



FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON DC 20554

June 1, 2011

Richard E. Sayers, Chief
Division of Consultation, HCPs,
Recovery and State Grants
U.S. Fish and Wildlife Service
4401 N. Fairfax Dr., Rm 420
Arlington, VA 22203

RE: FCC Request for Section 7(a)(1) Conservation Review of its ASR Program
FWS/AES/DCHRS/048198

Dear Mr. Sayers:

This letter is in response to your May 3, 2011 letter suggesting that the Federal Communications Commission (Commission) conduct its Section 7 consultation of its Antenna Structure Registration (ASR) program by seeking a conservation review by the U.S. Fish and Wildlife Service (Service) under Section 7(a)(1) of the Endangered Species Act. We agree with your recommendation, and therefore ask that the Service conduct a conservation review of the ASR program.

To enable the Service to conduct this review, you asked that the Commission provide “any information relevant to its authorities and procedures, any indications of past beneficial or adverse effects of the ASR program on endangered or threatened species or their habitats, any potential changes to the ASR program that might tend to promote better compliance with the requirements of the Act, or any other information or materials it believes would assist in conducting the review.” The remainder of this letter is devoted to addressing your request.

The governing authority for the ASR Program.

Section 303(q) of the Communications Act of 1934, as amended (Communications Act), authorizes the Commission to prescribe painting and/or illumination of radio towers when there is a “reasonable possibility” that an antenna structure may cause a hazard to air navigation, and requires permittees, licensees, and tower owners to maintain such lighting and/or illumination. Section 1501 of the Federal Aviation Act authorizes the FAA to require that persons proposing to erect a structure provide notice to the FAA, when such notice will promote air safety. Under current rules, each tower owner proposing to construct or alter an antenna structure that is more than 200 feet (60.96 meters) in height, or that may interfere with the approach or departure space of a nearby airport runway, must notify the FAA of the proposed construction and must register the tower with the Commission. The FAA considers whether the proposed structure constitutes a potential hazard, and may recommend appropriate painting and lighting for the structure. The Commission requires that each owner or constructor of a proposed structure providing such notice to the FAA must, in turn, register the structure in the Commission’s database, at which time the Commission imposes specific marking and lighting requirements on the tower owner. Although the Commission ordinarily prescribes marking and lighting based on the FAA’s recommendations, the Commission retains, consistent with statutory authority, the ability to specify different requirements when appropriate.

The ASR Program's NEPA Process.

Current Rules. The Commission ensures compliance with the Endangered Species Act for registered towers as part of its NEPA review process. To register an antenna structure, the antenna structure owner must submit to the Commission a valid ASR application (FCC Form 854, Application for Antenna Registration), along with a No Hazard Determination from the FAA. Question 38 on Form 854 requires the applicant to certify whether the proposed antenna structure may have a significant environmental effect, as defined by Sections 1.1307(a) and (b) of the Commission's rules, and if so to submit an Environmental Assessment (EA). Section 1.1307(a)(3) states that an EA is required for "Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973."

Thus, prior to submitting its Form 854, an applicant must consider the potential effects that its proposed tower has on threatened and endangered species. To perform that review, the applicant needs to obtain a species list for the area where the tower is to be constructed. If any threatened or endangered species are present in the general area, the applicant must conduct a physical review of the site to determine whether the identified species or critical habitat is present at the proposed construction site. If any is present, the applicant must informally consult with the Service.¹ Should the Service be unable to concur that the proposed facility will not affect threatened or endangered species or critical habitats, the Commission engages in formal consultation with the Service under Section 7(a)(2) of the Endangered Species Act. Where the Commission has engaged in formal consultation with the Service, the applicant must respond "yes" to Question 38 and submit an EA.

A "no" answer to Question 38 signifies that none of the circumstances set forth in Sections 1.1307(a) and (b) of the Commission's rules apply to the proposed tower, and that the applicant need not submit an EA with its application. In that event, the ASR system verifies against the FAA's database the accuracy of the lighting and marking specifications provided by the applicant. The ASR system then issues an antenna structure registration (Form 854R) without the Commission having provided prior public notice of the pending ASR application.

If the response to Question 38 is "yes," the applicant must submit an EA, along with supporting documentation, when it files the ASR application. The reviewing Bureau will not process the application until it has resolved the environmental concerns addressed in the EA. The Bureau places the application on public notice for thirty (30) days, affording interested persons the opportunity to comment and seek environmental review with respect to effects that do not routinely require preparation of an EA.

Potential Rule Changes. On April 5, 2011, the Wireless Telecommunications Bureau of the Commission published draft rule changes in the Federal Register that would require, *inter alia*, that all proposed towers in the ASR Program, not just those for which the applicant has determined that an EA is necessary, be placed on environmental public notice for at least 30 days prior to construction.² In addition, the draft rules would require, on an interim basis, that applicants prepare EAs for all new towers taller than 450 feet. The draft rules would not change the routine process for Endangered Species Act compliance, but would give members of the public a greater opportunity to identify environmental issues, including potential effects on threatened and endangered species.

¹ The Commission has delegated to its applicants the authority to conduct informal consultation with the Service. See Letter from Susan H. Steinman, Associate General Counsel, FCC, to Steve Williams, Director, U.S. Fish and Wildlife Service (July 9, 2003).

² Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program, 76 FR 18679 (2011).

The ASR Program and the Endangered Species Act.

The Commission has entered formal consultation with the Service for roughly 20 proposed communications towers over the last 10 years, and in each instance, the Service has been able to conclude that with mitigation measures, the proposed tower would not jeopardize any endangered species, and has issued an incidental take statement for the tower. In such instances, the Commission conditions the approval of the application on the applicant adhering to the Reasonable and Prudent Measures identified in the Service's Biological Opinion.

The Commission also entered into post-construction consultation with the Service for 49 public safety towers owned by the State of Michigan, for which the Service issued an incidental take permit for one endangered species (the Kirtland's warbler (*Dendroica kirtlandii*)).

The FAA's Permitted Lighting Styles.

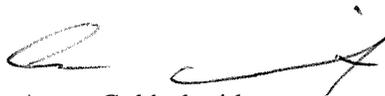
The Service has indicated that red steady lights on communications towers tend to attract certain migratory birds, including some threatened and endangered species, and accordingly should not be used whenever possible. Currently, the FAA's guidelines require red steady lights on all communications towers that rely on red lighting. The FAA recently conducted a conspicuity study to determine if removing red steady lights from communications towers, or changing them to flashing lights, would have an adverse effect on aviation safety. We understand that the FAA's study indicated that such removal would not harm aviation safety, and that it is beginning the steps necessary to revise its guidelines so that future towers will not have red steady lights. Some tower owners have informally indicated that if the FAA revises its guidelines, they would remove red steady lights from existing towers.

The Commission's Programmatic Environmental Assessment of its ASR Program.

The Commission is currently undertaking a Programmatic Environmental Assessment (PEA) of its ASR Program. We expect to release a Draft PEA for public comment within the next several weeks, and will provide it to you at that time. We would be pleased to meet with you at any time to discuss the progress of the PEA.

Please let me know if there is any additional information that you require to move forward with the conservation review of the Commission's ASR Program.

Sincerely,



Aaron Goldschmidt
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Spectrum and Competition Policy Division
Wireless Telecommunications Bureau