The Pennsylvania State University

From the SelectedWorks of Benjamin W. Cramer

September 22, 2008

Fine-Feathered Adversaries: The FCC and Avian Mortality at Communications Towers

Benjamin W. Cramer

Available at: https://works.bepress.com/benjamin_cramer/2/
FINE-FEATHERED ADVERSARIES: THE FCC AND AVIAN MORTALITY AT COMMUNICATIONS TOWERS

BENJAMIN W. CRAMER

Ph.D. candidate, College of Communications, The Pennsylvania State University.
© 2007-2008 Benjamin W. Cramer

Abstract:

Every year, millions of birds are killed at communications towers in the United States, and the Federal Communications Commission (FCC) oversees hundreds of thousands of such towers. In 2000, the U.S. Fish & Wildlife Service (FWS), utilizing the legal mandates of the National Environmental Policy Act, the Endangered Species Act, and the Migratory Bird Treaty Act, issued guidelines urging the FCC to take action on ameliorating the widespread avian mortality at its communications towers. These guidelines included provisions for the siting of towers and environmental assessments of tower construction processes, which are conducted by the FCC’s licensees. Two years later, a consortium of citizens' groups, led by the American Bird Conservancy, petitioned the FCC for compliance with the FWS guidelines. The FCC ignored the guidelines and the petition for several years, while also defeating American Bird Conservancy in court, after that group attempted to sue to agency for compliance with the guidelines. Finally, in late 2006 the FCC belatedly acknowledged the problem of avian mortality at its towers, and initiated a proposed rulemaking and public comments process, while simultaneously downplaying its years of obfuscation on the issue.

The National Environmental Policy Act and related laws require compliance from all government agencies, including the FCC. Conversely, the FCC is required to comply with those laws as cited by the FWS in its recommended guidelines. The FCC's dismissal of such guidelines and legal requirements raises issues of administrative law and jurisprudence, particularly as the agency used legal uncertainty and procedural strategies to defeat citizens' groups in court. The agency's belated acknowledgement of the avian mortality issue also raises questions about the effectiveness of administrative regulations and environmental laws that can be easily sidestepped by a federal agency that oversees a different area of the public interest.

This paper is a legal analysis of FCC compliance with applicable environmental statutes, with the avian mortality issue as the most prevalent example, and the conflicts that arise between the agency’s mandate to maintain a robust telecommunications network and its statutory responsibilities for environmental protection. The paper concludes that citizens wishing to dispute FCC environmental compliance in court will face many challenges arising from conflicting statutes, jurisdictional and evidentiary requirements, and inconsistencies in administrative law jurisprudence concerning agency behavior.
I. INTRODUCTION

The United States contains tens of thousands of communications towers, and every year millions of birds are killed when they fly into those towers. In 1999, the U.S. Fish & Wildlife Service (FWS) urged the Federal Communications Commission (FCC) to take action on this widespread avian mortality. The following year, FWS published in-depth guidelines for the siting and construction of towers to minimize the danger to birds. The FCC ignored the guidelines for several years, during which it was sued by a collection of birdwatching and environmental organizations. In 2006, the FCC finally announced a plan to observe the guidelines.

This article will examine the legal and administrative ramifications of the FCC’s failure to observe avian mortality guidelines at its communications towers. Part II will introduce the matter of avian mortality from a scientific and ecological perspective, followed by coverage of the FWS guidelines. Part III will discuss the FCC’s dismissal of the FWS guidelines and the environmental laws on which the guidelines were based. Part IV will discuss the lawsuit for FCC compliance with the guidelines, and the agency’s belated acknowledgement of the problem. The conclusion of this article will consider the ramifications of the FCC’s refusal to follow the guidelines of other government agencies, and the issues of jurisprudence that are raised when an administrative agency fails to observe regulations until challenged in court by citizens.

II. BIRD DEATHS AT COMMUNICATIONS TOWERS

Ever since human beings have been constructing tall buildings and other edifices, birds have collided with those structures. In literature, this phenomenon was noted as far
back as 1891, when Dr. Watson drolly uttered “folks who were in grief came to my wife like birds to a lighthouse,” in the Sherlock Holmes installment *The Man with the Twisted Lip*. In addition to lighthouses, birds are especially prone to colliding with objects that are more than 100 feet above the ground, and which usually feature lights. These objects include high-rise buildings, wind turbines, high-tension power lines, and even airplanes in flight. In addition to those hazards, the present article will discuss the problem of bird collisions with communications towers, which include those used for radio, television, microwave, emergency notification, and cellular transmissions. Though exact mortality counts are difficult to obtain, it is estimated that at least 100 million, and possibly more than one billion, birds are killed in the United States every year by colliding with manmade objects, and millions of those deaths are caused by communications towers.

The mind of a bird remains something of a mystery to ornithologists, who are still striving to understand the mental processes and abilities that birds utilize for navigation and migration. How birds manage to find their way precisely to their homes, over the course of migration routes that can be thousands of miles long, is one of the great mysteries of science. The possible mental tools used by birds include magnetic sensory perception, visual and color cues, radio frequency perception, and ancestral instinct – all of which differ by species – or even some mysterious psycho-physiological mechanism.

---

that remains unknown to humans.\textsuperscript{4} Regardless, scientists generally agree that avian collisions with manmade objects are caused by lights, particularly those that move irregularly or blink rhythmically.\textsuperscript{5} An additional hazard for birds at communications towers are the signals transmitted by the towers, particularly radar, which can interfere with a bird’s sensory systems.\textsuperscript{6} In general, birds that become confused by lights during flight, particularly during nocturnal migrations or in cloudy conditions, tend to fly in circles around the lighted tower. Eventually they collide with the tower itself or with something nearby.\textsuperscript{7}

There have been few comprehensive studies of avian collisions with communications towers across the United States, due primarily to the imposing quantity of such towers and the lack of standardized metrics and research procedures.\textsuperscript{8} However, upon compiling the results of smaller-scaled studies, researchers have reached a conservative estimate of four to five million avian deaths at communications towers annually in the United States – an estimate that is rising quickly each year, as are the


\textsuperscript{5} Bruno Bruderer, et al., \textit{Behaviour of Migrating Birds Exposed to X-Band Radar and a Bright Light Beam,} 202 J. EXPERIMENTAL BIOLOGY 1015, 1019-1020 (1999). Note that the lights on communications towers are usually placed in compliance with the regulations of the Federal Aviation Administration (FAA), to ensure visibility for pilots.


\textsuperscript{7} The prevailing theory on this behavior is that birds may confuse the bright lights on towers with the moon, the pursuit of which may be instinctual migratory behavior. Once they fly into the light, the birds may become reluctant to leave the lighted area and reenter the dark night sky. Hence, they fly in circles around the tower, which especially increases their chances of colliding with the guy wires that support the tower, and which are difficult to see in relation to the bright lights. The birds may also collide with each other when migrating in flocks, with the tower itself, or with other structures nearby. Birds have also been known to die from exhaustion during such incidents. See Ronald P. Larkin, \textit{Investigating the Behavioral Mechanisms of Tower Kills,} Proceedings of the Avian Mortality at Communications Towers Workshop, August 11, 1999, available at http://www.fws.gov/migratorybirds/issues/towers/larkin.html (last accessed: Sept. 22, 2008). See also ERICKSON ET AL. at 11-12.

\textsuperscript{8} ERICKSON ET AL. at 12.
towers themselves. In more recent years, the estimate is as high as 40 to 50 million birds annually.\textsuperscript{9} Scientists have also established that the majority of birds killed at communications towers are from species that migrate nocturnally.\textsuperscript{10}

Despite the lack of precise nationwide information, studies and media coverage of bird mortality at individual communications towers or in specific geographic areas are common.\textsuperscript{11} For example, in January 1998, between 5,000 and 10,000 birds were killed at a complex of three towers in western Kansas.\textsuperscript{12} An even more grisly incident occurred in 1963 at a television tower near Eau Claire, Wisconsin, where at least 12,000 birds (and possibly thousands more) were killed in a single night, in what is believed to be the largest single case of bird death at a manmade structure in history.\textsuperscript{13}

As of April 2007, the Federal Communications Commission (FCC), the agency that oversees communications towers, maintains registrations on more than 92,000 towers across the United States. More than half of all these towers are more than 200 feet tall,\textsuperscript{14} which places the towers in the line of flight for low-flying birds, and which increases the presence of lights and wires.\textsuperscript{15} However, the exact number of towers across the country is unknown and may be considerably greater, because some older towers are not registered with the FCC, and there are various stages of the registration and construction processes

---

\textsuperscript{9} Manville. See also \textsc{Erickson et al.} at 12.  
\textsuperscript{10} \textsc{Erickson et al.} at 50-55.  
\textsuperscript{11} For a comprehensive list of such studies up to the late 1990s, see \textit{Id}.  
\textsuperscript{12} \textit{Workshop to Seek Methods to Save Birds from Towers}, \textsc{Wall St. J.}, Aug. 9, 1999, at B.9.A.  
\textsuperscript{13} Meg Jones, \textit{Fast-Multiplying Communications Towers Signal Lethal Threat for Migratory Birds}, \textsc{Milwaukee J.-Sentinel}, August 27, 1999, at 1.  
\textsuperscript{14} This information was found via a general search for registrations for constructed towers, in the Antenna Structure Registration area of the FCC website. The information was originally collected in April 2007, from a registration database that is updated daily. Registration Search, Antenna Structure Registration, available at \url{http://wireless2.fcc.gov/UlsApp/AsrSearch/asrRegistrationSearch.jsp} (last accessed: Sept. 22, 2008).  
\textsuperscript{15} \textsc{Erickson et al.} at 11. For towers that are more than 200 feet tall, guy wires are usually required for structural support, while lights become required per FAA regulations concerning tower visibility for airplane pilots.
that result in uncertainty in the counting of newer towers.\textsuperscript{16} For towers that have actually
gone through a complete construction process, in the five years from 2002 through 2006,
an average of nearly 4,600 new communications towers were constructed each year, for
an average annual increase of nearly six percent.\textsuperscript{17}

Consequently, there are now, or soon will be, more than a hundred thousand
communications towers in America. The Telecommunications Act of 1996 has greatly
increased the rate of tower construction, mandating the FCC to conduct its licensing
practices to promote the rapid deployment of new communications technologies and
services in the public interest.\textsuperscript{18} In recent years the FCC has also proposed that all
broadcasters convert to digitized transmission methods, which in turn will increase the
demand for new towers even more.\textsuperscript{19} Given the modern pro-business philosophy of the
FCC and the rapid growth of wireless communications, towers are likely to continue their
rapid increase in number into the foreseeable future,\textsuperscript{20} with the possibility of turning
America, and in particular the Northeast, into a “giant pincushion” of pervasive and
widespread towers.\textsuperscript{21}

\textsuperscript{16} Id. A November 2006 Notice of Proposed Rulemaking from the FCC reported an estimated total of
104,703 antenna structures in the United States, with the admission that this figure includes towers that do
not yet exist and have only be proposed. See F.C.C. 06-164 (Nov. 7, 2006) (Notice of Proposed
Rulemaking) at ¶ 5. This FCC document will be discussed extensively in Part IV infra.
\textsuperscript{17} These figures were obtained via the same search strategy described in supra note 14. Date of tower
construction was the search criterion for each of the five years from 2002 to 2006. To find the annual
increase, the number of towers constructed each year was compared to the number of existing towers that
had been constructed through the entire history of the FCC registration records database prior to the year in
question.
\textsuperscript{19} Rachael Abramson, \textit{The Migratory Bird Act Treaty’s Limited Wingspan and Alternatives to the Statute:
Protecting the Ecosystem without Crippling Communication Tower Development}, 12 FORDHAM ENVTL.
\textsuperscript{20} Sheldon Moss, \textit{The Wireless Industry Perspective}, Proceedings of the Avian Mortality at
Communications Towers Workshop, August 11, 1999, available at
\textsuperscript{21} The term “giant pincushion” was coined by Senator Patrick Leahy of Vermont. See 143 CONG. REC. S11,
402 (Oct. 30, 1997).
The FCC, at the fundamental level, is a licensing agency for the U.S. Government. The agency’s origins date back to the Radio Act of 1927, which codified the need for management of the electromagnetic spectrum. Now governed by the Communications Act of 1934 and the Telecommunications Act of 1996, the FCC has since expanded its operations into the management and regulation of all interstate communications (by wireless, cable, or satellite) and international communications that originate in the U.S., as well as licensing portions of the electromagnetic spectrum for broadcast and wireless usage. The 1934 Act, as amended by the 1996 Act, also authorized the FCC to license and regulate “public telecommunications facilities,” including towers and antennas.

The FCC contends that its statutory mandate is only to foster an efficient nationwide telecommunications network. It is not a land planning or environmental agency, and defers environmental responsibilities to its licensees and applicants. The FCC also claims not to have the resources to actively monitor tower sites, and it also does not have an environmental review office. In terms of tower siting, the agency has the mandate to determine whether the general public interest would be better served by environmental protection or by the efficiency of the communications network.

---

22 Pub. L. 69-632, 44 Stat. 1162. Note that agency was originally named the Federal Radio Commission (FRC).
25 Communications Act of 1934 at § 397(13).
27 Communications Act of 1934 at § 310(d).
However, as a federal agency the FCC is required to observe the environmental responsibilities that are required of all agencies. Agency responsibilities regarding environmental and wildlife concerns have been codified at the federal level in the National Environmental Policy Act of 1969.\(^{28}\) Also relevant to the issue of avian deaths at communications towers is the Migratory Bird Treaty Act of 1918.\(^{29}\)

The National Environmental Policy Act (NEPA) requires the federal government and all its agencies to perform an environmental assessment for any major federal action that will significantly affect the quality of the environment.\(^{30}\) This process must also be made transparent to all other government agencies and to the public, as required under the Freedom of Information Act.\(^{31}\) At the time of its enactment, NEPA also required each federal agency to review its policies and procedures, and to make recommendations for revisions that would allow that agency to come into compliance with the environmental review requirements of NEPA.\(^{32}\)

NEPA has been deemed at least partially successful in increasing government transparency regarding the environmental assessment process, and the Act has also

\(^{28}\) 42 U.S.C. §§ 4321–4375 (1994) (enacted 1969) [hereinafter NEPA]. Note that for bird species that have been officially designated as threatened or endangered, the requirements of the Endangered Species Act will apply to the FCC tower application and registration process. However, for reasons that will be discussed herein, that Act is infrequently considered during the process because of the scientific uncertainty in determining which particular bird species are likely to follow migratory routes near the tower in question. Given this difficulty in precisely naming the bird species that may be impacted by a proposed tower, the provisions of NEPA allow more flexibility. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000) (enacted 1973). See also Paul Kerlinger, Standardizing Methods and Metrics for Quantifying Avian Fatalities at Communications Towers: Lessons from the Windpower Industry, Proceedings of the Avian Mortality at Communications Towers Workshop, August 11, 1999, available at http://www.fws.gov/migratorybirds/issues/towers/kerling.html (last accessed: Sept. 22, 2008).

\(^{29}\) See infra note 46.

\(^{30}\) NEPA §§ 4332(C)(i)-4332(C)(v). The definition of “major federal actions” and the procedures to take environmental consequences into account are also codified in the related legislation establishing the Council on Environmental Quality and its procedures for complying with NEPA. See 40 C.F.R. §§ 1500-1508.


\(^{32}\) NEPA at § 4333.
codified a viable public outreach process.\textsuperscript{33} The telecommunications industry has also noted the possible effectiveness (for its opponents) of the NEPA review process, by encouraging the FCC to consider bird death problems at tower construction sites before getting wrapped up in the legal disputes that NEPA may incur later.\textsuperscript{34} As a result, the FCC has codified NEPA compliance regulations into its internal rules.\textsuperscript{35}

When reviewing applications for the construction of new communications towers, the FCC is now required, by law, to determine whether the construction will have a significant impact on the environment.\textsuperscript{36} The term “significant” falls into eight possible categories of damage, and if some or all of those categories of damage are expected to occur with the tower construction, the FCC is required to submit an environmental assessment that describes the possible damage in detail.\textsuperscript{37} These rules do not apply specifically to migratory birds or the siting of towers, though birdwatchers and environmentalists have long requested that the FCC address such issues.\textsuperscript{38} Of interest in this regard is a provision within the FCC’s internal rules that allows any “interested person” to petition the agency to request an environmental assessment, for any construction project that would not otherwise require one.\textsuperscript{39} But on the other hand, one important result of this regulatory structure is that no environmental assessment is required for any tower construction project that lies in the path of avian migratory routes,


\textsuperscript{36} Id. at § 1.1307.

\textsuperscript{37} Id. at §§ 1.1307(a)(1)-1.1307(a)(8). None of the eight categories of damage pertain to animals in general. Two of them apply to threatened or endangered species. The others apply to surface environmental impacts or to jurisdictional matters such as wilderness preserves or Indian lands.

\textsuperscript{38} Abramson at 260.

\textsuperscript{39} \textit{FCC Practice and Procedure} at § 1.1307(c).
unless an endangered or threatened species is at risk. In other words, non-endangered bird species are not protected by the environmental assessment process, unless an interested person petitions the agency otherwise.  

NEPA also allows interested parties to contest suspected violations of the Act in court, though this ability has encountered some regulatory roadblocks, including issues of legal standing and jurisdiction. Due to the text of NEPA, the matter of legal standing and jurisdiction for concerned environmental groups was unclear until Sierra Club brought suit against the then-Secretary of the Interior, early in the Act’s history. In a battle against the development of a ski resort in California’s Sequoia National Forest, Sierra Club attempted to derail the approval process for the resort under a NEPA claim that the environmental review process had not been followed properly. A lower court ruled that Sierra Club did not have standing to sue under the text of NEPA, with the belief that the Act required proof of direct harms to the party bringing the suit. The Supreme Court overturned this ruling, establishing that drastic changes to ecology and aesthetics can be considered sufficiently harmful to the members of a public interest organization, thus giving that group standing to sue under NEPA.

---

42 Abramson at 262.
44 Id. at 727.
45 Id. at 734-735. Sierra Club also utilized the Administrative Procedure Act (APA), which guarantees that “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” The Court accepted that this provision of the APA made citizen lawsuits for review of violations of NEPA viable. See Id. at 732-733. See also Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000) (enacted 1946) at §702. The possible use of APA as a tool by the petitioning party in a NEPA suit was also ruled upon in Jones v. Gordon, 792 F. 2d 821, 824 (9th Cir., 1986), which defined the jurisdictional basis for the use of APA in NEPA suits. This resulted in a “back door” jurisdictional method that has been treated differently by the courts, and whether the method can be applied to any federal statute has not been settled. See also
In addition to NEPA, the FCC is also required to comply with the Migratory Bird Treaty Act (MBTA). This treaty was originally forged in 1916 by the United States and the United Kingdom. During that era, fears of widespread extinction encouraged the two nations to act for the protection of migratory birds in the United States and Canada. While primarily aimed at controlling overzealous recreational hunters, the MBTA also codified the aesthetic and environmental values of birds. America later forged similar agreements with Mexico in 1936, Japan in 1972, and the Soviet Union in 1976, and the treaty provisions with those nations were incorporated into the text of the MBTA.

The MBTA makes it unlawful to hunt, take, capture, or kill any migratory bird, or to attempt to do any of those, at any time, or by any means. None of the above terms are defined any further, which has resulted in some judicial uncertainty throughout the history of the treaty. However, the use of “kill” in the treaty presumes liability for the death of a bird. Also, the terms “take” and “kill” can be applied as they are in the...
Endangered Species Act, though the MBTA covers more than just endangered or threatened species.\(^{52}\)

Unfortunately, the MBTA contains many more uncertainties, beyond the vaguely-defined terminology, that severely limit its applicability to the issue of bird collisions with communications towers. The major difficulty with MBTA is that its original authors did not formulate procedures that are specific enough for the modern legal and regulatory environment. There is no language in the Act that distinctly outlines who has standing to sue for a violation of the Act, the jurisdictional basis for handling a violation, or who can be sued.\(^{53}\) These issues came to a head in the important *Defenders of Wildlife* case, in which the court emasculated the public interest possibilities of MBTA by ruling that it had no jurisdiction to determine a claim of MBTA violation, and that the Act does not proscribe private rights of action – meaning that private parties cannot make a claim of damages from a suspected violation of the Act.\(^{54}\) Conversely, one provision of MBTA is too precise, stating that “any person, association, partnership, or corporation” can be sued for an alleged MBTA violation. This eliminates the federal government, and by extension the FCC, as a party that can be sued by citizens for a violation of the Act.\(^{55}\)

Citizens have had difficulty, thus far, in utilizing the National Environmental Policy Act or the Migratory Bird Treaty Act to compel the FCC to address the problem of avian fatalities at communications towers. However, another federal agency, the United States Fish & Wildlife Service (FWS), has taken the matter seriously, particularly via its

---

\(^{52}\) Abramson at 274-275.

\(^{53}\) *Id.* at 266-267. Emphasis added.

\(^{54}\) *Defenders of Wildlife v. Administrator, E.P.A.*, 882 F.2d 1294 (8th Cir., 1989).

\(^{55}\) *MBTA* at § 707(a).
responsibilities under NEPA and MBTA. The FWS observes the provision in NEPA that any agency with jurisdiction by law or recognized special expertise (itself, for birds) has the responsibility to provide guidance to the licensing agency for government actions with significant environmental impact (the FCC, for communications towers). The FWS has actively endeavored to consult with agencies that are engaged in federally-licensed activities in which it can exercise jurisdiction or expertise, regardless of whether the licensing agency has invited such consultation. The FWS also observes the provisions of MBTA, which gives it jurisdiction over bird mortality issues.

In 1999, FWS director Jamie Rappaport Clark wrote to the FCC urging action in completing a comprehensive environmental impact statement on bird deaths at towers, under the provisions of NEPA. In September 2000, Clark instructed FWS regional directors to begin actively consulting with the FCC on the bird mortality issues surrounding new tower construction applications, regardless of whether such consultations were invited. At that time Clark and the FWS also released Service Interim Guidelines for Recommendations on Communications Tower Siting, Construction, Operation, and Decommissioning. This forceful document utilized the jurisdiction granted by NEPA and MBTA, and empowered FWS officials to follow twelve robust guidelines when advising on the tower construction process, utilizing

57 See NEPA at § 4332(C).
58 Willis.
59 Id.
current scientific knowledge on minimizing avian mortality via the design and siting of communications towers.\textsuperscript{62}

To further illustrate the American concern over this issue, in early 2001 President Bill Clinton issued an executive order requiring federal agencies to consider the impacts of their activities on migratory birds.\textsuperscript{63} This order, \textit{Responsibilities of Federal Agencies to Protect Migratory Birds}, borrowed language from NEPA, MBTA, and the Endangered Species Act.\textsuperscript{64} The most important provision of this order included the requirement that any federal agency, if involved in activities that have measurable negative impacts on migratory birds, must implement a Memorandum of Understanding (MOU) with the Fish & Wildlife Service within two years.\textsuperscript{65} An extensive list of requirements for the content of any such MOU was included in the presidential order, including provisions for the restoration of habitat and the promotion of conservation efforts.\textsuperscript{66}

\section*{III. The FCC's Noncompliance with NEPA and its Dismissal of the FWS}

Despite the legal applicability of the FWS guidelines and the presidential order described in the last section, the FCC has largely ignored these recommendations. This is because under administrative law, the guidelines are voluntary, and the FCC is under no legal mandate to follow them. However, this section will discuss the jurisprudential and public interest concerns that arise when a federal agency ignores the wishes of the public, and the recommendations of other federal agencies.

\footnotesize{\textsuperscript{62} Unites States Department of Interior, Fish and Wildlife Service, \textit{Service Interim Guidelines for Recommendations on Communications Tower Siting, Construction, Operation, and Decommissioning}, available at http://www.fws.gov/migratorybirds/issues/towers/comtow.html (last accessed Sept. 22, 2008). Note that this document appears in the lower half of the webpage cited.\\ \textsuperscript{63} Exec. Order. No. 13,186, 66 Fed. Reg. 3,853 (Jan. 10, 2001).\\ \textsuperscript{64} \textit{Id.} at §§ 1-2.\\ \textsuperscript{65} \textit{Id.} at § 3(a).\\ \textsuperscript{66} See generally \textit{Id.} at §§ 3(e)(1)-3(e)(15).}
Matters of American administrative law come into play whenever an agency decides whether or not to follow such guidelines. Typically, courts will only find against an agency if a particular statutory violation can be found. For the FCC and communications towers, violations must be found concerning the particular statutes that apply to the avian mortality phenomenon, including the Endangered Species Act (which has not proven to be consistently useful) and the National Environmental Policy Act. As described above, NEPA can certainly be applied to the bird death issue, and the Act has been cited in the FWS guidelines and the 2001 presidential order.

However, the Supreme Court has ruled that NEPA is “essentially procedural,” meaning that the Act can dictate procedures to be followed by an agency, but says little about judicial review. Thus, if an agency is found to have violated the provisions of NEPA, it would not be appropriate for the courts to decide whether that violation harms the public interest, because NEPA does not precisely define the public interest that it is trying to protect. Therefore, the Supreme Court has ruled that discretion on such matters of public interest must be left to the negotiation process between regulatory agencies and the federal, state, or local governments with which they interact.

And while NEPA requires that agencies follow certain procedures to ensure environmental protection, the Act also includes an educational component, in that it requires information about the environmental impacts of agency actions to be made

67 The Administrative Procedure Act, which governs the processes followed by the courts in reviewing regulatory agency decisions, permits a court to find that an agency has violated a statute if its actions are deemed arbitrary, capricious, or an abuse of discretion; in excess of statutory jurisdiction; or a failure to observe legally required procedures. See 5 U.S.C. §§ 706(2)(A), 706(2)(C), 706(2)(D).
68 Supra note 28.
71 Vermont Yankee at 558.
transparent and available to the public. The Supreme Court has ruled on the primacy of this educational function of NEPA, stating that “it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”\textsuperscript{72} The rationale behind this reasoning is the belief that the procedural requirements of NEPA will encourage agencies to make less environmentally destructive decisions, because of the possibility of public awareness.\textsuperscript{73} The Environmental Protection Agency has also viewed NEPA as mandating a process that is “intended to help public officials make decisions that are based on an understanding of environmental consequences.”\textsuperscript{74}

The overall result of the judiciary’s focus on NEPA’s procedural structure, and its educational component, is that federal agencies are given discretion over how to observe the Act. This makes enforcement of NEPA procedures a post-hoc process that will not be considered by the courts until after a violation (and the subsequent environmental damage) has occurred, and after other interested parties have recognized the violation and have initiated the legal process.\textsuperscript{75} Even then, the court can only review whether the precise procedures of NEPA were followed, and the court cannot rule on the consequences to be faced by the agency for failure to follow those procedures.\textsuperscript{76}

This leaves internal agency discretion as the deciding factor in compliance with NEPA. History has shown that courts tend to defer to an agency’s discretion concerning

\textsuperscript{73} French at 946.
\textsuperscript{74} 40 C.F.R. § 1500.1(c).
\textsuperscript{75} Nicholas C. Yost, \textit{NEPA’s Promise – Partially Fulfilled}, 20 ENVTL. L. 533, 547-549 (1990).
\textsuperscript{76} Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (1972). This ruling has since been cited by the Supreme Court in Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976); and Stryker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980).
the environmental impacts of its activities, or the activities that it licenses.\textsuperscript{77} Additionally, the environmental assessment processes required by NEPA, which have been written into the FCC’s internal compliance rules, basically allow the FCC to regulate its own compliance with the Act.\textsuperscript{78} The FCC requires its licensees to review the environmental consequences of their siting and construction proposals, and to submit the results to the FCC’s Wireless Telecommunications Bureau. After that bureau reviews the submission, it has the discretion to require further investigation (often in the form of an environmental impact statement as required by the Environmental Protection Agency), or to allow the tower construction process to proceed.\textsuperscript{79} This procedure allows the FCC to determine if the requirements of NEPA are being followed by its licensees, as NEPA itself does not feature a self-contained enforcement mechanism, and instead allows self-review by federal agencies regarding the environmental impacts of their activities.\textsuperscript{80}

Meanwhile, American administrative law rests upon the premise that a regulatory agency can only be required to furnish expertise in its own area of responsibility. Judicial review of agency actions must strike a balance between allowing an agency to perform its mandated duties and compelling it to observe associated laws.\textsuperscript{81} Also, courts have recognized the impossibility of scrutinizing every action taken by administrative agencies, and for practical purposes have limited judicial review, with the assumption

\textsuperscript{77} Abramson at 282-283.

\textsuperscript{78} See generally FCC Practice and Procedure at §§ 1.1307-1.1319. See also supra note 35 and accompanying text.


\textsuperscript{80} NEPA at § 4333. Note that the Council on Environmental Quality, the creation of which was mandated in NEPA at §§ 4341-4347, is not an oversight or enforcement body, but instead collects agency environmental information with which it advises the Executive Branch.

\textsuperscript{81} French at 933.
that the agency in question possesses the necessary expertise in its own area of operations.\textsuperscript{82}

For the FCC, courts have traditionally deferred to the agency’s expertise in telecommunications and its mandate to maintain a robust American communications network. Thus, courts cannot presume that the FCC possesses enough environmental expertise to comply with all the requirements of NEPA.\textsuperscript{83} Regardless, according to its own rules, the FCC is required to consult with other knowledgeable agencies, including the U.S. Fish & Wildlife Service, when proposed towers are suspected to pose significant environmental hazards.\textsuperscript{84}

But unfortunately for proponents of environmental protection, NEPA is not powerful enough to steer any federal agency away from its primary mission. Internal agency discretion also extends to the agency’s view of its own agenda, allowing an agency to determine whether the environmental assessment process, and the collection and submission of the resulting data, favors its own agenda or not. This degree of deference may also tempt the agency in question to understate environmental impacts altogether.\textsuperscript{85}

In the eyes of its detractors, NEPA is an impediment to the primary mission of any federal agency, because by exposing the possible environmental impacts of a planned

\textsuperscript{82} BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.1 (3rd ed. 1991). The Administrative Procedure Act (if interpreted widely) gives courts the authority to follow this philosophy of deference, stating that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” \textit{See} 5 U.S.C. § 706.

\textsuperscript{83} French at 987.

\textsuperscript{84} FCC \textit{Practice and Procedure} at § 1.1308(c).

agency action, the Act is likely to encourage public criticism and legal challenges.\textsuperscript{86} Therefore, whenever a potentially destructive project is proposed, an agency may be tempted to craft the environmental assessment process for the support of its own mission and preferences.\textsuperscript{87} Even though NEPA requires the agency to consider environmental impacts in detail, the problem is that the only impacts that may be judicially enforceable will be those reported with a degree of detail that will convince the average judge. Even worse, the responsibility for providing those details will belong to potential plaintiffs in hypothetical future lawsuits.\textsuperscript{88}

This conundrum has been addressed by one court in a case involving NEPA. The court found that making an agency’s compliance with NEPA contingent upon the possible actions of future plaintiffs would encourage that agency to evade its environmental responsibilities. Hence, the agency should be required to ensure its own compliance with NEPA.\textsuperscript{89} Unfortunately, that particular ruling did not solve the problem that it so articulately described. The continuing conundrum is that plaintiffs who suspect that an agency has violated NEPA are forced to compile the information that should have been compiled by the agency \textit{before} the violation took place. Thus, the plaintiffs (who are typically private citizens) are performing the tasks that NEPA requires of the agencies, while the agencies are encouraged to ignore their NEPA duties, and take the arguably

\textsuperscript{86} French at 962-963. For a list of cases in which NEPA’s possible obstructions of an agency’s primary mission were argued, see Id. at 962-963, n210.
\textsuperscript{87} Lynton K. Caldwell, \textit{A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need}, 31 \textit{Environment} 6, 25-26 (1989). For a list of incidents in which agency officials downplayed environmental impacts during the assessment process, see French at 963, n211.
\textsuperscript{88} French at 964.
\textsuperscript{89} City of Davis v. Coleman, 521 F.2d 661, 678 (9th Cir., 1975).
remote risk of possibly being required to react after citizens have taken on the burden of proof.\textsuperscript{90}

In cases involving suspected NEPA violations, the courts have largely taken this procedural approach, which not only reveals the weaknesses in those procedures, but also compels the courts to avoid intruding on an agency’s discretion in its own area of expertise. The agency is thus allowed to make the ultimate choice of whether, and to what degree, it carries out its environmental assessment obligations under NEPA. As a result, this purely procedural view of NEPA largely eliminates its ability to require compliance from agencies. This preserves the independent discretion of those agencies toward environmental protection.\textsuperscript{91}

In terms of FCC licensing of tower construction, the Telecommunications Act of 1996 has required the agency to foster the rapid development and implementation of the growing digital communications network in the United States.\textsuperscript{92} Furthermore, the FCC’s charter requires that its every licensing and procedural decision must consider public interest, convenience, and necessity – as they apply to the agency’s primary mission.\textsuperscript{93} Consequently, the FCC has the discretion to balance the public’s interest in the telecommunications benefits of tower construction, with the public’s interest in the environmental benefits of migratory bird protection. This allows the FCC to dictate the environmental assessment process on its own terms, with the ability to decide whether or not such assessments are even required at all.\textsuperscript{94} The FCC’s charter allows this discretion, which in turn overpowers NEPA, because that Act says nothing about this type of

\textsuperscript{90} French at 965. Emphasis added.
\textsuperscript{91} Id. at 966.
\textsuperscript{92} See supra note 18 and accompanying text.
\textsuperscript{93} Communications Act of 1934 at § 309(a).
\textsuperscript{94} Abramson at 284.
balancing of public interests. Meanwhile, because the requirements of NEPA are the basis for the tower siting guidelines issued by the U.S. Fish & Wildlife Service, the same procedural weaknesses inherent in NEPA have allowed the FCC to ignore, or at least to disdain, the very real environmental and avian mortality concerns that have been advanced by the agency that is most knowledgeable on those matters.

IV. THE ABC CASE AND BELATED FCC ACKNOWLEDGEMENT

Even though the FCC was able to find administrative justifications (thanks to the weaknesses of NEPA) for ignoring the FWS guidelines about tower siting, and also the 2001 executive order from President Bill Clinton, it did not take long for citizens to realize that the agency could be compelled to do more to prevent the deaths of millions of birds at the communications towers under its purview. In 2005, the American Bird Conservancy (ABC), the Forest Conservation Council, and the Conservation Council for Hawai‘i filed a lawsuit against the FCC, claiming that the agency could mitigate the

95 Merrell v. Thomas, 807 F.2d 776, 780-781 (9th Cir., 1986). This case concerned inconsistencies between NEPA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The court’s ruling primarily concerned the applicability of FIFRA to the dispute between the two parties in the case. In ruling on the provisions of FIFRA, the court differentiated that act from NEPA, and hence created a negative judgment on the latter. “FIFRA’s registration standard, unlike NEPA’s standard, reflects the need to balance environmental and agricultural impacts.” Thus, NEPA was indirectly found to lack an agency balancing test.
96 See supra notes 60-62 and accompanying text.
97 See supra note 63 and accompanying text.
avian mortality at its towers, especially those where significant bird deaths had been known to occur, if the agency followed the measures advocated by the FWS.  

This legal battle actually dated back to 2002, when the ABC and the Forest Conservation Council (who at the time were joined with the environmental activist group Friends of the Earth but not the Conservation Council for Hawai‘i), presented a petition to the FCC requesting the agency’s compliance with the FWS guidelines for siting towers and mitigating bird deaths. This course of action was legally sanctioned by the FCC itself, as the agency’s rules for complying with NEPA state that if an interested person suspects that any FCC action will have significant environmental impacts, a written petition can be submitted to the agency, detailing the need for environmental consideration in the FCC decision-making process. When the FCC failed to respond to the petition, the groups attempted to bring suit in the U.S. Circuit Court of Appeals for the District of Columbia, but that action did not proceed, because the court ruled that the groups had not given the FCC enough time to respond to an administrative petition. By 2005, the FCC had still ignored the petition, so the plaintiffs re-filed the lawsuit, this time claiming that the FCC should be brought to task not just for its dismissal of the FWS

99 American Bird Conservancy v. F.C.C, 408 F.Supp.2d 987 (D.Hawai‘i, 2006) [hereinafter ABC v. FCC]. The American Bird Conservancy was listed as the primary plaintiff, and the case took place in the District Court for Hawai‘i so perceived harms to the members of the Conservation Council for Hawai‘i could be claimed on jurisdictional grounds. The Forest Conservation Council contributed legal expertise and funding.


101 FCC Practice and Procedure at § 1.1307(c).

guidelines, but also for violations of NEPA, the Migratory Bird Treaty Act, and the Endangered Species Act. ¹⁰³

The court action brought by ABC and its partners was intended to compel the FCC to actively consult with the FWS on the siting of towers, in the interests of mitigating avian mortality. Particular tower sites in Hawai‘i, which were known to present hazards to endangered bird species,¹⁰⁴ were named in the suit. This tactic brought the Endangered Species Act (ESA) into consideration in the case. The plaintiffs’ primary allegation was that from 1996 to 2001, the FCC had improperly delegated, to its licensees and applicants, the agency’s mandated responsibilities under the ESA. In doing so, the FCC permitted those parties to act as “non-federal representatives” who were able to self-determine whether their proposed activities would threaten endangered species.¹⁰⁵ This self-determination was enabled by the FCC’s own rules for complying with NEPA, as a question on FCC Form 854 allowed applicants to answer the question of whether their proposal “may have a significant environmental effect.” The FCC rarely took any further action on any proposal for which the self-reported answer to that question was no. This was the answer given by the applicants for each of seven tower sites in Hawai‘i that were named in the suit.¹⁰⁶

The first response of the FCC to the lawsuit was the filing of a motion to dismiss. The motion was based on provisions in the Hobbs Act¹⁰⁷ and the 1934 Communications

¹⁰³ Id. Recall that the requirements of NEPA, MBTA, and ESA were considered in the FWS guidelines. See supra note 62 and accompanying text.
¹⁰⁴ ABC v. FCC at 989. The species believed to be harmed at the tower sites in Hawai‘i were the Newell’s shearwater and the Hawaiian petrel.
¹⁰⁵ Id. The relevant provision in the Endangered Species Act is found at 16 U.S.C. § 1536, which mandates inter-agency cooperation in the protection of endangered or threatened species.
¹⁰⁶ ABC v. FCC at 989, 989 n1. See also FCC Practice and Procedure at § 1.1307.
Act\textsuperscript{108} that the FCC believed divested the district court of jurisdiction in the case.\textsuperscript{109} This caused a dilemma for the court, because it was forced to reconcile two facially incompatible jurisdictional provisions. The ESA mandates that district courts should have jurisdiction over any claims of its violation.\textsuperscript{110} However, the FCC contested that the suit was a challenge to its mandated responsibilities in tower registration and licensing. Under that reasoning, jurisdictional matters should be under the purview of the Communications Act, which states that judicial review of FCC actions lies exclusively with the circuit courts.\textsuperscript{111} The specific provision within the Communications Act further justifies this stance by citing the Hobbs Act.\textsuperscript{112}

In determining the solution to this jurisdictional dilemma, the court made use of a Ninth Circuit precedent, the \textit{Northwest Resources} case, in which a review of a number of previous rulings on facially incompatible jurisdictional mandates found that the courts in question have typically favored circuit court jurisdiction.\textsuperscript{113} Another important precedent was the \textit{City of Rochester} case, which involved another alleged FCC violation of NEPA. The court in that case found that a district court may not exercise jurisdiction over FCC actions that are exclusively within the jurisdiction of the appeals court by law, regardless of the federal statute the FCC was alleged to have violated.\textsuperscript{114} Via these precedents, the court in the \textit{ABC} case found that the FCC’s actions in tower registration and licensing fell

\footnotesize{\textsuperscript{108} Supra note 23.} \hspace{1em} \textsuperscript{109} \textit{ABC} v. \textit{FCC} at 989. \hspace{1em} \textsuperscript{110} 16 U.S.C. § 1540(c). See also supra note 28. \hspace{1em} \textsuperscript{111} \textit{Communications Act of 1934} at § 402(c). \hspace{1em} \textsuperscript{112} \textit{ABC} v. \textit{FCC} at 990. \hspace{1em} \textsuperscript{113} Northwest Resource Information Center, Inc. v. National Marine Fisheries Service, 25 F.3d. 872, 874 (9th Cir., 1994). This case also involved a suit under the Endangered Species Act, and the Ninth Circuit found that the Act’s mandate for district court jurisdiction did not subjugate the higher jurisdictional mandate of the other Act under consideration in the suit, the Northwest Power Act. Related cases cited by the \textit{ABC} court included California Save Our Streams Council, Inc. v. Yeutter, 887 F.2d 908 (9th Cir., 1989); \textit{Bywater Neighborhood Association} v. Tricarico, 879 F.2d 165 (5th Cir., 1989). The latter case involved an alleged violation by the FCC of the National Historic Preservation Act. \hspace{1em} \textsuperscript{114} \textit{City of Rochester} v. Bond, 603 F.2d 927, 932 (D.C. Cir., 1979).}
within the purview of the Hobbs Act and the Communications Act. Therefore the
jurisdictional mandate of the Endangered Species Act was moot.\(^{115}\)

Consequently, on January 25, 2006, the court granted the FCC’s motion to
dismiss the suit on jurisdictional grounds.\(^{116}\) This brought an unceremonious close to the
American Bird Conservancy’s legal efforts to compel FCC compliance with the tower
siting guidelines of the Fish & Wildlife Service. The FCC successfully used procedural
arguments to avoid courtroom discussion of the most vexing questions that have been
discussed throughout this article, including its failure to consult with the FWS on the
siting issue, and whether it should be required to do so, based upon its own rules for
complying with NEPA.

Unsurprisingly, after this courtroom victory the issue of bird kills at the towers
administered by the FCC would not go away, thanks to continued public pressure by
birdwatching enthusiasts and environmental groups. Onlookers may have been
confounded by an unexpected FCC news release on November 3, 2006,\(^{117}\) in which it was
announced that the FCC had adopted a Notice of Proposed Rulemaking (NPRM)\(^{118}\) on
the avian mortality issue, and would seek public comments on whether it should “take
measures to reduce the number of migratory bird collisions with communications
towers.” Included in the press release were references to all of the scientific factors that
have been considered during research on the issue, most notably the color and intensity of

\(^{115}\) *ABC v. FCC* at 993-994.
\(^{116}\) *Id.* at 998.
lights, but also tower height, tower location, the use of guy wires, and the addition of new antennas to existing towers.\textsuperscript{119}

The press release and the NPRM document are noteworthy for their selective coverage of historical events. No mention was made of the fact that the scientific factors cited were predominantly investigated by researchers and bird lovers who have long been critical of the FCC’s lack of response to the avian mortality issue. The press release also stated very briefly that in 2003, the FCC had issued a Notice of Inquiry (NOI) seeking information on the impact of communications towers on migratory birds.\textsuperscript{120} But the release did not mention that the NOI came one full year after the initial American Bird Conservancy petition, two years after the presidential order, and four years after the release of the FWS guidelines. Those documents all strongly encouraged FCC action years before the agency even decided to collect comments on the issue.

A closer reading of the much more extensive NPRM document reveals some cosmetic details on the FCC’s new-found concern about the avian mortality problem, but otherwise the document continues to avoid the issue of the agency’s years-long obfuscation and dismissal of the other concerned parties. To introduce the issue, the NPRM references a comment from the Fish & Wildlife Service, which had been made in response to the FCC’s 2003 Notice of Inquiry, that anywhere from four to fifty million migratory birds are killed by collisions with communications towers every year.\textsuperscript{121} The NPRM also comments extensively on the FCC’s responsibilities in compliance with the

\textsuperscript{119} FCC News Release at 1-2.
\textsuperscript{120} Id. at 1. For the original 2003 NOI, see In the Matter of Effects of Communications Towers on Migratory Birds, Notice of Inquiry, WT Docket No. 03-187, FCC Rcd 16398 ¶ 1 (2003).
\textsuperscript{121} F.C.C. 06-164 at ¶ 6.
National Environmental Policy Act, the Endangered Species Act, and the Migratory Bird Treaty Act.\textsuperscript{122}

Interestingly, the petition delivered in 2002 by the American Bird Conservancy, the Forest Conservation Council, and Friends of Earth is also acknowledged in the NPRM document – but only the most pertinent points of the original petition are described.\textsuperscript{123} Furthermore, it is important to note that while the NPRM makes note of the petition’s main themes and concerns, that description is presented as if the ABC comments were inspired only by the 2003 Notice of Inquiry, and not as an independent petition delivered by concerned and knowledgeable citizens the year before. This is achieved through the listing of ABC’s concerns under a sub-heading called \textit{Parties supporting Commission action}, which also includes the FWS.\textsuperscript{124} With a little bit of rhetorical subterfuge, here the FCC was able to imply a longstanding spirit of agreement with a government agency whose guidelines it had ignored for seven years, and a citizens’ coalition whose petition it had ignored for four years and whom it had defeated in court. Meanwhile, the diverse comments inspired (or said to have been inspired) by the 2003 NOI, both for and against FCC action on avian mortality, are blithely summed up in the NPRM document as “a myriad of comments reflecting widely divergent views” on the issue.\textsuperscript{125}

The most curious aspect of the Notice of Proposed Rulemaking is that it makes no mention of the ABC lawsuit, in which the FCC successfully utilized procedural arguments to avoid taking action on the very same scientific evidence and statutory

\textsuperscript{122} \textit{Id.} at ¶¶ 7-11, 33-35.
\textsuperscript{123} \textit{Id.} at ¶ 17.
\textsuperscript{124} \textit{Id.} at ¶ 16.
\textsuperscript{125} \textit{Id.} at ¶ 36.
requirements discussed throughout the document and the concurrent news release. In fact, the FCC had succeeded in having the suit dismissed less than one year previous. Nevertheless, multiple years of obfuscation and unfriendly courtroom proceedings suddenly became friendly cooperation on November 3, 2006. The news release on that date emphasized the FCC’s new hope for cooperating with the same entities that it had been either ignoring or opposing for years.

The November 3 news release, in addition to seeking comment on the issues described above, also states that “the FCC tentatively concludes that its obligation under the National Environmental Policy Act (NEPA) to consider the environmental effects of the actions it authorizes may provide a basis for such regulations.”126 The news release also solicits comments on the FCC’s “responsibilities under the Migratory Bird Treaty Act (MBTA) and on whether the MBTA gives any government agency other than the Department of the Interior authority to enforce its terms.”127

Several FCC commissioners also commented on the agency’s new commitment to bird protection, in statements released in conjunction with the NPRM announcement on November 3. Commissioner Robert M. McDowell’s statement was closest to a typical agency boilerplate comment, in encouraging all interested parties to cooperate in mitigating bird deaths while not unduly hampering industry.128 Commissioner Jonathan S. Adelstein provided more details in a generally similar statement of cooperation, but

---

127 Id.

Commissioner Michael J. Copps, in his statement on the Notice of Proposed Rulemaking, claimed to have been pushing for FCC acknowledgement of the avian mortality issue since joining the FCC in 2001, and noted that “there is simply no question that bird-tower collisions are a serious problem.” Importantly, Copps went beyond the boilerplate statements of his colleagues in admitting that “the Commission could have faced up to this problem years ago. Put bluntly, for too many years this agency treated a widely-recognized problem with not-so-benign neglect. Now we have learned, I hope, that this is not a problem that will just go away if we ignore it.”\footnote{Statement of Commissioner Michael J. Copps, Federal Communications Commission, Re: Effects of Communications Towers Migratory Birds, WT Docket No. 03-187, November 3, 2006, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-164A2.pdf (last accessed Sept. 22, 2008).}

Notwithstanding the “years ago” comment by Copps, none of the statements from the FCC commissioners,\footnote{Note that the other two FCC commissioners, Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, did not release statements on the proposed rulemaking announcement.} the Notice of Proposed Rulemaking, or the concurrent press release moved beyond present-day commitments for cooperation and understanding, as if the NPRM was merely the natural outcome of a friendly comment-gathering process dating back to the Notice of Inquiry in 2003. No explanation was given for the FCC’s recent legal efforts to avoid the very same cooperation and legal duties it was now proclaiming to encourage, its dismissal four years earlier of the American Bird Conservancy petition, or most of all, its seven-year dismissal of the Fish & Wildlife Service guidelines.
V. CONCLUSION

At the time of writing, the reasons for the abrupt FCC about-face in November 2006 remain unreported, except for speculation in opinion pieces by environmental activists and bird lovers. Seven years of obfuscation on the issue is just one recent example in a historical pattern of FCC refusal to confront the environmental problems posed by its communications towers.\(^{132}\) For the present article, rhetorical questions and speculation about political influences and public pressure would not be appropriate. However, concerned citizens must consider the historical and legal lessons of this tale.

Regardless of the FCC’s newfound enthusiasm for addressing the avian mortality issue, the case history discussed in this article will have considerable implications for future citizen challenges concerning the environmental effects of tower siting and design. As the American Bird Conservancy found in its suit against the FCC, jurisdictional issues can sink a legal challenge against the FCC before the merits of the agency’s actions are even discussed. This presents a potential “catch-22” for bird lovers who wish to bring the FCC to task for failing to observe its mandated environmental responsibilities.

On the one hand, researchers have had difficulty in ascertaining avian mortality patterns at the national level, while evidence of dangers to specific bird species in local areas is much easier to obtain. However, this localized evidentiary pattern would all but force legal challenges against the FCC into district courts, while forcing the plaintiffs to utilize claims of violations of the Endangered Species Act. But on the other hand, the ESA does not qualify for jurisdiction in the circuit courts, which have jurisdiction over

the FCC as mandated in the Communications Act of 1934.\(^{133}\) To successfully challenge the FCC on the issue of bird mortality, plaintiffs would have to bring suit in the circuit courts, but this would require evidence of FCC violations of the National Environmental Policy Act or the Migratory Bird Treaty Act. This in turn would create significant evidentiary challenges, due to the difficulty of finding national-level evidence of avian mortality at communications towers, and the particular bird species affected.

At the time of writing, it is not yet known whether the FCC’s new spirit of concern and cooperation on the issue of avian mortality will lead to significant mitigation or amelioration of the problem. Granted, vast changes in the processes of tower licensing and construction would be required, not to mention enhancements to existing towers and consideration of the specific environmental issues at each tower’s site. Regardless, the legal and regulatory history discussed herein should inspire concerned citizens and bird lovers not to give up hope, but to remain skeptical about the FCC’s ongoing commitment to the issue.

\(^{133}\) See supra notes 107-112 and accompanying text.