

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Part 1 of the Commission's Rules) WT Docket No. 08-61
Regarding Environmental Compliance Procedures) WT Docket No. 03-187
for Processing Antenna Structure Registration)
Applications)
)
Draft Programmatic Environmental Assessment of)
the Antenna Structure Registration Program)

To: The Commission

**COMMENTS OF THE INFRASTRUCTURE COALITION
ON THE DRAFT PROGRAMMATIC ENVIRONMENTAL
ASSESSMENT**

Michael F. Altschul
Christopher Guttman-McCabe
Brian M. Josef
CTIA—THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036
(202) 785-0081

Jane E. Mago
Jerianne Timmerman
Ann West Bobeck
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Jim Goldwater
NATIONAL ASSOCIATION OF
TOWER ERECTORS
345 South Patrick Street
Alexandria, VA 22314
(703) 836-3654

Jonathan Campbell
PCIA—THE WIRELESS INFRASTRUCTURE
ASSOCIATION
901 N. Washington St., Suite 600
Alexandria, VA 22314
(703) 739-0300

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EXECUTIVE SUMMARY

To review the effect of communications towers on migratory birds on a nationwide programmatic basis, the FCC took the unusual step of hiring an independent environmental consultant with avian expertise, conducting three public meetings as part of its scoping process, and providing the public with its Draft Programmatic Environmental Assessment (“PEA”) for comment. This resulted in a comprehensive record reflecting the input of conservation groups, the United States Fish and Wildlife Service, the Infrastructure Coalition, other wireless, broadcast, and public safety interests, and members of the public. The Commission should now adopt the Draft PEA’s conclusions as a Final PEA, without significant changes, and adopt a Notice of Proposed Rulemaking to integrate the Draft PEA’s “No Action” Alternative (or “Alternative 1,” if the FAA changes its lighting requirements) into the FCC’s rules.

The Draft PEA provides an in-depth assessment of the impact of towers on migratory birds and concludes that towers do not represent a significant source of avian mortality from a nationwide perspective. Indeed, the Draft PEA finds that communications towers are responsible for less than 0.2 percent of avian mortality, while buildings, cats, and power lines are responsible for nearly 90 percent. Towers pale in significance to those other causes of avian mortality. The courts have held that higher cumulative impacts from other sources can render a project’s adverse impact relatively insignificant. The Draft PEA properly determined that, on a national basis, projected tower construction would be only a minor contributor to total avian mortality, both when compared to other sources and on an absolute basis. There is no credible evidence that a “tipping point” has been reached, such that tower-related bird deaths will tip the balance, as to either migratory birds in general or specific species of migratory birds, at the national level.

The Draft PEA appropriately considered a wide range of alternatives, *all* of which are more protective of birds than current procedures. The Draft PEA concluded that under *none* of the alternatives was there a significant adverse effect on avian mortality on a nationwide basis, given other much more significant contributors. However, each of these alternatives would result in varying delays in processing time and drains on public and private resources. For example, the draconian Alternative 2 Options A and B would cause the antenna structure registration program to grind to a halt, impeding the rapid broadband buildout mandated by the President, the Congress, and the Commission itself, which would also delay the extension of rural public safety service and the implementation of new and improved broadcast coverage.

The Infrastructure Coalition submits that because adoption of none of the alternatives would result in a significant impact on migratory birds, the Commission should use the least invasive alternative. Specifically, it should adopt the No Action Alternative, or Alternative 1, if the FAA eliminates its steady red lighting requirements. Alternative 2 Option C is unwarranted, as Option C would double the number of EAs needed, as well as the staff time needed to process them, but it is nevertheless preferable to the two remaining options (Alternative 2 Options A and B). Given the additional drain on resources and increased processing time, Option C should not be adopted without a compelling showing that its benefits outweigh the burdens.

The Infrastructure Coalition strongly opposes Alternative 2 Options A and B. Option A would represent a *4200 percent* increase in EAs, with nearly six times as many EAs being filed annually than the present staff can process in a year, assuring an ever-growing decades-long backlog. While endangering nationwide broadband buildout and costing applicants over \$400 million dollars over ten years, it would reduce bird deaths only “somewhat” or “slightly” in

comparison with the No Action Alternative. Similarly, Option B is also unacceptable; it would require three to four times as many EAs as the No Action Alternative, and would increase the processing time, which is currently one day in many cases, to as long as 200 days.

The Draft PEA recognized, as pointed out in the ERM Report, that there are significant flaws in the estimates of avian mortality. The Draft PEA correctly concludes that most of the studies of avian mortality are not species-specific and cannot reliably yield conclusions about specific species. In addition, this paper had a wide variety of other fundamental flaws, including an inherently biased dataset and the use of data about streetlight-related mortality instead of tower-caused mortality in one region.

The Infrastructure Coalition notes that many of the studies fail to make clear whether they are tallying the mortality only of species that are subject to FCC environmental consideration (threatened or endangered species, migratory birds, or bald and golden eagles), or of all avian species. The lines blur further when some participants (and studies) refer to “Birds of Conservation Concern,” which includes species that the FCC is not required to consider.

Rather than attempt to heavy-handedly impose complex and time-consuming procedures on a nationwide basis, the Infrastructure Coalition urges the FCC to adopt the least intrusive regulatory alternative and rely on the local and national public notice process to provide interested members of the public the opportunity to raise local tower-specific concerns. There is simply no basis for a nationwide requirement for EAs for broad categories of towers when all of the tower-specific concerns can and will be addressed by the applicant itself in the project’s planning phase, and when the new public notice process will assure the public a meaningful opportunity to raise site-specific and species-specific information.

The Draft PEA properly found no significant impact as to each of the alternatives, which eliminates the need for a nationwide Programmatic Environmental Impact Statement. Instead, the Commission can proceed to a rulemaking to integrate its selected alternative into its regulations. By adopting the No Action Alternative, the Commission will establish a regulatory framework that creates new and meaningful avian protections while permitting the nationwide buildout of wireless broadband service and the provision of new broadcast services and technologies.

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CTIA–The Wireless Association[®], the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA–The Wireless Infrastructure Association (collectively, the “Infrastructure Coalition” or “Coalition”) hereby submit comments on the Commission’s Draft Programmatic Environmental Assessment (“PEA”) of the Antenna Structure Registration (“ASR”) Program.¹ The Infrastructure Coalition urges the Commission to adopt the Draft PEA’s conclusions as a Final PEA, without significant changes. The Infrastructure Coalition believes that the public interest is best served by the expeditious adoption of the Draft PEA, and it should be accompanied by a Notice of Proposed Rulemaking to integrate the PEA’s “No Action” Alternative (or “Alternative 1,” if the Federal Aviation Administration (“FAA”) changes its lighting requirements) into the rules.

¹ *Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program*, DA 11-1455 (Aug. 26, 2011) (“Draft PEA”), *summarized*, 76 Fed. Reg. 54422 (Sept. 1, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0826/DA-11-1455A2.pdf.

As discussed herein, the Draft PEA provides a solid foundation for the Commission's environmental determination concerning the ASR program and for potential changes to that program. The Wireless Telecommunications Bureau and the Commission's contractor, URS Group, Inc., have carefully separated facts from unfounded concerns and have created a record that provides a solid basis for a final PEA and appropriate rule changes to implement its determinations.

In the Draft PEA, the Commission considers five alternative scenarios and concludes that, while they all will have some adverse effect on birds, in each case there will be *no significant effect*, given the vastly greater contribution to avian mortality from other sources. As a result, the proper determination under each of the five alternatives is a finding of no significant effect, eliminating any need for a nationwide Programmatic Environmental Impact Statement ("PEIS").

Consistent with guidance from both Congress and the Executive Branch, the Commission has spent years crafting policies to facilitate ubiquitous deployment of advanced services, including not only broadband wired and wireless Internet access, but also next-generation public safety and broadcast services. The nationwide buildout of these services is dependent on construction of new and replacement towers, as well as maximizing the use of existing infrastructure for collocation.

In the interest of minimizing the obstacles to nationwide infrastructure buildout, the Infrastructure Coalition believes the best regulatory response is the No Action Alternative, followed by Alternative 1, which is premised on the FAA changing its lighting criteria but is otherwise identical to the No Action Alternative. The only other justifiable alternative is Alternative 2 Option C, which would require an EA for towers over 450 feet. However, the FCC

has documented the significantly greater impact that approach would have on agency and industry resources and the potential slowdown of ASR processing which would result. Thus, Alternative 2 Option C only would be warranted if the Commission finds that benefits that are unique to its utilization would outweigh its quantified detriments. Conversely, Alternative 2 Options A and B are unacceptably burdensome — both for agency and third party resources — and cannot be justified.

As a starting point for the analysis of these alternatives, it is important to recognize that under the Commission’s current rules, tower applicants already are charged with ensuring compliance with environmental laws dealing with endangered and threatened species.² As a result, whenever a tower site is proposed in the vicinity of endangered or threatened species, applicants routinely consult with the United States Fish and Wildlife Service (“USFWS”) — and in many cases proceed with comprehensive and costly studies and tests to ensure that a proposed site will not have any significant effect on endangered or threatened species. Given that this process is in place and widely used, no additional regulatory initiatives are needed on a national level with regard to the protection of threatened or endangered species.

I. THE DRAFT PEA PROPERLY CONCLUDES ON A NATIONWIDE BASIS THAT COMMUNICATIONS TOWERS DO NOT HAVE A SIGNIFICANT EFFECT ON AVIAN MORTALITY UNDER ANY OF THE ALTERNATIVES BEING CONSIDERED

In determining the significance of a project, it is necessary to consider its effects on the human environment in the context of other actions that may have far greater environmental impacts. The Draft PEA correctly assesses the relative significance of tower-related avian mortality in light of the fact that buildings, cats, and power lines cause nearly 90 percent of avian mortality, while communications towers are only responsible for less than 0.2 percent, ranking

² See 47 C.F.R. § 1.1307(a).

below hunting, automobiles, and pesticides.³ Here, there is no disagreement as to the relative proportions of avian mortality attributable to communications towers versus buildings, cats, and power lines. Simply put, towers pale in significance to those causes of avian mortality.

The Second Circuit addressed the issue of relative significance in *Hanley v. Kleindienst*, where it considered the significance of the impact of building a new federal jail in New York City.⁴ It held that a project may not produce a significant impact because of much higher cumulative impacts from other sources. For example, it noted that “one more highway in an area honeycombed with roads usually has less of an adverse impact than if it were constructed through a roadless public park.”⁵ Thus, “[a]n office building or, indeed, a jail, may have an adverse impact in an area where such use does not exist and is not permitted by zoning laws . . . whereas the contrary would hold in a location where such uses do exist and are authorized by such laws”⁶ Accordingly, the court found it reasonable for an agency to determine that the proposed jail would not have a significant impact when constructed in the immediate area of another, much larger and busier jail in an area already zoned for prisons.⁷

The same logic compels the conclusion here that, on a national scale, communications towers do not have a significant effect on avian mortality. The evidence shows that projected tower construction under *any* of the alternatives under consideration will be only a scarcely noticeable contributor to total annual avian mortality when compared to other sources of mortality.

³ See Draft PEA at 6-4, 6-5. The legend to the pie chart at page 6-5 indicates that the three largest sources of avian mortality account for 89.5 percent of bird deaths.

⁴ *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

⁵ *Id.* at 831.

⁶ *Id.*

⁷ *Id.* at 833.

The Conservation Groups have, in the past, cited the *Hanley* case for the proposition that even a relatively small environmental effect can cause a “tipping point” when added to other environmental harms.⁸ The court did observe that “even a slight increase in adverse conditions” can, under some conditions, “represent the straw that breaks the back of the environmental camel.”⁹ The court did not, however, say that each and every “slight increase” must be considered as though it has the potential to tip the balance. To the contrary, the court held that it is essential to consider the “absolute, as well as comparative, effects” of a proposed federal action.

Here, the Draft PEA does consider from a national perspective both the absolute and the comparative effects of the various alternatives on avian mortality. The fact is there exists no credible evidence on a national scale that avian mortality is at or near a tipping point where tower construction might realistically tip the balance. There is no credible evidence of such a tipping point for migratory birds generally, and none for any specific migratory species. And as an absolute matter, with only 0.2 percent of avian mortality at stake, it would be difficult, if not impossible, to demonstrate that communications tower-based avian mortality would constitute a “significant” effect on all migratory birds or on specific migratory species on a national scale. To the extent there is evidence that, in a particular location, a population of a protected species of birds is at a tipping point that will be triggered by a proposed tower, that evidence can and will be considered during the authorization process for that tower.

⁸ See, e.g., Conservation Groups’ August 3, 2011 Memo at 4, filed as an attachment to their *ex parte* letter from Greer S. Goldman to the Secretary, WT Docket Nos. 08-61 & 03-187 (Aug. 4, 2011) (“Conservation Groups’ August 3 Memo”).

⁹ 471 F.2d at 831.

A. THE DRAFT PEA APPROPRIATELY CONSIDERS A WIDE RANGE OF ALTERNATIVES

The Draft PEA properly considered a wide range of alternatives. It considered as its “No Action” Alternative a procedure that actually affords more protection to birds than taking no action at all — it assumes that the notice-and-comment procedure proposed as an Interim ASR Rule has been adopted, but omits the automatic EA requirement for towers over 450 feet that is also contained in the proposed Interim ASR Rule.¹⁰ The Commission also considered as Alternative 1 the same procedural scheme assuming that the FAA changes its lighting criteria to eliminate steady-burning red lights.¹¹

Grouped together under the umbrella of Alternative 2, the Commission considered three additional options: Alternative 2 Option C is the equivalent of the proposed Interim ASR Rule; in addition to the notice and comment procedure in the No Action Alternative, it would also require applicants to file an EA for any new or significantly modified tower over 450 feet tall.¹² Alternative 2 Option A would require an EA for virtually all new or significantly modified tower construction,¹³ while Alternative 2 Option B would require an EA for new or significantly modified towers that are near bald and golden eagle nests or that have certain features and are located on ridgelines, in coastal zones, or in bird staging areas or colonial nesting sites.¹⁴ The

¹⁰ See *Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program*, WT Docket Nos. 08–61 & 03–187, *Public Notice*, 26 FCC Rcd 4099 (WTB 2011) (“Interim ASR Rule”), *summarized*, 76 Fed. Reg. 18679 (Apr. 5, 2011); Draft PEA at 3-1. Although the Commission has announced that an order concerning the Interim ASR Rule is on circulation among the Commissioners, the Commission has not yet adopted it.

¹¹ See Draft PEA at 3-3.

¹² See *id.* at 3-7 – 3-8

¹³ See *id.* at 3-4 – 3-5.

¹⁴ See *id.* at 3-7.

Commission also considered a variety of other alternatives that it rejected as impracticable, such as not authorizing any more communications towers.¹⁵

The Draft PEA considered all of the relevant evidence and concluded that under none of these alternatives was there a significant effect on avian mortality due to towers, given the much greater impact of other sources of avian mortality. Moreover, the Draft PEA properly assessed the threat each alternative posed to the continued viability of the ASR process, and quantified the impact each alternative would have on the Commission's resources, as well as the economic impact on the wireless industry.

The Infrastructure Coalition must stress that if draconian regulations such as Alternative 2 Option A or B were imposed, the number of applications requiring EAs would increase greatly, placing an unmanageable burden on the Commission's resources, as discussed below, and the ASR process would grind to a halt.¹⁶ The inevitable result would be that the rapid buildout of wireless broadband infrastructure mandated by the President,¹⁷ the Congress,¹⁸ and the Commission itself¹⁹ would falter and then collapse as the number of proposed towers that could not be built due to a lack of an ASR multiplied exponentially. The extension of broadband Public Safety services to rural areas would be indefinitely delayed. Likewise, broadcast stations and their viewers and listeners would suffer from delays in bringing coverage to new areas as well as implementing next-generation technologies for television and radio service.

¹⁵ See *id.* at 3-9 – 3-10.

¹⁶ See Section II below.

¹⁷ See The White House, *Memorandum on Unleashing the Wireless Broadband Revolution* (June 28, 2010), 75 Fed. Reg. 38387 (July 1, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

¹⁸ See American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, 516 (2009).

¹⁹ See, e.g., FCC Chairman Julius Genachowski, "The Clock is Ticking," (Mar. 16, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305225A1.pdf.

B. A FINDING OF NO SIGNIFICANT IMPACT ELIMINATES ANY NEED FOR A PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT

Under FCC and Council for Environmental Quality (“CEQ”) rules, an EA is used to determine whether there is or is not a significant impact.²⁰ By definition, if the Commission concludes that the authorization of communications towers will have no significant impact on the environment, then no PEIS is required.²¹ The Draft PEA’s conclusion that towers do not significantly impact avian mortality clears the way for the Commission to issue a Final PEA with a Finding of No Significant Impact that: (a) concludes that no PEIS is required; and (b) announces that the FCC will initiate a Notice of Proposed Rulemaking to integrate its selected alternative into its regulations.

The Commission has considered a wide range of alternatives and has followed procedures that were as thorough and demanding as those that would be used in the context of conducting a PEIS.²² At the end of this process, the Commission will be in a position to determine, as in the Draft PEA, that towers do not have a significant effect on avian mortality. Accordingly, there is no procedural or substantive justification for a PEIS.

II. THE “NO ACTION” ALTERNATIVE SHOULD BE ADOPTED BECAUSE IT WILL HAVE NO SIGNIFICANT ADVERSE IMPACT ON BIRD MORTALITY AND WOULD LEAST INTERFERE WITH CONTINUED DEPLOYMENT OF WIRELESS AND BROADCAST FACILITIES

The Infrastructure Coalition supports adoption of the No Action Alternative. Given that the FCC has finite resources and an obligation under the Communications Act to foster

²⁰ See 47 C.F.R. § 1.1308(d); 40 C.F.R. §§ 1508.9, 1508.13.

²¹ 40 C.F.R. § 1508.13 (“‘Finding of no significant impact’ means a document by a Federal agency briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. . .”).

²² Under CEQ regulations, the exploration and evaluation of “all reasonable alternatives” is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14, (a).

nationwide wireless networks, it is both appropriate and necessary for the Commission to engage in a cost-benefit analysis of each Alternative, consistent with the President’s directive to assess costs and benefits in its decisionmaking.²³ The Draft PEA’s analysis and conclusions appropriately find that towers will not have a significant impact on avian mortality under any of the alternatives laid out in the Assessment.²⁴ Several of the alternatives, however, would threaten the timely buildout of broadband and broadcast infrastructure and create a significant drain on FCC resources. This creates a powerful incentive to utilize the least invasive alternative.

Based on the cost and processing time estimates provided in the Draft PEA,²⁵ the five alternatives under consideration would impose vastly different costs and burdens on applicants and the Commission staff. The following table and the subsequent discussion rank these alternatives from the most acceptable to unacceptable:

Alternative	Total EA Cost to Applicants	EA Processing Burden on Staff
No Action Alternative	\$325,000–\$1,125,000	65–75 EAs/year; 40–50 days to review
Alternative 1	Same as No Action Alternative	Same as No Action Alternative
Alternative 2 Option C	\$650,000–\$2,100,000	130–140 EAs/year; without additional staff, 80–100 days to review
Alternative 2 Option B	\$1,125,000–\$3,975,000 if no change in FAA circular; \$950,000–\$3,375,000 if FAA eliminates steady red lighting	225–265 EAs/year if no FAA change; 190–225 EAs/year with FAA change; without additional staff, up to 160–200 days to review
Alternative 2 Option A	\$14,000,000–\$42,000,000	About 2800 EAs/year; without additional staff, up to 2150 days to review

²³ President Obama’s Executive Order 13563 directs executive agencies, among other things, to “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.” E.O. 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011). In addition, in Executive Order 13579, the President asked independent agencies to comply with E.O. 13563 and to make decisions only after considering the costs and benefits. E.O. 13579, *Regulation and Independent Regulatory Agencies*, 76 Fed. Reg. 41587 (July 14, 2011). Chairman Genachowski immediately announced that the FCC is following that policy, and he reiterated that in a series of Congressional letters on September 12, 2011.

²⁴ Draft PEA at 7-1 – 7-6.

²⁵ *Id.* 5-28 – 5-30.

The No Action Alternative. The Draft PEA finds that under the No Action Alternative, there will be no significant impact on bird mortality, albeit there is a possibility of a slight increase in the comparatively small number of bird deaths associated with communications towers. We note that what has been called the No Action Alternative is actually a substantial change from the current process, which involves a one-day ASR application process for the vast majority of applications. The No Action Alternative would replace this with an ASR process that will take a minimum of 40 to 50 days to complete.²⁶ Despite this adverse impact on processing time (and hence on buildout), the No Action Alternative is the least burdensome option currently available.

Alternative 1. In the event the FAA revises its lighting circular to permit elimination of steady-burning red lights (L-810s), the Coalition could endorse this proposal as it has the potential, according to one study, to significantly decrease avian mortality by as much as 70 percent while it retains the same FCC procedures found in the No Action Alternative.²⁷

Alternative 2 Option C. From the Infrastructure Coalition’s perspective, adoption of Alternative 2 Option C is unwarranted but nevertheless preferable over the remaining two choices, Options A and B. This alternative is essentially identical to the proposed Interim ASR

²⁶ The increase in time over the current ASR process is due to the inclusion of the notice and comment procedures from the proposed Interim ASR Rule.

²⁷ In a presentation entitled, “Communications towers as barriers to bird migration and opportunity to reduce the risk,” delivered by Prof. Joelle L. Gehring at the December 6, 2010 scoping meeting, Dr. Gehring stated her finding that towers with steady-burning side-mounted L-810s are responsible for 3.5 times as many instances of avian mortality as occur when other lighting schemes are used, and by eliminating L-810s, avian mortality associated with communications towers could be reduced by “as much as 70%.” See FCC video archive, *ASR Environmental Assessment* at 20:30-21:30 (Dec. 6, 2010), available at <http://www.fcc.gov/events/asr-environmental-assessment/>. See also Draft PEA at 7-3 (“A tower without red steady-burning lights is estimated to result in 50 to 70 percent less avian mortality than if it uses red steady-burning lights (Gehring *et al.* 2009).”).

Rule, in that it includes the requirement of an EA for all new or significantly modified towers over 450 feet tall, even when they employ a preferred lighting scheme that will minimize effects on birds. This is less preferred to the No Action Alternative and Alternative 1, which omit the unnecessary burden of mandatory EAs for towers over 450 feet tall. Alternative 2 Option C also would roughly double the number of EAs (and tower applicants' EA preparation expenses) and double the time needed to process EAs, absent additional staff.

The Infrastructure Coalition believes that the local and national notice and the FCC comment process will provide an adequate opportunity for consideration of local avian effects for specific towers over 450 feet, as discussed in Section IV.A below. On balance, the Infrastructure Coalition does not believe the additional burden of EAs for all towers over 450 feet is justified, given this notice and comment procedure. Accordingly, Alternative 2 Option C should not be adopted absent a compelling showing that it is in the public interest and outweighs the burdens.

Alternative 2 Option B. The Coalition strongly opposes Alternative 2 Option B. This alternative would be unduly burdensome on both the Commission staff and applicants. Option B would require EAs for new or significantly modified towers within arbitrary distances from certain eagle nesting areas, whether or not the tower will have any significant effect on the eagles. It also would require EAs for towers that are located in certain types of ill-defined areas — ridgelines, coastal zones, bird staging areas, or colonial nesting areas — that also are over 450 feet tall, have steady red lighting, or are guyed. There would be three to four times as many EAs required under this option than under the No Action Alternative, more than tripling the cost to applicants, and increasing the processing time for EAs to as much as 200 days, if additional staffing cannot be procured. This is not an acceptable alternative.

Alternative 2 Option A. The Coalition strongly opposes Alternative 2 Option A, which is simply unworkable. This is the most burdensome option proposed; it would require EAs for virtually all new or significantly modified towers. This would spark a dramatic increase in the number of EAs to be filed and processed from the 65-75 currently processed in a year to 2800 being filed per year for the next decade. This would impose a significant burden on Commission resources. For example, at the FCC’s current speed of processing EAs, the thousands of EAs that would be filed in just the first year of implementation of Option A would take nearly six years to complete. Each subsequent years’ EAs would be stacked like cordwood on top of the uncompleted first year’s EAs, guaranteeing a decades-long and ever-growing backlog for tower authorizations after a couple of years. It would cost the industry about 43 times as much to prepare those EAs — \$420 million over a decade — compared with the No Action Alternative.²⁸ This cost to the public is not offset by the anticipated avian conservation benefit — the Draft PEA estimates that bird deaths would be reduced only “somewhat” or “slightly” in comparison with the No Action Alternative, and the “factors contributing to migratory bird deaths would likely be difficult to avoid.”²⁹

Moreover, the Commission’s NEPA team, would very likely be unable to increase its staffing by 4200 percent to keep pace with the growth in EA filings. Moreover, it is unrealistic to expect that the FCC would even be able to increase its staffing to the level that would be needed to keep significant backlogs from occurring. Comparing the meager and speculative benefits of Option A against the Herculean resources that would have to be brought to bear compels its outright rejection.

²⁸ It is unclear how infrastructure builders, wireless operators, public safety networks, and broadcasters could weather such additional costs and delays.

²⁹ Draft PEA at 5-21.

III. THE DRAFT PEA PROVIDES A REASONED, CONSERVATIVE ASSESSMENT OF THE EFFECTS OF COMMUNICATION TOWERS ON THE HUMAN ENVIRONMENT

A. THE DRAFT PEA’S USE OF AVIAN ADVOCATES’ INFLATED AVIAN MORTALITY ESTIMATES TO ESTABLISH AN UPPER BOUND ON THE MORTALITY THAT CAN BE ATTRIBUTED TO TOWERS PRECLUDES ANY ARGUMENT THAT THE COMMISSION DOWNPLAYED AVIAN MORTALITY

The Draft PEA recognizes that avian mortality figures are merely estimates that have varied considerably over the years. It also recognizes that the high-end estimates (40–50 million birds) from ten years ago are well beyond the 5 million level that recently has been cited as a closer approximation in the literature. Moreover, the Longcore meta-analysis³⁰ yields an estimate in this same range. Accordingly, the Commission uses the 5 million figure as a “reasonable conservative estimate.”³¹ The Coalition believes that the 5 million figure is likely inflated, given the nature of the studies relied upon to derive the estimates. However, we agree with the Commission that this figure can conservatively be used to create an approximate *upper bound* of avian mortality.

We note that this 5 million bird estimate has yet to be substantiated. As the Coalition’s expert consultant, Environmental Resources Management (“ERM”), previously observed, the problem with many existing estimates of avian mortality attributed to towers, including the Longcore meta-analysis, is that many of the “studies” have been non-peer-reviewed studies, anecdotal accounts of geographically and temporally limited bird kills, and, in particular, non-representative data, such as unusual bird mortality events at isolated locations. Moreover, the data covers only limited parts of the United States, with many regions lacking adequate

³⁰ Travis Longcore *et al.*, *An Estimate of Avian Mortality at Communication Towers in the United States and Canada* (Jan. 14, 2011 draft) (“Longcore Mortality” or “2011a”).

³¹ Draft PEA at 4-22.

data.³² The Draft PEA acknowledges that the available data suffers from these and other flaws, noting that the conclusions from many of the studies “are not based on typical conditions at a majority of tower sites.”³³

The Longcore Mortality meta-analysis re-analyzes this unreliable data to extrapolate a nationwide estimate of avian mortality. The result is that the meta-analysis compounds the errors in the data to the point that the Longcore Mortality study is so flawed that it “should not be viewed as a scientifically valid determination or consensus in the context of the PEA analysis,” and “the results have limited utility for use in the PEA and related decision making.”³⁴

Another serious deficiency in the estimates of bird mortality associated with towers is that it is not always clear whether the bird deaths being tallied are of species that are subject to potential FCC environmental consideration — namely, threatened or endangered species, migratory birds, or bald and golden eagles. In this connection, we note that some participants in this proceeding repeatedly refer to “Birds of Conservation Concern.”³⁵ This term has no legal significance in this proceeding, because it is not synonymous with the avian species the FCC is required to consider.³⁶

³² See ERM, *Final Report: Peer Review of Longcore et al. 2011 Draft Papers* at 1, 8 (May 13, 2011) (“ERM Report”), included as Attachment 1 to the Infrastructure Coalition’s Further Comments, WT Docket Nos. 08-61 and 03-187 (filed May 17, 2011) (“Further Comments”).

³³ Draft PEA at 4-13.

³⁴ *Id.* at 1, 6, 8, 19.

³⁵ See, e.g., Travis Longcore *et al.*, *Species Composition of Birds Killed at Communication Towers in North America* at 5, 8, 9, 10, 31 (Jan. 14, 2011 draft) (“Longcore Species” or “2011b”); Conservation Groups’ August 3 Memo at 2, USFWS Scoping Comments at 67 (filed May 13, 2011).

³⁶ Birds of Conservation Concern are those listed in a USFWS book by that name, and it includes “the migratory and non-migratory bird species (beyond those already designated as federally threatened or endangered) that represent our [*i.e.*, USFWS’s] highest conservation priorities.” USFWS, *Birds of Conservation Concern 2008*, at iii (“BCC”), available at http://library.fws.gov/bird_publications/bcc2008.pdf. It includes birds that are “candidate[s]” for

(continued on next page)

Unfortunately, most of the studies of avian mortality are not species-specific, as the Draft PEA acknowledges, and cannot reliably be used to derive conclusions about specific species.³⁷ It is equally apparent that avian mortality data compiled without attention to species cannot reliably be used to predict the effects of communications towers on threatened or endangered species, migratory birds, or bald and golden eagles as a class. Such data undoubtedly count the deaths of some non-protected birds — as do tallies of Birds of Conservation Concern — as part of their estimate of total avian mortality attributable to towers, thus skewing the estimates upward.

B. THE DRAFT PEA PROPERLY CONCLUDES THAT THERE IS A LACK OF ADEQUATE DATA FOR DRAWING SPECIES-SPECIFIC CONCLUSIONS

As the Draft PEA notes, the Longcore Species paper erroneously drew species-specific conclusions from studies that were not species-specific.³⁸ ERM’s analysis, submitted by the Infrastructure Coalition, properly noted that:

The Longcore *et al.* papers (2011a and b) and associated estimates of annual avian mortality and species composition of birds killed at communications towers have fundamental flaws involving dataset selection, data bias, variable development, statistical methodology and assumptions, extrapolation of results across geographic regions/Bird Conservation Regions, and conclusions reached, resulting in an estimate of annual avian mortality that is not scientifically defensible and potentially yields a significant overestimate of annual average mortality. This defect in the mortality estimate, in turn, affects the conclusions regarding

(footnote continued)

endangered species designation, as well as “proposed endangered or threatened, and recently delisted species.” *Id.* Thus, Birds of Conservation Concern are not necessarily endangered, threatened, migratory, or eagles protected under the Bald and Golden Eagle Protection Act. There is no statutory basis for the FCC to consider the effects of its actions, or those of its licensees, on Birds of Concern. The appropriate focus for the PEA is, and remains, threatened or endangered species, migratory birds, and bald and golden eagles.

³⁷ Draft PEA at 4-23.

³⁸ *Id.* at 4-23.

species composition and relative impacts to species of conservation concern.³⁹

To develop species-specific estimates for entire regions, ERM notes that “Longcore multiplied the total bird mortality” for a region “by the average proportion of species found in kills in that region,” even though the figures came from “an inherently biased dataset” and the model was applied “to unsampled geographic areas and time periods.”⁴⁰

The reliability of the Longcore Species estimates is further undermined by the fact that when faced with an absence of tower-caused avian mortality data, the authors instead employed species estimates from studies of avian deaths attributed to streetlights.⁴¹ As streetlights are structures with lighting and heights totally dissimilar to towers, the substitution of streetlight data was inappropriate and produced unreliable data and conclusions.

At the FCC Draft PEA workshop held on September 20, 2011, one of the authors of the Longcore papers, Dr. Albert Manville of the USFWS, took issue with the Draft PEA’s conclusion that there were insufficient data to draw conclusions about specific species. Ultimately, however, he conceded that the studies examined in the Longcore meta-analysis did not contain significant species-specific data and stated that “it’s the best we have.”⁴²

³⁹ ERM Report at 18.

⁴⁰ *Id.* at 10-11.

⁴¹ See Longcore Species at 18 (“For the Gulf Coastal Prairie we included a record of mortality at streetlights (James 1956) to develop the species profile because no searches of towers had been reported in the literature from this region. The streetlight kill illustrated the ability of lighted structures to kill migratory birds in this region by attracting and drawing them down to near ground level.”).

⁴² See FCC Video Archive, *Discussion of the Draft Programmatic Environmental Assessment (PEA)*, at 42:44 – 44:08 (Sept. 20, 2011), available at <http://www.fcc.gov/events/discussion-draft-programmatic-environmental-assessment-pea>.

IV. LOCAL EFFECTS OF PARTICULAR TOWERS CAN BEST BE ADDRESSED ON A CASE-BY-CASE BASIS

A. GIVEN THAT ALL OF THE ALTERNATIVES PROVIDE FOR PUBLIC NOTICE AND AN OPPORTUNITY TO REQUEST ENVIRONMENTAL PROCESSING, THERE IS NO NEED FOR RULES AT THE NATIONAL LEVEL TO ADDRESS POSSIBLE TOWER-SPECIFIC AVIAN CONCERNS

The purpose of this PEA is to determine national impact of the authorization of future communications towers, not localized impacts. *All* of the alternatives under consideration include a procedure that allows for individualized consideration of the impact of a particular tower on specific migratory or threatened and/or endangered species. Every tower requiring an ASR will be placed on separate local and public notices and any member of the public with requisite standing may request that the FCC conduct an environmental review of a proposed tower. Thus, the public will be provided with a meaningful opportunity to raise location-specific environmental issues relating to migratory birds, threatened and endangered avian species, or bald or golden eagles in the vicinity of the proposed tower, as well as unique terrain conditions that may be attractive to bird populations and possible hazards to such birds. As a result, there is no basis for imposing a nationwide requirement for EAs for up to 28,000 projected sites over the next decade, under Alternative 2 Options A or B, based on unsubstantiated, assumed local environmental effects.

B. THE COMMISSION SHOULD CONSIDER EFFECTS ON BALD AND GOLDEN EAGLES ONLY AS PART OF ITS CASE-BY-CASE NEPA REVIEW, GIVEN THAT THE FCC IS NOT EMPOWERED TO ENFORCE THE BALD AND GOLDEN EAGLE PROTECTION ACT

While the FCC can play an important role in this area, the FCC is not the agency tasked with enforcing the Bald and Golden Eagle Protection Act (“BGEPA”). Rather, the Department of the Interior (“Interior”) is the agency responsible for enforcing the BGEPA, which is a strict

liability criminal statute.⁴³ In turn, Interior's USFWS is responsible for granting permits for the take of eagles.⁴⁴ Neither the statute nor the Communications Act designates the FCC as having any authority or responsibility for enforcement of the BGEPA.⁴⁵

The FCC can consider credible evidence that construction of a given tower will have a significant adverse effect on eagles (as well as threatened or endangered species), when raised on a case-by-case basis, in the course of its NEPA review. When such evidence comes to the Commission's attention, whether through the applicant's environmental review, comments by a member of the public, or through the staff's own diligent review, the Commission may consult with USFWS whenever it finds such consultation would be appropriate.⁴⁶

V. CONCLUSION

The Commission should adopt the Draft PEA's conclusions without significant changes. The public interest is best served by the adoption of the Draft PEA as a Final PEA, and it should be accompanied by a Notice of Proposed Rulemaking to integrate the PEA's No Action Alternative (or Alternative 1, if the FAA changes its lighting requirements) into the rules, including elimination of the unnecessary 450-foot EA requirement. Conversely, the

⁴³ The BGEPA, 36 U.S.C. § 668–668c, prohibits anyone, without a permit from USFWS, from “taking” bald and golden eagles, including “disturbing” these eagles, and it provides for fines and imprisonment.

⁴⁴ See 50 C.F.R. Part 22; *Eagle Permits, Final Rule*, 74 Fed. Reg. 46836 (Sept. 11, 2009).

⁴⁵ Nor does the FCC have authority to adopt rules to enforce the BGEPA in order to carry out its own statutory responsibilities. The Supreme Court has held that an agency's statutory charge to promote the “public interest” does not give the agency “a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.” *NAACP v. FPC*, 425 U.S. 662, 669 (1976). Thus, the Court has held that the FCC's power to adopt rules and policies in the public interest is limited by “the purpose of the [Communications] Act, the requirements it imposes, and the context of the provision in question” *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

⁴⁶ In many instances however, the applicant will already have coordinated with USFWS to determine if eagles or threatened or endangered species are in the vicinity, to ensure there is no impact.

Infrastructure Coalition vigorously opposes adoption of Alternative 2 Options A or B, as the quantified adverse impact of each option would render the ASR process unworkable. Quite simply, the adoption of either of the latter options would derail the nationwide wireless broadband buildout called for by the President, Congress and the FCC, the continued buildout of public safety services, and would likewise frustrate the expansion of both existing and new radio and television broadcast services.

Respectfully submitted,

THE INFRASTRUCTURE COALITION

/s/ Brian M. Josef

Brian M. Josef
Michael F. Altschul
Christopher Guttman-McCabe
CTIA–THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036
(202) 785-0081

/s/ Ann West Bobeck

Jane E. Mago
Jerianne Timmerman
Ann West Bobeck
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

/s/ Jim Goldwater

Jim Goldwater
NATIONAL ASSOCIATION OF
TOWER ERECTORS
345 South Patrick Street
Alexandria, VA 22314
(703) 836-3654

/s/ Jonathan Campbell

Jonathan Campbell
PCIA–THE WIRELESS INFRASTRUCTURE
ASSOCIATION
901 N. Washington St., Suite 600
Alexandria, VA 22314
(703) 739-0300

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