

The killing of at least 65 species of Birds of Conservation Concern at communication towers has been documented in the literature and in filings with the FCC, and is again documented herein. See Section IV below and see, also: Shire, G.G., K. Brown, and G. Winegrad. 2000. *Communication towers: a deadly hazard to birds*. American Bird Conservancy, Washington, D.C (2000); Longcore et al. Land Protection Partners Reports (2005); and Longcore et al. Land Protection Partners Analysis (2007).

The take of millions of these U.S. FWS listed Birds of Conservation at communication towers and the detailed estimates of the annual killing of the 65 listed Birds of Concern is documented in the analysis and comments in Longcore et al. Land Protection Partners Reports (2005) and Longcore et al. Land Protection Partners Analysis (2007) and in the other publications cited above. This take of not only MBTA protected migratory birds, but of U.S. FWS Birds of Conservation Concern as well should trigger the FCC to complete a programmatic EIS under NEPA and to fully comply with NEPA, MBTA, and the ESA.

The FCC implies that its procedures are sufficient because “although under our present rules we do not routinely require environmental processing with respect to migratory birds, the Commission has considered the impact of individual proposed actions on migratory birds as part of its overall responsibility under NEPA,” citing a total of two individual tower licensing proceedings. See NPRM, paragraph 33, Note 111. However, this is grossly insufficient. In both cases, consideration of migratory bird impacts resulted from challenges by concerned third parties, not from FCC’s compliance with its own regulations. *In re Leelanau County, Michigan*, 9 FCC Rcd 6901 (1994) arose as a result of a challenge by the Citizens for Existing Towers, Michigan Audubon Society, National Audubon Society, and the National Parks and Conservation Association. *In re Deersville, OH*, 19 FCC Rcd 18149 (WTBSCPD 2004), was the subject of a Petition to Deny that the Appellants filed on the basis that the proposed facility would have a significant effect on migratory birds. See Memorandum Opinion and Order DA 04-29990 (Sept. 14,2004).

But for these third party challenges, there is zero consideration given or required for impacts to non-ESA listed migratory birds, nor for congressionally mandated Birds of Conservation Concern, and not for migratory birds given protection under the MBTA. Approximately 100,000 lit communication towers are operating in the U.S. under FCC jurisdiction, with at least another 70,000 towers under 200’ in height, and the FCC cites two cases where impacts to migratory birds were considered.

We suggest that 47 C.F.R. §1.1307 be amended to require that an applicant must review and evaluate the following, at a minimum:

Is the proposed antenna structure located in a migratory bird corridor, on a ridge, near a wetland, or in or near a wildlife area such as a refuge or park, or in any other area that attracts migratory birds?

Is the proposed antenna structure to be constructed likely to cause any migratory birds, and specifically U.S. FWS Birds of Conservation Concern, to be killed at the structure?

Is the proposed antenna structure to be constructed and operated so as to avoid, or at least minimize, the likelihood of causing fatalities to any migratory birds, and specifically U.S. FWS Birds of Conservation Concern, including avoiding the use of guy wires where possible and not using red steady burning pilot warning lights (L-810) for night time conspicuity?

If an applicant responds “yes” to either of the first two questions, or “no” to the third question, an EA would be triggered. The new requirements for the avoidance measures detailed in Section II above should be applied to all towers, but in cases where migratory birds may be affected, the FCC should closely review the application and assure full compliance.

Each tower applicant should be required to provide documentation verifying a determination that no EA is required, and this should include a U.S. FWS regional office determination of whether any threatened or endangered species are in the area and potential effects on such species, as well as a review by the regional office of the U.S. FWS of potential migratory bird impacts for each new tower and whether the tower would be constructed and operated so as to avoid taking migratory birds. After all, the FCC acknowledges in the NOI at page 14, that it is not expert in migratory birds but that the FWS is the lead Federal agency for managing and conserving migratory birds and possesses the requisite expertise. Given that the FCC acknowledges that it has no in-house capability to ascertain whether individual antenna structures may affect migratory birds or ESA-listed species, the FCC should require the U.S. FWS review and comment. Again, the FCC should assure that the applicant adopts the avoidance measures detailed in Section II above to prevent, or at least minimize, bird fatalities.

Crucial to the FCC’s compliance with conservation statutes are these procedural requirements related to a tower applicant’s determination whether an individual EA is required. Currently, the applicants are not required to submit any data or documentation to validate their claim that no EA is required, and there is no requirement for the FCC independently to review the applicant’s assertion. This procedure plainly violates the law. See *State of Idaho, et al. v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (noting that an agency’s “attempt to rely entirely on the environmental judgments of other agencies” and of the regulated entities was a “blatant departure from NEPA”). Likewise, under the ESA, “compliance with section 7 of the ESA requires that the agency itself ultimately determine the likely impact of [the proposed activity] on the listed species”. *Id.* at 598.

The FCC must correct its procedural requirements appropriately, to ensure compliance on an individual tower basis by its own review and evaluation of new antenna structures and the adoption of avoidance measures for migratory birds. U.S. FWS input would assist the FCC in its determinations. NEPA, ESA, and the prohibitions of the MBTA criminalizing even the incidental, accidental, or inadvertent take of migratory birds without a permit dictate such action, at a minimum, to prevent bird deaths.

The FCC cannot cure the defects in its current antenna structure program by simply adding items to a checklist that is entirely left up to the applicant and for which the FCC

is incapable of independently reviewing for accuracy as to environmental impacts, and specifically, impacts to migratory birds. We believe that by adding the three items above, followed by a required submittal and review by the regional office of the U.S. FWS, the FCC could then evaluate migratory bird impacts for each new tower and whether the tower would be constructed and operated so as to avoid taking migratory birds. This presumes that the tower is required to adopt the avoidance measures detailed in Section II above and that the applicant details these measures in the application to be reviewed by FWS and, ultimately, by the FCC.

The practice of automatically registering each new antenna structure where no item in the 47 C.F.R. § 1.1307 checklist is checked affirmatively must end and the FCC must conduct its own independent analysis, relying of course on the comments of the FWS and the applicant's use of avoidance measures, to determine if the statutory requirements of the MBTA, ESA, and NEPA are met for each new tower.

Currently, applicant's rarely do seek FWS comments on tower impacts to birds, but if the FWS advises that ESA-listed species are not likely to be impacted, the applicant ignores comments on adverse impacts to migratory birds because the tower will have red steady burning lights (1-810) and guy wires, and the FCC automatically approves the application unless a third party intervenes. This current FCC practice of rubber-stamp approval and registration of nearly all towers and their categorical exclusion from environmental review under NEPA violates NEPA, the MBTA, and the ESA.

The FCC should adopt the changes in its antenna structure approval and registration program suggested above through this NPRM to cure the violations of NEPA.

3) THE FCC CANNOT SHIFT ITS BURDEN TO STUDY THE EFFECTS OF ITS PROGRAM TO THE CONSERVATION COMMUNITY.

The NPRM incorrectly suggests that the FCC may require some higher "threshold" showing of adverse effects before the agency will recognize and comply with its duties under NEPA. See NPRM at paragraph 34. In particular, the NPRM suggests that the FCC will only comply with NEPA "provided that there is probative evidence that communications towers are adversely affecting migratory birds." *Id.* This approach clearly violates NEPA.

As an initial matter, the FCC lacks any legal basis for requiring "probative evidence" of actual effects. As explained above, both NEPA and FCC regulations require the agency to conduct an EIS whenever its actions "will or may" cause significant adverse effects. 40 C.F.R. § 1508.3 and 47 C.F.R. § 1.1303. Further, the FCC cannot shift the burden of its duty to study the effects of its program onto the conservation community. See *Alaska v Andrus*, 580 F. 2d 465,473-474 (D.C. Cir. 1978).

Finally, the FCC cannot require the public to show that significant effects will in fact occur, in order to demonstrate that the agency must prepare an EIS. "It is enough for the plaintiff to raise 'substantial questions whether a project may have a significant effect' on the environment." *Blue Mtns Biodiversity Project v. Blackwood*, 161 F. 3d 1208, 1212

(9th Cir. 1998), cert. denied sub nom *Malheur Lumber Co. v. Blue Mtns Biodiversity Project*, 527 U.S. 1003 (1999).

4) THE FCC SHOULD PROVIDE THE OPPORTUNITY FOR PUBLIC COMMENT ON ANTENNA STRUCTURE APPROVALS AND REGISTRATION.

The FCC is in violation of NEPA public participation requirements set forth in 40 C.F.R. § 1506.6 concerning public notice and opportunity to comment on antenna structure approvals and registrations by the FCC. The FCC excludes public participation opportunities for the vast majority of antenna structures that come before it for approval and registration. This is because under the FCC antenna approval and registration process, the FCC categorically excludes the vast majority of new towers from NEPA review and hence public participation and comment.

In making each approval and registration decision for categorically excluded towers, the FCC simply rubber-stamps approval and registration and issues the registration decision on the same day or, at most, one day after, the subject registration applications are received. This is all done without any public notice. Only in those cases where an applicant determines that one of the items triggering an EA under 47 C.F.R. 1.1307 applies does the public have any notice of the application before the FCC by combing the FCC web site, and then, the public must respond within 30 days or the application is approved and the new tower is registered.

This FCC process fails to provide the public any opportunity to review the vast majority of tower applications and their supporting documentation, raise issues and concerns germane to the decisions, or object to use of a categorical exclusion prior to the registration decisions. Instead, in the vast majority of cases, the FCC fails to alert the public before quickly approving and registering the categorically excluded tower.

This issue has been repeatedly raised with the FCC and is included as one of requests in the Gulf Coast petition filed on August 26, 2002 with the FCC.

5) THE FCC HAS BEEN ADVISED REPEATEDLY OF ITS FAILURE TO COMPLY WITH NEPA AND SHOULD USE THE NPRM PROCESS TO CURE THESE VIOLATIONS.

Although the FCC has been implementing a nationwide tower approval and registration program for many years, the agency has never prepared an Environmental Impact Statement (“EIS”) on the program. Thus, the agency has never taken a look at the cumulative environmental impacts of this program as a whole, and has never systematically considered reasonable alternatives to various aspects of the program.

Indeed, in the letter dated November 2, 1999, the Director of the U.S. Fish and Wildlife Service specifically insists that the FCC prepare a programmatic EIS under NEPA to delineate the extent of the mortality to birds from towers, the cause of the mortality, and to arrive at mitigation measures. The Director references data that indicate the annual killing of migratory birds from communication towers may be 4 million to an order of magnitude above this (40 million) and notes the failure of the FCC’s current environmental review procedures to prevent “substantial losses of migratory birds

[which] are not being accounted for in FCC's permit and NEPA decision-making process." Letter from Jamie Rappaport Clark, Director, FWS to William Kennard, Chairman, FCC (Nov. 2, 1999).

The FCC refused the Service's request without any coherent explanation, except the curt assurance that the FCC would continue to evaluate the adverse effects of the agency's approximately 5,000 annual communication tower registration and licensing decisions on a "case-by-case basis." Letter from William Kennard, Chairman, FCC to Jamie Rappaport Clark, Director, FWS (Mar. 21, 2000).

The FCC's failure to prepare an EIS for its overall program -- and especially its failure to consider the significant, cumulative effects of thousands of incremental approval, registration, and licensing decisions on migratory birds -- violates NEPA and the CEQ regulations implementing the Act. See 40 C.F.R. § 1508.18(b)(3) (an EIS is required for the "adoption of programs, such as a group of concerted actions to implement a specific policy or plan [and] systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive"); see also id. at § 1502.4(c)(2) (an EIS must be prepared on "broad actions" which "have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter").

In our filings in the NOI and in repeated communications with the FCC, we have cited the U.S. FWS letter and the failure of the FCC to comply with NEPA. See our comment letter on the NOI dated November 11, 2003. We presented the legal basis as to why the FCC was not in compliance with NEPA and how the FCC should come into compliance in the NOI comments and do so again herein.

The FCC has declined to conduct an EIS and has done virtually nothing to come into compliance with NEPA over the last seven and one-half years. The FCC currently violates NEPA regularly regarding the permitting, approval, registration, operation, and licensing of communication towers. The FCC should complete a NEPA programmatic EIS leading to a final EIS, and should adopt additional appropriate rule changes supported herein for tower registrations to prevent bird mortality.

6) UNTIL FCC COMPLETES EIS, NEW TOWER APPROVAL AND REGISTRATION MUST CEASE UNDER NEPA.

Until the FCC completes a programmatic environmental impact statement on its communication tower registration program, the agency must refrain from issuing new authorizations for towers that may adversely affect migratory birds. As clearly set forth by CEQ regulations implementing NEPA, "[u]ntil an agency issues a record of decision as provided in 40 C.F.R. § 1505.2, no action concerning the proposal shall be taken that would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives." Additional authorizations of towers harmful to migratory birds will only add to the direct, indirect, and cumulative environmental harm such towers already create. Additional authorizations will also preclude the agency from adopting reasonable alternatives for mitigating such harm, such as reduced tower size, selection of lower-

impact tower locations, changes in lighting, elimination of guy wires, and the other measures recommended by the U.S. Fish and Wildlife Service Guidelines and in section II above.

D. ENDANGERED SPECIES ACT COMPLIANCE.

1) ILLEGAL TAKE UNDER ESA.

The FCC's antenna structure approval and registration program violates the agency's obligations under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, in several ways. First, section 9 of the ESA prohibits the "take" of a listed animal. 16 U.S.C. § 1538(a)(1); 50 C.F.R. §§ 17.21, 17.31. The term "take" is broadly defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or [] attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

In this case, there is no question that FCC permitted communications towers have caused, and may continue to cause, the "take" of birds listed under the ESA. For example, ESA-listed Endangered Red-cockaded Woodpeckers were killed at one tower. Bird fatalities at towers in Alaska also may be linked to the killing of Spectacled and Steller's Eiders, both listed as threatened under ESA. See the U.S. FWS comments on this FCC NPRM dated February 2, 2007 and signed by Acting Deputy Director Kenneth Stansell. In Hawaii, the U.S. FWS on March 5, 2007 confirmed that seven already constructed communication towers in Hawaii were likely to affect two ESA-listed seabirds, Newell's Shearwater and the Hawaiian (Dark-rumped) Petrel and that consultation by the FCC was required under Section 7 of the ESA. See the attached FWS letter dated March 5, 2007.

In the U.S. FWS comments on this NPRM, FWS Acting Deputy Director Kenneth Stansell states: "In summary, the Service feels that immediate action needs to be taken to reverse these tower collision impacts on migratory birds....We recommend that FCC implement the Service's 2000 voluntary communication tower guidelines into rulemaking. The FCC would be responsible for informing license permit applicants of the guidelines, overseeing implementation of the guidelines, and would not depend on applicants independently contacting the Service for recommendations. Adopting the guidelines into rulemaking would expedite the consultation process, eliminate the need for the Service to review every communication tower project other than through a Site Evaluation Form, and would establish a basis for programmatic consultation **Accordingly, as with the MBTA, the FCC's authorization of towers that result in the death of listed species are illegal 'takes' under section 9 the ESA.** See, e.g., *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997)." (Emphasis provided).

The FCC needs to cure the illegal take or potential take of ESA-listed birds by formal ESA Section 7 consultation with the U.S. FWS on a nationwide basis to arrive at avoidance and mitigation measures to be adopted by the FCC as suggested by the U.S. FWS Tower Siting Guidelines, and as recommended in Section II above and in the U.S. FWS comments on this NPRM filed on February 2, 2007.

2) CONSULTATION UNDER SECTION 7 OF THE ESA IS REQUIRED.

The FCC fails to comply with Section 7 of the **ESA**. 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. Under Section 7 of the **ESA**, federal agencies must ensure that their granting of approvals, registrations, licenses and permits will not jeopardize the continued existence of endangered species. See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, et al.*, 515 U.S. 687,692 (1995).

To carry out its duty under Section 7, with respect to any agency action, each federal agency must **ask** the USFWS whether any “listed or proposed [endangered] species or designated or proposed critical habitat..... may be present” in the area of the proposed action. See 16 U.S.C. §§ 1536(a)(2)-(3) and 50 C.F.R. § 402.12(c). The consultation requirement in 16 U.S.C. §§ 1536(a)(2) and (3) applies to continuing agency actions, including programs that establish standards and guidelines that individual projects must follow. See 50 C.F.R. § 402.02 (“*Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies..... Examples include, but are not limited to..... the granting of licenses.. ..”) (emphasis added). See also *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1052-53 (9th Cir. 1994) (holding that consultation was required for “comprehensive [resource] management plans governing a multitude of individual projects”); *Conner v. Burford*, 848 F. 2d 1441, 1453-1458 (9th Cir. 1988) (same); *Greenpeace v. National Marine Fisheries Service*, 80 F. Supp. 2d 1137, 1143-1145 (W.D. Wash. 2000) (concluding that certain fishery management plans constitute an agency action that has a “significant ongoing effect” and that therefore require a comprehensive biological opinion).

To comply with this mandate, before taking an action which may affect listed species -- including the issuance of a federal permit, license, or other approval which may affect listed species -- agencies must first prepare a Biological Assessment which contains an analysis of the effects of the action on species, “including consideration of cumulative effects,” and consideration of “alternate actions considered by the Federal agency for the proposed action.” *Id.* at § 402.12(f). Only if the BA concludes that a project will not adversely affect any listed species, and the Fish and Wildlife Service concurs in writing, may the agency avoid formal consultation. 50 C.F.R. § 402.13. If an agency cannot support such a conclusion, or if the Fish and Wildlife Service does not concur with the agency’s conclusion, the agency must engage in formal consultation and obtain a Biological Opinion from the Fish and Wildlife Service which details the steps necessary to avoid jeopardy. 16 U.S.C. § 1536(b).

The FCC has already recognized its own duty to comply with the **ESA**. See FCC Opposition to Mandamus at 8, *In re American Bird Conservancy, et al. v. FCC*, Case No. 05-1112 (August 4, 2005). Also, the FCC wrote to tower owners and licensees in Hawaii acknowledging that FCC tower authorization “is considered a ‘federal action’ under the Endangered Species Act”. See FCC letter to FWS of May 3, 2004 acknowledging that “because the FCC retains jurisdiction over the licenses [for the towers], the Commission can conduct an on-going section 7 consultation despite the fact that the towers have

already been constructed.” The FCC requested a list of threatened and endangered species, stating that it would then distribute the list to the tower owners and licensees. At the same time, the FCC wrote to tower owners and licensees, acknowledging that FCC tower authorization “is considered a ‘federal action’ under the Endangered Species Act” and encouraging the licensees and owners to initiate informal consultation over the towers with the U.S. FWS. The FCC also directed the licensees and owners to provide the FCC with information about the tower structures and sites, and the effect of the towers on threatened and endangered species.

The U.S. FWS on March 5, 2007 confirmed this statutory duty on the part of the FCC to formally consult with the FWS under Section 7 of the ESA concerning the construction and operation of Hawaiian towers approved and registered by the FCC. The FWS wrote to the FCC recommending that the FCC consult on seven already constructed communication towers in Hawaii. See the attached FWS letter dated March 5, 2007.

3) CURRENT FCC PROCEDURES VIOLATE ESA REQUIREMENTS.

The Commission claims that it complies with the ESA through its regulations relating to Environmental Assessments (EAs), set forth at 47 C.F.R. § 1.1307(a)(3). *Id.*, NPRM ¶ 10. However, the FCC’s existing regulations are inadequate to ensure compliance with the ESA, because the FCC relies exclusively on registrants and applicants, either private tower corporate owners/operators or communication industry corporations to decide whether consultation on individual towers is required.

The FCC delegates to industry applicants as “non-federal representatives” both the responsibility for determining whether ESA consultation is necessary for a particular tower approval and registration decision and, if the applicant so chooses, the responsibility for obtaining a formal ESA consultation from the U.S. Fish and Wildlife Service. The FCC violates the ESA by its failure to prepare Biological Assessments on communication tower approval and registration decisions that are likely to adversely affect listed species, as well as by the agency’s decision to delegate its ESA consultation obligations to industry applicants (in those few cases where ESA consultation is actually initiated).

This approach to compliance with the ESA is impermissible because “compliance with section 7 of the ESA requires that the agency itself ultimately determine the likely impact of [the proposed activity] on the listed species.” *State of Idaho, et al. v. ICC*, 35 F.3d 585, 598 (D.C. Cir. 1994).

Indeed, the U.S. FWS on March 5, 2007 wrote to the FCC recommending that the FCC (and not the tower owners/operators) formally consultation with the FWS under Section 7 of the ESA concerning the construction of seven Hawaiian towers. The FCC failure to comply with the ESA regarding these Hawaiian towers was brought to the attention of the FCC and the FWS by NGOs in an ESA-60 day letter notifying the FCC of intent to sue under the ESA. This matter is now in litigation. The FWS letter to the FCC states: “In summary, we do not concur with the NLAA [not likely to adversely affect] determinations provided by the BA’s for the guyed towers. It is our position that these

towers do present a collision hazard for listed seabirds. Based on radar studies in other locations on the islands, we expect that listed seabirds are likely to be transiting the tower vicinities. We expect that over the 25-year life of a tower, individual listed seabirds could be injured or killed by colliding with guy-wires at these towers. We recommend the FCC initiate formal consultation for all aforementioned towers.

We recognize that these towers are all currently licensed by the FCC and have been in operation for years. Because these facilities already exist, there are limited options for minimizing collision hazards for birds at these sites. However, there are a number of wire-marking devices and other tools that could be used to reduce the risk of avian collisions with aerial lines. We also encourage the use of radar surveys at tower facilities to determine the extent that listed seabirds are transiting the tower areas. We look forward to working with the FCC and the licensees to develop alternatives to minimize the risk of avian collisions at these facilities. We appreciate your efforts to conserve endangered species.” Letter attached.

In this case involving the seven Hawaiian towers, the FCC did not have records of any ESA reviews having been conducted by the tower owners/operators or the FCC at the time of the approval, registration, and construction of the towers, nor any records of consultation with the FWS. All ESA review was after FCC approval, registration, and the owners/operators’ construction of the towers—and this only because of the intervention of the plaintiffs in these cases.

After an ESA 60-day letter notifying the FCC of the plaintiffs’ intention to sue for violations of the ESA, the FCC wrote the tower owners/operators and requested that they consult with the FWS and provide information on any possible affects to ESA-listed species of the seven operating towers. All seven of the towers were determined by the FCC through the industry owner/operators to be “not likely to adversely affect” ESA-listed species.” The FCC conducted no independent review of the affect on ESA-listed species either before or after its approval and registration and the subsequent construction. These Hawaii tower cases are typical of how the ESA is routinely violated under the FCC tower approval and registration program.

We also note that in enacting the ESA, Congress explicitly determined “to require agencies to afford first priority to the declared national policy of saving endangered species” and made a “conscious decision. . .to give endangered species priority over the ‘primary missions’ of federal agencies.” TVA v. Hill, 437 U.S. 153, 184-86 (1978). The FCC fails to comply with the ESA, its implementing regulations, and the clear mandates of court decisions applying the ESA.

In accordance with Section 11(g)(2) of the ESA, 16 U.S.C. § 1540(g)(2), the American Bird Conservancy, Friends of the Earth, and Forest Conservation Council gave notice of the violations of the ESA to the FCC and to the Secretary of the Department of Interior by certified mail, return mail receipt requested, on April 12,2001. For the specific towers approved and registered by the FCC in Hawaii, notice of ESA violations was sent the FCC on April 9, 2004 under Section 11(g)(2) of the ESA The FCC has failed to act to

end these violations and litigation is before two U.S. Circuit Courts of Appeals regarding these violations.

The FCC needs to cure these violations of the ESA by formally consulting with the U.S. FWS under Section 7 of the ESA on a nationwide basis to arrive at avoidance and mitigation measures to be adopted by the FCC as suggested by the U.S. FWS Tower Siting Guidelines, and as recommended in Section II above. Such consultations also should be conducted by the FCC, not the tower applicants, where a tower “may adversely affect” an ESA-listed species. Obviously, this needs to occur in Hawaii for the seven towers the FWS has determined require such consultation and for any new towers that “may adversely affect” listed species.

E) MIGRATORY BIRD TREATY ACT VIOLATIONS.

In this section, we answer inquiries in the FCC’s NPRM concerning the applicability of the Migratory Bird Treaty Act, 16 U.S.C. § 701 et seq., to the FCC tower approval and registration program. We discuss and detail why the FCC must immediately take action to comply with the MBTA, a strict liability statute, as the Act imposes an absolute prohibition on any “taking” of migratory birds, unless authorized by a permit. We establish why this prohibition applies even if the taking is unintentional, accidental, or occurs incidentally during an otherwise lawful activity. We also discuss and establish why the MBTA clearly applies to federal agencies, including the FCC.

We and others have repeatedly advised the FCC of its MBTA obligations both in our NOI filings, in the Gulf Coast petition, in the U.S. Court of Appeals for the DC Circuit appeal now pending, and in repeated meetings with FCC staff and Commissioners over the last eight years. Since at least 1999, the U.S. Fish and Wildlife Service has also urged the FCC to act to prevent avian fatalities at towers under its jurisdiction. The FWS filed comments on this FCC NPRM dated February 2, 2007 and signed by Acting Deputy Director Kenneth Stansell. Those comments note: “The unauthorized taking of even one bird is legally considered a “take” under MBTA and is a violation of the law.” “The Migratory Bird Treaty Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the Act has no provision for allowing unauthorized take, it must be recognized that some birds may be killed at structures such as communication towers even if all reasonable measures to avoid it are implemented. The Service’s Division [sic Office] of Law Enforcement carries out its mission to protect migratory birds not only through investigations and enforcement, but also through fostering relationships with individuals and industries that proactively seek to eliminate their impacts on migratory birds. While it is not possible under the Act to absolve individuals or companies from liability if they follow these recommended guidelines, the Division of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals or companies who have made good faith efforts to avoid the take of migratory birds. (Director’s September 14, 2000, cover memorandum to the Regional Directors).”

The FWS filing in this NPRM *also* notes that the September 14, 2000 letter from the U.S. FWS Director, “...in issuing the FWS tower siting guidelines, repeated concerns that the ‘The construction of new towers creates a potentially significant impact on migratory birds, especially some 350 species of night-migrating birds. Communication towers are estimated to kill 4-5 million birds per year, which violates the spirit and intent of the Migratory Bird Treaty Act and CAR Part 50 designed to implement the MBTA.’ ”

We also have advised the FCC that because the FCC has not obtained a permit to “take” migratory birds under the MBTA, or required applicants for tower licenses to obtain such a permit, or otherwise taken action to avoid unpermitted takings, it is in violation of the MBTA and also of the Administrative Procedure Act (APA) 5 U.S.C. §706, which requires courts to strike down final agency action under where the FCC or other federal agency has acted arbitrarily, capriciously, or otherwise not in accordance with the law. Upon review of the tower approval and registration process, it should be clear that the actions by the FCC are “otherwise not in accordance with the law” and thus violate the APA as migratory birds are “taken” at these towers without permits and this constitutes a violation of the MBTA. .

The FCC persists in its NPRM in again raising the same questions regarding its duties under the MBTA while continuing to ignore the statutory dictates of the MBTA, NEPA, and ESA leading to the deaths of millions of migratory birds protected under the Migratory Bird Treaty Act.

In paragraph 35 of the NPRM, the FCC states: “Courts have rendered differing decisions regarding the scope of the MBTA’s applicability to federal agencies. The Commission, however, has indicated that “it is not clear” whether the MBTA applies to the Commission’s actions. Nonetheless, some commenters argue that under the MBTA, a party may be liable for any unintentional, incidental death of a migratory bird, such as through a collision with a communications tower. Others contend that the MBTA has a narrower purpose to prohibit only intentional kills of migratory birds, such as by hunting or through a program to control migratory bird population. We seek comment on the nature and scope of the Commission’s responsibilities, if any, under this statute. We also seek comment on whether the **MBTA** gives the Commission (or any agency other than the Department of the Interior) any authority to promulgate regulations to enforce its terms. If the Commission has statutory authority to issue regulations to enforce the MBTA, how could the Commission draft such regulations in a manner that does not impede our responsibility under the Communications Act to ensure the construction of communications towers that are necessary to meet the communications service needs of our nation? We seek comment on these questions.

We again answer those inquiries herein and state that the FCC must end the equivocation and immediately take action to comply with the Migratory Bird Treaty Act 16 U.S.C. § 701 et seq.

A) *THE MBTA APPLIES TO THE FCC AND COMMISSION ACTIONS.*

The MBTA aims to preserve and restore migratory birds in the United States, a goal the U.S. Supreme Court and the U.S. Court of Appeals for the DC Circuit 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 in *Missouri v. Holland*, 252 U.S. 416, 435 (1920)).

The MBTA imposes an absolute prohibition on all “taking” of migratory birds, nests, and eggs, unless authorized by permit issued under regulations promulgated by the Secretary of the Department of Interior. 16 U.S.C. § 703. “Take” is defined as to “pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12 (1997). This prohibition on take without a permit applies to federal agencies, including the FCC. *Humane Society v. Glickmun*, 217 F.3d 882,883 (D.C. Cir. 2000).

In *Humane Society v. Glickmun*, the U.S. Court of Appeals for the District of Columbia Circuit explicitly ruled that the MBTA prohibition against take of migratory birds not only applies to private individuals and corporations but also “prohibits federal agencies from killing or taking migratory birds without a permit from the Interior Department.” The Court ruled that the MBTA could be enforced by injunctive relief against federal agencies whose actions would constitute prohibited acts. In ruling that the U.S. Department of Agriculture acted contrary to the MBTA by proceeding to take resident Canada Geese at an Air Force base in Virginia without an MBTA permit, the Court stated that, “it would be odd if [federal agencies] were exempt. The Migratory Bird Treaty Act implements the Treaty of 1916. Treaties are undertakings between nations; the terms of a treaty bind the contracting powers...the fact that the Act enforced a treaty between our country and Canada reinforces our conclusion that the broad language of §703 applies to actions of the federal government.” And, in fact, this had been the longstanding policy of the Department of the Interior.

The U.S. Court of Appeals for the District of Columbia Circuit is the same Federal Court with jurisdiction over matters pertaining to the FCC. Under the Communications Act of 1934, 47 U.S.C. §151 et seq., jurisdiction for appeals of final FCC decisions and actions rests in the U.S. Court of Appeals. The FCC has many times acknowledged this jurisdiction. Since the FCC is clearly within the jurisdiction of this court-- the U.S. Court of Appeals for the District of Columbia Circuit-- it is bound by its decisions and has a statutory duty to prevent such illegal take. Hence, it is unlawful for the FCC to approve or register the construction of a communication tower if that tower causes the taking of a migratory bird. Such unlawfulness should cease immediately, not after years of delay, but under new rules that should be adopted immediately.

The *Humane Society v. Glickman* decision dictated that Federal agencies are bound by and subject to the MBTA and triggered the issuance of a Director’s Order on December 20, 2000 from the Director of the U.S. Fish and Wildlife Service. Director’s Order No.131, relying on *Humane Society v. Glickman*, ruled that under this case, all Federal agencies are subject to the jurisdiction of the D.C. Circuit. The Order implements the application of the MBTA consistent with the decision. The Order clearly states that the take of migratory birds by Federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA. The FWS is the federal agency statutorily charged with the implementation and enforcement of the MBTA and the FCC is bound by the *Humane Society v. Glickman* case and the requirements of the U.S. Fish and Wildlife Service.

The MBTA is not a discretionary statute and prohibits all take of migratory birds without a permit.

Director's Order No.131 reversed a 1997 FWS memorandum to its regional offices stating that federal agencies no longer needed to obtain permits from the FWS before taking or killing bird species protected under the MBTA. That earlier memorandum was based on two other circuit court rulings from the Eighth and Eleventh Circuits that have been superseded by the *Humane Society v. Glickman* case and its applicability to federal agencies, including the FCC.

The United States Supreme Court has also accepted the premise that the MBTA applies to federal agencies. In a 1992 ruling, *Robertson v. Seattle Audubon Society*, 503 U.S. 429, the Supreme Court ruled on the validity of a Congressionally-enacted directive to the U.S. Forest Service to allow timber harvest in a region where the Northern Spotted Owl (a protected species) is found. The Court was called on to determine if implementation of the "Northwest Timber Compromise" by the Forest Service would violate the take prohibitions of the MBTA. The Court's analysis noted that, "Before the Compromise was enacted, the courts adjudicating these MBTA claims were obliged to determine whether the challenged harvesting would "kill" or "take" any northern spotted owl, within the meaning of §2." The ruling hinged on the technical legal issue of the validity of the Congressional directive, and not on the applicability of the MBTA to federal agencies, but the Supreme Court accepted without question the idea that Forest Service timber sales were restricted under the MBTA, indicating that any lower court rulings to the contrary would not pass Supreme Court review.

Another federal court decision within the U.S. Court of Appeals for the District of Columbia Circuit reinforces the conclusion that the MBTA applies to federal agencies. In *Centerfor Biological Diversity v Pirie*, 191 F. Supp. 2d 161, the U.S. District Court for the District of Columbia stated plainly that the language of the MBTA, "applies with equal force to federal agencies" In the *Pirie* case, the court ruled the MBTA applied to the U.S. Navy

It is clear from the statute itself, decades of application of the statute, the case law applicable to the FCC and other federal agencies, and from the FWS Director's Order (superseded by a section of the U.S. Fish and Wildlife Service Manual at 724 FW 2) that the MBTA applies to the FCC. Why would the MBTA apply to the U.S. Department of Agriculture and the U.S. Navy and not to the FCC? There are no exemptions in the MBTA for the FCC nor does any other statute exempt the FCC from the MBTA. The courts with jurisdiction over the FCC have clearly ruled that the MBTA applies to federal agencies and the Director of the U.S. FWS has issued directives implementing the court decisions.

B) THE MBTA PROHIBITS AND RENDERS A PARTY LIABLE FOR UNINTENTIONAL, INCIDENTAL DEATHS OF MIGRATORY BIRDS, SUCH AS THROUGH COLLISIONS WITH COMMUNICATIONS TOWERS AND RELATED STRUCTURES.

Since the MBTA is a strict liability statute, which means even unintentional, incidental, or accidental take or killing is prohibited, the FCC is under a legal obligation to conduct its tower registration program in a manner that prevents, or at least minimizes, avian fatalities to comply with the MBTA. The FCC has done neither and continues to violate the MBTA.

How is the FCC hound by the strict liability standards for the take of migratory birds without permits under the MBTA and how do such restrictions apply even if the FWS exercises prosecutorial discretion and does not criminally prosecute the FCC or its licensees? Besides the language of the MBTA, the case law provides clear answers:

1. *Center for Biological Diversity v. Pirie*.

In 2002, the U.S. District Court for the District of Columbia held that the U.S. Navy was violating the MBTA by unintentionally taking migratory birds while otherwise lawfully using a bombing range on one of the Farallon de Medinilla Islands in the Central Pacific Ocean. *Center for Biological Diversity v Pirie*, 191 F. Supp. 2d 161 (2002). The court noted that §2 of the MBTA (addressing unlawful acts) is worded generally, and that relief other than criminal penalties was available in the form of injunctive relief. The court initially ruled only on this liability issue, and asked for additional briefing on many questions, including the availability and structuring of possible injunctive relief. In a subsequent case, the Court found it had no choice but to enjoin the Navy (and the Air Force) from using the range, and required it to apply for a permit from FWS. *Center for Biological Diversity v. Pirie*. 201 F. Supp. 2d 113 (D.D.C. May 1, 2002). The court stayed the injunction, thereby allowing training activities to continue, and the Congress eventually exempted such military readiness activities from the full application of the MBTA.

It is important to note that the *Center for Biological Diversity v Pirie* case was not a criminal prosecution, but rather an action brought by a conservation NGO under the federal Administrative Procedure Act (APA), 5 U.S.C. §706. Judicial review under the APA is limited to the question of whether a federal agency acted arbitrarily, capriciously, or otherwise not in accordance with the law. 5 U.S.C. § 706. Courts apply this standard in suits for violations of the MBTA, and this occurred in *Center for Biological Diversity v Pirie*. The FCC is subject to the APA, and in granting applications for towers and registering them without requiring migratory bird avoidance measures, the FCC acts arbitrarily, capriciously, and otherwise not in accordance with the law. 5 U.S.C. §706.

Courts apply this standard for suits to enforce the MBTA by citizens and citizen groups, as was the case with the Center for Biological Diversity in the case cited above. Also, the Humane Society of the United States was the plaintiff in the successful case brought against the U.S. Department of Agriculture for proceeding to take resident Canada Geese at an Air Force base in Virginia, without an MBTA permit. *Humane Society v. Glickman*, 217 F.3d 882,883 (D.C. Cir. 2000).

The courts have explicitly ruled in these cases in the Circuit wherein the FCC is located that even absent a criminal prosecution under the MBTA, a party may proceed civilly and seek injunctive relief.

It should be clear that the actions by the FCC in approving and registering communication towers are “otherwise not in accordance with the law” and thus violate the APA as migratory birds *are* “taken” at these towers without permits and this clearly constitutes a violation of the MBTA.

Unfortunately, the FCC has resisted all attempts to correct this violation and failed to modify the antenna structure program in any way so as to prevent avian fatalities. These violations of the MBTA strict liability prohibitions against the take of federally protected migratory birds should be corrected immediately by the adoption of the measures detailed in Section II above and the U.S. FWS tower siting guidelines.

It should be clear that the actions by the FCC in approving and registering communication towers are “otherwise not in accordance with the law” and thus violate the APA as migratory birds are “taken” at these towers without permits and this constitutes a violation of the MBTA. The Navy argued that it had not violated the MBTA because it did not intend to kill birds. This is parallel to the case with the FCC approving and registering antenna structures. The Navy argued that killing the birds was not the purpose of its actions and hence, the take was not subject to the prohibitions of the MBTA. The *Pirie* court noted that the MBTA applies to both intentional and unintentional takings and that the prosecutorial discretion of the FWS in not criminally prosecuting the case did not make the Navy’s actions unreviewable under the APA. The courts then can fashion injunctive relief.

Other cases holding that unintentional, accidental, or incidental take of migratory birds without permits pursuant to otherwise lawful activities was a criminal violation of the MBTA:

2. *U.S. v. Moon Luke Electric Association*.

The case of *U.S. v. Moon Luke Electric Association*, 45 FSupp 2d 1070 (1999), decided in the U.S. District Court for Colorado, and the cases cited therein, also clearly demonstrate the culpability of the FCC and the tower owners/operators in the take of migratory birds at towers through the FCC antenna structure registration program. In *Moon Luke*, the defendant electric co-operative was charged under the MBTA for “taking” migratory birds through accidental electrocution on its power lines and poles. The take of 12 Golden Eagles, 4 Ferruginous Hawks, and 1 Great Horned Owl that were accidentally electrocuted at the electric co-operative’s power lines and poles were at the center of the criminal prosecution. Despite the defendants motion to dismiss based on arguments that the MBTA was a hunting statute and applied to willful takings only, the Court disagreed and ordered the case to proceed to trial. Moon Lake subsequently pled guilty and was fined \$100,000 and has spent more than \$750,000 in modifying its power lines and poles to prevent future electrocutions.

The Federal District Court in *Moon Lake* noted that: "The plain language of the Acts belies Moon Lake's contention that the Acts regulate only "intentionally harmful" conduct. In *United States v. Corrow*, 119 F.3d 796 (10th Cir.1997), cert. denied, 522 U.S. 1133, 118 S.Ct. 1089, 140 L.Ed.2d 146 (1998), the Tenth Circuit joined the majority of Circuit Courts of Appeal in holding that §707(a) of the MBTA is strict liability crime. *Id.* at 805 (collecting cases). "Simply stated, then, 'it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.' " *Id.* (quoting *United States v. Manning*, 787 F.2d 431, 435 n. 4 (8th Cir.1986)); see also S.Rep. No. 445, at 16, reprinted in 1986 U.S.C.C.A.N. 6113, 6128 ("Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. §707(a), a standard which has been upheld by many Federal court decisions."). Thus, whether *Moon Lake* intended to cause the deaths of 17 protected birds is irrelevant to its prosecution under §707(a)."

The FWS comments on this FCC NPRM dated February 2, 2007 and signed by Acting Deputy Director Kenneth Stansell state: "We note that the court in Moon Lake was endorsing the position of the Department of Justice, which brought the prosecution at issue, and which ultimately sets the litigation position of the United States. Thus, it is our opinion that the Commission should require its licensees to adopt and comply with all reasonable and prudent measures to avoid take of migratory birds, particularly endangered and threatened birds, bald eagles and species of conservation concern. Requiring licensees to maximize collocation opportunities is an excellent example of such a 'reasonable and prudent' measure." (The FWS comment letter to the FCC on this NPRM further provides very specific measures the FCC should take to comply with the MBTA, NEPA, and the ESA).

The *Moon Lake* case also cites other federal prosecutions under the MBTA of unintentional takes of migratory birds that were upheld by the courts, including cases establishing that the Migratory Bird Treaty Act reaches as far as direct, though unintended, bird poisonings from toxic substances:

3. *United States v. FMC Corp.*

In *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir.1978), the Court found it sufficient that a defendant created hazardous circumstances that ultimately killed migratory birds, though the defendant had no intention of harming such birds by dumping waste water; and

4. *United States v. Corbin Farm Serv.*

In *United States v. Corbin Farm Serv.*, 444 F.Supp. 510 (E.D.Cal.), *affd* on other grounds, 578 F.2d 259 (9th Cir.1978), the Court ruled that an MBTA prosecution could be pursued where birds died after feeding on a crop sprayed with a registered pesticide.

Other cases where the take of birds was not deliberate and did not involve hunting or poaching but the Court approved criminal prosecutions under the MBTA:

5. *United States v. Stuarco Oil Co*

In *United States v. Stuarco Oil Co.*, 73-CR- 129 (D.Colo., Aug. 17, 1973), an oil company was charged with 23 counts for the death of 23 birds resulting from the company's failure to build oil sump pits in a manner that could keep birds away; defendant pled nolo contendere to 17 counts.

6. *United States v. Union Texas Petroleum.*

In *United States v. Union Texas Petroleum*, 73-CR-127 (D.Colo., July 11, 1973), a prosecution was upheld under the MBTA of an oil company for maintenance of an oil sump pit that killed migratory birds; disposition unknown.

7. *United States v. Equity Corp.*

In *United States v. Equity Corp.*, Cr. 75-51 (D.Utah, Dec. 8, 1975), an oil company was charged with 14 counts for the death of 14 ducks caused by the company's oil sump pits; oil company pled guilty and was fined \$7,000.

8. *U.S. v. FMC.*

In *US. v. FMC*, 572 F.2d 902 (2d Cir.1978), a prosecution under the MBTA was upheld of a pesticide manufacturer for dumping wastewater into a ten-acre pond, thereby accidentally causing the death of Horned Larks, Green Herons, Canada Geese, Ring-billed Gulls, Short-billed Dowitchers, Least Sandpipers, and migratory Fringillids; manufacturer fined \$1,800.

Importantly, numerous courts have held that a government agency that issues licenses or permits to a private commercial actor, whose operations in turn injured or killed listed species, is itself liable for a "take." See, e.g., *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997). The same reasoning can be applied to FCC decisions to approve and register communication towers that kill species listed under the MBTA. To date, the FCC has no MBTA permits to take migratory birds and it is undisputed that antenna structures the FCC approves and registers result in the taking of migratory birds protected by the MBTA. Hence under the MBTA and the APA, the FCC is in violation of the basic prohibitions against the take of migratory birds and must act to correct these violations at existing and current antenna structures under its jurisdiction.

The FCC has been aware of the MBTA problem since at least 1999 when this was raised with the agency by the U.S. FWS and conservation groups. Also, the FCC and industry were alerted to this issue by a Telecom Land Management Law Report article of September 1999, Volume 1, No. 11, entitled *Migratory Bird Act Can Mean Trouble for Tower Owners*. The trade publication notes recent cases and the possibility of MBTA prosecutions for the illegal take at towers of migratory birds. The article quotes a FWS spokesman noting that "There's no reason why the law couldn't be applied in a situation of a bird kill at a telecommunications tower." This article was provided to the FCC.

C) THE MAGNITUDE OF MIGRATORY BIRD TAKE AT COMMUNICATION TOWERS IS IRRELEVANT TO THE APPLICABILITY OF THE MBTA.

In paragraph 37 of the NPRM, the FCC states: "Understanding the scope of any problem involving communications towers and migratory birds is essential to devising meaningful solutions consistent with our responsibilities under the Communications Act and other federal statutes. In particular,

we seek comment on whether the evidence concerning the impact of communications towers on migratory bird mortality adduced in response to the questions posed in paragraph 36 is sufficient to justify and/or authorize Commission action under the legal standards discussed in response to the questions posed in paragraph 34.”

The NPRM query linking the applicability of the MBTA to the impact of communication towers on migratory bird mortality is without merit. The MBTA imposes an absolute prohibition on all taking of migratory birds and the MBTA does not have a threshold for such a prohibition to be activated. The MBTA is unequivocal in the prohibition on the take of even one migratory bird without a permit. The cases cited herein sometimes involve only a few birds. The U.S. FWS, the federal agency tasked with enforcing the MBTA, has unequivocally advised the FCC that “The unauthorized taking of even one bird is legally considered a “take” under MBTA and is a violation of the law.”, and further that unintentional take at communication towers is actionable. See the U.S. FWS comment letter of February 2, 2007 on this NPRM.

The *Moon Lake* case is but one example cited of such actionable unintentional take and involved the take of 17 birds accidentally electrocuted on power lines and this led to a criminal MBTA conviction; in *United States v. Equity Corp.*, an oil company was charged with 14 counts for the death of 14 ducks caused by the company’s oil sump pits and the oil company pled guilty and was fined \$7,000. Even if an FCC approved and registered tower kills only one migratory bird, the FCC is obligated to act under the MBTA to either obtain a permit or to prevent such mortality.

Unfortunately, the take of migratory birds at communication towers is in the millions, and one night kills can exceed 10,000 migratory birds at ONE tower. We and others have repeatedly documented the take of millions of migratory birds and do so again in this document. A 38-year study of a single television tower in west central Wisconsin documented 121,560 birds killed representing 123 species, primarily long-distance migratory neotropical birds. *A Study of Bird Mortality at a West Central Wisconsin TV Tower from 1957-1995*, by Dr. Charles Kemper, *The Passenger Pigeon*, Vol. 58, No. 3, pp. 219-235. (1996).

A 29-year study by the Tall Timbers Research station at a Florida TV tower documented the killing of over 44,000 birds of 186 species, 94% of which were migratory neotropical birds. *Characteristics of Avian Mortality at a North Florida Television Tower: A 29-year Study*, Robert L. Crawford and R. Todd Engstrom, *Journal of Field Ornithology*: Vol. 72, No. 3, pp.380-388, (2001). In a review of other bird kills, more than 542,000 birds of 230 species were identified as being killed at FCC registered towers, the vast majority of them migratory birds. *Communication Towers: A Deadly Hazard to Birds*, by Shire, G., *et al.* American Bird Conservancy. (June 2000).

Each one of these takes of a migratory bird is a violation of the MBTA as no permits were issued for such takes and the FCC has a statutory duty to take action to prevent this illegal take of migratory birds whether the annual take is 4 million or 50 million.

D) THE FCC NOT ONLY HAS THE AUTHORITY UNDER THE MBTA BUT THE AFFIRMATIVE DUTY TO ADOPT RULES TO PREVENT THE TAKE OF MIGRATORY BIRDS. The NPRM posits the question as to whether the MBTA gives the Commission any authority to promulgate regulations to enforce its terms. The query continues: “If the Commission has statutory authority to issue regulations to enforce the MBTA, how could the Commission draft such regulations in a manner that does not impede our responsibility under the Communications Act to ensure the construction of communications towers that are necessary to meet the communications service needs of our nation? We seek comment on these questions.”

Clearly, the FCC has a statutory duty to comply with all federal laws, unless exempted. These laws include our nation’s environmental and wildlife conservation laws. NEPA, ESA, and MBTA not only authorize the FCC to act and adopt the necessary rules to prevent the killing of migratory birds, but require the FCC to bring its tower approval and registration program into compliance with these statutes. Under the statutes and case law cited above, it should be clear that the FCC must act under the MBTA to prevent the take of migratory birds, or at least, to minimize such take. See both the MBTA and APA, and the cases cited and discussed above.

The U.S. FWS comment letter filed on this NPRM and cited above in this Section clearly advises the FCC of its duty to act to comply with the MBTA and unequivocally states that concerning migratory bird kills at towers: “In addition to the fact that these ‘takings’ are in violation of the MBTA and the spirit and intent of Executive Order 13186, they may also be impacting avifauna at a population level, especially for ‘species of conservation concern’ and State and Federally-listed birds.”

On September 14, 2000, the U.S. FWS issued its Guidance Document on the Siting, Construction, Operation and Decommissioning of Communications Towers. In issuing the Guidelines, the U.S. FWS Director repeated concerns that the “The construction of new towers creates a potentially significant impact on migratory birds, especially some 350 species of night-migrating birds. Communication towers are estimated to kill 4-5 million birds per year, **which violates the spirit and intent of the Migratory Bird Treaty Act and CAR Part 50 designed to implement the MBTA** (emphasis added). Some of the species are also protected under the Endangered Species Act and Bald and Golden Eagle Act.”

The Director noted that “These guidelines were developed by Service personnel from research conducted in several eastern, midwestern, and southern states, and have been refined through Regional review. They are based on the best information available at this time, and are the most prudent and effective measures for avoiding bird strikes at towers. We believe that they will provide significant protection for migratory birds pending completion of the Working Group’s recommendations. As new information becomes available, the guidelines will be updated accordingly.”

On November 20, 2000, the U.S. FWS Director wrote to the FCC Chairman, attaching the Guidelines and urging the Chairman to have tower owners and operators adopt “the

best measures available for avoiding fatal bird collisions....We believe that widespread use of these guidelines will significantly reduce the loss of migratory birds at towers.” U.S. FWS letter attached. The FCC has had the FWS Guidelines for more than 6.5 years and has failed to incorporate any of the measures into its rules or tower approval and registration process.

The FWS in its comment letter on this NPRM again advises the FCC that “While it is not possible under the Act to absolve individuals or companies from liability if they follow these recommended guidelines, the Division of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals or companies who have made good faith efforts to avoid the take of migratory birds.” But the FCC continues to resist the adoption of any of these measures to prevent avian mortality at towers.

The FWS Guidelines, the measures recommend in the FWS February 2, 2007 letter on this NPRM, and the measures we recommend in Section II above should be put into rules immediately and would bring the FCC into compliance with the MBTA and other federal statutes. These measures would not in any way impede FCC responsibility under the Communications Act to ensure the construction of communications towers that are necessary to meet the communications service needs of our nation. For example, by simply requiring co-location of antenna on existing structures where possible, how could the communications service needs of our nation be impeded? Or how can requiring aviation safety lights to be exclusively white or red strobes at night impede our nation’s communications service needs,? Whether the tower structure holding the antenna necessary to transmit communication signals has a read steady burning light that attracts birds to their deaths or a white or red strobe should in no way impede our nation’s communications service needs.

Compliance with the MBTA can be achieved by taking action to eliminate, or at least minimize the “takes” of migratory birds at existing and new communication towers. This can be done by requiring communication towers to be appropriately sited, constructed, and operated through the tower registration process and through the use of the measures we have detailed in Section II above and in the U.S. FWS Guidelines. These processes and measures clearly demonstrate that bird fatalities could be eliminated, or at least minimized, with simple changes in tower siting, lighting, and operation, including modifications to lighting of existing structures. Importantly, this could be done without in any way inhibiting the expansion and provision of communication services, and needs to be done on new towers, and on the lighting systems of existing towers by eliminating steady burning red aviation safety lights (L-810).

Such lighting changes have been documented in the Dr. Gehring and Dr. Kerlinger Michigan research (Report II) to decrease bird deaths by up to 70% without in any way impeding the provision of communication services. Indeed, in this Report, the authors note that “Our study is the first to compare collision rates at communication towers equipped with different types of FAA obstruction lighting. The results also provide the first scientifically validated and economically feasible means of reducing fatalities of

night migrating birds at communication towers...By simply removing the L-810 lights from all communication towers.,it is possible that more than one to two plus million bird collisions with communication towers might be averted each year...The elimination of steady burning, red L-810 lights, leaving only flashing L-864 lights would also be beneficial for tower owners. Although fatalities would not be completely eliminated, the numbers of fatalities would undoubtedly be reduced greatly. The economic incentive for removing L-810 lights is substantial. Electric consumption, and therefore electric costs, as well as tower maintenance costs (changing of bulbs –labor and bulb cost) would be greatly reduced. The elimination of these same lights would also benefit the Federal Communication Commission (FCC) and the Federal Aviation Administration (FAA). Because the FCC is tasked with licensing towers under the National Environmental Policy Act (NEPA), they should welcome a means of reducing fatalities thereby increasing federal compliance with the Migratory Bird Treaty Act (MBTA). A similar situation exists for the FAA. By recommending L-810 steady burning red lights, the FAA advisory circular basically makes it difficult for tower owners and operators, not to mention the FCC, to comply with the MBTA. Removal of the L-810 lights from towers should be encouraged by both the FCC and FAA.” See Gehring, Joelle and Kerlinger, Paul, *Avian collisions at communication towers: II. The role of Federal Aviation Administration obstruction lighting systems*, Prepared for: State of Michigan (March 2007).

The Dr. Gehring and Dr. Kerlinger Michigan research (Report I) verifies that guy wired towers killed 16X more birds than unguyed towers of the same height and lighting. The authors note that “According to these data bird fatalities may be prevented by 69% -100% by constructing unguyed towers instead of guyed towers. Gehring, Joelle and Kerlinger, Paul, *Avian collisions at communication towers: I. The role of tower height and guy wires*, Prepared for: State of Michigan (March 2007). How can trying to keep guy wires off of new tower structures impede the provision of communication services?

The Dr. Gehring and Dr. Kerlinger Michigan research (Report I) finds that “Minimizing tower height is also an important consideration in reducing avian fatalities at communication towers. Our results also support the prediction that many more avian collisions occur at taller towers. Data indicate that 68%-86% fewer fatalities were registered at guyed towers 116-146 m AGL than at towers > 305 m AGL. Similarly, a long-term study at a communication tower in Florida detected a dramatic decrease in bird fatalities after the tower height was decreased from 308 m to 91 m AGL (Kerlinger 2000)...Tall guyed towers were responsible for about 70 times as many birds fatalities as the 116-146 m unguyed towers and nearly 5 times as many as guyed towers 116-146 m. These data provide manager; and regulators with the first quantitative data for establishing best practices to minimize collision fatalities of migrating and other birds at federally licensed communication towers.”

The authors in Report I also note that “Given the increasing number of communication towers in the U.S. and a growing interest in addressing the bird collision issue, this study is of particular importance (Shire et al. 2000, Erickson et al. 2001, FCC 2003, 2005, 2006). Our results show that bird fatalities may be reduced by 69% to nearly 100% by

constructing unguyed towers instead of guyed towers, and 54%-86% by constructing guyed towers 116-146 m AGL instead of guyed towers >305 m AGL.”

Both of these recently published research reports were submitted to the FCC as part of this NPRM.

Any implications that adopting new rules to comply with the MBTA (or NEPA or ESA) somehow might interfere with the FCC goal of fulfilling the nation’s communication needs are without merit. Gehring and Kerlinger in Report II conclude that: “Changing lights on existing and new communication towers provides a feasible means to dramatically reduce collision fatalities at communication towers (two other methods include tower height reduction and guy wire elimination on new towers). One advantage of our findings is that lighting can be changed at minimal cost on existing towers and such changes on new or existing towers greatly reduces the cost of operating towers. Removing L-810 lights from towers is one of the most effective means of achieving a significant reduction in avian fatalities at existing communication towers.”

Further, generalized concerns about the FCC complying with the MBTA (and NEPA and the ESA) do not absolve the FCC from complying with these statutes, especially when they can be complied with without in any way preventing the FCC from fulfilling the nation’s communication needs. The evidence is clear that towers can be constructed and operated to prevent most, if not all, avian mortality without impeding the provision of communication services. But even if the FCC determines that for some reason it cannot prevent migratory bird fatalities caused by towers without in some way impeding communication services, the FCC and tower owners and operators are still bound by the prohibitions of the MBTA.

Also, the FCC should act immediately to amend its current rules for the conduct of environmental review by tower applicants in 47 C.F.R. §§1.1301 et seq. See the discussion above. These FCC regulations spell out a checklist of environmental items that might trigger the applicant to prepare an Environmental Assessment but these omit consideration of migratory bird impacts. Unless a migratory bird is an ESA-listed species, there is no specific consideration whatsoever that must be given to impacts of an antenna structure on migratory birds. Despite the prohibitions of take of migratory birds under the MBTA, the FCC does not require a tower applicant to review or note any possible impact on these federally protected species. This deficiency has been raised repeatedly with the FCC since 1999 and changes in 47 C.F.R. §§1.1301 et seq. to cover migratory birds have been suggested.

The FCC should incorporate migratory bird impacts into all future NEPA analyses and should begin a detailed programmatic EIS on the extent of bird kills at communication towers, the causes, and solutions. This EIS should not delay the adoption of the measures to prevent mortality detailed herein.

We note that the electric power industry has joined with the U.S. FWS and conservation groups, and more than two decades ago formed and funded the Avian Power Line Interaction Committee. This industry/government/conservation NGO group has

identified key prevention measures to prevent avian fatalities at power lines and poles and published detailed guideline manuals in both English and Spanish. The APLIC group also helped foster the adoption of Memorandum of Agreements with the FWS beginning in the late 1980s that saw electric utilities adopt mitigation measures and avoid any MBTA prosecutions. Recently, the FWS and industry have joined together to foster the adoption of Avian Avoidance Plans by industry. See: <http://www.aplic.org/>.

Unfortunately, the FCC and tower and communication industries have not followed this example of cooperation, and the FCC and industry continue to avoid any measures that would change the status quo.

IV. COMMUNICATION TOWERS ADVERSELY AFFECT MIGRATORY BIRDS; IMPACT IS SIGNIFICANT AND FCC ACTION IS REQUIRED..

The Notice of Proposed Rulemaking, in seeking comment on whether the Federal Communication Commission should take measures to reduce the number of instances in which migratory birds collide with communications towers, requests comments on the extent of any effect of communications towers on migratory birds and whether any such effect warrants regulations specifically designed to protect migratory birds. The NPRM seeks comment on research/evidence to demonstrate an environmental problem that would authorize or require that the Commission take action. The FCC posits the question: Is there probative evidence that communications towers are adversely affecting migratory birds?

The FCC also seeks further comment supported by evidence regarding the number of migratory birds killed annually by communications towers. Where possible, commenters are encouraged to support their (estimates with scientifically reviewed studies.

We have amply demonstrated in our comments above and in previous filings with the FCC the legal requirements and basis for FCC action to prevent avian mortality at antenna structures under the FCC's jurisdiction. We have previously detailed the changes that need to be made to bring the FCC into compliance with NEPA, ESA, and MBTA, and we do again in Sections II and III above and in Section V below, as well as in this section. We will not dwell on those requirements and measures in this section, but will directly document again in this section the environmental significance of avian mortality caused by antenna structures under the jurisdiction of the FCC.

However, we again must point out that the FCC has asked these same or similar questions before in its August 2003 Notice of Inquiry (NOI) on Migratory Bird Collisions with Communication Towers and Birds in WT Dkt. No. 03-187. We and others submitted comments and replies on the NOI concluding in December 2003 in anticipation of the FCC ending its inaction and adopting measures to prevent, or at least minimize, avian mortality at towers so as to come into compliance with NEPA, MBTA, and ESA requirements. But, the FCC instead retained Avatar in May 2004 to review the comments submitted on the NOI, and then again failed to act after publication of the Avatar findings in December 2004. Instead the FCC asked for more comments on the review of

comments by Avatar. We and others again submitted detailed comments on February 14, 2005 that were accompanied by a rigorous Report completed by scientists at Land Protection Partners. These comments detailed significant impacts to birds from towers and detailed measures that could be taken by the FCC to prevent these fatalities at towers. We then submitted reply comments to the FCC on this Avatar Report matter on March 9, 2005, supplemented with another detailed Report completed by scientists at Land Protection Partners.

The U.S. FWS submitted reply comments on the Avatar Report noting that “In our opinion, the LPP comments provide a detailed and scientifically-sound analysis of current avian-communication tower interactions.” “The population impacts to migratory songbirds (and other avifauna) and impacts to their population status are frightening and biologically significant.” After submittal of comments on the Avatar report, the FCC again failed to do anything to change the status quo in its antenna structure approval and registration program and still has made no changes to better protect avian species.

The U.S. FWS has more recently documented the significant nature of these bird kills at towers. The U.S. Fish and Wildlife Service filed comments on this FCC NPRM dated February 2, 2007 and signed by Acting Deputy Director Kenneth Stansell. Those comments note: “The U.S. peer-reviewed scientific literature documents many examples of substantial tower kills. For example, since 1948 when Aronoff (1949) described a large bird kill at a radio tower near Baltimore, Maryland, the scientific literature has been replete with references to large bird kills and results of long-term tower mortality monitoring studies.

Communication towers in aggregate nationwide are estimated to continue to take a significant number of migratory birds each year in the United States. Since the mid-1970s, the Service has developed several estimates of mortality from collisions with communication towers. We did this because the FCC does not require licensees or operators to monitor or even report bird mortality and because reported mortality in the literature only represents a small fraction of total number of collision deaths. Banks (1979) assessed avian mortality at some 505 of the then existing 1,010 tall radio and television towers in the U.S. in 1975, estimating 1.25 million birds killed/year at towers. Evans (1998), collaborating with FWS, reassessed mortality based on increased numbers of tall towers considerably greater in number than what Banks had studied in 1975, estimating 2-4 million birds killed/year. Manville (2001a), based on a 1999 evaluation, estimated some 4-5 million bird deaths per year from tower collisions in the U.S. as tower placement continued to grow exponentially. However, in 2000, Manville (2001b) again cited the 4-5 million annual mortality estimate, but indicated that mortality could range as high as 40-50 million birds deaths per year, the latter estimate, however, predicated on validation through a nationwide cumulative impacts analysis of U.S. communication tower effects on migratory birds. The Service more recently reiterated the latter mortality estimate — conservatively 4-5 million, to perhaps as high as 40-50 million birds killed per year (Manville 2005).

In addition to the fact that these ‘takings’ are in violation of the MBTA and the spirit and intent of Executive Order 13186, they may also be impacting avifauna at a population

level, especially for ‘species of conservation concern’ and State and Federally-listed birds.”

From August 2002, when ABC and others filed its Gulf Coast petition seeking action on tower kills from the FCC, until the FCC was forced to act on April 11, 2006 by a pending court suit, the FCC failed to act on the Petition. The FCC dismissed the Petition on April 11, 2006, never finalized the NOI, and committed to publishing a NPRM to deal with the bird kill problem. The FCC Order did state “We intend to complete our review of the record in the Migratory Bird NOI.” To our knowledge, this still has not been done.

On November 22, 2006, the FCC published this Notice of Proposed Rulemaking that proposes no new rules, but instead asks many of the same questions as previously posited in 2003 in the NOI. This NF’RM further delays any actions by the FCC to fulfill its statutory obligations under NEPA, MBTA, and ESA. During the pendency of all of these matters, many millions of migratory birds protected under the MBTA, have been killed at towers. We again request that our previous comments and those of Longcore et al. Land Protection Partners Reports (2005) filed previously in the FCC NOI be incorporated by reference with our comments on this NPRM and we are again providing copies of these documents to the FCC.

In 1999, the U.S. FWS Director urged the FCC to comply with NEPA and complete an EIS on bird kills at towers. The Director noted in that letter that “The 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.” Letter from Jamie Rappaport Clark, Director, FWS to William Kennard, Chairman, FCC (Nov. 2, 1999).

Despite this urging by the governmental agency tasked by law with the conservation of migratory birds, and despite the repeated documentation of the significance of bird kills at towers, the FCC has persisted in its refusal to comply with NEPA, MBTA, and ESA and has failed to complete a programmatic EIS, end the categorical exclusion of its tower program, and failed to comply with the requirements of the MBTA and ESA.

We have repeatedly submitted documentation on the extent of avian mortality and the avian species that are disproportionately affected by mortality at towers. Our previous filings with the FCC, including the detailed Longcore et al. Land Protection Partners Reports (2005) and Longcore et al. Land Protection Partners Analysis (2007), and the data cited from the U.S. FWS and other authors, document this mortality and that the mortality is at least 4.3 million birds annually, and may be much higher.

As the FCC already knows, the exact number of birds killed annually at communication towers is unknown because the FCC has failed to require any systematic avian fatality surveys at –100,000 lit towers under its jurisdiction. Nor have the tower operators and owners conducted such surveys. In reality, the FCC has never required such surveys except in one or two rare case;; such as with the Michigan State Police towers built in violation of the FCC lax environmental rules.