

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Michigan Public Safety Communications System
Public Safety Towers
Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 2015

Released: February 6, 2015

By the Commission:

I. INTRODUCTION

1. The National Wildlife Federation, Copper County Audubon Club, Michigan Audubon Society, and the Upper Peninsula Environmental Coalition (collectively, Petitioners) have filed an application for review (AFR) challenging the environmental review of certain towers built by the Michigan Department of State Police (MSP) for the Michigan Public Safety Communications System (MPSCS).1 Based on our review of the AFR and associated documents, including a letter from the U.S. Fish and Wildlife Service (USFWS) concluding review of these towers under Section 7 of the Endangered Species Act (ESA),2 we deny the Application for Review.

II. BACKGROUND

2. Events Prior to the Filing of the Application for Review. The MPSCS is a statewide emergency radio system that utilizes 179 sites constructed in four phases from 1996-2001. The system provides public safety radio communication coverage across the State of Michigan. Each of the towers is individually licensed by the Commission and registered in the Antenna Structure Registration system.

3. On September 30, 1998, the USFWS formally notified the Commission and the MSP that four ESA-listed species, including the endangered Kirtland's warbler, might inhabit locations near the 117 towers that were then proposed for construction.3 Over the next three years, MPSCS constructed most of these towers and additional ones without completing the process of assessing the towers' effects

1 In the Matter of Kirtland's Warbler and Other Migratory Birds - Failure to Prepare Environmental Assessment of Communications Towers in Michigan, Application for Review Submitted by the National Wildlife Federation, Copper County Audubon Club, Michigan Audubon Society, and the Upper Peninsula Environmental Coalition, Dec. 17, 2003 (AFR). See also Opposition to NWF's Application for Review of the Dismissal of the Petition for Environmental Assessment, Jan. 9, 2004; and Reply Memorandum in Support of Application for Review, Jan. 28, 2004.

2 16 U.S.C. § 1536(a)(2).

3 Letter from Charles Wooley, USFWS Regional Director, to Jeff Steffel, Michigan Department of State Police, dated Sept. 30, 1998.

on these species. On April 18, 2002, Petitioners filed a petition pursuant to 47 C.F.R. § 1.1307(c) asserting claims under the National Environmental Policy Act (NEPA), ESA, and the National Historic Preservation Act (NHPA).⁴

4. On September 17, 2003, the MSP entered into a Memorandum of Understanding (MOU) with the USFWS Office of Law Enforcement.⁵ The MOU provided that the State of Michigan would conduct an Avian Collision Study using MPSCS towers to advance scientific knowledge regarding the effects communications towers may have on migratory birds. Also on September 17, 2003, the MSP entered into a Memorandum of Agreement (MOA) with the Wireless Telecommunications Bureau (Bureau) and the Commission's Enforcement Bureau in which the parties agreed to work cooperatively to complete any necessary consultation with the USFWS under the ESA, and MSP agreed to participate in and facilitate the Avian Collision Study.⁶

5. On November 17, 2003, the Bureau's Commercial Wireless Division (Division) dismissed Petitioners' petition insofar as it requested an EA, stating that the petition was premature while the Avian Collision Study was ongoing.⁷ The Division severed the Petitioners' arguments regarding compliance with the NHPA.⁸

6. The Petitioners thereafter filed the AFR, focusing on the Division's dismissal of their claims under NEPA and the ESA. (Their NHPA claims were resolved separately and are not raised in the AFR.)

7. *Events Subsequent to the filing of the Application for Review.* From 2003 through 2005, the State of Michigan conducted the Avian Collision Study described above, and reached three key findings:

- All other factors being equal, taller towers result in higher levels of avian mortality than shorter towers;⁹
- All other factors being equal, towers with guy wires result in higher levels of avian mortality than towers without guy wires;¹⁰ and
- All other factors being equal, steady-burning lights on towers result in higher levels of avian mortality than flashing lights.¹¹

⁴ See 42 U.S.C. §§ 4321-4370h, 16 U.S.C. §§ 1531-1544, and 54 U.S.C. §§ 300101 *et seq.*, respectively.

⁵ Memorandum of Understanding: U.S. Fish and Wildlife Service, Office of Law Enforcement and Regional Director with the Michigan Department of State Police and Michigan Department of Information Technology, dated Sept. 17, 2003.

⁶ Memorandum of Agreement between the Michigan Department of State Police and Michigan Department of Information Technology and Federal Communications Commission's Wireless Telecommunications Bureau and Enforcement Bureau, dated Sept. 17, 2003.

⁷ Letter from Jeffrey S. Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, FCC, to F. Michelle Halley, Esq. (Division Letter), dated November 17, 2003. Shortly after the Division Letter was issued, the Wireless Telecommunications Bureau was reorganized so that the Commercial Wireless Division was eliminated and the Spectrum and Competition Policy Division assumed responsibility for this matter. References to the "Division" are to either of these entities, depending on the date of the action.

⁸ *Id.* at 3.

⁹ See Gehring, J., P. Kerlinger, and A.M. Manville II. 2011. The role of tower height and guy wires on avian collisions with communication towers. *Journal of Wildlife Management* 75(4):848-855.

¹⁰ *Id.*

¹¹ See Gehring, J., P. Kerlinger, and A.M. Manville II. 2009. Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions. *Ecological Applications* 19(2):505-514.

8. On August 26, 2005, the Division submitted to the USFWS a biological assessment (BA) requesting concurrence that none of the 179 towers in the MPSCS were likely to adversely affect the thirteen threatened or endangered species present in the vicinity of one or more of those towers.¹² On October 25, 2005, the USFWS concurred with the determinations for all but one of the species, and recommended that the Commission initiate formal consultation for the Kirtland's warbler.¹³ On November 7, 2006, the Division submitted to the USFWS a BA to address the 49 towers in the MPSCS that the USFWS had identified as of concern for the Kirtland's warbler.¹⁴ The USFWS's subsequent Biological Opinion, issued on July 13, 2007, requested that, in order to reduce the risk to Kirtland's warblers, the Commission or Michigan seek approval from the Federal Aviation Administration (FAA) to extinguish the steady-burning, red L-810 lights used on the MPSCS towers of concern, and that they conduct monitoring at certain of those towers.¹⁵ Although Michigan sought approval from the FAA to turn off the L-810s on the towers of concern shortly after the USFWS issued its Biological Opinion, the FAA denied Michigan's requests for waiver of the FAA's standard lighting schemes.¹⁶

9. On March 13, 2012, the Bureau released the Final Programmatic Environmental Assessment for the Antenna Structure Registration Program (PEA), which found that the removal of red steady lights from communications towers could reduce avian mortality between 50 and 70 percent.¹⁷ In May 2012, the FAA released a conspicuity study finding that removal of red steady lights does not pose a hazard to aircraft navigation, provided at least two levels of flashing lights remain.¹⁸ Based on that study, the FAA now routinely grants, upon request, lighting deviations that enable owners of towers taller than 350 feet above ground level (AGL) to eliminate red steady lighting.

10. On June 3, 2014, the Division sought to reinstate formal consultation with the USFWS on the 49 MPSCS towers of concern for the Kirtland's warbler.¹⁹ On June 11, 2014, the USFWS issued a concurrence letter stating that if steady-burning, red L-810 lights were removed from the 46 towers taller than 350 feet AGL that were among the 49 towers subject to the Biological Opinion, the effects of the towers on the environment and the Kirtland's warbler would be "discountable," and that therefore they

¹² Letter from Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC, to Craig A. Czarnecki, Field Supervisor, U.S. Fish and Wildlife Service, East Lansing Field Office (Aug. 26, 2005).

¹³ Letter from Craig A. Czarnecki, Field Supervisor, U.S. Fish and Wildlife Service, East Lansing Field Office, to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC (Oct. 25, 2005).

¹⁴ Letter from Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC, to Craig A. Czarnecki, Field Supervisor, U.S. Fish and Wildlife Service, East Lansing Field Office (Nov. 6, 2006).

¹⁵ Letter from Craig A. Czarnecki, Field Supervisor, U.S. Fish and Wildlife Service, East Lansing Field Office, to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC at Attachment (July 13, 2007).

¹⁶ Letter from Iris M. Lopez, Assistant Attorney General, State Operations Division, Department of Attorney General, State of Michigan, to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC (Sept. 4, 2008).

¹⁷ Final Programmatic Environmental Assessment for the Antenna Structure Registration Program, Federal Communications Commission, WT Docket Nos. 08-61 & 03-187, at ES-5, released March 13, 2012, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-312921A1.pdf.

¹⁸ Patterson, Jr., James W. 2012. Evaluation of New Obstruction Lighting Techniques to Reduce Avian Facilities, available at <http://www.airporttech.tc.faa.gov/safety/downloads/TC-TN12-9.pdf>.

¹⁹ Letter from Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC, to Scott Hicks, Field Supervisor, U.S. Fish and Wildlife Service, East Lansing Field Office (June 3, 2014) (Goldschmidt June 3, 2014 Letter).

would not be likely to adversely affect the Kirtland's warbler.²⁰ In keeping with the USFWS's guidance, on July 24, 2014, the State of Michigan informed the Commission by e-mail that the MSP had removed all steady-burning, red L-810 lights from the identified 46 towers to minimize any potential effects to migratory birds, including the Kirtland's warbler.²¹ On August 5, 2014, the Division notified the MSP that it had satisfied the terms of the MOA, and that it had no further environmental obligations under the Commission's rules.²²

III. DISCUSSION

11. Petitioners advance three arguments. First, they argue that, contrary to the ESA, the Commission has failed to prepare a BA, consult with the USFWS, or develop a conservation program.²³ Second, Petitioners assert that the Commission's rules concerning categorical exclusions violate NEPA.²⁴ Finally, Petitioners claim that the Division Letter arbitrarily concludes that the MPSCS towers are categorically excluded, and improperly delegates the Commission's environmental review responsibilities to the MSP.²⁵

12. With respect to the assertions concerning the ESA, we agree that at the time the Division dismissed the Petition, a BA had not been prepared. Nevertheless, the Division already had begun informal consultation with the USFWS at that time, and the consultation ultimately resulted in a BA and formal consultation with the USFWS. We recognize that under the ESA and the Commission's rules,²⁶ consultation with the USFWS should have been completed prior to construction of the towers. Nevertheless, the USFWS, as the agency in charge of enforcing the ESA, engaged in post-construction review of the towers and in its discretion did not initiate enforcement action. As to the effects that these towers have on threatened or endangered species, we defer to the USFWS's determination that the Kirtland's warbler is the only species that the towers may affect, and that with the extinguishment of steady-burning L-810s on 46 of the towers of concern, the MPSCS towers are "not likely to adversely affect" the Kirtland's warbler. Based on this determination, we concur with the Division's finding that there was no obligation to prepare an Environmental Assessment or undertake a conservation program, and conclude that the Division has met the agency's responsibilities under the ESA.

13. Next, we disagree with Petitioners' contention that the Commission's rules establishing categorical exclusions violate NEPA. Our rules defining what projects are categorically excluded were reviewed by the Council on Environmental Quality, the entity charged with overseeing agency NEPA

²⁰ Re-initiation of Section 7 Consultation under the Endangered Species Act for the Michigan Public Safety Communications System (FWS Report), Log No. 017-R3-ELFO-01, sent by the U.S. Fish and Wildlife Service, dated June 11, 2014. Discountable effects are those effects that are extremely unlikely to occur. *Id.* at 2. USFWS also stated that the effects of the three towers shorter than 350 feet AGL are "considered discountable given their location, height and lack of guy wires." *Id.*

²¹ Email from Iris M. Lopez, Assistant Attorney General, Office of the Michigan Attorney General, to Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC (July 24, 2014).

²² Letter from Aaron Goldschmidt, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, FCC, to Iris M. Lopez, Assistant Attorney General, Office of the Michigan Attorney General (Aug. 5, 2014).

²³ *See* AFR at 6-11.

²⁴ *See id.* at 11-14.

²⁵ *See id.* at 14-16.

²⁶ *See* 47 C.F.R. §§ 1.1307(a)(3) (requiring submission of an Environmental Assessment prior to construction when construction may affect listed threatened or endangered species or designated critical habitats); 1.1308(b) Note (providing that the Commission shall solicit and consider the comments of the Department of Interior, in accordance with its established procedures, for actions that may implicate Section 1.1307(a)(3)).

rules, prior to their adoption.²⁷ Contrary to Petitioners' assertions,²⁸ the Commission's rules in fact establish a "category of actions" eligible for treatment as categorically excluded, *i.e.*, actions that do not fall within one of the categories defined under Section 1.1307 of the Commission's rules.²⁹ In *American Bird Conservancy v. FCC*,³⁰ the Court of Appeals for the D.C. Circuit found infirmities with the Commission's notice provisions for certain projects subject to categorical exclusions, which the Commission has since corrected,³¹ but did not question the validity under NEPA of Section 1.1306 of the Commission's rules, which governs categorical exclusions.

14. Finally, Petitioners claim that the Division Letter arbitrarily concludes that the MPSCS towers met the criteria for categorical exclusion, and improperly delegates the Commission's environmental review responsibilities to the MSP. This assertion distorts the record, however, and accordingly lacks merit. When the Division dismissed the petition, it took no position on whether the towers were eligible for categorical exclusion.³² Instead it dismissed the petition for an Environmental Assessment as premature without determining whether the towers were categorically excluded from environmental review. This was the appropriate course because at the time the Division Letter was issued, the Division did not know whether these towers might have significant environmental impacts and require further environmental processing. For example, had the USFWS ultimately not concluded that the MPSCS towers are unlikely to adversely affect the Kirtland's warbler, under Commission rules the towers that may have had adverse effects would not have been entitled to categorical exclusions.³³ The MSP would have had to complete EAs for those towers. Accordingly, the Division simply stated that it had not determined whether the MSP would be required to complete EAs for the MPSCS towers, and that it was premature to make such a determination.³⁴ Subsequently, the Division has been able to conclude that the towers were categorically excluded. This determination was made possible due to the Avian Collision Study results, the data in the Final Programmatic Environmental Assessment, and subsequent actions by the FAA on lighting changes, together with the USFWS's determination that these towers are unlikely to adversely affect any endangered species.

15. As for Petitioners' argument regarding improper delegation, Department of Interior rules authorize Federal agencies to designate non-Federal representatives for purposes of Section 7 consultation,³⁵ and the Commission long ago made such a general designation.³⁶ Moreover, Commission rules authorize licensees and applicants to contact the USFWS to determine whether their proposed facilities will affect threatened or endangered species or designated critical habitats and to obtain USFWS

²⁷ See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, FCC 85-626, *Report and Order*, 60 R.R. 2d 13, at para. 3 (1986).

²⁸ See AFR at 12-13.

²⁹ 47 C.F.R. § 1.1307.

³⁰ *American Bird Conservancy v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008).

³¹ See National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, *Order on Remand*, 26 FCC Rcd 16700 (2011). These modifications to our notification rules incidentally address Petitioners' claims that our rules are deficient in failing to provide pre-construction notice. See AFR at 12-14.

³² See Division Letter at 3.

³³ See 47 C.F.R. § 1.1307(a)(3).

³⁴ See Division Letter at 3.

³⁵ See 50 C.F.R. § 402.08.

³⁶ See Letter from Susan Steiman, Associate General Counsel, Office of General Counsel, FCC, to Steve Williams, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior (July 9, 2003) (Delegation Letter).

concurrence.³⁷ As provided in Commission rules,³⁸ in USFWS regulations,³⁹ and in the Delegation Letter,⁴⁰ applicants are designated non-Federal representatives and must determine in the first instance whether their proposed actions may affect threatened or endangered species and habitats, but the Commission retains legal responsibility to satisfy Section 7 of the ESA.⁴¹ Thus, if threatened or endangered species or their critical habitats may be affected, the applicant must file an Environmental Assessment and the Commission will pursue further environmental processing.⁴² Based upon its consultation with the USFWS, which ultimately issued its concurrence, the Division affirmatively determined that the MSP towers at issue would not likely affect the environment or the Kirtland's warbler. For these reasons, we concur with the Division's dismissal of this claim.

16. For the foregoing reasons, the Commission denies the Application for Review and terminates this proceeding.

IV. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Sections 1.115(g) and 1.1307(a), (c) of the Commission's rules, 47 C.F.R. §§ 1.115(g), 1.1307(a), (c), the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ 47 C.F.R. § 1.1307(a) (3) Note.

³⁸ 47 C.F.R. § 1.1307(a) (identifying actions that require Environmental Assessments and that may require further processing); 47 C.F.R. § 1.1308(c) (providing that the Commission determines, based on an independent review of the Environmental Assessment and any mandatory requirements imposed on Federal agencies, whether the proposal will have a significant environmental impact on the quality of the human environment).

³⁹ See 50 C.F.R. § 402.08 (providing that, while a Federal agency may designate a non-Federal representative for informal consultation and preliminary document preparation, the Federal agency retains final responsibility for Section 7 compliance).

⁴⁰ Delegation Letter at 2 (“[U]nder the FCC’s environmental rules, all FCC licensees, applicants, tower companies and their representatives have a blanket designation and are authorized to contact and work with the [US]FWS to ensure that any effects on threatened and endangered species and their critical habitats are evaluated in siting proposed communications facilities.”).

⁴¹ *Id.* at 1.

⁴² 47 C.F.R. § 1.1307(a) (3) Note.