



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



FWS/AMB/DMBM/050553

MAR 22 2012

Shruti Suresh
Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W. Suite 700
Washington, D.C. 20009-1063

Re: Rulemaking Petition to the U.S. Fish and Wildlife Service for Regulating the Impacts of Wind Energy Projects on Migratory Birds

Dear Ms. Suresh,

Thank you for your letter and petition for rulemaking, requesting the U.S. Fish and Wildlife Service (Service) to promulgate regulations under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, governing the impacts of wind energy on migratory birds. We have reviewed the petition and considered the merits of your request.

In 2007, the Service convened a Federal Advisory Committee (FAC) to obtain a wide spectrum of views regarding how to avoid and mitigate impacts of wind-energy facilities on wildlife, particularly birds and bats. The FAC spent three years developing their recommendations to the Service. The Service developed draft Land-Based Wind Energy Guidelines (WEG) based on the FAC's recommendations and circulated the draft WEG for public review in February 2011. After receiving comments on that version, the Service circulated two more revisions for public comment prior to FAC meetings. At each FAC meeting, the public had an opportunity to provide oral and/or written comments. Representatives of the American Bird Conservancy (ABC) attended all of the FAC meetings and provided oral and written comments on numerous occasions. This process has resulted in what the Service believes are guidelines developed with input from a diverse spectrum of stakeholders that will assist us as we implement our statutory responsibilities under the MBTA. This process has been meticulously transparent, and designed to achieve broad, although clearly not complete consensus. While we know that ABC preferred a mandatory approach, the strong consensus was for voluntary guidelines, and that consensus includes many conservation partners such as the Audubon Society, The Nature Conservancy, and Defenders of Wildlife.

In the future, we will compile information from wind-industry facilities that are implementing the WEG. This will provide us with data in order to better assess the potential impact of wind-energy facilities on migratory bird populations. That data and further analysis and discussions with partners like ABC, will help determine if further agency action may be warranted.

The Service is working with permitting agencies that are authorizing some of these projects, such as the Bureau of Land Management, which signed a Memorandum of Understanding (MOU) as required by Executive Order 13186 in April 2010. Executive Order 13186 directs federal agencies whose actions have, or are likely to have, a measurable negative effect on migratory bird populations to develop an MOU with the Fish and Wildlife Service. Through the MOU development process, the Executive Order directs these Federal agencies to incorporate migratory bird conservation measures into their agency activities and to develop and implement standards and practices that reduce the impact of such activities on migratory bird populations and habitat. The Service's interaction with federal permitting agencies and subsequent development of MOU's should help to reduce bird impacts caused by the projects those agencies authorize.

ABC's analysis of the case law regarding incidental take under MBTA is thorough. Incidental take under the Migratory Bird Treaty Act (MBTA) has traditionally been addressed through a combination of enforcement and prosecutorial discretion as well as voluntary partnerships with various entities, such as the Avian Powerline Interaction Committee (APLIC) addressing transmission and distribution lines, and communication tower guidelines. Such efforts do not provide legal assurances, but rather document an individual's willingness to employ all current avoidance and minimization measures available. The Service exercises its enforcement discretion in such cases, as appropriate. Current regulations authorize permits for intentional take of migratory birds for activities such as scientific research, education, depredation control, and "special purposes." See 50 C.F.R. Part 21. However, these regulations do not expressly address incidental take, except in the context of military readiness activities or, in certain situations, under a Special Purpose Permit, 50 C.F.R. § 21.27. As ABC noted in the petition, the Service has been examining approaches to developing incidental take regulations under the MBTA, a difficult task considering the magnitude and scope of implementation to adequately address 1,007 species and the wide variety of activities that might incidentally take migratory birds.

As discussed in the petition, the Service has pursued prosecution for incidental take by energy companies for violations of MBTA on numerous occasions. The resulting multi-million dollar fines and restitutions send a clear message of the Service's intent and priorities in upholding the tenets of the MBTA.

For the reasons discussed above, the Service declines ABC's petition. This is the Service's final determination on ABC's petition for rulemaking under 43 C.F.R. § 14.3.

To foster conservation of migratory birds and other species that might be affected by wind energy development, the Service plans instead to finalize and implement the WEG and monitor its effectiveness. We hope that ABC will continue to provide its valuable input into these efforts. We look forward to continuing our partnership to conserve migratory birds.

Sincerely,

A handwritten signature in dark ink, appearing to read "Daniel M. Ashe". The signature is fluid and cursive, with a long horizontal stroke at the end.

DIRECTOR