Bird Conservancy
<b>ESA:</b>	Endangered Species Act
<b>FCC:</b>	Federal Communications Commission
<b>MBTA:</b>	Migratory Bird Treaty Act
<b>NEPA:</b>	National Environmental Policy Act
<b>USFWS:</b>	United States Fish and Wildlife Service

## PETITION FOR WRIT OF MANDAMUS

Pursuant to Rule 21 of the Federal Rules of Appellate Procedure and Rule 21 of the Rules of this Circuit, Petitioners American Bird Conservancy (“ABC”) and Forest Conservation Council (“Council”) (“Petitioners”), respectfully request that this Court order the Federal Communications Commission (“FCC”) to take final action on the Petitioners’ petition for environmental compliance, filed with the FCC on August 26, 2002.

### STATEMENT OF FACTS

Petitioners and their members are concerned about mortality of birds that strike communication towers while the birds are in flight. In 2002, Petitioners filed an administrative petition with the FCC, requesting the Commission to comply with applicable environmental statutes in its communication tower licensing program. However, the FCC has failed to resolve Petitioners’ requests or otherwise address Petitioners’ concerns. As further discussed below, the FCC’s delay is unreasonable and harms the interest of Petitioners’ members in conserving birds.

#### **I. FATAL COLLISIONS OF MIGRATORY BIRDS AT COMMUNICATION TOWERS**

Fatal collisions of birds with communication towers have been well documented throughout the United States since communication towers were first developed. *See* U.S. Fish and Wildlife Service, Avian Mortality at Communication Towers: A Review of Recent Literature, Research and Methodology (March, 2000) (Exhibit A at 4). It has been estimated that communication towers in the United States could cause as many as fifty million bird deaths every year. *See* U.S. Fish and Wildlife Service biologist Albert M. Manville, II, Ph.D, Comment to FCC.<sup>1</sup> The United States Fish and Wildlife Service (“USFWS”) Division of Migratory Bird Management concluded on March 9, 2005, that “[t]he population impacts to migratory songbirds

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<sup>1</sup> Cited in Avatar Environmental, LLC, Notice of Inquiry Comment Review, Avian / Communication Tower Collisions (2004), Exhibit B at 3-23.

(and other avifauna) and impacts to their population status are frightening and biologically significant.” See USFWS Reply Comments to FCC at 2 (Exhibit C at 2).

Documented mortalities at communication towers include mortality of two federally designated endangered species (the Red Cockaded woodpecker and the Kirtland’s Warbler), two federally designated Birds of Conservation Concern (the Bay Breasted Warbler and Blackpoll Warbler), and over fifty species that are in decline or require special management attention according to the USFWS’ *Nongame Birds of Management Concern List* or the *Partners in Flight Watch List*. See *id.* at 3-64; and Shire, G.K. Brown and G. Winegrad, *Communication Towers: A Deadly Hazard to Birds* (June, 2000) (Exhibit D at 3). In addition, several species killed by communication towers are listed as Extremely High Priority on the Partners in Flight Watch List, including the Swainson’s Warbler, Cerulean Warbler, Bachman’s Sparrow and Henslow’s Sparrow. See Shire and Winegrad, *Communication Towers*, (Exhibit D at 3).<sup>2</sup> Moreover, bird mortality at communication towers contributes to a suite of factors that are causing the decline of bird populations.

While communication tower collisions kill many bird species, neotropical songbirds are most vulnerable, and thrushes, vireos and warblers are particularly at risk. See Manville, A. M. II, *The ABCs of Avoiding Bird Collisions at Communication Towers: The Next Steps* (December 2, 1999) (Exhibit F at 2). According to a recent detailed analysis of species-specific mortality at communication towers, for the ten avian species killed most frequently at towers, total annual mortality is estimated to be as high as 4.9 million individuals for each species,

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<sup>2</sup> The species assessments cited in this Petition, including endangered and threatened species lists and the other watch lists, apply several criteria to estimate overall vulnerability of the species to endangerment. Consequently, it is impossible and misleading to express the significance of mortality estimates for each species without a corresponding analysis of all factors affecting the survival of each affected bird species. For example, continued viability of a particular bird species may require a much higher total population for that species to avoid inevitable extinction than is required for other species. See Declaration of Philip Stouffer (Exhibit E at ¶ 10.d).

including two U.S. FWS Birds of Conservation Concern, Bay-breasted Warbler and Blackpoll Warbler. *See* Travis Longcore, Ph.D, *et al.*, Scientific Basis to Establish Policy Regulating Communications Towers to Protect Migratory Birds<sup>3</sup> (February 14, 2005) (Exhibit G at 5). The most conservative estimates demonstrate that each of the top ten bird species documented killed at communication towers lose between 85,000 and 490,000 individuals per year to tower collisions. With respect to the two U.S. FWS Birds of Conservation Concern, the most conservative estimates also show that approximately 225,000 individuals of the Bay-Breasted Warbler and approximately 136,000 individuals of the Blackpoll Warbler are killed by towers per year. *Id.* Thus, even at the lowest end of estimated mortality, nineteen USFWS Birds of Conservation Concern each have over 10,000 fatalities at communication towers annually. *Id.* at 5-6.

These fatalities have the potential to adversely affect endangered and threatened bird species in a critical way. For example, according to Longcore, et al., *id.*:

Discovery of any one specimen of an endangered species at a communications tower would be an indicator of a significant impact on the population of the species. If just one Kirtland's Warbler had been part of the dataset that we analyzed in Table 1, then the interpretation would be that between approximately 20 and 200 individuals of this species are killed at communications towers each year. The total population size of Kirtland's Warbler is only ~2,000 breeding individuals each year. Each breeding pair produces on average 2.2 fledglings, meaning that approximately 4,200 birds migrate each year. If our extrapolation is close, then communications towers would kill between 0.5% and 5% of the migrants of this species each year.

*See* Longcore, Ph.D, *et al.* (Exhibit G at 10) (internal citations omitted). Similarly, the Longcore analysis showed that the “population effects from tower mortality could affect viability of Red-Cockaded Woodpecker,” another federally ESA-designated endangered

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<sup>3</sup> This study was prepared for the Petitioners, Defenders of Wildlife and The Humane Society of the United States, and was included in comments submitted to the FCC by those organizations on February 14, 2005.

species. Based on just two recovered carcasses of the Red-Cockaded Woodpecker at communication towers,<sup>4</sup> the analysis estimated that 40 to 400 individuals are killed by communication towers annually; in other words 0.4% to 4% of the total population. *Id.*

Simple tower design modifications can minimize bird mortality at communication towers. For example, as early as 2000, studies showed that bird deaths could be minimized through the use of visual daytime markers, minimized and down-shielded lighting, use of white strobe lights rather than red pulsating lights, minimal or no use of guy wires, and co-location of antennae on a single structure. *See* Shire, *et al.*, 2000 (Exhibit D at 19). *See also* Manville, A. M. II, The ABCs of Avoiding Bird Collisions (Exhibit F at 8-9). Based on this knowledge, other federal agencies have recognized the need to modify tower design to avoid bird mortality. For example, in 2000 the USFWS issued guidelines for siting and construction of communication towers to avoid bird strikes. *See* USFWS, Jamie Rappaport Clark, Letter to Regional Directors (September 14, 2000) (Exhibit H at 3). Similarly, the Federal Aviation Administration (“FAA”) recently found the avian mortality problem sufficiently critical to issue an advisory circular to its Regional Air Traffic Division Managers, advising them to consider using “medium intensity white strobe lights for nighttime conspicuity” as “the preferred system over red obstruction lighting systems.” *See* FAA, Program for Air Traffic Airspace Management Advisory Circular (AC) 70/7460-1 (April 6, 2004) (Exhibit I). Nonetheless the FCC, the agency charged with licensing and regulating communication towers for the benefit of the public interest, has not incorporated these design modifications into its regulations.

Petitioners are concerned about the potentially significant adverse effects of FCC-approved communication towers on bird mortality. Accordingly, the Petitioners filed a petition

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<sup>4</sup> *See* Shire and Winegrad, Communication Towers, (Exhibit D at 12) (documenting two Red-Cockaded Woodpeckers killed at one tower).

with the FCC on August 26, 2002, (“2002 Petition”) (Exhibit J), which targeted FCC’s national communication tower registration policies.<sup>5</sup> The FCC has taken no action that plaintiffs are aware of on the 2002 Petition, despite numerous requests by the Petitioners for a final decision, including meetings with appropriate FCC staff and attorneys. Since the Petition was filed on August 26, 2002, the FCC has allowed thousands of new towers to be erected in the Gulf Coast region and nationally, many over 500 feet in height. Many do not meet the requirements of applicable environmental statutes. *See, e.g.*, USFWS, Accomplishment Reporting System (“ARS”), available online at <https://ars.fws.gov> (September 2003) (Exhibit K) (reporting FCC’s failure to comply with environmental statutory requirements in licensing 180 towers in Michigan).

## **II. THE FCC’S TOWER LICENSING PROGRAM**

The Communications Act of 1934 directed the FCC to grant licenses for communication facilities “if public convenience, interest, or necessity will be served thereby,” 47 U.S.C. § 307(a), and to “[r]egulate the kind of [communication] apparatus to be used with respect to its external effects. . . .” 47 U.S.C. § 303(e). Commission regulations require certain towers – generally those over 200 feet in height – to obtain a license and register with the agency. 47 C.F.R. §§ 17.4 and 17.7. FCC regulations also require tower facilities to comply with the Commission’s requirements for such external elements as lighting, painting and siting of antenna structures. 47 C.F.R. § 17.22. The FCC is authorized to suspend a license if the licensee violates any law that the FCC is authorized to administer. 47 U.S.C. § 303(m).

Currently there are tens of thousands of communication towers in the U.S. that are required to be registered with the FCC. For example, Texas, with much critical habitat for

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<sup>5</sup> Petitioners also filed a separate petition relating to communication towers in Hawaii, and have sent a 60-day notice of intent to sue to the FCC concerning that petition. *See* ABC and Forest Conservation Council Petition to FCC, April 9, 2004 (“2004 Petition”) (Exhibit L).

numerous migratory bird species, has at least 10,000 existing or planned and permitted towers registered by the FCC. *See* FCC Antenna Structure Registration Search,<sup>6</sup> available online at <http://wireless.fcc.gov/antenna/> (February 16, 2005) (Exhibit M). According to the FCC's database, today there are nearly 23,000 existing or planned and permitted towers in the Gulf Coast region that are registered by the FCC, including Texas, Louisiana, Mississippi, Alabama and Florida, along with a constant flow of applications for new towers. *Id.*

The FCC's Chairman has acknowledged that the Commission's responsibilities under environmental statutes "most prominently come into play regarding the construction of communications towers and their impact on the environment and historic sites . . . ." *See* Statement by Former FCC Chairman Michael K. Powell (May 1, 2003) (Exhibit N at 1-2). Notwithstanding this fact, the FCC has "categorically excluded from environmental processing" all but a few types of antenna structures. *See* 47 C.F.R. § 1.1306.<sup>7</sup> Significantly, however, FCC regulations do not exclude individual communication towers that may affect ESA-listed threatened or endangered species or designated critical habitats, or that are likely to jeopardize the continued existence of any proposed endangered or threatened species, or that are likely to result in the destruction or adverse modification of proposed critical habitats.<sup>8</sup> To the contrary, the FCC's regulations declare that "Commission actions with respect to the [foregoing] types of

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<sup>6</sup> Online search for freestanding or guyed towers, poles and "antenna tower arrays" registered with FCC.

<sup>7</sup> NEPA regulations permit federal agencies to create "categorical exclusions," categories of actions that "do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect" in procedures adopted by the federal agency. *See* 40 C.F.R. §§ 1507.3(b)(2)(ii) and 1508.4.

<sup>8</sup> In addition, the following types of towers require preparation of an EA prior to licensing under FCC regulations: 1) towers to be located in an officially designated wilderness area or wildlife preserve; 2) towers that may affect places that are listed, or are eligible for listing, in the National Register of Historic Places; 3) towers that may affect Indian religious sites; 4) towers that are to be located in a flood plain; 5) towers whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion) (*See* 47 C.F.R. §§ 1.1306(a) and 1.1307(a)(1) to (7)); 6) towers to be equipped with high intensity white lights and located in residential neighborhoods (*See* 47 C.F.R. §§ 1306(b) and 1.1307(a)(8)); and 7) towers that result in human exposure to radiofrequency radiation in excess of the applicable safety standards (*See* 47 C.F.R. §§ 1.1306(c) and 1.1307(b)).

facilities may significantly affect the environment and thus require the preparation of EAs by the applicant . . . and may require further Commission environmental processing.” 47 C.F.R. § 1.1307(a) (citations omitted). Tellingly, the checklist under 47 C.F.R. § 1.1307 does not mention tower impacts on migratory birds – and the FCC has repeatedly refused to add migratory birds to the list of environmental concerns that would trigger an EA by tower applicants.

The FCC has designated each of its licensees, applicants, tower companies and their representatives to act as non-federal representatives for purposes of consultation and preparation of a biological assessment under Section 7 of the ESA. *See* FCC Response to Petition for Writ of Mandamus (April 30, 2003) (Exhibit O at 6). The FCC’s regulations provide that “[w]ith respect to actions specified under §1.1307 (a)(3) and (a)(4),” i.e. those actions that require preparation of an EA, “the Commission shall solicit and consider the comments of the Department of Interior. . . in accordance with their established procedures. See Interagency Cooperation—Endangered Species Act of 1973, as amended, 50 CFR part 402.” However, as described below, the FCC has eviscerated its EA “requirement” by allowing tower applicants to avoid preparation of an EA simply by declaring, without supporting documentation, that the proposed tower does not create any significant environmental effect. Thus, if a licensee deems the EA requirement inapplicable to its proposed tower, the FCC conducts no further inquiry into its own obligations under the applicable environmental statutes. Moreover, as numerous challenges by the Petitioners to individual licensing decisions have demonstrated, in many cases when the licensees did prepare an EA, that EA was inadequate.

Therefore, as it is currently implemented, the FCC’s tower licensing program fails to ensure that towers that may have a significant environmental impact are preceded by an EA and, if appropriate, an environmental impact statement (“EIS”), in compliance with FCC regulations. For example, the FCC tells tower license applicants that “[i]f, after consulting the NEPA rules, a

wireless service provider determines that its proposed service facility project does not fall under any of the listed categories,” then “the licensee may proceed with the project without providing any documentation to the [Wireless Communications] Bureau.” *See* FCC, Guidance on Compliance with FCC’s Rules Implementing NEPA (2004) (“FCC NEPA Guidance”) (Exhibit P at 2) (emphasis added and in original). Under this policy, the FCC allows tower permit applicants to avoid the requirement to prepare an EA simply by asserting – without proof – that the proposed tower has no significant environmental effect. Tower license applicants are required only to answer the following question, buried at the end of the FCC’s Form 854, Application for Antenna Structure Registration:

( ) Yes No: Would a Commission grant of Authorization for this location be an action, which may have a significant environmental effect? *See* Section 1.1307 of 47 CFR. If ‘Yes’, submit an environmental assessment as required by 47 CFR, Sections 1.1308 and 1.1311.

The form does not require documentation to support a “No” response, and the FCC has neither a procedure nor staff biologists to conduct independent review of that assertion. Consequently, the FCC conducts no real review. *See* USFWS, Jamie Rappaport Clark, Letter to FCC Chairman William Kennard (November 2, 1999) (Exhibit Q at 1). This policy allows tower applicants to proceed to approval without evaluating the proposed tower’s environmental and species impact. *Id.* All they need do is circle “No” on the form. *See* FCC NEPA Guidance Exhibit P at 2.

Consequently, many towers are licensed and constructed in violation of law. *See, e.g.* Exhibit K.

### **III. THE FCC’S FAILURE TO COMPLY WITH REQUESTS FROM USFWS TO ADDRESS AVIAN MORTALITY**

According to the USFWS, the FCC has known since at least 1996 – nearly a decade ago – that, as a result of its policies, “substantial losses of migratory birds are not being accounted for in FCC’s permit and NEPA decision-making process.” *See* Exhibit Q at 1 (stating that USFWS and FCC had engaged in discussions “for the past 3 years” concerning the impact of FCC’s

tower licensing program on migratory birds). In 1999 the USFWS formally requested the FCC to complete a programmatic environmental impact statement (“PEIS”) “to delineate the true impacts of tower construction” nationwide and to “identify ways to reduce those impacts by incorporating measures in the applicant’s permits to minimize potential losses to migratory birds.” *Id.* at 2. Specifically, USFWS was concerned “with the way communication towers are planned, sited, and constructed” around the country, “FCC’s regulations in 47 C.F.R. 1.1301-1.1319, and how those regulations are being interpreted by FCC personnel.” *Id.* at 1. Moreover, the USFWS concluded that the Commission’s policy of allowing tower license applicants to determine whether to provide environmental information ensured “almost no environmental oversight by the FCC.” *Id.* at 2.

The FCC took no action in response to USFWS’s requests. Instead, the FCC responded that “there is very little study and research, and thus no consensus within the scientific community, on the issue of what impact communication towers have on the migratory bird population and what, if any, mitigation measures would be effective.” FCC, Letter from William Kennard to Jamie Rappaport Clark (March 21, 2000) (Exhibit R at 1). The FCC further stated that “[u]ntil the necessary research and study is undertaken. . . , we do not believe it appropriate for the FCC to undertake the expansive, generic EIS effort [USFWS] describe[s].” *Id.* On November 20, 2000, the USFWS again wrote to the FCC (Exhibit S), attaching the USFWS Guidance Document on the Siting, Construction, Operation and Decommissioning of Communications Towers Guidelines, and urging the Chairman to “. . . make the interim guidelines available to all applicants requesting Federal communication licenses, in order to distribute the information more widely among the....industries.” *Id.* at 1. The Director noted that the Guidelines represent “the best measures available for avoiding fatal bird collisions,” and “widespread use of these guidelines will significantly reduce the loss of migratory birds at

towers.” *Id.* at 1. The FCC has steadfastly refused to incorporate any of the guidelines into its tower regulations, despite repeated entreaties to do so. Today, more than eight years since the USFWS first asked the FCC to address bird strikes at communication towers, the FCC still has not acted or made a commitment to mitigate bird mortality. Moreover, the USFWS’ requests preceded the Petitioners’ requests by more than 5 years.

The impact of FCC’s delay is substantial. To illustrate, in 2001 USFWS learned that the FCC had permitted Motorola to complete construction of a network of 180 communication towers in Michigan without complying with the ESA or NEPA and without considering USFWS guidelines under the MBTA for protecting migratory birds. *See* USFWS, ARS (Exhibit K). One hundred and twenty of these towers are located in Michigan’s Lower Peninsula, a location that harbors the only surviving population of endangered Kirtland’s Warblers in the U.S.<sup>9</sup> After two years of negotiations, the FCC, USFWS and the State of Michigan reached an agreement providing for research and consultation on the future operation and maintenance of towers only in that particular tower network. *Id.* This is but one example of the continuing harm to migratory birds that results from the FCC’s delay in addressing Petitioners’ concerns.

The FCC’s failure to act has had a grave impact on birds. In the spring of 2004, researchers monitoring only 23 of the towers in the Michigan network found 194 birds likely killed by tower collisions during a period of just 20 days. *See* Joelle Gehring, Ph.D., Avian Collision Study Plan for the Michigan Public Safety Communications System (MPSCS): Spring 2004 Summary, 2 (July 20, 2004) (Exhibit U at 2).<sup>10</sup> During 20 days in the fall of 2004, researchers found an additional 153 birds likely killed by tower collisions. *See* Joelle Gehring,

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<sup>9</sup> *See* USFWS, Endangered Species Fact Sheet on Kirtland’s Warbler, available online at <http://www.fws.gov/midwest/Endangered/birds/Kirtland/kiwa-facts.htm> (Exhibit T).

<sup>10</sup> All of the towers in this study are 116-146 meters (380-480 feet) tall, and none use lighting or other measures designed to mitigate avian mortality. *See* Exhibit U at 1. *See also* p. 4 of this petition (discussing tower design and lighting that is safer for migrating birds).

Ph.D., Fall 2004 Summary (November 9, 2004) (Exhibit V at 2). These mortalities included at least 20 Blackpoll warblers, which are listed as Birds of Conservation Concern by the USFWS. *Id.* at 4. These data include only the numbers of carcasses found, and do not include an extrapolation for searcher efficiency or predator/scavenger removal. Thus, according to the researchers' own estimates, actual birds killed could be up to 3.41 times the number of birds found. *Id.* at 5.

#### IV. STATUTORY BACKGROUND

**The Endangered Species Act (“ESA”)**. Courts have recognized that “the plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *See Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 124 (D.D.C. 2001). The ESA protects endangered and threatened species by mandating that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. *See* 16 U.S.C. § 1531(c)(1); *Rancho Viejo LLC v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003). This explicit mandate “admits of no exception.” *See TVA v. Hill*, 437 U.S. 153, 173 (1978).

Moreover, “the ESA constituted an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species ... [and] reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 184 (internal citations omitted). The ESA prohibits all persons, including federal agencies, from “taking” endangered species, and all federal agencies are explicitly required to “seek to conserve endangered species and threatened species,” *see* 16 U.S.C. § 1531(c)(1); and to “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species.” *See* 16 U.S.C. § 1536(a)(1).

Section 7 of the ESA requires all federal agencies to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. This requires each federal agency to ensure that its granting of licenses and permits will not jeopardize the continued existence of endangered species. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, et al.*, 515 U.S. 687, 692 (1995). Section 7 also established the Endangered Species Committee, charged with reviewing all applications for exemptions from the requirements of the ESA. *See* 16 U.S.C. § 1536(e). Congress authorized the Committee to grant an exemption from the requirements of Section 7 only if the applicant met specific enumerated requirements including, *inter alia*, that there are “no reasonable and prudent alternatives to the agency action” and “the benefits of such action clearly outweigh the benefits of alternative courses” that do not jeopardize endangered species. *See* 16 U.S.C. §§ 8(h)(1)(A)(i) and (ii). There are no exemptions from the responsibilities of federal agencies under Section 7 except those approved by the Endangered Species Committee. *See id.*

To carry out its duty under Section 7 of the ESA, each federal agency must, “with respect to any agency action,” ask the Secretary of the Interior whether any “species which is listed or proposed to be listed” as endangered or threatened is present in the area of the proposed action. *See* 50 C.F.R. § 402.12(c); *State of Idaho v. Interstate Commerce Comm’n*, 35 F.3d 585, 596 (D.C. Cir. 1994). If the Secretary (represented by the USFWS in matters of endangered and threatened avian species) informs the action agency that endangered or threatened species “may be present in the action area,” the action agency must prepare a biological assessment (“BA”) to determine whether endangered species or critical habitat are “likely to be adversely affected by

the action” and to determine “whether formal consultation or a conference is necessary.” *See id.*;  
50 C.F.R. § 402.12(a).

The only exception to this stringent requirement is when the action agency and the Secretary, either after the agency prepares a biological assessment *or* as the result of informal consultation, agree that the agency action is not likely to affect any listed species or critical habitat. This concurrence must be in writing.

*See Sierra Club v. EPA*, 162 F. Supp. 2d 406, 422 (D. Md. 2001) (emphasis in original, citations omitted).<sup>11</sup>

ESA regulations allow agencies to designate a non-federal representative to fulfill certain specific agency obligations under the ESA, namely “to conduct informal consultation or prepare a biological assessment” for a particular agency action. *See* 50 C.F.R. § 402.08. However, even where an agency designates non-federal representatives to conduct consultation or prepare a BA, “the ultimate responsibility for compliance with section 7 remains with the Federal agency.” *Id.* Moreover, the ESA does not permit agencies to exclude any category of agency action from compliance with the agency’s Section 7 duties. *See* 50 C.F.R. § 402.01 *et seq.*

**The National Environmental Policy Act (“NEPA”).** NEPA makes environmental protection a mandate of every federal agency. *See State of Idaho, et al. v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994). Pursuant to Section 102 of NEPA, every federal agency is required to compile a detailed statement (“environmental impact statement” or “EIS”) discussing the environmental impact of all “actions with effects that may be major and which are potentially subject to Federal

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<sup>11</sup> The court in *Sierra Club v. EPA* held that Maryland violated the ESA by approving water quality revisions without preparing a BA. *See also Hawksbill Sea Turtle v. Federal Emergency Mgmt. Agency*, 11 F.Supp.2d 529, 545 (D. V.I. 1998) (the only valid alternative to preparing a BA is informal consultation). It is settled that agencies cannot lawfully refuse to engage in consultation when the agency is aware that its actions may affect protected species. *See Natural Resources Defense Council v. Houston*, 146 F.3d 1118 at 1127 (9th Cir. 1998) (Bureau of Reclamation violated the ESA by forgoing consultation prior to renewing contracts to supply water from an existing dam); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (Forest Service’s refusal to consult with the USFWS regarding its criteria for harvesting resources within the habitat of protected salmon violated the ESA); *Florida Key Deer v. Stickney*, 864 F.Supp. 1222, 1228 (S.D. Fla. 1994) (FEMA violated ESA by refusing to consult regarding the impact of its National Flood Insurance Program upon new development within the habitat of the endangered Florida Key Deer).

control and responsibility.” *See Id.*; 42 U.S.C. § 4332 and 40 C.F.R. § 1508.18. Furthermore, it is the role of the courts to “ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Nat’l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

To comply with Section 102 of NEPA, federal agencies must prepare an EIS for all new and continuing activities, projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by the agency. *See State of Idaho, et al. v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994). Council of Environmental Quality (“CEQ”) regulations enacted to implement NEPA allow an agency to prepare a more limited Environmental Assessment (“EA”) in certain circumstances where the proposed action does not clearly require preparation of a full EIS. *See* 40 C.F.R. §§ 1507.1 and 1507.3(a)(2). Whenever an agency decides, as a result of its analysis under an EA, that no EIS is required it must issue a “finding of no significant impact” (“FONSI”) presenting the reasons why an action will not have a significant impact on the human environment. *See* 40 C.F.R. §§ 1501.4(e) and 1508.13.

In the licensing context, agencies cannot delegate their responsibilities under NEPA Section 102 to license applicants or defer to the license applicant’s judgment on environmental matters. *See State of Idaho, et al. v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994). There the agency “deferred to [the] scrutiny of others” by granting licenses subject to conditions that required the licensee to consult with various agencies about environmental impacts. *Id.* As a result only the licensee was in a position to assess the environmental impact of its activities. *Id.* This Court found that the agency’s “attempt to rely entirely on the environmental judgments of other agencies” and of the regulated entities was a “blatant departure from NEPA.” *Id.*

**The Migratory Bird Treaty Act (“MBTA”).** The MBTA is aimed at preserving and restoring migratory birds in the United States<sup>12</sup>, a goal this Court has recognized as “a national interest of very nearly the first magnitude.” *Humane Society v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000) (quoting Justice Holmes, *Missouri v. Holland*, 252 U.S. 416, 435 (1920)); 16 U.S.C. § 701 *et seq.* The Act imposes an absolute prohibition on any “taking” of migratory birds, unless authorized by a permit. *Id.* The MBTA applies to federal agencies including the FCC, and killing birds with communication towers violates the MBTA even if the killing is unintentional and the deaths are inadvertent. *Id.*; *U.S. v. Moon Lake Electric Assoc.*, 45 F.Supp.2d 1070 (D. Colo. 1999). However, notwithstanding the plain language of the MBTA, the FCC has not obtained a permit to “take” migratory birds under the Act, nor do its regulations require tower license applicants to obtain such a permit. *See* 47 C.F.R. § 1.1301 *et seq.*

#### **V. THE FCC’S FAILURE TO RESPOND TO PETITIONERS’ REQUESTS TO MITIGATE BIRD MORTALITY CAUSED BY COMMUNICATION TOWERS**

For more than five years, Petitioners have made extensive efforts to obtain the relief requested in this petition.<sup>13</sup> Beginning in 2001, the Petitioners filed challenges to individual tower licensing decisions in the Gulf Coast and nationally, explaining to the FCC that in each of the applications that were accompanied by EAs, the EAs failed to address the impact of the towers on migratory birds and therefore did not support issuance of a “FONSI”. *See* Petition for Writ of Mandamus (February 13, 2003) (“2003 Mandamus Petition”) (Exhibit W at 14-15). The

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<sup>12</sup> The MBTA covers 83 percent of all birds native to the U.S., with all species in the lower 48 States protected except the house sparrow, rock pigeon, European starling, and non-migratory game birds like pheasants, gray partridge, and sage grouse. *See* U.S. Geological Survey, Possession of Migratory Birds, Including Feathers, Nests, and Eggs at: <http://www.npwrc.usgs.gov/info/faqs/birds/feathers.htm>. It does not cover birds that are not native to the U.S. *See* 70 Fed. Reg. 372.

<sup>13</sup> In addition to their formal efforts with the FCC, Petitioners have made numerous informal efforts to persuade the agency to minimize avian mortality in the agency’s tower registration program. Additionally, Petitioner ABC has participated in USFWS’ Communication Tower Working Group (CTWG) since 2000 to determine the best ways to construct and operate towers to prevent bird strikes, and has repeatedly requested (without success) that FCC incorporate the USFWS Guidelines and research presented to the CTWG into its tower licensing program.

FCC dismissed the first twenty-nine of these petitions in one ruling, stating that the Petitioners did not have standing to assert their claims, and thereby avoiding the Petitioners' NEPA, ESA, and MBTA claims. *Id.*

When the FCC refused to address the problem of tower mortalities either locally or nationwide, Petitioners filed a petition in August 2002 pursuant to FCC's NEPA procedures, requesting the Commission to comply with applicable environmental statutes throughout the implementation of its licensing program. *See* 2002 Petition (Exhibit J).<sup>14</sup> That petition asks the FCC, *inter alia*, to 1) comply with NEPA, 42 U.S.C. § 4321 *et seq.*, by preparing a programmatic environmental impact statement (PEIS) to evaluate, analyze and mitigate the effects of communication tower registrations on migratory birds and other protected resources; 2) comply with Section 7 of the ESA, 16 U.S.C. § 1531 *et seq.*, by, where appropriate, initiating formal consultation with the USFWS on the effects of 5,797 antenna structure registrations on threatened and endangered species in the Gulf Coast region; 3) comply with the MBTA, 16 U.S.C. § 701, by taking steps to reduce or eliminate "takes" of migratory birds; and 4) halt the approval of new individual communication towers that pose a risk to birds until the Commission has complied with the ESA, NEPA and the MBTA. *Id.* at 17 and 19-20. The FCC has taken no action that plaintiffs are aware of on the 2002 Petition, nor has the agency committed to resolving the Petition within a reasonable time.

On February 13, 2003, ABC and the Council filed suit before this Court requesting a writ of mandamus ordering the FCC to act on their petition. *See* 2003 Mandamus Petition (Exhibit W). In response to the 2003 Mandamus Petition, the FCC filed an opposition with this Court that denied the extent of the harm caused by tower collisions and claimed that the agency had

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<sup>14</sup> Petitioners also filed a separate petition relating to communication towers in Hawaii, and have sent a 60-day notice of intent to sue to the FCC concerning that petition. *See* ABC and Forest Conservation Council Petition to FCC, April 9, 2004 ("2004 Petition") (Exhibit L).

“more substantial and pressing” priorities, while stating that the Commission was “moving expeditiously” to address the problem of bird kills at communication towers. *See* Response of FCC to Petition for Writ of Mandamus (Exhibit O at 20). On July 2, 2003, this Court ruled that the FCC’s continuing delay was not yet so egregious to require the writ. *See In re Forest Conservation Council, Inc. et al.*, No. 03-1034 (Exhibit X). Importantly, this Court denied the writ petition “without prejudice to renewal in the event of significant additional delay.” *Id.* This put the FCC on notice that it needed to act in a reasonable time on the petition. It has failed to do so. Today – after one and one half years of further delay – FCC still has not resolved the Petitioners’ August 2002 Petition.

The FCC’s studied refusal to act indicates that it will continue avoiding and delaying its legal obligations until it is compelled by this Court to address the Petitioners’ concerns about bird mortality occasioned by its tower licensing program. Moreover, the FCC’s refusal to take final action on the 2002 Petition prevents the Petitioners from obtaining a final resolution of their requests and, if necessary, judicial review of the FCC’s action. The Petitioners therefore request this court to order the FCC to take final administrative action on their August 2002 petition without further delay.

### **JURISDICTION**

The Court has jurisdiction over this Petition to preserve its future right of review of agency actions under the All Writs Act, 28 U.S.C. § 1651(a), and the statute governing judicial review of the FCC’s final agency orders, 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75, 79 (D.C. Cir. 1984) (“TRAC”).

It has long been recognized by this Court that “where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court’s future

jurisdiction is subject to the *exclusive review* of the Court of Appeals.” *TRAC* at 75 (emphasis in original). This Court is vested with exclusive jurisdiction over review of final FCC orders under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The FCC’s failure to take final agency action to resolve Petitioners’ requests simply defeats this Court’s statutory obligation to review Petitioners’ contentions on the merits. This Court therefore has jurisdiction to resolve the Petitioners’ claims of unreasonable delay and to compel the FCC to take final agency action on the issue of migratory bird mortality at communication towers. *Id.* at 77.

## ARGUMENT

### I. INTRODUCTION

The Administrative Procedure Act requires agencies to conclude business “within a reasonable time,” and the courts are instructed to “compel agency action unlawfully withheld or unreasonably delayed.” *See* 5 U.S.C. §§ 555(b) and 706(1). *See also In re Center for Auto Safety et al.*, 793 F.2d 1346, 1353-54 (D.C. Cir. 1986) (compelling unreasonably delayed agency action to issue fuel efficiency standards requested by petitioners). Despite Petitioners’ numerous informal and formal administrative requests to the FCC over the course of the past five years to comply with applicable environmental statutes in the agency’s tower licensing program, and despite the previous petition to this Court for a writ of mandamus, the FCC has failed to grant or otherwise resolve the Petitioners’ requests for relief.

This Court has identified six factors that are relevant to determining whether mandamus should issue for unreasonable delay:

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

and (5) the court should also take into account the nature and extent of the interests prejudiced by delay and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is “unreasonably delayed.”

*TRAC*, 750 F.2d 70, 77 (D.C. Cir., 1984) (internal quotes and citations omitted; emphasis added).

These factors strongly support a writ of mandamus in this case.

## II. THE FCC’S DELAY EXCEEDS THE RULE OF REASON

This Court recently held that, although “[t]here is no *per se* rule as to how long is too long to wait for agency action,” “a reasonable time for agency action is typically counted in weeks or months, not years.” *In re American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal citations omitted; emphasis added). In *American Rivers*, the Court found the Federal Energy Regulatory Commission’s six-year delay in responding to a petition for consultation under the Endangered Species Act was “nothing less than egregious.” *Id.* The Court further noted that it previously had found delays of three, four and five years “unreasonable.” *Id.* at 419 n.12 (citing *Airline Pilots Ass’n v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay in responding to application for adjudication was unreasonable); *Public Citizen Health Research Group, v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (three-year delay in responding to petition for ethylene oxide standards was unreasonable); and *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 324-25 (D.C.Cir.1980) (four-year delay in responding to petition for reasonability determination was unreasonable). Here, the FCC has delayed resolving Petitioners’ informal requests for nearly five years, and has delayed for over two and one half (2 ½) years in resolving Petitioners’ formal administrative requests for relief. Moreover, the FCC has failed to act for more than one and one half (1 ½) years following this Court’s ruling on July 2, 2003, that left open the opportunity for petitioners to renew their earlier petition for writ of mandamus in the event of “significant additional delay” by the FCC. *See In*

*re Forest Conservation Council*, No. 03-1034. (D.C. Cir. 2003) (Exhibit X). The FCC's failure to act has resulted in the killing of as many as 50 million birds per year at communication towers, and these deaths continue to occur as the FCC continues its refusal to act to prevent these fatalities.

**A. Timing Provisions in the ESA, NEPA and the MBTA Demonstrate that The FCC's Delay is Unreasonable.**

NEPA and the ESA require federal agencies to address the environmental impacts of their actions before the negative effects occur, even in circumstances where there remains some uncertainty concerning the extent of those effects. Indeed, the plain language of the ESA requires that a biological assessment be prepared at a stage where there is still uncertainty, when any listed species "may be present" in the proposed project area, to determine whether "such action will likely affect such species." 16 U.S.C. § 1536(a)(3) (emphasis added). To illustrate, the Federal Emergency Management Agency ("FEMA") was ordered to consult with the USFWS under Section 7 of the ESA, after USFWS informed FEMA that its National Flood Insurance Program encouraged new development within the remaining habitat of the endangered Florida Key Deer, and therefore that its program might adversely affect the Key Deer. *See Florida Key Deer v. Stickney*, 864 F.Supp. 1222, 1238 (S.D. Fla. 1994). The court ordered consultation even though the alleged impacts of new development upon endangered Florida Key deer had not been formally established. *Id.* Similarly, the Ninth Circuit ordered the Forest Service to comply with the ESA by preparing a biological assessment for proposed road and timber sales within an area identified by USFWS as habitat of the endangered Rocky Mountain Gray Wolf. *See Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). The court also ordered the Service to comply with NEPA by analyzing the combined environmental impacts of the road and timber sales, even though the alleged effects of the proposed sales had not been formally

established. *Id.* at 759, 763 (alleging that agency actions were “likely to affect” the Rocky Mountain Gray Wolf).

The statutory purpose and language of the ESA and NEPA further demonstrate the FCC’s affirmative duty to address any potential adverse effects before they occur. For example, NEPA’s purpose is “to promote efforts which will prevent or eliminate damage to the environment and biosphere.” 42 U.S.C. § 4231 (emphasis added). Similarly, the ESA expresses a policy and purpose that “all Federal departments and agencies shall seek to conserve endangered species and threatened species” and “the ecosystems upon which endangered species and threatened species depend” 16 U.S.C. § 1531(b) and (c) (emphasis added). FCC’s refusal to evaluate the “potential effects” of its actions, and to “prevent or eliminate damage” resulting from such action, therefore violates both the spirit and the letter of the ESA and NEPA. *See* 50 C.F.R. § 402.12(a); and 42 U.S.C. § 4321.

In the previous mandamus proceeding, the Commission attempted to justify its delay by stating that “the agency faces no statutory deadline.” *See* Response of the FCC to Petition for Writ of Mandamus (Exhibit O at 2). However, the FCC should not be allowed to evade its legal obligation to resolve the 2002 Petition simply by pointing to a claimed lack of statutory deadlines for acting on a petitioner’s requests. As an initial matter, the FCC’s procedural regulations contain an implicit deadline for the agency to take action on petitions for environmental compliance under 47 C.F.R. § 1.1307(c). Under that provision, the FCC must issue a determination on the petition in sufficient time for that determination to “serve as the basis for the [FCC’s] determination to proceed with or terminate environmental processing.” *Id.* The FCC’s refusal to take final action on the 2002 Petition has made it impossible for that determination to “serve as a basis” for deciding whether an EA should have been prepared for license applications the FCC has granted during the pendency of the petition. Because tower

applications challenged in the 2002 Petition continue to be approved without EAs, this problem is ongoing. Allowing the FCC to delay indefinitely simply because it alleges that it is not subject to a fixed statutory deadline would defeat the requirement of the Administrative Procedure Act that agencies shall conclude the matters before it “within a reasonable time.” 5 U.S.C. § 555(b).

Moreover, allowing the FCC to delay final action on the 2002 Petition for environmental compliance would frustrate the Congressional mandate that federal agencies act expeditiously to protect the environment and wildlife under the ESA, NEPA and the MBTA. Under those statutes, agencies must take action in sufficient time to “prevent or eliminate” environmental damage under NEPA, 42 U.S.C. § 4231; before agency action that “will likely affect [endangered] species” under the ESA, 16 U.S.C. § 1536(a)(3); and before any migratory bird is “taken” or killed as defined under the MBTA, 16 U.S.C. § 703. Here, where the lives of millions of individual birds are threatened and the continued viability of several threatened and endangered bird species and other migratory birds are potentially at stake, FCC’s delay is patently unreasonable.

**B. The FCC’s Delay Is Unreasonable Because It Defeats Congressional Intent.**

In determining whether a particular delay is unreasonable, a court “must also estimate the extent to which [the] delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is ‘losing its ability to effectively regulate at all.’” *See Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987). Congress intended federal agencies to use their full regulatory authority to *prevent* harm to the environment and wildlife. Indeed, Congress “carefully omitted all of the reservations” that limited agency obligations under the ESA in terms of practicality or the primary purposes of the respective agencies. *See TVA v. Hill*, 437 U.S. at 182. The FCC’s refusal to take final action on the

Petitioners' requests without a valid basis for such refusal frustrates Congress' intent, and is therefore manifestly unreasonable.

**C. The FCC's Delay Is Not Excused by the Commission's Purportedly "Imminent Plans" to Devote More Time to the Problem of Bird Mortality.**

The FCC's previously claimed that the agency is "moving expeditiously" to resolve the Petitioners' requests. *See* Response of FCC to Petition for Writ of Mandamus (Exhibit O at 20) (citing "imminent plans to devote more institutional time and effort to dangers communication towers may pose to migratory birds") (emphasis added). However, the FCC's "plans" do not excuse its unreasonable delay in complying with the agency's present responsibilities under environmental statutes. At a minimum, the FCC has a present duty under the APA and its own regulations to take final action on the Petitioners' requests for environmental compliance.

The FCC's claim that it is moving expeditiously is belied by the agency's dilatory actions. Instead of fulfilling its already overdue responsibilities, FCC issued a public "Notice of Inquiry" in 2003, to "gather comment and information" on the impact of communications towers upon migratory birds and to solicit public comment on "whether such research would support changes within the structure of [FCC's] current rules and processes...." *See* FCC, Notice of Inquiry (August 8, 2003) (Exhibit Y). Predictably, this "inquiry" provided the regulated industry an opportunity to downplay bird deaths at communication towers.<sup>15</sup> However, as discussed above, the FCC had no discretion to decide whether to comply with applicable environmental statutes once it had been informed by the USFWS that its action was impacting migratory birds. Consequently, the FCC's Notice of Inquiry contravenes the strict procedural requirements of

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<sup>15</sup> The FCC has employed this dilatory tactic before. For example, when the National Audubon Society requested the FCC to prepare an EIS in connection with its proposed rulemaking on digital television towers, the FCC issued a request for comments on the Society's request. *See* FCC, Public Notice (March 6, 1998) (Exhibit Z).

those Acts. Moreover, it violates the agency's substantive obligation to act expeditiously in accordance with the ESA, NEPA and the MBTA.

The FCC's delay is further unreasonable because it has not committed to taking final action to resolve Petitioners' requests even after the agency concludes its prolonged "inquiry," which is still not yet concluded. The inquiry period closed over a year ago, yet FCC has taken no final action on Petitioners' requests for environmental compliance in the FCC's licensing policies. Instead, in May 2004 the FCC commissioned consultants to prepare a review of the public comments.<sup>16</sup> *See* Exhibit B. The consultants concluded that "[o]verall there is...sufficient documented evidence of avian mortality by communications towers and that the construction and operation of tall structures will likely result in the risk of bird collisions and possible mortalities." *See* Exhibit B at 3-19. Nevertheless, the consultants recommended no immediate action by the FCC to address the deficiencies in its tower registration policies to mitigate the bird mortalities presently being caused by tower collisions. Instead, the FCC's consultants recommended, for example, that the agency "provide guidance on the need" for further research and "encourage the development" of baseline information about bird populations. *See* Exhibit B at 5-1 to 5-13.

After the consultants completed their review of the public comments, the FCC requested public comment on the Comment Review itself, adding another layer of unreasonable delay to already overdue action. *See* FCC, Public Notice DA 04-3891 (December 14, 2004) (Exhibit AA).<sup>17</sup> Meanwhile, the FCC has taken no action to mitigate avian mortality at communication

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<sup>16</sup> The FCC specifically directed its consultants to ignore the regulatory, legal, policy, and administrative requirements of NEPA, ESA, MBTA and other federal laws in their analysis. *See* Exhibit B at 1-2. Thus, the Avatar Report makes no recommendations that would correct the violations of federal environmental laws.

<sup>17</sup> Petitioners have submitted comments and a scientific analysis to the FCC detailing why the consultants' recommendations do not "adequately represent the current state of scientific knowledge about bird kills," and "are insufficient to address the adverse impacts of communication towers on birds." *See* Exhibit BB at 1 and Exhibit G at 1.

towers that the agency has known about for nearly ten years. Moreover, there is no indication of when this prolonged second comment process will end, and the FCC has made no commitment to take final action on Petitioners' requests even after the comment period is concluded. The FCC's delay not only prevents Petitioners from obtaining relief, but also frustrates the future jurisdiction of this Court.

**D. The FCC's Delay Is Unreasonable Because It Ignores the Available Scientific Evidence of the Impact of Communication Towers upon Migratory Birds.**

Even if the FCC's request for public comment on the impact of bird strikes was legitimate, the FCC's delay contravenes scientific evidence that bird mortality at communication towers potentially threatens the continued viability of a number of species, contrary to assertions by the regulated industry members.<sup>18</sup> For example, comments by the USFWS directly controvert industry's claim that the number of birds killed by towers is relatively small. *See* Exhibit B at 3-63 (citing USFWS comments concluding that the national and regional mortality estimates of birds documented killed by tower collisions represent a significant and unacceptable impact on avian populations). The comments submitted to the FCC by the Petitioners further illustrated the significance of tower mortalities, noting that documented bird mortalities at communication towers include mortality of over fifty species that are endangered or require special management attention according to the USFWS' *Birds of Management Concern List* (2002). *See* Exhibit B at 3-64 (citing Petitioners' comments).

**E. The FCC's Delay Harms Human Welfare**

The FCC's failure to address the petitions before it is particularly egregious because it harms the welfare of Petitioners' members that watch, study and protect birds. For example, in his job as an expert ornithologist, ABC member Philip C. Stouffer observes and researches bird

species that migrate through the Gulf Coast region of Louisiana, including many birds that have been documented as killed at communication towers. *See* Declaration of Philip C. Stouffer (Exhibit E). FCC's delay results in continued mortality to bird species that Mr. Stouffer studies, and thus harms his interest in observing and researching those birds in his professional career. *Id.* at ¶10.

ABC member Joy Haynes Hester has participated in bird studies on the Texas coast in her job as Executive Director of the Houston Audubon Society, and she hopes to participate in such studies in the future. *See* Declaration of Joy Haynes Hester, (Exhibit CC at ¶ 10.a). Also, as part of her job, Ms. Hester is currently planning a birding trip to south Texas to cultivate donors, where she hopes to find and show donors some of the bird species that have been documented as killed by communication tower collisions. *Id.* at ¶ 9. FCC's delay harms her professional interests by increasing mortality of birds she watches, shows and studies as part of her job. *Id.* Similarly, ABC member James A. Cox researches migratory and non-migratory birds and manages habitat for those birds as part of his job as a vertebrate ecologist. *See* Declaration of James A. Cox (Exhibit DD at ¶ 4). FCC's delay harms his professional interests because birds that Mr. Cox studies and manages are endangered by nearby communication towers that do not conform with bird-safe design. *Id.* at ¶ 11.d.

FCC's delay also harms the welfare of Petitioners' members who enjoy recreational birdwatching. For example, ABC member Joy Haynes Hester enjoys recreational birdwatching throughout the year in areas on the upper Texas Gulf Coast. *See* Exhibit CC at ¶ 7. The FCC's delay harms her interest by increasing mortality of migratory bird species that she hopes to observe in the course of her future birdwatching activities. *Id.*

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<sup>18</sup> This scientific evidence is comprehensively analyzed in a report by Land Protection Partners filed on February 14, 2005 with the FCC. The authors of this report have conducted critical research, including research at communication towers, on lighting effects on birds. *See* Exhibit G at 1.

Finally, the FCC's delay harms the Petitioner ABC's interests in protecting and promoting the survival of bird species throughout the Americas. *See* Declaration of Philip C. Stouffer (Exhibit E at ¶¶ 3 and 10.b) and Declaration of Joy Haynes Hester (Exhibit CC at ¶¶ 3 and 10.e). By allowing bird deaths at communication towers to continue unmitigated, the FCC's delay constitutes a concrete and demonstrable injury to ABC's activities. In contrast, compliance with the FCC's obligation to resolve the Petitioners' requests will not impair the agency's regulatory activities. Simple tower design modifications can minimize bird mortality at communication towers without impeding the provision of telecommunication services or in any way compromising aviation safety. *See* Clark, Letter to Regional Directors, (Exhibit H), Longcore, Ph.D, *et al.* (Exhibit G), and USFWS Reply Comments to FCC (Exhibit C).

### **CONCLUSION**

For the foregoing reasons, the American Bird Conservancy and Forest Conservation Council respectfully request the Court to order the FCC to address and take final, justiciable agency action on Petitioners' August 26, 2002 Petition within the next three months.

DATED: April 8, 2005

Respectfully submitted,

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# EXHIBITS

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

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)  
In re AMERICAN BIRD CONSERVANCY )  
and FOREST CONSERVATION COUNCIL, )  
Petitioners. ) Civil Action No. \_\_\_\_\_  
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\_\_\_\_\_)

DECLARATION OF PHILIP C. STOUFFER

1. I, Philip C. Stouffer, make the following declaration pursuant to 28 U.S.C. § 1746 in support of the above-captioned petition for writ of mandamus. I declare under penalty of perjury that this declaration is true and correct.
2. My name is Philip C. Stouffer. I live at 17410 Faust Lane, Independence, Louisiana 70443.
3. I am a member of the American Bird Conservancy (“ABC”), whose mission is to conserve wild birds and their habitats throughout the Americas. I am also a member of the Forest Conservation Council (“Council”), whose mission is to protect and restore forests and other wildlands throughout the United States and to safeguard the populations of plants, animals, and fish that depend on native forest ecosystems.
4. I am an Associate Professor in the School of Renewable Natural Resources, Louisiana State University. I teach courses in ecology, conservation biology, and field ornithology.
5. I regularly research, study and teach about birds, particularly in Louisiana and other areas of the Gulf Coast. I have authored or co-authored over 40 publications relating to birds, including the following:
  - a. Long, J.A. and P.C. Stouffer, 2003, Diet and preparation for spring migration in captive Hermit Thrushes, *Auk* 120: 323-330;
  - b. Brown, D.R., C.M. Strong and P.C. Stouffer, 2002, Demographic effects of habitat selection by Hermit Thrushes wintering in a pine plantation landscape, *Journal of Wildlife Management* 66: 407-416;
  - c. Stouffer, P.C, 2001, Do we know what we think we know about the ranges of migrants to South America? The case of the Veery (*Catharus fuscescens*). *Auk* 118: 832-837;
  - d. Brown, D. R., P. C. Stouffer, and C. M. Strong, 2000, Movement and territoriality of wintering Hermit Thrushes in southeastern Louisiana, *Wilson Bulletin* 112: 347-353.
6. I regularly birdwatch in the following areas of the Gulf Coast Region in Louisiana: Grand Isle, Big Branch National Wildlife Refuge, Bayou Sauvage National Wildlife

Refuge, Fairview Riverside State Park, Lake Martin, Manchac Wildlife Management Area, Tickfaw State Park, Bogue Chitto National Wildlife Refuge, Fontainebleau State Park, and Madisonville wetlands. I routinely watch birds all year around, and especially in spring and fall during migration. I particularly enjoy watching migratory songbirds as they use these areas of the Gulf Coast Region during migration.

7. The list of birds I have personally observed includes over 1000 species, and I hope to see many of these species again in the future. I have seen over 200 species in Louisiana, about 75% of which are migratory birds that migrate through the Gulf Coast region of Louisiana. I also study and watch birds along the Gulf Coast in Texas, Mississippi, Alabama, and Florida. I enjoy the diversity of all birds and especially the migratory songbirds that fly through the Gulf Coast Region.
8. During my visits to the above-referenced refuges, parks and wetlands, I have seen and hope to see in the future birds that are on the Endangered Species List, the United States Fish and Wildlife Service Nongame Birds of Management Concern List, or the Partners in Flight Watch List and that have been documented as killed by communication towers in scientific literature. I also bird watch, study, research, write and teach about other species killed by communication towers.
9. Of the bird species on the combined management concern lists, I have observed all of the following, some of them frequently, in the Louisiana Gulf Coast region and along the Gulf Coast of Texas, Mississippi, Alabama, and Florida:

Blackpoll Warbler	Eastern Meadowlark	Common Tern
Black-throated Blue Warbler	Blue-winged Warbler	Ovenbird
Chestnut-sided Warbler	Northern Flicker	Red-eyed Vireo
Wood Thrush	Nelson's Sharp-tailed Sparrow	Tennessee Warbler
Grasshopper Sparrow	Sparrow	Common Yellowthroat
Yellow-billed Cuckoo	Henslow's Sparrow	Bay-breasted Warbler
Prothonotary Warbler	Red-headed Woodpecker	American Redstart
Swainson's Warbler	Seaside Sparrow	Philadelphia Vireo
Worm-eating Warbler	Chuck-will's Widow	Swainson's Thrush
Sedge Wren	Painted Bunting	Veery
Louisiana Waterthrush	Red-cockaded Woodpecker	Hermit Thrush

I watch for these species for my own personal recreational enjoyment, and I also observe many of these species in order to write and teach about them. I hope to continue these activities in the future.

10. My professional and personal interests in continuing all of these activities are threatened by mortality of bird species that I watch through fatal collisions with communication towers, as detailed below:
  - a. Communication tower mortalities contribute to decline in bird populations of the affected species. Because the FCC has delayed in addressing this problem via its communication tower licensing regulations, unmitigated mortality at towers continues to occur and fewer migratory songbirds are present for me to see and

study. The FCC's delay thus directly harms my interests in teaching and researching ornithology, studying bird species and birdwatching.


- b. Current and planned communication towers that do not conform with bird-safe tower design standards present a wall of lethal barriers to migrating and resident birds that has caused, and will continue to cause, mortality to many of the birds I regularly watch, study and teach about. Consequently, FCC's refusal to address avian mortality caused by the communication towers it licenses directly injures my interest in studying and watching birds and teaching ornithology.
- c. According to the FCC's database, many guyed, tall, lit communication towers are next to and around the areas I use for bird-related activities. For example, I frequently view, study, research, and teach about birds at Maurepas, Talisheek, Folsom, Pearl River, Ponchatoula, Hammond, Manchac, and Independence, Louisiana, where towers exist. I also live within 5 miles of two towers, one at Loranger that is 355 feet tall, and one at Independence that is 234 feet tall. These towers kill birds that are vital to my personal and professional interests. They contribute to the cumulative impact of mortality factors that result in declines of many species' populations, increasing the risk of extinctions.
- d. The probability of persistence of an individual bird species ("viability") is highly variable among bird species, and depends on numerous factors including total population size, the number of breeding individuals, geographic distribution, predation, parasitism, nest site availability, food availability and other environmental characteristics. For some birds species, continued viability requires a much higher total population for that species to avoid inevitable extinction; for other species continued viability can occur at lower population levels. FCC's refusal to recognize the potential adverse impact of communication tower collisions on birds, without having performed an analysis of the viability of each affected bird species, harms my interest in protecting and preserving birds.
- e. To the extent that FCC's policies allow licensees to obtain tower licenses without complying with FCC regulations and environmental statutes that require preparation of an environmental assessment ("EA") evaluating the impact of a proposed tower on migratory birds, those policies harm my interests in preserving bird species.

11. The FCC could redress my concerns about avian mortality at towers by requiring full environmental reviews of proposed communication towers to analyze their impacts on migratory birds, and by requiring mitigation measures on these towers to prevent avian mortality. The relief that ABC and the Council seek will benefit me in the following ways:

- a. Site-specific environmental assessments would help ensure that existing structures harmful to migratory birds and other protected resources are carefully evaluated and, if necessary, modified in a manner that mitigates mortality to migratory birds and thus mitigates the harm to my interests.

- b. An adequate programmatic environmental impact statement and adequate mitigation measures would ensure that all future antenna structures are constructed in a manner that mitigates harm to my interests in protecting migratory birds.
- c. These actions would redress and better protect my direct interests in observing, studying and teaching about birds. Without the relief requested by the Council and the ABC, local conditions will continue to be adversely affected by mortality of migratory and resident birds at towers, and my interests in birds and bird-related activities will be injured.
- f. Because the viability of each bird species must be evaluated individually, my interests in preserving bird species would be benefited by preparation of an environmental assessment ("EA") and, if necessary, an environmental impact statement ("EIS") prior to individual tower approvals in cases where the proposed tower may affect a particular endangered or threatened species.
- g. Finally, the public participation opportunities the Council and ABC seek will benefit me by enabling me to become aware of new antenna structure registration applications harmful to migratory birds in areas that I use and enjoy for observing birds recreationally and as part of my profession. It will also provide me an opportunity to attempt to influence the location and configuration of proposed structures so that harm to migratory birds and other protected resources of concern to me is mitigated.

12. I have read the foregoing statements and such statements are true to the best of my knowledge, information, and belief. Dated this 28 day of MARCH 2005, 2005.

  
Philip C. Stouffer, Member  
American Bird Conservancy  
Forest Conservation Council

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

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)  
In re AMERICAN BIRD CONSERVANCY )  
and FOREST CONSERVATION COUNCIL, )  
Petitioners. )

Civil Action No. \_\_\_\_\_

DECLARATION OF JOY HAYNES HESTER

1. I, Joy Haynes Hester, make the following declaration pursuant to 28 U.S.C. § 1746 in support of the above-captioned petition for writ of mandamus. I declare under penalty of perjury that this declaration is true and correct.
2. My name is Joy Haynes Hester. I live at 5203 Spellman Road, Houston, Texas 77035.
3. I am a member of the American Bird Conservancy ("ABC"), whose mission is to conserve wild birds and their habitats throughout the Americas.
4. I have been the Executive Director of Houston Audubon Society for three years. My professional mission as Executive Director of the Houston Audubon Society is to promote the conservation and appreciation of birds and wildlife habitat. I plan to leave this position in April but will continue to be active with these issues as President-elect of Houston Audubon Society.
5. Houston Audubon Society owns and maintains over 3,000 acres of bird sanctuaries on the upper Gulf Coast of Texas that support hundreds of thousands of resident and migratory birds throughout the year. All of these bird sanctuaries are within the Gulf Coast region that is covered by the petition before the FCC filed by American Bird Conservancy and Forest Conservation Council and this litigation.
6. I regularly birdwatch in areas on the upper Texas Gulf Coast, in particular on the Bolivar Peninsula and Galveston Island. I frequently visit the Anahuac National Wildlife Refuge and the Houston Audubon bird sanctuaries on the Bolivar Peninsula where I watch birds all year round and especially in the spring and fall during migration. I am responsible for birding duties as part of my job as Executive Director of Houston Audubon Society, and I also enjoy recreational birding activities.
7. In the course of my birding activities I have seen, and hope to see in the future, birds that are on the Endangered Species List or the Partners in Flight Watch List, and that have been documented as killed by communication tower collisions. These include all of the following:

Tennessee Warbler  
Chestnut-sided Warbler

Yellow-billed Cuckoo  
Prothonotary Warbler

Worm-eating Warbler  
Louisiana Waterthrush

Dickcissel  
Eastern Meadowlark

Nelson's Sharp-tailed  
Sparrow

Loggerhead Shrike

During my recreational and professional birding activities, I have observed these and many other species that have been documented as killed by communication towers along the Texas Gulf Coast, and I hope to continue to observe them in the future.

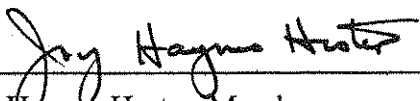
8. Approximately 10,000 birders from the United States and other countries travel to the Peninsula and Houston Audubon Society sanctuaries each spring to view migrating warblers, tanagers, and vireos, among others, and a colonial waterbird rookery in its Smith Oaks Sanctuary that provides nesting sites for Roseate Spoonbills, Great Egrets, Snowy Egrets, Tricolored Herons, Black-crowned Night Herons, Cattle Egrets, and Cormorants. Birders pay admission to access these sanctuaries, and the funds so derived are used to support Houston Audubon, including support for my professional birding and conservation activities as Executive Director.
9. I regularly take members and donors of Houston Audubon Society to birding locations on the upper Texas coast, and one of the central purposes of these birding trips is to cultivate donations to the Society. A portion of these donations enables me to continue my professional birding and conservation activities within the Society. I am currently planning a birding trip to south Texas with friends and potential donors to Houston Audubon Society.
10. My professional and personal interests in continuing all of these activities are threatened by mortality of bird species that I watch, caused by fatal collisions with communication towers, as detailed below:
  - a. I have participated in bird studies conducted by the Gulf Coast Bird Observatory on the Texas coast, and I hope to participate in similar bird studies in the future. Mortality caused by communication tower collisions of the bird species that I hope to study injures my ability to study those birds in the future.
  - b. In addition to promoting Houston Audubon Society's bird sanctuaries, I oversee its education programs that teach children and adults about birds and conservation. Field trips to locations on the Texas Gulf Coast are an integral part of those education programs. Mortality caused by communication tower collisions, to the extent that they result in diminished populations of the bird species that I hope to study, injures Houston Audubon Society's ability to conduct education programs with field trips related to those species in the future.
  - c. I watch and show to others many of the same species of birds in the Gulf Coast region that have been documented as having been killed by collisions with towers. My direct personal interests in recreational birding and in my professional activities as Executive Director of the Houston Audubon Society are injured by mortality of migratory songbirds that I watch and show to others
  - d. Communication tower mortalities contribute to decline in bird populations of the affected species. Decreased bird populations result in diminished interest in bird-related activities and fewer birds to be seen, studied, and photographed.

Consequently, communication towers that kill birds directly harm my personal and professional interests in promoting and participating in those activities.

- e. Current and planned communication towers that do not conform with bird-safe tower design standards present a wall of lethal barriers to migrating and resident birds that has caused, and will continue to cause, mortality to many of these birds. Consequently, FCC's refusal to require the use of bird-safe tower design standards directly injures my interest in watching birds, in raising funds and promoting Houston Audubon, in acquiring and protecting bird sanctuaries and showing birds to others in the course of my work.
  - f. Guyed, tall, lit communication towers under the jurisdiction of the FCC are next to and around the areas I frequent on the Gulf Coast for bird-related activities and some are directly adjacent to Houston Audubon bird sanctuaries. These towers kill birds that are vital to my personal and professional interests. They contribute to the cumulative impact of mortality factors that result in declines of many species' populations, increasing the risk of extinctions.
  - g. The probability of persistence of an individual bird species ("viability") is highly variable among bird species, and depends on numerous factors including total population size, the number of breeding individuals, geographic distribution, predation, parasitism, nest site availability, food availability and other environmental characteristics. For some bird species, continued viability requires a much higher total population for that species to avoid inevitable extinction; for other species continued viability can occur at lower population levels. FCC's refusal to recognize the potential adverse impact of communication tower collisions on birds, without having performed an analysis of the viability of each affected bird species, harms my interest in protecting and preserving birds.
  - h. To the extent that FCC's policies allow licensees to obtain tower licenses without complying with FCC regulations and environmental statutes that require preparation of an environmental assessment ("EA") evaluating the impact of a proposed tower on migratory birds, those policies harm my interests in preserving bird species.
11. FCC's delay in addressing the adverse effects of its communication tower licensing regulations continues a policy that results in the killing of birds that I enjoy seeing and showing to others as a recreational activity and as a part of my profession.
12. The FCC could redress my concerns about avian mortality at towers by requiring full environmental reviews of proposed communication towers to analyze their impacts on migratory birds, and by requiring mitigation measures on these towers to prevent avian mortality. The relief that ABC and the Council seek will benefit me in the following ways:
- a. Site-specific environmental assessments would help ensure that existing structures harmful to migratory birds and other protected resources are carefully evaluated

and, if necessary, modified in a manner that mitigates mortality to migratory birds and thus mitigates the harm to my interests.

- b. An adequate programmatic environmental impact statement and adequate mitigation measures would ensure that all future antenna structures are constructed in a manner that mitigates harm to my interests in protecting migratory birds.
  - c. The foregoing actions would redress and better protect my direct interests in observing, studying, acquiring land for, raising funds, and showing birds. Without the relief requested by the Council and the ABC, local conditions will continue to be adversely affected by mortality of migratory and resident birds at towers, and my interests in birds and bird-related activities will be injured.
  - d. Because the viability of each bird species must be evaluated individually, my interests in preserving bird species would be benefited by preparation of an environmental assessment ("EA") and, if necessary, an environmental impact statement ("EIS") prior to individual tower approvals in cases where the proposed tower may affect a particular endangered or threatened species.
  - e. Finally, the public participation opportunities the Council and ABC seek will benefit me by enabling me to become aware of new antenna structure registration applications harmful to migratory birds in areas that I use and enjoy for observing birds recreationally and as part of my profession. It will also provide me an opportunity to attempt to influence the location and configuration of proposed structures so that harm to migratory birds and other protected resources of concern to me is mitigated.
13. I have read the foregoing statements, and such statements are true to the best of my knowledge, information, and belief. Dated this 17<sup>th</sup> day of March, 2005.



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Joy Haynes Hester, Member  
American Bird Conservancy

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

\_\_\_\_\_  
In re AMERICAN BIRD CONSERVANCY )  
and FOREST CONSERVATION COUNCIL, )  
Petitioners. )

Civil Action No. \_\_\_\_\_

DECLARATION OF JAMES A. COX

1. I, James A. Cox, make the following declaration pursuant to 28 U.S.C. § 1746 in support of the above-captioned petition for writ of mandamus. I declare under penalty of perjury that this declaration is true and correct.
2. My name is James A. Cox. I live at 1503 Wekewa Nene, Tallahassee, FL 32301.
1. I am a member of the American Bird Conservancy ("ABC"), whose mission is to conserve wild birds and their habitats throughout the Americas. I am also a member of the Forest Conservation Council ("Council"), whose mission is to protect and restore forests and other wildlands throughout the United States and to safeguard the populations of plants, animals, and fish that depend on native forest ecosystems.
3. I am the Vertebrate Ecologist at Tall Timbers Research Station (13093 Henry Beadel Dr., Tallahassee, FL 32312). Both my home and my place of business lie within the Gulf Coast region as delineated in the Petition filed with the Federal Communications Commission ("FCC") by ABC, the Council and Friends of the Earth ("FoE")
4. I conduct research on both migratory and non-migratory birds, lead field trips to observe migratory and non-migratory birds, and provide guidance on management and conservation of forest systems in the Red Hills region of north Florida and southwest Georgia for migratory and non-migratory species. I also regularly research, study and teach about birds, particularly in northwest Florida in the Gulf Coast Region and other areas of the Florida Gulf Coast.
5. I have authored or co-authored 36 publications relating to birds, including the following:
  - a. Barrow, W.C., L. Randall, M. Woodrey, J. Cox, E. Inzunza, C. Riley, and C. Eberly, Coastal forests of the Gulf of Mexico: a description and thoughts on their conservation (Proceedings of the Partners in Flight Conference, Asilomar, California);
  - b. J. Cox, 1988, The influence of forest size on transient and resident birds occupying the maritime hammocks of northeastern Florida (Florida Field Naturalist 17:25-34);

- c. Cox, J. 2003. Saving migrant birds. Developing strategies for the future (book review, Florida Field Naturalist 31:30-32);
- d. Cox, J., and S. Roth. 2004. Use of recorded vocalizations in winter surveys of Bachman's sparrow; Journal of Field Ornithology 75:359-363;
- e. Cox, J., and R. T. Engstrom. In press. Red-cockaded Woodpecker habitat in the Red Hills region: do federal foraging guidelines apply? Fourth Red-cockaded Woodpecker Symposium, Savannah, Georgia;
- f. Hagan, G., R. T. Engstrom, J. Cox, and P. Spivey. In press. Monitoring for effects of removal of subadult red-cockaded woodpeckers for translocation. Fourth Red-cockaded Woodpecker Symposium, Savannah, Georgia;
- g. Cox, J. and P. Spivey. 2003. Adoption in the Red-cockaded Woodpecker. Wilson Bulletin 115(3):338-340;
- h. Cox, J., W. Baker, and R.T. Engstrom. 2001. Red-cockaded woodpeckers in the Red Hills region: a GIS-based assessment. Wildlife Society Bulletin 29:1278-1288;
- i. Cox, J., and R.T. Engstrom. 2001. Influence of the spatial pattern of conserved lands on the persistence of a large population of red-cockaded woodpeckers. Biological Conservation 100:137-150.

6. I regularly birdwatch in the following areas of the Gulf Coast Region of north Florida: St. Marks (Wakulla Co.) and St. Vincent (Gulf Co.) National Wildlife Refuges; St. George Island State Park (Franklin Co.); Alligator Point State Park (Franklin Co.); Bald Point Preserve (The Nature Conservancy; Franklin Co.); Big Bend Wildlife Management Area (Taylor and Dixie Co.), and Aucilla Wildlife Management Area (Jefferson and Taylor Co.). I bird watch approximately once a week throughout the year, and more frequently during Spring and Fall during migration. I especially like to take the opportunity to watch migratory songbirds as they use these areas of the Gulf Coast Region during Spring and Fall migration.
7. All of the areas in which I birdwatch have communication towers nearby. Of over 1,200 bird species I have seen in my lifetime and hope to see again in the future, about 70% are migratory birds that migrate through the Gulf Coast region of Florida. I enjoy the diversity of all birds and especially the migratory songbirds that fly through the Gulf Coast Region.
8. I teach about, research, study, and watch many of the same species of birds in the Gulf Coast Region that have been documented as having been killed by collisions with communication towers. My direct interests in birdwatching, studying the ecology and habitat needs of native species birds, and writing about birds is harmed when fewer migratory songbirds are present due to mortality associated with collisions with towers.
9. During my visits to locations in the Louisiana Gulf Coast region and along the Gulf Coast of Texas, Mississippi, Alabama, and Florida, I have seen and hope to see birds in the near future that are either on the Endangered Species List, United States Fish and Wildlife Service's Nongame Birds of Management Concern List, or the Partners in Flight Watch List, and that have been documented as killed by communication tower collisions. These include all of the following:

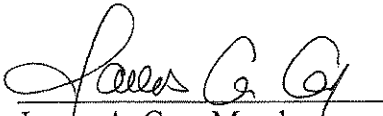
Blackpoll Warbler	Wood Thrush	Painted Bunting
Black-throated Blue Warbler	Louisiana Waterthrush	Red-cockaded Woodpecker
Chestnut-sided Warbler	Yellow-billed Cuckoo	Ovenbird
Swainson's Warbler	Sedge Wren	Red-eyed Vireo
Worm-eating Warbler	Eastern Meadowlark	Black-whiskered Vireo
Blue-winged Warbler	Northern Flicker	Philadelphia Vireo
American Redstart	Sharp-tailed Sparrow	Swainson's Thrush
Tennessee Warbler	Henslow's Sparrow	Veery
Common Yellowthroat	Red-headed Woodpecker	Hermit Thrush
Bay-breasted Warbler	Seaside Sparrow	
Prothonotary Warbler	Chuck-will's Widow	

10. I watch for these species, as well as other species that have been documented as killed by collisions with communication towers, for my own personal recreational enjoyment. In addition, I observe many of these species in order to research, write and teach about them. I hope to continue these activities in the future.
11. My professional and personal interests in continuing all of these activities are threatened by mortality of bird species that I watch through fatal collisions with communication towers, as detailed below:
- a. According to the Federal Communications Commission database, there were at least 5,779 existing towers in the Gulf Coast region when the FCC received the Gulf Coast Petition in August 2002, and the FCC has registered hundreds of additional towers since. I study, research, and birdwatch at or near at least 1,000 of these existing communications towers. For example, I frequently view, study, research, and teach about birds at Panacea, Carabelle, Shell Point, Alligator Point, Apalachicola, East Point, Port St. Joe, and St. Marks, Florida, where towers exist. All of the towers near and around where I go to view and study birds are inconsistent with USFWS guidelines. As a result they kill birds that are vital to my professional and personal interests.
  - b. Avian fatalities at communication towers contribute to the cumulative impact of mortality factors that result in declines of many species' populations, and this may increase the vulnerability of some birds that I study, research, teach, write about and birdwatch.
  - c. Current and planned communications towers pose serious threats to birds in the Gulf Coast Region where millions of birds migrate each spring and fall. These towers present formidable obstacles to many of these migratory species in the Gulf Coast region and nationwide. I understand from the scientific literature that the cumulative impact of the tens of thousands of existing and planned towers may result in 5 million to 50 million avian fatalities in the U.S. each year. These avian fatalities harm my personal and professional interests in preserving and protecting birds that I hope to study, research, teach, write about and birdwatch in the future.

- d. In my work at the Tall Timbers Research Station, I help run the Vertebrate Ecology Lab. The Lab helps manage and conserve the endangered Red-cockaded Woodpecker population found on properties in the Red Hills region of Florida. This is the largest woodpecker population remaining on private lands. Communication towers that are located in the Red Hills and that do not conform to bird-safe design may threaten local breeding groups of this species. As a result, such towers may threaten my personal and professional interests in protecting and conserving the Red-cockaded Woodpecker.
  - e. The probability of persistence of an individual bird species (“viability”) is highly variable and depends on numerous factors including total population size, the number of breeding individuals, geographic distribution, predation, parasitism, nest site availability, food availability and other environmental characteristics. For some birds species, continued viability requires a much higher total population to avoid inevitable extinction; for other species continued viability can occur at lower population levels. FCC’s refusal to recognize the potential adverse impact of communication tower collisions on birds, without having considered the viability of each affected bird species, harms my interest in protecting and preserving birds.
  - f. To the extent that FCC’s policies allow licensees to obtain tower licenses without complying with FCC regulations and environmental statutes that require preparation of an environmental assessment (“EA”) evaluating the impact of a proposed tower on migratory birds, those policies harm my interests in preserving bird species.
12. The FCC could redress my concerns about avian mortality at towers by requiring full environmental reviews of proposed communication towers to analyze their impacts on migratory birds, and by requiring mitigation measures on these towers to prevent avian mortality. The relief that ABC and the Council seek will benefit me in the following ways:
- a. Site-specific environmental assessments would help ensure that existing structures harmful to migratory birds and other protected resources are carefully evaluated and, if necessary, modified in a manner that mitigates mortality to migratory birds and thus mitigates the harm to my interests.
  - b. An adequate programmatic environmental impact statement and adequate mitigation measures would ensure that all future antenna structures are constructed in a manner that mitigates harm to my interests in protecting migratory birds.
  - c. These actions would redress and better protect my direct interests in observing, studying and teaching about birds. Without the relief requested by the Council and the ABC, local conditions will continue to be adversely affected by mortality of migratory and resident birds at towers, and my interests in birds and bird-related activities will be injured.

- d. Because the viability of each bird species must be evaluated individually, my interests in preserving bird species would be benefited by preparation of an environmental assessment ("EA") and, if necessary, an environmental impact statement ("EIS") prior to individual tower approvals in cases where the proposed tower may affect a particular endangered or threatened species.
- e. Finally, the public participation opportunities the Council and ABC seek will benefit me by enabling me to become aware of new antenna structure registration applications harmful to migratory birds in areas that I use and enjoy for observing birds recreationally and as part of my profession. It will also provide me an opportunity to attempt to influence the location and configuration of proposed structures so that harm to migratory birds and other protected resources of concern to me is mitigated.

13. I have read the foregoing statements and such statements are true to the best of my knowledge, information, and belief. Dated this 11 day of March, 2005.

  
James A. Cox, Member  
American Bird Conservancy  
Forest Conservation Council

# ADDENDUM

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

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In re AMERICAN BIRD CONSERVANCY )  
and FOREST CONSERVATION COUNCIL, )  
Petitioners. ) Civil Action No. \_\_\_\_\_  
)  
\_\_\_\_\_)

**CERTIFICATE OF PETITIONERS  
AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1)(A), the Petitioners American Bird Conservancy and Forest Conservation Council hereby submit the following Certificate as to Parties, Rulings and Cases:

**I. PARTIES AND AMICI**

**Parties, Intervenors and Amici Who Appeared Before the Agency.**

American Bird Conservancy, Forest Conservation Council, and Friends of the Earth appeared before the Federal Communications Commission in connection with their Petition for environmental compliance filed August 26, 2002 (attached hereto as Exhibit K).

**Parties, Intervenors and Amici in This Court.**

The Petitioners in this case are American Bird Conservancy (“ABC”) and Forest Conservation Council (“Council”). The Respondent in this action is the Federal Communications Commission (“FCC”) and Kevin J. Martin, Chairman of the FCC.

**Disclosures Pursuant to D.C. Circuit Rule 26.1:**

The Petitioners hereby make the following disclosures required by D.C. Circuit Rule 26.1:

### **American Bird Conservancy**

Petitioner American Bird Conservancy is a national non-profit organization, whose mission is to conserve wild birds and their habitats throughout the Americas.

The following are parent companies, subsidiaries or affiliates of American Bird Conservancy that have issued shares or debt securities to the public: none.

### **Forest Conservation Council**

Forest Conservation Council is a national non-profit organization, whose mission is to protect and restore forests and other wildlands throughout the United States and to safeguard the populations of plants, animals, and fish that depend on native forest ecosystems.

The following are parent companies, subsidiaries or affiliates of Forest Conservation Council that have issued shares or debt securities to the public: none.

## **II. RULINGS UNDER REVIEW**

Because this petition for mandamus seeks enforcement of the FCC's duty to conclude a matter presented to it within a reasonable time, there are no rulings under review.

## **III. RELATED CASES**

This Court denied the Petitioners' previous request for writ of mandamus without prejudice to renewal in the event of significant additional delay. *See In re Forest Conservation Council Inc., et al.*, No. 03-1034 (July 2, 2003) (Exhibit DD hereto). Petitioners are unaware of any other cases that are related under the meaning of D.C. Circuit Rule 28(a)(1)(C).

DATED: 04/08/05

Respectfully submitted,

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Jennifer C. Chavez  
Stephen E. Roady

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Attorneys for Petitioners

## CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2005, the foregoing *Petition for Writ of Mandamus* was served by United States first-class mail to the following:

Kevin Martin, Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

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Emily Robinson  
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