



November 2, 2011

Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Draft Programmatic Environmental Assessment for Antenna Structure
Registration Program; WT Docket No. 08-61 and WT Docket No. 03-187; DA
11-1455

Dear Commissioners:

These comments are submitted on behalf of American Bird Conservancy, Defenders of Wildlife and National Audubon Society (hereinafter "Conservation Groups") regarding the draft programmatic environmental assessment (DPEA) of the Commission's Antenna Structure Registration (ASR) Program. The programmatic environmental review of the ASR program results from the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy v. FCC*, 516 F.3d 1027 (2008), ordering the Commission to revise its rules on notice and public participation in the review of proposed towers and concluding that registered towers may have a significant environmental effect on migratory birds, warranting further environmental analysis.

For many years, the Conservation Groups have been urging the Commission to revise its ASR program to comply with environmental laws, i.e. the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (BGEPA) to reduce bird mortality from collisions with communications towers. Toward that end, we have filed numerous documents with the Commission in the two open dockets, all of which are hereby incorporated by reference, including our Petition for Expedited Rulemaking and Other Relief, filed April 14, 2009.

American Bird Conservancy (ABC) is a non-profit organization dedicated to the conservation of wild native birds in the Americas. Founded in 1994, ABC has long been a leader in Partners in Flight and the North American Bird Conservation Initiative and is

the only U.S.-based group dedicated solely to overcoming the greatest threats facing native birds in the Western Hemisphere. ABC has 9,000 members, offices in Virginia and the District of Columbia, and staff in California, Indiana, Missouri, Montana, New Hampshire, New York, and Oregon.

Defenders of Wildlife (“Defenders”) is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities, with its headquarters in Washington, D.C. Defenders’ mission is to preserve wildlife and emphasize appreciation and protection for all species in their ecological role within the natural environment through education, advocacy, and other efforts. Defenders has more than one million members and supporters throughout the country and field offices in several states.

National Audubon Society, Inc., is a not-for-profit corporation organized under the laws of the State of New York. National Audubon’s mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth’s biological diversity. National Audubon has more than one million members and supporters and a presence in all 50 states, including more than 450 certified chapters, nature centers, sanctuaries, and education and science programs.

INTRODUCTION AND SUMMARY

First, we commend the Commission for having finally begun the process of bringing the ASR program into compliance with NEPA and the other environmental laws. To date, the Commission has initiated the environmental review process by preparing the DPEA and holding public workshops. It has also proposed new rules to comply with the court of appeals order on notice and public participation, including interim procedures – currently under consideration by the Commission – that we and the Infrastructure Coalition, representing industry, have urged the Commission to adopt immediately.

Unfortunately, the DPEA does not comply with NEPA law governing such analyses and does not satisfy the Commission’s obligations under NEPA and the other environmental laws. We are not alone in this assessment. The Commission has failed to follow the guidance of the expert agency on migratory birds – the Migratory Bird Management Division of the Fish and Wildlife Service of the Department of the Interior – throughout the PEA process, and the DPEA continues to ignore the advice of those experts. The DPEA also fails to follow the advice of other leading experts in the field regarding impacts of towers on migratory birds. And it ignores final guidance issued by the Council on Environmental Quality (CEQ) in December 2010 on the need to review and revise categorical exclusions. On these grounds alone, the DPEA should be considered seriously flawed.

Our comments focus on the major defects that we have identified in the DPEA. For example, the DPEA itself is not the proposed action for purposes of NEPA, for which a defined purpose and need should be the first step in the analysis. Rather, the proposed action is an ASR program that complies with all applicable environmental laws. Here,

the purpose and need for the action is to comply with these laws and to reduce migratory bird deaths caused by communications towers, not merely to conduct an analysis. This misconception runs through the entire document, leading to a flawed analysis. Furthermore, the assumptions regarding existing towers and future needs and trends – limiting the range of alternatives presented – undermine the reliability of the DPEA’s analysis. In addition, the DPEA’s criteria for data collection and analysis are inconsistent with NEPA’s implementing regulations issued by CEQ because they do not give appropriate weight to the views of established experts in the field. Given these experts’ opinions that communications towers have significant impacts on migratory birds, the DPEA cannot reasonably conclude that there are no significant impacts. In these circumstances, if the FCC doubts that towers are having a significant impact on migratory birds, the conclusion must be that further environmental review is needed, in a comprehensive, programmatic Environmental Impact Statement (EIS).

The impacts analysis, which essentially concludes that impacts from towers are overshadowed by impacts from windows and cats, does not satisfy NEPA and the other applicable environmental laws. It does not address the impacts on migratory bird species that the DPEA should analyze, i.e. federally listed migratory bird species and migratory Birds of Conservation Concern (BCC), which are disproportionately affected by towers as compared to all avian species. The DPEA ignores the fact that federally listed migratory birds and BCC have been granted greater protections than other birds and must be separately evaluated, making the cumulative impacts analysis fatally flawed. The reference to climate change is superficial and fails to address the unique nature of these impacts. And the discussion of impacts to cultural resources fails to address the adverse impacts of towers on Bald and Golden Eagles for Native American Tribes, for whom these birds have religious, spiritual, and cultural significance.

The alternatives analysis does not comply with CEQ guidance because it fails to rigorously and objectively evaluate all reasonable alternatives. For example, the DPEA does not include an alternative to address the impacts of the 5,000+ existing towers on migratory birds; nor does it utilize the FWS Guidance on Siting and Management of Communications Towers or other existing models being developed by some states as a reasonable basis for an alternative. Regarding the alternatives discussed in the DPEA, we would urge the FCC adopt Option A of Alternative 2 because it is the most protective of migratory birds. At a minimum, the FCC should revise Options B to incorporate Option C of Alternative 2 to assure that the revised rules address almost all towers at which migratory birds are being killed. Option B protects eagles but requires an EA for proposed towers over 450 feet AGL, towers with steady burning lights, or towers with guy wires only if the proposed towers are in ridgelines, coastal zones, and bird staging areas or colonial nesting sites; Option C requires an EA for proposed towers over 450 feet AGL, towers with steady burning lights, and towers with guy wires, but does not provide for EAs to protect eagles. All towers should have EAs. Furthermore, the final document should include monitoring and mitigation measures to assure that the alternative selected is accomplishing the purpose and need and that the FCC is administering the ASR program in compliance with its obligations under the environmental laws.

While the PEA process has been a useful first effort, we continue to urge the FCC to prepare a programmatic EIS for the ASR program in cooperation with the Fish and Wildlife Service and other governmental agencies.

DISCUSSION

THE DPEA MISCONSTRUES THE PROPOSED ACTION TO BE EVALUATED, INCLUDING ITS PURPOSE AND NEED.

The DPEA mistakenly describes the proposed action as the DPEA itself. Its purpose, according to the DPEA is: “to examine how potential environmental impacts are evaluated as part of the ASR program . . .” DPEA at 2-1. And the need is: “to consider whether the current program should be revised . . .” *Id.* These words derive from the court of appeals decision ordering the Commission to conduct an environmental analysis. Per the court’s ruling, the FCC must complete that environmental analysis. In addition, the DPEA must comply with 40 C.F.R. § 1502.13, and per that CEQ regulation, the proposed action should be to revise the ASR program to be consistent with the environmental laws; the purpose and need should be to bring the ASR program into compliance with the environmental laws and to protect migratory birds by reducing mortality caused by communications towers.

THE DPEA’S ASSUMPTIONS AND STANDARDS FOR DATA COLLECTION AND REVIEW ARE CONTRARY TO NEPA GUIDANCE.

Underlying the DPEA is the assumption that existing towers cannot be altered except as the owners and operators may decide. According to the DPEA, there are more than 85,000 towers in the FCC database, of which more than 5,000 are over 450 feet AGL. It is not reasonable to develop a group of alternatives that leaves these towers out of the equation. As described below in the discussion of alternatives, NEPA regulations require that all reasonable alternatives be analyzed, including those that are not within the jurisdiction of the lead agency. *See* 40 C.F.R. § 1502.14(c), regarding environmental impact statements and incorporated into the requirements for environmental assessments by 40 C.F.R. § 1508.9(b). There is not even a discussion of how the ASR regulations might provide incentives for changes to existing towers. The DPEA also assumes, without elaboration, that the dictates of the technology limit the range of options to be reviewed. By failing to critically review these assumptions, the DPEA limits itself to options easily adopted, rather than options that accomplish the purpose and need.

Another questionable assumption is the 10-year time frame adopted in the DPEA for impact analysis. It is unexplained why that time period was chosen when the program has been in existence for more than 50 years, and there is no reason to believe that it will not exist for the foreseeable future.

The DPEA’s approach to data collection is another major flaw. Specifically, the DPEA discounts the latest analysis by an acknowledged expert, Dr. Travis Longcore, that

documents impacts at the population level by species. According to the DPEA, that work is “insufficient to support a finding that the effects of towers on individual species of migratory may be significant.” DPEA at 5-17. The DPEA’s dismissal of this important analysis undermines the whole DPEA. In any event, to the extent there are data gaps regarding impacts on migratory bird species, the conclusion would not be that the ASR program has no significant impact on migratory birds. Rather, the proper scientific conclusion would be that there may be such impacts and more analysis is needed, in an EIS, to determine the level of impacts on migratory bird species.

THE IMPACTS ANALYSIS FAILS TO ADDRESS THE SIGNIFICANCE OF IMPACTS ON MIGRATORY BIRDS.

a. Direct impacts.

The most fundamental flaw in the analysis of direct impacts is the use of aggregate bird data, as opposed to data for migratory birds at the species or group of species level. The gross data shown on the pie chart (DPEA at 6-5), showing annual avian mortality by source and ascribing to communications towers an aggregate impact of less than one percent of avian mortality does not meaningfully describe the impacts because impacts on specific species can be significant at population levels as determined by the best scientific evidence. While windows and cats kill many more birds than towers, the impact of towers on migratory birds, especially federally listed birds and BCC, should have been the focus of the analysis. Thus, the DPEA does not reflect species level impacts (for species where the data exist) or impacts for groups of species. Reliable data reported by Dr. Longcore show population level impacts for migratory birds.

The DPEA dismisses Dr. Longcore’s latest work on the grounds that the peer review process on the paper has not yet been completed and that the findings are based on a meta-analysis of existing studies that were not designed to address species-specific effects (DPEA at 4-13). Under CEQ guidance, studies should not be rejected merely because they are not yet peer-reviewed. *See* 40 § C.F.R. § 1500.1(b) (requiring only that information “be of high quality”). Indeed, courts have held that NEPA contains “no legal requirement that a methodology be ‘peer-reviewed or published in a credible source.’” *Lands Council v. Martin*, 529 F.3d 1219, 1226 (9th Cir. 2008) (“[NEPA] regulations contain no such requirements and do not even mention peer review or publication.”). *See also* 40 § C.F.R. § 1502.22. In any event, the FCC should look to experts such as the Fish and Wildlife Service to evaluate the study’s conclusions. Furthermore, the statement in the DPEA that “the analysis carries an inherent bias by including an overrepresentation of extreme episodic events that skew the mortality estimates” (DPEA at 5-17) is nonsensical. The data are the data, and extreme events occur, when thousands of migratory birds are killed. The fact that thousands of birds may die in a single event does not make the event an outlier. Dr. Longcore’s paper concludes that for some migratory bird species, impacts from towers are at population levels and are a significant environmental concern. If the FCC’s DPEA does not credit Dr. Longcore’s analysis, the take away should be that more documentation and analysis are needed to confirm or deny these population level impacts. On the basis of this record, it is not reasonable to

conclude that the impacts of communications towers on migratory birds are not significant at the national level.

b. Indirect impacts.

The importance of species level impacts is also relevant for an evaluation of indirect impacts. For example, Greater Sage grouse will not nest if their habitat is bifurcated by towers or roads leading to towers. Lesser Prairie chickens will abandon otherwise suitable habitat where structures such as towers attract birds of prey and provide perching sites. These types of indirect impacts, together with identified direct impacts, may be significant enough to jeopardize the continued existence of threatened and endangered bird species.

c. Cumulative impacts.

The analysis of cumulative impacts is perhaps the greatest flaw in the DPEA. As set forth in the CEQ regulations and referenced in FCC regulations, 40 C.F.R. § 1508.27(b)(7), “cumulative impact” means:

the impact on the environment which results from the incremental impact of the action *when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions*. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. at § 1508.7 (emphasis added). “Individually minor but collectively significant actions, taking place over time, can generate cumulative impacts.” *Senville v. Peters*, 327 F. Supp. 2d 335, 348 (D. Vt. 2004) (citing 40 C.F.R. § 1508.7). Thus, NEPA’s mandate to include a wide range of effects requires the FCC to consider not only the immediate, incremental impacts of the towers, but also the long term impacts of the continual take of birds from all sources of harm – including windows and cats – and the impact of that cumulative take on the migratory birds and the environment.

In *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002), the United States Court of Appeals for the District of Columbia Circuit, after reviewing the case law on cumulative impacts, declared: “[T]he consistent position in the case law is that, depending on the environmental concern at issue, the agency’s environmental assessment must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.” *Id.* at 342. In that case, the Trust challenged the adequacy of the FAA’s environmental assessment for a proposed replacement airport near Zion National Park. Focusing on the noise impacts, the Trust argued that the FAA addressed only the incremental impact of the project and failed to consider the project’s cumulative impact, *i.e.*, the project’s contribution to existing adverse conditions in the area. The court rejected the agency’s view and embraced the Trust’s interpretation of the law. The court noted that the regulatory definition of cumulative impacts specifies that the

“‘incremental impact of the action’ [at issue] must be considered ‘when added to other past, present, and reasonably foreseeable future actions.’” *Id.* (quoting *Coalition on Sensible Transp. v. Dole*, 826 F. 2d 60, 70-71 (D.C. Cir. 1987)). See also *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972) (“[E]ven a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory . . . may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered.”); *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 196 (4th Cir. 2005) (“NEPA requires an agency to consider not only the direct effects of an action, but also the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” (internal quotations and citations omitted)); *Great Old Broads for Wilderness v. Kempthorne*, 452 F. Supp. 2d 71 (D.D.C. 2006) (rejecting the agency’s environmental assessment for lack of a sufficient cumulative impact analysis).

Among the impacts cumulatively affecting migratory birds is climate change, which the DPEA acknowledges but does not analyze (DPEA at 6-4). It is well documented that the northern range of many species is expanding northward, and there is no question that these changes in migration patterns are in response to climate change. These changes in bird migration patterns should have been part of the cumulative impacts analysis at the species level or for groups of species, so that the DPEA would meaningfully identify and evaluate the full range of impacts.

In sum, the DPEA should have analyzed the full range of cumulative impacts on migratory birds. The fact that cats and windows kill much greater numbers of birds than do communications towers does not make insignificant the impact of the towers on birds, particularly migratory birds, and the environment; if anything, the vast number of kills from these other sources may increase the significance of the impact from towers because towers may be “the straw that breaks the back of the environmental camel” or in this case, the birds.

d. Cultural resources.

Similarly lacking in analysis is the impact of towers on cultural resources, i.e., the Bald and Golden Eagles, which have religious, spiritual, and cultural significance for Native American Tribes. Section 106 of the National Historic Preservation Act of 1966 directs the Federal Government to consider the effects of its actions on historic and cultural resources. The DPEA should have provided an analysis of how that determination is to be made for the ASR program.

THE ALTERNATIVES ANALYSIS DOES NOT EVALUATE ALL REASONABLE ALTERNATIVES.

The DPEA’s array of alternatives fails to take into account the FCC’s legal obligations under all applicable environmental laws, i.e. NEPA, the Endangered Species Act (ESA),

the Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (BGEPA). The DPEA's statement: "The FCC has not yet resolved the nature and scope of its responsibilities, if any, under the MBTA" (DPEA at 4-12) is astounding in light of the FCC's position in the court of appeals in *American Bird Conservancy v. FCC*, argued in 2007, that it was at that time in the process of addressing the MBTA issue in the context of a nationwide proceeding begun 2003. The MBTA applies to the take of migratory birds whether or not the FCC has decided on its position regarding the law.

We address first the alternatives selected in the DPEA and then discuss additional, reasonable alternatives that the DPEA failed to consider.

a. Alternatives described in the DPEA.

With respect to the alternatives identified in the DPEA, we categorically reject the No Action Alternative because it fails to fulfill the purpose and need of the proposed action, which should be to comply with the FCC's legal obligations and reduce the killing of migratory birds caused by communications towers. Furthermore, the No Action Alternative should be rejected because the DPEA's conclusion that the current program has no significant adverse environmental impacts at the national level is contrary to the weight of reliable evidence, including the Longcore papers that the DPEA dismisses as biased. (DPEA at 4-13). In addition, the fact that proximity to Bald and Golden Eagle nests is not routinely considered in determining whether an EA is required is, in and of itself, sufficient to reject the No Action Alternative. We also note that there is no data on the impacts of the program with the interim measures in place, which is called the No Action Alternative. In these circumstances, it is impossible to document with any degree of confidence the impacts of not-yet-adopted interim procedures and to meaningfully compare them to the hypothetical impacts of the alternatives. The No Action Alternative is meant to be the present course of action against which reasonable but hypothetical alternatives are to be compared. As stated by CEQ in its response No. 3, the No Action Alternative "provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives." <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>. To comply with CEQ guidance, the No Action Alternative should have been the existing program.

Alternative 1 is the No Action Alternative, i.e., the existing ARS program and not-yet-adopted new notice and interim regulations, together with changes in lighting styles currently under consideration by the FAA. Based on studies conducted in Michigan, it is anticipated that these lighting changes will significantly reduce bird mortality caused by communications towers. If the changes are adopted and if they have that impact, this alternative would surely be preferable to the No Action Alternative. However, the changes have not yet been adopted, and Alternative 1 does not include any monitoring to assure that the anticipated diminution in bird kills from lighting changes will occur and to determine if the diminution is sufficient to reduce kills below population level impacts. This alternative should have included a requirement for collection and analysis of monitoring data so that the FCC, the FWS, and the public would have confidence that

this alternative would sufficiently reduce bird kills caused by communications towers to the level of no significant impact on migratory birds.

Alternative 2 has three options. We urge the FCC to adopt Option A, which would require an EA for all projects submitted for registration except for certain changes to existing towers. Option B would require an EA only in defined circumstances, based on specified impacts and landscape features when towers are more than 450 feet AGL, use steady burning lights or have guy wires. Option C would require an EA only for towers over 450 feet AGL, essentially a continuation of the interim measures. Neither B nor C alone is sufficient to accomplish the purpose and need of the proposed action. At a minimum, the FCC should revise the last part of Option B to require an EA for towers that are: (i) in ridgelines, coastal zones, or bird staging areas or colonial nesting sites or (ii) more than 450 feet AGL, use steady burning lights, or have guy wires. With these revisions, Option B would be almost as inclusive as Option A. Option A and revised Option B would require a revision of the FCC's categorical exclusion for towers.

We have urged the Commission to revise the categorical exclusion in numerous filings in the docket, including our Petition for Expedited Rulemaking, filed April 14, 2008, and comments in response to the announcement of the PEA process, filed January 14, 2011. In December 2010, CEQ issued final guidance on categorical exclusions, which we continue to urge the FCC to follow. *See* <http://www.nepa.gov>, specifically at, http://ceq.hss.doe.gov/ceq_regulations/guidance.html. In addition, we urge the FCC to consider the alternatives discussed below in addition to the procedures adopted by New Jersey and other states, the procedures adopted for NEPA review of cultural resources, and the procedures under consideration for wind farms.

b. Additional alternatives.

A reasonable alternative could be based on the FWS Guidance for Siting and Management of Communications Towers. The current version, adopted in 2000, includes a set of procedures designed to inform siting and management decisions so as to protect migratory birds. (If the FAA approves the proposed changes in lighting styles, the FWS Guidance will then be updated to reflect those changes.) Framed as an alternative, the FWS Guidance could be made a part of the ASR application process. For example, an alternative could provide that applicants that follow the FWS Guidance would be categorically excluded under NEPA. Those that did not follow the Guidance would be required to file an EA with the application for registration. Or, an alternative could provide that applicants that follow the FWS Guidance would be fast-tracked for FCC review.

Another alternative that should have been considered concerns existing towers. There are more than 5,000 existing towers over 450 feet AGL according to the FCC database, and the impacts of those towers should not have been ignored just because there is no current set of requirements applicable to existing towers. As stated in 40 C.F.R. § 1502.14(c), NEPA analysis of alternatives should include “reasonable alternatives not within the jurisdiction of the lead agency.” Existing towers are re-licensed, and conditions based on

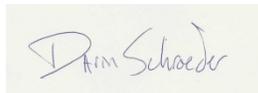
the need to protect migratory birds could be made part of the re-licensing criteria. Incentives could be explored to encourage retrofitting of towers where the economics would not otherwise justify the changes. The DPEA's failure to suggest any alternative that addresses the impacts of existing towers leaves a huge hole in the FCC's choice of options to minimize and mitigate for the impact of registered towers on migratory birds.

Finally, all of the alternatives should have included monitoring and mitigation measures. Without monitoring (including a standardized method of reporting and analysis of the data), there would be no way of knowing whether the alternative selected is having the anticipated effect and whether the actual effect is sufficient. Without any consideration of mitigation, the range of reasonable options may be more limited than it might be otherwise. Therefore, we urge the FCC to develop monitoring and mitigation components are part of the reasonable alternatives analysis.

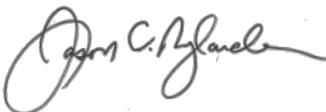
CONCLUSION

We acknowledge the FCC for beginning the process of bringing the ASR program into compliance with its obligations under the environmental laws. The DPEA is a first step in a process to identify and evaluate the full scope of environmental impacts of communications towers and all reasonable alternatives for addressing the environmental impacts of the ASR program so as to reduce bird kills at communications towers. We offer the foregoing comments to assist in that process to ensure sound decisionmaking and compliance with the environmental laws. We urge the Commission to reflect on these comments and to conclude that a programmatic EIS is needed to satisfy its legal obligations.

Respectfully submitted,



Darin C. Schroeder
Executive Director of Conservation Advocacy
American Bird Conservancy
1731 Connecticut Avenue, NW
Washington, DC 20009
(202) 234-7181 x209



Jason C. Rylander
Senior Attorney
Defenders of Wildlife
1130 17th Street, NW
Washington, D.C. 20036
(202) 682-9400

A handwritten signature in black ink, appearing to read "Mike Daulton". The signature is fluid and cursive, with the first name "Mike" being more prominent than the last name "Daulton".

Mike Daulton
Senior Director, Government Relations
National Audubon Society
1150 Connecticut Ave. N.W., Ste. 600
Washington, D.C. 20036
(202) 861-2242