November 11, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20054

Dear Commissioners:

The National Wildlife Federation is grateful for the opportunity to comment in response to the FCC Notice of Inquiry on the Effects of Communication Towers on Migratory Birds, in the Federal Register of September 12, 2003, WT Dkt. No. 03-187, FCC 03-205. As the nation's communications infrastructure continues to expand at a rapid rate, significant negative impacts on migratory birds will increase as well. We are hopeful that this Notice is a meaningful step in the Commission's recognition of the need to address avian mortality from communication towers. The FCC must meet its legal obligations under various environmental protection statutes -- including the National Environmental Policy Act (NEPA), Migratory Bird Treaty Act (MBTA), and the Endangered Species Act (ESA) – in order to ensure protection of the nation's migratory bird population from death due to collision with communication towers.

It is estimated that the 90,000+ communication towers in the U.S., particularly those over 200 feet, cause the death of at least 5 million and as many as 40 million birds a year.[1] An American Bird Conservancy report documents the killing of 230 species of birds at communication towers, including the endangered Red-cockaded Woodpecker and 51 species that were on either the U.S. Fish and Wildlife Service's Species of Management Concern List or the Partners in Flight Watch List. With the number of such towers expected to double by 2010[2], avian mortality will continue and rise without corrective measures. The Director of the U.S. Fish and Wildlife Service noted in 2000, that "[t]he cumulative impacts of the proliferation of communication towers on migratory birds, added to the combined cumulative impacts of all other mortality factors, could significantly affect populations of many species."

The National Wildlife Federation (NWF) represents four million members and supporters devoted to protecting wildlife, people and wild places. The well-documented avian mortality due to communication towers is a serious threat to the aesthetic, recreational, and economic interests of our members. In fact, bird watching is one of the nation's fastest-growing hobbies and is a significant share of the approximate $30 billion annually Americans spend on viewing wildlife.[3] In addition, migratory birds provide a number of highly valuable environmental services, including pollination of food crops and control of pests and weeds.

---

[1] Federal Aviation Agency
[2] Issue Brief from the Ornithological Council, Volume 1, Number 8, October 1999
[3] Ibid

We urge the Commission to work with the scientific, business, and environmental communities to protect migratory birds from death due to collisions with communication towers. While more research is needed, particularly on safety measures for existing and future towers, sufficient long-term data exists on the extent of avian mortality to compel strict environmental review of new tower system permits. The Commission's recent permitting of the 180-tower system for the Michigan State Police clearly represents the Commission's failure to meet its legally mandated responsibility to protect the environment. The nation's migratory bird populations, already stressed by numerous factors, will be put at even greater peril if this pattern of lax permitting continues.

Below please find our response to a number of the questions in the Notice. Please include us in this process as you move toward rule-making in response to the comments generated by this Notice of Inquiry.

Introduction

The National Wildlife Federation (NWF)'s Lake Superior Project first became aware of the Federal Communication Commission (FCC)'s regulatory deficiencies when the FCC registered and licensed 180 communication towers across the State of Michigan for the Michigan State Police. At least ten of those towers are within the breeding range of the endangered Kirtland's warbler. At least three more are located directly in a well-documented flyway used by raptors and neo-tropical migrants on Michigan's Keweenaw Peninsula on Lake Superior. Through our efforts to protect the birds that migrate through and summer in northern Michigan, it has become glaringly apparent that FCC's regulations regarding migratory birds are insufficient, and that implementation of those regulations is equally inadequate. For those reasons, NWF has filed one petition with the FCC and is preparing another one. FCC simply must come into compliance with federal environmental statutes. These comments outline necessary changes and suggestions for moving toward adequate regulatory outcomes.

A. Current State of Scientific Information

A wealth of data exists on the extent and nature of avian mortality due to towers. In many cases, the data comes from long-term, well-documented studies. The Fish and Wildlife Service has compiled an up-to-date bibliography of past research in its *Bird Kills At Towers And Other Human-Made Structures: An Annotated Partial Bibliography (1960-1998)*. While available scientific information can be improved with further study, sufficient information exists today to justify timely action by FCC and tower owners to minimize impacts on migratory birds. Legally required environmental assessments addressing the impacts to migratory birds from FCC-permitted towers already are woefully overdue. Given the USFWS figure of *at least* 4 million dead birds per year, there is no justification for further delay.

B. Need for Additional Study

Even though enough data now exists for the FCC to improve regulations and implementation of those regulations, many experts in the field agree that additional study is needed to more fully understand avian behavior related to communication towers. A 1999 USFWS workshop on Avian Mortality and Communication Towers brought together a range of experts to discuss many of the technical and policy issues raised by this Notice. The proceedings are an excellent resource and can be found at http://www.towerkill.com/workshop/proceedingsindex.html. In addition, a brief from the Ornithological Council entitled *Deadly Spires in the Night* (Issue Brief, Volume 1, Number 8, October 1999) is a valuable summary of issues and research questions.

The FCC should require the communications industry to allocate funding for the necessary research. Also, the Commission should require cooperation from tower owners for access to sites for research. Close coordination of research design and review with agencies like the FAA and USWFS is also necessary. The current study by the Michigan State Police should be evaluated for strengths and weaknesses when designing future research protocols. Finally, similar research efforts in the energy transmission and wind power industries should be used as models.

C. Methods for Minimizing Impacts

1. Ensure Compliance with National Environmental Policy Act (NEPA)

Recent permitting actions by the FCC demonstrate that the Commission's compliance with existing environmental protections is inadequate. For example, permitting of the Michigan State Police's 180-tower system does not meet the Commission's own regulations for compliance with NEPA (per 47 CFR 1.1301). NWF has petitioned the Commission to address this lack of compliance in its formal petition filed on April 2002. In order to comply fully with NEPA and to improve its Environmental Assessment (EA) requirements when permitting construction of all new communication towers, the Commission should:

- *Amend Categorical Exclusions:* FCC must consider migratory bird impacts when applying the Categorical Exclusions (CE) if those impacts may be significant. In addition to listing specific exceptions to their categorical exclusions, most agencies also provide a mechanism for considering actions unspecified or unknown at the time of the rule-making that may result in significant impacts. FCC regulations must be read to provide for exceptions for situations where licenses may have significant environmental impacts aside from those specifically identified in 47 C.F.R. § 1.1307(a).

- *Make Independent Determinations about Applicability of Categorical Exclusions.* The FCC must consider environmental information and make an *independent* determination about whether a CE applies. Currently, the applicants for tower licensure and registration simply mark a "yes" or "no" on the application form in response to one question about whether the project will result in significant environmental impacts. This check mark is the *sole* determining factor about CE inclusion. An applicant cannot be the decision maker about whether a project may have significant environmental impacts. Although the applicant may be asked to supply information, the agency, not the applicant, must make the final determination. Currently, FCC conducts absolutely no independent evaluation and makes no independent determination about the applicability of categorical exclusions.

- *Improve the Petition Process*. For example, NWF's initial petition requesting an EA was filed in April of 2002. Despite NWF requests for action on this petition, the FCC has not required that the Michigan State Police file a response nor has the FCC addressed the underlying regulatory issues that necessitated the petition.

- *Ensure No Action Taken on the Ground Before Review:* The FCC must review applications for significant impacts *prior* to allowing construction of towers.

- *Consider the Cumulative Impacts of the Towers:* NEPA Requires Assessment of cumulative impacts even if actions are otherwise categorically excluded.

- *Conduct environmental review of the entire system*: NEPA requires a programmatic EA/EIS for connected actions and a programmatic EA/EIS for cumulative actions.

2. Adopt Interim Permitting Guidelines

The rapid proliferation of towers for cellular communications and digital television surely will increase the rate of avian mortality. Technical guidelines for tower siting and construction should be developed and adopted immediately. These guidelines should be based on the best available science on the extent, cause, and prevention of bird kills from communication towers. We believe that guidelines can be applied so that they do not unduly impede provision of communications and public safety services.

The September 2000 U.S. Fish and Wildlife Service (FWS) Guidelines should be adopted as interim permitting guidelines. They indicate that co-location, keeping towers under 200', avoiding guy wires, minimizing lighting, and using only white strobes at minimum required pulse rates would greatly reduce, if not eliminate, avian mortality. The Commission should adopt these guidelines on an interim basis, updating and formally adopting them upon completion of the proposed research period.

Conclusion

Existing FCC regulations are not protective of migratory birds and do not meet the requirements of NEPA, MBTA, or ESA. This situation must be remedied through rule-making and procedural improvements. NWF hopes these suggestions, as well as the many conversations NWF staff has had with FCC over the last several years regarding this matter, will advance a remedy. Please advise NWF of the results of this Notice of Inquiry through our representative, Michelle Halley, Attorney, P.O. Box 914, Marquette, MI 49855. Should you wish to discuss these comments, she can be reached at 906-361-0520 or halleym@charter.net.

Thank you for this opportunity to comment on this Notice of Inquiry.

Respectfully,

Andrew Buchsbaum
Director, Great Lakes Natural Resource Center
National Wildlife Federation