

**Before the
United States Department of the Interior
United States Fish and Wildlife Service
Washington, DC 20240**

In the Matter of)	
)	
Migratory Bird Permits; Programmatic)	Docket No. FWS-HQ-MB-2014-0067
Environmental Impact Statement)	RIN 1018-BA69
)	

ATTN: Division of Policy and Directives Management

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ submits these comments in the above-captioned docket,² in which the United States Fish and Wildlife Service (FWS) provides notice of its intent to prepare a programmatic environmental impact statement (PEIS) under the National Environmental Policy Act (NEPA)³ to evaluate a proposal to authorize the incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA).⁴ The Notice proposes to apply new requirements to communications tower owners with the stated goal of protecting migratory birds from incidental takes. As set forth in further detail below, however, the FWS lacks authority under the MBTA to regulate migratory bird takes incidental to lawful activity, such as constructing buildings or towers, and accordingly cannot implement its proposal for new permitting requirements for incidental takes.

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

² *Migratory Bird Permits; Programmatic Environmental Impact Statement*, Docket No. FWS-HQ-MB-2014-0067, *Notice of Intent*, 80 Fed. Reg. 30032 (2015) (Notice).

³ 42 U.S.C. §§ 4321 *et seq.*

⁴ 16 U.S.C. §§ 703 *et seq.*

Beyond the basic question of its authority, moreover, the FWS has not provided any evidence in the Notice that broadcast towers have a significant impact on migratory bird populations and, thus, should not be covered under any programmatic environmental impact statement. If, despite these fundamental problems, the FWS nonetheless proceeds with its proposal, it should coordinate with the Federal Communications Commission (FCC), the expert agency on communications tower-related issues, to develop a Memorandum of Understanding (MOU) that would enable the FCC to include review of incidental takes within the scope of its NEPA review process.

I. THE FWS LACKS AUTHORITY TO ADOPT THE PROPOSALS IN THE NOTICE BECAUSE MIGRATORY BIRD DEATHS INCIDENT TO LAWFUL ACTIVITY ARE OUTSIDE THE SCOPE OF THE MIGRATORY BIRD TREATY ACT

The MBTA provides that “except as permitted by regulations made as hereinafter provided, it shall be unlawful . . . to pursue, hunt, take, capture, [or] kill . . . any migratory bird,”⁵ and it authorizes the FWS to “determine when, to what extent, if at all, and by what means, it is compatible with the [relevant treaties] to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any [migratory] bird . . . and to adopt suitable regulations permitting and governing the same.”⁶ NAB does not believe that this statutory language provides the FWS authority to regulate the indirect, incidental take of migratory birds resulting from ordinary, lawful commercial activities.

In examining the statutory language in context,⁷ the MBTA does not define the term “take” but includes it with other terms, such as “pursue,” “hunt,” “capture,” “kill,” “possess,”

⁵ 16 U.S.C. § 703.

⁶ 16 U.S.C. § 704.

⁷ All statutory interpretation starts with the language of the statute, considered in context. See, e.g., *Bailey v. U.S.*, 516 U.S. 137, 144-45 (1995).

“sell,” “purchase,” “ship,” “transport” and “export,” which all describe “physical conduct of the sort engaged in by hunters and poachers” or traffickers,⁸ or, at the least, “conduct *directed at* migratory birds.”⁹ On its face, the MBTA does not apply to unrelated activities that may indirectly or incidentally result in the deaths of migratory birds.

This interpretation of the statute is buttressed by the regulatory definition of “take” cited in the Notice, which “means to pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to “attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”¹⁰ The regulatory and ordinary definitions of “take” thus also describe “conduct of the sort engaged in by hunters and poachers,”¹¹ and appear similarly inapplicable to activities not directed toward, and only incidentally potentially affecting, migratory birds, such as constructing buildings or communications towers. NAB additionally observes that the Notice cites no statutory or regulatory definition of “incidental” or “incidental take.”

Given this “plain language,” a number of courts, including the Eighth and Ninth Circuit Courts of Appeals, have concluded that it would stretch the MBTA “beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct . . . that

⁸ *Seattle Audubon Soc. v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991) (explaining that this type of conduct was “undoubtedly a concern at the time of the statute’s enactment”).

⁹ *Newton County Wildlife Ass’n v. U.S. Forest Svc.*, 113 F.3d 110, 115 (8th Cir. 1997) (emphasis added).

¹⁰ 50 C.F.R. § 10.12. The ordinary meaning of “take” is similar. Merriam Webster defines “take” as “to get into one’s hands or into one’s possession, power, or control,” such as “to get possession of (as fish or game) by killing or capturing.” Merriam Webster’s Online Dictionary, Take, <http://www.merriam-webster.com/dictionary/take>. Black’s Law Dictionary similarly defines “take” as “to lay hold of; to gain or receive into possession; to seize; to deprive one of the possession of; to assume ownership.” Black’s Law Dictionary Free Online Legal Dictionary, 2nd ed., <http://thelawdictionary.org/take>.

¹¹ *Seattle Audubon Soc.*, 952 F.2d at 302.

indirectly results in the death of migratory birds.”¹² Under this precedent, the MBTA should not be read to criminalize lawful activity, including the construction or mere existence of communication towers, which can result in wholly incidental and indirect bird deaths.¹³

This reasonable understanding of the scope of the MBTA is supported by a comparison of the MBTA’s language with another statute protecting wildlife. In contrast to the MBTA, the Endangered Species Act (ESA) expressly defines “take,” and does so in a broad manner to include “harass” and “harm”¹⁴ – terms that are not included in either the list of prohibited conduct in the MBTA¹⁵ or in the regulatory definition of “take” cited in the Notice.¹⁶ These differences in language between two statutes with similar purposes are significant and have led courts to interpret the MBTA more narrowly than the ESA.¹⁷ If Congress had intended for the MBTA to reach indirect conduct “harming” or “harassing” migratory birds, then Congress obviously could have explicitly done so.¹⁸ The FWS should

¹² *Newton County*, 113 F.3d at 115 (emphasis in original) (MBTA’s prohibition on taking and killing migratory birds found not to cover timber harvesting that would “disrupt nesting migratory birds, killing some”). *Accord*, e.g., *Seattle Audubon Soc.*, 952 F.2d at 302-303.

¹³ The fact that the MBTA is a criminal statute supports a narrow construction of the statute. See, e.g., *U.S. v. Santos*, 553 U.S. 507, 514 (2008). The scope of conduct and activities criminalized under the MBTA also should be reasonably limited, given that the “migratory birds” covered by the statute include “any bird protected by any of the treaties” (which “currently includes 1,027 bird species” in the U.S.), “regardless of whether the particular species actually migrates” and regardless of whether the covered species are threatened or endangered. Notice, 80 Fed. Reg. at 30033.

¹⁴ 16 U.S.C. § 1532(19) (defining “take” to mean “*harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct*”) (emphasis added).

¹⁵ 16 U.S.C. § 703.

¹⁶ Notice, 80 Fed. Reg. at 30033, quoting 50 C.F.R. § 10.12.

¹⁷ For example, based on the differences between the two statutes, the Ninth Circuit found that indirect bird deaths, such as those caused by logging and habitat destruction, do not constitute a “take” under the MBTA but do constitute “harm” under the ESA’s broader definition of “take.” *Seattle Audubon Soc.*, 952 F.2d at 302-303.

¹⁸ Indeed, the Ninth Circuit noted that Congress amended the MBTA the year after it adopted the ESA, but did not modify the MBTA’s prohibitions to include “harm” or “harass.” *Id.*

recognize the more limited scope of the MBTA and not attempt to stretch it to include activities that its terms do not reasonably reach.¹⁹

NAB realizes that some courts have found that certain indirect or unintended effects on migratory birds to be within the MBTA's scope, but even those cases do not lead to the conclusion that all incidental migratory bird deaths arising from lawful commercial activity fall under the statute. For example, in *U.S. v. FMC Corp.*, a chemical manufacturer was found liable under the MBTA for bird deaths resulting from exposure to toxic chemicals, under a tort-like "notion[] of strict liability" for "abnormally dangerous activity."²⁰ Such situations are not comparable to the construction of ordinary structures, including buildings or towers. Indeed, the court made clear that its holding "does not dictate that every death of a bird will result in imposing strict criminal liability on some party,"²¹ recognizing that to "bring every killing within the statute such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense."²²

¹⁹ After all, "to read the requirements of the Endangered Species Act into the MBTA would be to render the latter act to some extent superfluous." *Humane Soc. of U.S. v. Watt*, 551 F. Supp. 1310, 1319 (D.D.C. 1982), *aff'd without opinion*, 713 F.2d 865 (D.C. Cir. 1983). There is a strong presumption against interpretations that render statutory provisions superfluous. See, e.g., *Hohn v. U.S.*, 524 U.S. 236 (1998).

²⁰ *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978) (citing tort law authority and stressing that FMC had engaged in the manufacture of a "highly toxic" pesticide and failed to "prevent this dangerous chemical" from reaching a pond where it was dangerous to birds and other living organisms that ingested or came into contact with it).

²¹ *Id.* at 908.

²² *Id.* at 905. Another court has found oil drilling operators liable under the MBTA for bird deaths resulting from their operations. See *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010). But in focusing almost exclusively on the MBTA's *mens rea* requirement and due process issues, this case failed to focus squarely on the types of conduct actually prohibited under the MBTA and whether – and how far – the MBTA's scope extends beyond the conduct of hunters, poachers and traffickers of migratory birds that the statute clearly addresses and that the Eighth and Ninth Circuits limited the MBTA to covering. Because it found that the MBTA lacks a *mens rea* requirement, the court in *Apollo Energies* appeared to then assume that oil drilling fell within the types of conduct

Under the statutory language and a number of court decisions, and consistent with the proper narrow interpretation of criminal statutes, MBTA liability should not reach bird deaths resulting from ordinary, lawful activities not directed at migratory birds. Accordingly, the FWS lacks authority to regulate bird takes incidental to activities, such as the construction or mere existence of communications towers, as proposed in the Notice.

II. BROADCAST TOWERS DO NOT HAVE A SIGNIFICANT IMPACT ON MIGRATORY BIRD POPULATIONS AND SHOULD NOT BE COVERED UNDER ANY PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT

The Administrative Procedure Act (APA) requires that agency action be “based on a consideration of the relevant factors,” and rest on reasoned decision making in which the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²³ In addition, under the Data Quality Act, agencies including the FWS have an obligation to “ensur[e] and maximize[e]” the “quality, objectivity, utility, and integrity of information (including statistical information)” they disseminate.²⁴

Contrary to these clear requirements, the Notice provides virtually no factual basis to support a conclusion that broadcast towers have a significant impact on migratory birds or that the FWS should complete a PEIS regarding a potential permitting regime for broadcast

prohibited in Section 703 and within the meaning of the statutory term “take,” which, as described above, is highly questionable.

²³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

²⁴ 44 U.S.C. § 3516 note (also known as the Information Quality Act). This includes information used to support new regulations. See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 Fed. Reg. 8452, 8454, 8460 (OMB 2002); *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664, 2667 (OMB 2005). The FWS has promulgated guidelines for ensuring the quality of the information it relies upon and disseminates. See U.S. Fish and Wildlife Service Information Quality Guidelines and Peer Review (revised June 2012), http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf

towers.²⁵ The Notice asserts that “millions of birds” are killed by interaction with human activities and structures, and states that the cumulative effects are contributing to “population declines for many species,”²⁶ but such generalized claims about the combined effects of all types of activities and structures, including buildings, does not justify regulatory action against a small subset of structures, such as communications towers. And while the Notice also claims that “[c]ommunications towers can have a significant impact on birds,”²⁷ it cites little to no evidence showing that communications towers in general have an impact on migratory bird populations, let alone evidence that broadcast towers specifically impact these bird populations. In fact, broadcast towers represent a very small fraction of the total number of communications towers, further warranting their exclusion from any PEIS.²⁸

Perhaps even more significantly, the Notice’s assertions about communications towers’ impact on birds are contrary to directly relevant evidence found in the FCC’s Final Programmatic Environmental Assessment for its Antenna Structure Registration Program proceeding.²⁹ The FCC developed a voluminous record in that proceeding, in which NAB played a significant role as part of a coalition with CTIA, the trade association representing wireless carriers and suppliers, PCIA, the wireless infrastructure trade association, and the

²⁵ Any agency decision lacking an adequate evidentiary basis is subject to reversal by a reviewing court. See, e.g., *Otay Mesa Prop., L.P. v. U.S. Dept. of Interior*, 646 F.3d 914, 916, 918 (D.C. Cir. 2011).

²⁶ Notice, 80 Fed. Reg. at 30033.

²⁷ *Id.* at 30035.

²⁸ See, e.g., *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (stating that an agency needs “to provide more than its own broadly stated fears to justify its rules” and finding the agency’s order contrary to APA because its “generalized conclusions” lacked “factual support”).

²⁹ FCC, Final Programmatic Environmental Assessment for the Antenna Structure Registration Program, at 7-6 (Mar. 13, 2012) (Final PEA), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-312921A1.pdf; FCC Public Notice, DA 12-388, WT Docket Nos. 08-61 and 03-187 (Mar. 13, 2012) (announcing release of Final PEA).

National Association of Tower Erectors. This coalition hired Environmental Resources Management (ERM) as consultants to peer review the data provided by avian groups, known as the Longcore study.³⁰ ERM ultimately concluded that the Longcore study had fundamental flaws severely limiting its utility.³¹ The FCC also hired a well-respected environmental firm to evaluate the Longcore study, and concluded in the Final PEA that “the incremental impact of [communications towers] on migratory birds, considered in context and together with the impacts of other past, present, and reasonably foreseeable future actions, is not cumulatively significant nationally.”³² The FCC noted that “tower collisions are only responsible for approximately 0.3 percent of the more than 2 billion annual bird deaths that currently occur due to cat predation and anthropogenic sources” and found that communications towers “are a relatively minor contributor to total human-caused avian mortality.”³³

The Notice references the NABCI State of the Birds report to support its conclusion that the cumulative effects of human activities contribute to population decline,³⁴ but that report does not support the conclusion that communications tower collisions have a significant impact on bird populations. The NABCI report provides bird mortality numbers for certain categories of bird deaths considerably in excess of the numbers provided in the

³⁰ Travis Longcore, *An estimate of avian mortality at communication towers in the United States and Canada* (Jan. 14, 2011), <http://apps.fcc.gov/ecfs/document/view?id=7021025796>; Travis Longcore, *Species Composition of Birds Killed at Communication Towers in North America* (Jan. 14, 2011), <http://apps.fcc.gov/ecfs/document/view?id=7021025797>.

³¹ Environmental Resources Management, *Peer Review of Longcore et al. 2011 Draft Papers*, Final Report at 18 (May 13, 2011), available at <http://apps.fcc.gov/ecfs/document/view?id=7021649074>.

³² Final PEA at 7-6.

³³ *Id.* at 6-6.

³⁴ Notice, 80 Fed. Reg. at 30033.

FCC's Final PEA, but fails to include sources or information on how the numbers were calculated.³⁵ The current Notice, moreover, does not address bird deaths caused by cats, buildings and windows, and other causes, even though the FCC's Final PEA estimated that cats cause 41.9 percent of bird deaths in the United States each year, buildings and windows cause another 41.9 percent of bird deaths, power lines cause 5.5 percent of bird deaths and hunting causes 5.0 percent of those deaths.³⁶ Further, as the Final PEA explained, the limited bird deaths from communications tower strikes occur in the context of a high level of natural mortality to bird populations during migration, related to lack of sufficient stopover habitat, predation, and exhaustion.³⁷ The Notice does not even refer to the FCC's Final PEA and its directly relevant information, let alone assess the actual impact communications towers have on migratory bird population decline.³⁸ The FWS therefore has no basis for moving forward with additional regulatory requirements on communications towers.

In addition, adding unnecessary regulatory burdens to the deployment of broadcast and wireless infrastructure on the eve of the FCC's 600 MHz incentive auction would run counter to the clear intent of Congress in the 2012 Spectrum Act.³⁹ Early next year, the FCC

³⁵ The State of the Birds 2014, Other Drivers of Decline (2014), available at <http://www.stateofthebirds.org/abundance/anthropogenic>.

³⁶ Final PEA at 6-5 (also estimating that pesticides and automobiles are responsible for 2.8 percent and 2.5 percent, respectively, of annual bird deaths, with communications towers estimated to cause only 0.3 percent of those deaths).

³⁷ *Id.* at 6-6.

³⁸ Failing to address the FCC's Final PEA is particularly problematic. See, e.g., *American Radio Relay League v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (agency acted contrary to APA by failing to offer reasoned explanation for not considering relevant empirical data).

³⁹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6569 (2014) (Incentive Auction Report and Order); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402; 6403 (2012 Spectrum Act).

is expected to conduct the first ever spectrum incentive auction, in which television broadcasters will bid to voluntarily relinquish spectrum rights and the FCC will repurpose and auction the vacated spectrum for mobile broadband use.⁴⁰ Following the auction, broadcasters across the country choosing to remain on the air will have just 39 months to carry out the massive task of relocating their operations onto new frequencies in a smaller broadcast television spectrum band.⁴¹ Broadcasters and FCC officials alike have expressed concerns that practical constraints, such as a shortage of tower work crews, may prevent broadcasters from meeting the 39-month deadline.⁴² At the same time, wireless carriers will be deploying wireless broadband services utilizing their expensively acquired and newly licensed frequencies.

Imposing new tower siting hurdles on the deployment of broadcast and wireless infrastructure at this time will hinder the post-incentive auction transition, frustrate federal spectrum policy, and delay the offering of new mobile broadband services, contrary to congressional intent. Such action is both unwarranted and unnecessary, given the FCC's conclusion that "the anticipated annual bird mortality from existing and future communications towers under any alternative is not significant at the national level, whether considered as a separate, direct impact or as part of a cumulative analysis."⁴³

⁴⁰ Incentive Auction Report and Order, 29 FCC Rcd at 6569.

⁴¹ *Id.* at 6573.

⁴² See, e.g., Remarks of Commission Michael O'Rielly, Federal Communications Commission, Before PCIA – The Wireless Infrastructure Association, 2015 Wireless Infrastructure Show (Apr. 28, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333214A1.pdf.

⁴³ Final PEA at ES-10.

III. IF THE FISH AND WILDLIFE SERVICE NONETHELESS PROCEEDS WITH ITS PROPOSAL, IT SHOULD COORDINATE WITH THE FEDERAL COMMUNICATIONS COMMISSION TO ENABLE THE FCC TO CONDUCT THIS REVIEW

If the FWS nonetheless proceeds with a PEIS and, ultimately, with its proposal to adopt a framework governing incidental takes by communications towers, it should coordinate closely with the FCC to negotiate a Memorandum of Understanding that will enable the FCC to review such incidental takes in the context of its NEPA review process. The FCC already regulates communications towers,⁴⁴ and is the expert agency with regard to those towers. In any such MOU, the FWS – in consultation with the FCC and industry – could authorize incidental migratory bird take under certain conditions, which the FCC could then integrate into its existing communications tower regulatory scheme, including its Antenna Structure Registration process.

This coordinated approach would streamline regulatory compliance for industry, and save government time and resources by reducing duplicative efforts by multiple governmental entities.⁴⁵ Such coordination with the FCC also is critical, due to the upcoming spectrum incentive auction and its impact on broadcast and wireless infrastructure, as discussed above.⁴⁶

⁴⁴ 47 C.F.R. §§ 17.1 *et seq.*

⁴⁵ See Notice, 80 Fed. Reg. at 30035 (recognizing that expanding existing and negotiating additional MOUs with federal agencies “could provide an efficient programmatic approach”). Indeed, there is precedent for stakeholders utilizing a MOU model for tower siting to mitigate avian mortality. See *Memorandum of Understanding between the Infrastructure Coalition and the Conservation Groups Concerning Interim Antenna Structure Registration Standards*, WT Docket Nos. 08-61 and 03-187 (May 4, 2010) (discussing preferential lighting schemes and circumstances in which Environmental Assessments for individual tower sitings would be appropriate). The FCC formally adopted many of the 2010 MOU’s essential elements. See *National Environmental Policy Act Compliance for Proposed Tower Registrations; Effects of Communications Towers on Migrating Birds*, Order on Remand, 26 FCC Rcd 16700 (2011).

⁴⁶ We note that in 2000, the FWS promulgated “voluntary” tower siting guidelines without the input of stakeholders such as the FCC, the FAA, tower companies and the communications industries. These guidelines did not take into account licensing requirements for broadcast facilities, terrain,

IV. CONCLUSION

The Notice proposes a course of action the FWS lacks authority to pursue and attempts to remedy a problem not shown to exist. If the FWS nonetheless proceeds with its proposals, the FWS should work closely with the FCC to streamline environmental review processes to benefit consumers of communications services, tower owners and federal agencies alike.

Respectfully submitted,

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aviation safety, and other issues. See
<http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/towers/comtow.html>