



March 19, 2020

Public Comments Processing, Attn: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041-3803

**Re: AWEA Limited Comments on “Regulations Governing Take of Migratory Birds,”
85 Fed. Reg. 5,915 (Feb. 3, 2020)**

Submitted to: <http://www.regulations.gov> Docket No. FWS-HQ-MB-2018-0090

The American Wind Energy Association (“AWEA”)¹ submits these limited comments in response to the U.S. Fish and Wildlife Service’s (“FWS” or “Service”) February 3, 2020, Proposed Rule Amending Regulations Governing Take of Migratory Birds (“Proposed Rule”) and the accompanying Notice of Intent to prepare an Environmental Impact Statement for the Proposed Rule.

The Proposed Rule would codify the Solicitor’s office’s legal opinion, M-37050, “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take,” concluding that the MBTA’s prohibitions apply only to actions directed at (*i.e.*, intentional take of) migratory birds and does not apply to incidental take. Regardless of whether the Proposed Rule is finalized, the current avian protection measures utilized by the wind industry to avoid, minimize and mitigate our relatively limited impacts to migratory birds are unlikely to materially change.

AWEA’s members have endeavored for years, through voluntarily adopted best management practices for siting and operating wind facilities, to reduce their limited impacts to migratory birds, and these efforts are not driven by a particular interpretation of incidental take under the MBTA. These best management practices are spelled out in the U.S. Fish and Wildlife Service’s voluntary Land-based Wind Energy Guidelines (“WEGs”),² and it is AWEA’s expectation that our members will continue adhering to the WEGs to inform industry best practices.

¹ AWEA is the national trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. AWEA members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, renewable energy supporters, utilities, marketers, customers and their advocates.

² Final Land-Based Wind Energy Guidelines (“Guidelines”), available at <http://www.fws.gov/windenergy/>.

I. Background

Unlike conventional sources, wind power emits no carbon dioxide during electricity generation, significantly reduces carbon emissions by displacing fossil generation and saves billions of gallons of water per year. Offsetting the generation of electricity from conventional fossil-fueled sources is one of the most cost-effective ways to mitigate climate change and is already playing a significant role in reducing carbon emissions, as well as emissions of other air pollutants.³ As one of the fastest-growing industries in the country, the wind industry is expected to increase its role in mitigating greenhouse gas emissions.

Reducing these emissions is vital to curbing climate change and, in turn, supporting the conservation of migratory birds. According to the Audubon Society, over 300 species of birds stand to lose more than 50 percent of their ranges without reductions in greenhouse gas emissions, and that number could rise without the benefit of wind energy's ability to reduce such emissions.⁴ Audubon and other leaders in the science and conservation communities agree that in order to prevent bird species extinctions, we must significantly and rapidly reduce pollution from fossil fuels and expand deployment of renewable energy.⁵ As one of the most economically competitive and largest generating source of renewable energy, wind energy therefore plays an important role in the conservation of birds.

According to the FWS-generated data included in the preamble of the Proposed Rule, wind turbines have the lowest bird mortality of all the listed industrial activities.⁶ The total extent of bird mortality caused by wind facilities in the U.S. is 0.025% of all avian mortality from industrial activities.⁷ In other words, of every 4,000 bird fatalities resulting from human industrial activities, only one is from wind energy. This percentage does not include cat-related or habitat-degradation-related avian fatalities, which account for more fatalities than all other causes combined. Following current wind-related fatality trends, even at greater levels of wind energy deployment, the industry should still have orders of magnitude fewer mortalities than other industries.

³ In 2018, for example, wind energy generation avoided an estimated 201 million metric tons of carbon emissions, reducing power sector carbon emissions by 11 percent and saving approximately 101 billion gallons of water, equivalent to 308 gallons per person in the U.S. U.S. Wind Industry Annual Market Report, Year Ending 2018 at 120-21.

⁴ Audubon's Birds and Climate Change Report, http://climate.audubon.org/sites/default/files/NAS_EXTBIRD_V1.3_9.2.15%20fb.pdf

⁵ Audubon's Position on Wind Power, available at <https://www.audubon.org/conservation/audubons-position-wind-power>.

⁶ FWS, Threats to Birds Migratory Bird Mortality - Questions and Answers, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>.

⁷ FWS, Threats to Birds Migratory Bird Mortality - Questions and Answers, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php> (listing threats to migratory birds).

The wind industry has worked in partnership with other stakeholders and government agencies to develop avian protection practices designed to define practicable and responsible measures to ensure impacts from wind energy facilities remain low. Perhaps most notably, FWS developed the WEGs in 2012 based on recommendations of the Wind Turbine Guidelines Advisory Committee (“Committee”). The Committee consisted of representatives from the wind energy industry, conservation community, FWS and other federal agencies, and states. At the time of issuance, FWS noted that “when used in concert with appropriate regulatory tools, the [WEGs] form the best practical approach for conserving species of concerns.”⁸

The siting phase of the WEGs uses a five-tiered approach for wind development that is designed to ascertain and minimize potential risks to avian (and other wildlife) species and their habitats at each tier. The WEGs include recommendations on pre-construction surveys, post-construction monitoring, adaptive management and research. In addition to the appropriate siting of wind energy facilities, the WEGs outline a comprehensive set of best management practices for these facilities, including during construction, operations and decommissioning.

II. Limited Comments: The Wind Industry Will Continue to Follow the Wind Energy Guidelines

AWEA anticipates that the wind industry will continue to adhere to the WEGs to avoid, minimize and mitigate incidental take of migratory bird species, as well as bats and other species of concern, regardless of whether the Proposed Rule is finalized. This has been the approach of our industry since the issuance of the Solicitor’s office’s legal opinion in December 2017, interpreting the take prohibition of the MBTA to apply only to affirmative actions that “have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”⁹ In addition, the industry has continued to adopt the best management practices in the WEGs even in areas where courts have held that incidental take is not prohibited under MBTA.

A significant portion of the industry publicly adopted the WEGs as standard procedure shortly after it was issued.¹⁰ And nearly eight years after their creation, the best management practices included in the WEGs continue to form a practical approach for the wind industry to limit impacts on migratory bird species and other wildlife.

Our members are committed to: maintaining an industry-wide culture of conservation; achieving safety, reliability and sustainability goals; and adhering to the goals and the objectives of federal and state laws and regulations designed to protect migratory birds (*e.g.*, MBTA, Endangered Species Act, Bald and Golden Eagle Protection Act, and federal land management plans)—all of which the WEGs support. For instance, the wind industry is working to pioneer

⁸ WEGs at vi.

⁹ DOI Solicitor Opinion M-37041 (Jan. 2017).

¹⁰ See AWEA Letter to Secretary Ken Salazar, Wind Industry Commitment Letter to WEGs (May 15, 2012) (listing nearly every major wind energy company as being committed to adhere to the WEGs).



new deterrence and avoidance technologies thereby advancing the state of the science of avian protection.

Even with further growth of the industry, wind energy development and operations should continue to have insignificant impacts on migratory bird populations. Indeed, given the benefits that wind energy provides for migratory birds related to climate mitigation and the limited risk wind energy facilities pose to such species in general, the continued development of properly sited wind energy should help overall reduce threats posed to migratory birds.

III. CONCLUSION

AWEA appreciates the opportunity to provide these limited comments clarifying that it is our expectation that our members will continue their practice of adhering to the WEGs and provide conservation benefits to migratory birds. If you have any questions, please do not hesitate to contact the undersigned at the contact information listed below.

Sincerely,

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