

**JOINT PUBLIC COMMENT ON THE NEW YORK STATE OFFICE OF RENEWABLE ENERGY SITING
Draft Regulations Chapter XVIII, Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-14)**

4 December 2020

Dear Mr. Moaveni,

We appreciate the opportunity to provide these comments on the draft regulations to implement the Accelerated Renewable Energy Growth and Community Benefit Act (hereafter “Act” or “Accelerated Renewable Energy Act”). We support elements of the Act and draft regulations, but on balance we have serious concerns about the lack of consideration of impacts to birds and other wildlife. Below we provide comments and recommendations for ways to ameliorate these concerns.

All signatories of this letter firmly support renewable energy development as part of a multifaceted approach to combating climate change. The likely impacts of climate change to humans and birds are well-documented, and renewable energy is an important component of our collective response. However, commercial-scale renewable energy development, and wind energy development in particular, can have its own negative impacts on birds and other wildlife. Estimates vary, but all sources agree that hundreds of thousands of birds are killed each year due to collisions with wind turbines. Less data is available for solar facilities, but one study placed annual bird mortality as high as ~140,000.

Fortunately, substantial efforts have been made to develop best practices to minimize the impacts of wind energy development on birds. The U.S. Fish and Wildlife Services published its *Land-Based Wind Energy Guidelines* in 2012. Many states and NGOs have developed their own recommendations, including New York’s 2016 *Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects*. Efforts are underway to develop similar guidelines for solar energy development.

The Accelerated Renewable Energy Act and the associated draft regulations unfortunately do not adhere to best practices for minimizing impacts to wildlife. Entirely too much emphasis is placed on speed and quantity over minimizing impacts. This will undoubtedly lead to increased conflict as projects are planned in a less-informed and less-inclusive manner. We understand the desire to speed the process, but it must be done in a way that assures positive, balanced outcomes for birds and other wildlife.

A recent study by New York’s own Cornell Laboratory of Ornithology and others shows that the United States and Canada have lost nearly 3 billion birds – almost 30% of the total population – since 1970. We must not let our shared sense of urgency to address climate change overwhelm the importance of protecting our vulnerable bird populations, which already face an overwhelming suite of threats.

New York has an opportunity to set a positive standard for developing renewable energy while protecting birds and other wildlife, but it will require substantial revision to these draft regulations.

We have five key concerns:

- Lack of Consideration for Non-Listed Wildlife Species
- Lack of Provisions to Ensure Appropriate Facility Siting
- Unrealistic and Inappropriate Timelines and Automatic Project Approvals
- Inappropriate Restrictions on Public Input and Lack of Data Transparency
- Lack of Post-Construction Wildlife Mortality Monitoring

Each of these is described in greater detail in the Key Concerns section below. Specific recommendations to ameliorate these through revisions to the draft regulations are provided in the subsequent Specific Recommendations section.

Key Concerns

Key Concern #1: Lack of Consideration for Non-Listed Wildlife Species

The draft regulations provide some reasonable considerations for wildlife species listed as State Threatened or Endangered. However, there are no such considerations for non-listed species. This a glaring omission in its own right, given that there are many species of conservation concern that are not yet at the far end of the spectrum to be in danger of extinction. The State has designated lists of species of Special Concern, and High Priority Species of Greatest Conservation Need for just such species. The scope of species that are considered and protected as part of the planning process must be expanded.

This concern can be partially ameliorated by expanding the scope of species to be considered in studies and project planning to include state-designated species of Special Concern and High Priority Species of Greatest Conservation Need, as discussed in detail in the Specific Recommendations section below.

Key Concern #2: Lack of Provisions to Ensure Appropriate Facility Siting

Any organization that supports truly environmentally responsible renewable energy development will indicate that facility siting is by far the most important aspect of minimizing impacts to wildlife. There are currently few technologies available to minimize impacts once turbines are installed, so it is crucial to avoid the most high-risk locations. The draft regulations outline a process of information gathering and consultation, but there is no clear mechanism to influence facility or turbine siting. It is also not clear that there is any location or scenario under which a project proposal might be denied. Not only is appropriate siting critically important to minimizing impacts to wildlife, but crucial to minimizing conflict.

In addition to considering impacts to species of conservation concern, the number of individuals affected is also critically important. Certain features on the landscape concentrate birds and other wildlife and should be avoided. For example, Golden Eagles and other raptors use ridges during migration, and migratory songbirds are found in large numbers along the Lake Ontario shoreline. These concentrations of wildlife must be considered in addition to rare species, and facilities planned accordingly.

This concern can be partially ameliorated by identifying and requiring science-based setbacks from areas of importance to wildlife, including areas where wildlife concentrate, as discussed in detail in the Specific Recommendations section below.

Key Concern #3: Unrealistic and Inappropriate Timelines and Automatic Project Approvals

The aggressive timelines and automatic approvals at key deadlines in the various planning stages pose too great a risk for unforeseen and unavoidable issues to compromise the legitimacy of the review process. Automatic approvals pose a high likelihood of advancing projects that may be unacceptably harmful to birds. Collectively, these create opportunities for exploitation. For example, a developer could submit multiple proposals at one time in order to overwhelm agency staff and obtain automatic approvals. A similar result could arise from submitting documentation to start any given time-constrained approval immediately before typical periods of reduced staffing, such as year-end holidays. Further, this does not account for normal times for staff absence, such as paid time off and conference

attendance. This leaves the process vulnerable to becoming a de facto approval, rather than an informed evaluation that serves the public good.

More specifically, there are points in the process where input by the New York State Department of Environmental Conservation (NYSDEC) is critical to inform facility planning. We are unaware of the specific situation at NYSDEC, but it is often true that state wildlife management agencies are understaffed and have demanding workloads that make rapid deadlines challenging, if not prohibitive. The emphasis must be placed on the necessity of meaningful input by NYSDEC over artificial deadlines. This ensures more informed decision-making and more defensible outcomes that could be supported by a broader suite of stakeholder groups.

Further, in some instances, the artificial deadlines make it impossible to conduct appropriate studies to evaluate likely impacts to wildlife for a given project. Some studies must be conducted over a full year (e.g., surveys for Golden Eagles). Others must be conducted over multiple years for rare species or those with high inter-annual variation in presence and abundance. Not only do the artificial timelines inappropriately restrict the ability to conduct appropriate data collection, but these ignore the State's own recommendations provided in the 2016 *Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects*.

This concern can be ameliorated by: (1) removing or extending unrealistic deadlines and automatic approvals, and (2) requiring certain field studies to be completed before an application is submitted for a given project, as discussed in detail in the Specific Recommendations section below.

Key Concern #4: Inappropriate Restrictions on Public Input and Lack of Data Transparency

The importance of public input cannot be overstated. Publicly available data regarding wildlife species presence and use of a given property throughout the year varies considerably. In some locations (e.g., refuges), the State may have sufficient data for decision-making regarding likely wildlife impacts, but this is likely to be uncommon. State biologists cannot be expected to have detailed understanding of wildlife populations everywhere, especially on private lands where most renewable energy projects are located. This is particularly problematic given the short time windows for input allowed to state biologists in the draft regulations. Local and other expert input is thus invaluable and must be gathered and fully considered at key points in the planning process.

Wind energy facilities typically maintain post-construction bird mortality monitoring data as proprietary information (i.e., not shared with the public). This creates considerable uncertainty for conservation organizations and individuals concerned about these impacts, leading to a continuation of this source of conflict. The State has an opportunity to create a positive precedent by making this data publicly available, providing an understanding of the actual impacts to interested parties. This would inform substantive discussion, evaluation of cumulative impacts, and project-specific adaptive management.

This concern can be partially ameliorated by: (1) revising proposed restrictions on public hearings and input, and (2) requiring that pre- and post-construction wildlife data be made public, as discussed in detail in the Specific Recommendations section below.

Key Concern #5: Lack of Post-Construction Wildlife Mortality Monitoring

Monitoring direct wildlife impacts from wind energy facility operations, i.e., bird and bat collisions with turbines, is a standard practice in the industry. Accurate wildlife fatality data is crucial to understand

actual impacts because pre-construction wildlife risk assessment is not yet a reliable predictor. For example, most avian fatalities occur at night and pre-construction studies typically provide little or no species information on the nocturnal migrants that are likely to pass through a wind project. Furthermore, there are no fatality studies in New York involving the new generation of wind turbines that are taller with much larger rotor-swept zones. We can't assume their collision impact will be the same as the older models.

Fatality monitoring is particularly important when species of conservation concern are known to inhabit a site, and thus likely to be negatively affected by development. It is also difficult to understand how mitigation requirements will be determined if impacts are not evaluated. Without accurate fatality monitoring, the actual impacts are not known, creating unnecessary uncertainty and associated conflict.

This concern can be partially ameliorated by requiring post-construction mortality monitoring in appropriate instances, as discussed in detail in the Specific Recommendations section below.

Specific Recommendations

900-1.2: Add a definition - "*Listed* means those wildlife species designated by the state to be Threatened, Endangered, Special Concern, or High Priority Species of Greatest Conservation Need."

900-1.3(a)(2): Add ", to include the location of turbines, any new power and transmission lines, and any forest clearing" after "components."

900-1.3(b): The number of meetings with community members should not be artificially restricted, and this language allows for every proposed project to stop at one meeting. Input from local stakeholders and subject matter experts is critical to inform facility planning, resulting in improved outcomes (see Key Concern #4 above). This should be revised to read "the applicant shall conduct a number of meetings sufficient to allow all interested stakeholders the opportunity to provide input."

900-1.3(b): Concurrent with the above point, there may be cause for holding a separate meeting for community members "who may be adversely impacted by the siting of the facility," but there should be no artificial restrictions on who should be allowed the opportunity to provide input. Local context and expertise is crucial to inform planning, and this language creates ambiguity that is likely to result in conflict over its interpretation and application. If community members "who may be adversely impacted by the siting of the facility" are not allotted a separate and additional meeting, this language should be struck.

900-1.3(b): The purpose of the meeting should be to provide sufficient information to the public to allow a full understanding of the project. As such, the portion about the purpose of the meeting should be revised to indicate that the same information provided in the consultation with local agencies (900-1.3(a)) should be provided in the meeting with community members, at minimum.

900-1.3(b): Add "...and receive public input on the proposed plan" after "The purpose of the meeting is to educate the public about the proposed project."

900-1.3(g): In addition to state-listed wildlife species, it's critically important to identify areas of wildlife concentrations and movement corridors, where large numbers of individuals may be impacted by wind

turbines (see Key Concern #2 above). To address this, the heading for this section should be revised to state “NYS Listed Species and Wildlife Concentrations,” (i.e., using the more inclusive recommended definition provided for “listed” under 900-1.2 above). The inclusion of wildlife concentrations as a need for evaluation and study should be carried forward to all subsequent relevant language, to include the need for mitigation.

900-1.3(g)(1): Assessment of the presence and potential risks of a wind energy facility to state listed wildlife is most valuable when conducted very early in the planning process when changes can still be made without major conflict. As such, “at the earliest point possible” should be defined here or boundaries otherwise placed to prevent ambiguity and conflict over the interpretation and application of this language. Recommend adding “, such as when a general area of interest has been identified (i.e., before site leases are pursued),” after “earliest point possible.” This is entirely reasonable and protects the developer from potential conflict later in the process, as the assessment outlined in this section identifies “red flags” early, and should routinely be conducted as part of the site feasibility and prospecting phase for a given project regardless.

900-1.3(g)(1): As detailed in Key Concern #3 above, field surveys may be needed for more than one season in some instances to gather data necessary to adequately assess a project’s impacts to wildlife. Given the rapid pace of the process and hard stop deadlines once the application has been submitted, pre-application field studies become crucial to making this process work.

Many of the issues raised in Key Concern #3 could be ameliorated if the draft regulations were revised to require, at minimum, a single year of appropriate wildlife studies prior to submission of the wildlife site characterization, using the State’s 2016 *Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects* as guidance. The agency can then review the study(ies) and require an additional year of studies as stated in 900-1.3(g)(2), if needed. This is standard procedure and poses no burden on renewable energy developers - they typically work with biological consultants, who advise them regarding surveys that are needed to evaluate risks to wildlife, and then conduct these studies.

900-1.3(g)(1): Building on the previous recommendation, add “Migrant land bird radar studies conducted by the U.S. Fish and Wildlife Service as part of the Avian Radar Project should be consulted, as geographically applicable, as well as other available field studies and resources informing avian migratory patterns” before “With respect to NYS threatened...”

900-1.3(g)(1): Add National Audubon Society’s Important Bird Areas map and American Bird Conservancy’s Wind Risk Assessment Map to the list of available resources.

900-1.3(g)(1)(i): Add “or within 10 miles of” after “documented at.” Given the importance of documenting occurrences of state listed wildlife species and their rarity, restricting this search to the project footprint is insufficient. This assessment must encompass an area outside the project footprint that is likely to discover the presence of a listed species in the vicinity, which may inform further information needs. This is particularly important given that most wind facilities are on private lands, where there may be little or no data available regarding wildlife use. We suggest 10 miles here as a reasonable distance and assert that it should be no less than this, but refinement of this number can be informed by data regarding movement patterns of specific species.

900-1.3(g)(1)(iii): Add “large rivers, areas between the Finger Lakes, and areas within five miles of Great Lakes shorelines” to the list of landscape features and resources of potential concern, all of which are features that often support concentrations of wildlife.

900-1.3(g)(1)(iv): Add “and all other elements of the project footprint,” after “access roads” to ensure that this is comprehensive.

900-1.3(g)(2): As indicated previously, this analysis is critically important to informing appropriate facility siting and minimizing impacts to birds and other wildlife. As such, a timing requirement must be added. Recommend adding “Before site leases are pursued,” at the beginning of this section.

900-1.3(g)(2): As indicated in Key Concern #3, NYSDEC review is critical to the success of project planning, particularly in these preliminary stages, and must be prioritized. Requiring organization of a meeting and a comprehensive, substantive review of a wildlife site characterization study within four weeks is unrealistic and counter-productive to the importance of these actions. The four-week deadline should either be removed (preferred), or increased to a more reasonable and realistic timeline (recommend a minimum of 10 weeks).

900-1.3(g)(2)(iii): Strike “occupied.” This places an unrealistic burden on the agencies, as many areas of private land have not been surveyed or traversed by agency staff, making an evaluation of whether it is occupied by a given species impossible. A “desktop” evaluation such as this makes evaluation of whether there is potential habitat possible, but not necessarily whether it is occupied. The purpose of the agencies’ review should be to identify areas that require further study (i.e., to determine if they are occupied or not).

900-1.3(g)(2)(iv): Add “additional” after “Recommend,” i.e., to augment the initial studies recommended for 900-1.3(g)(1) above.

900-1.3(g)(2)(iv): Change the timeline from “within one year” to “within one full survey season.” As described in Key Concern #3 and recommendations for 900-1.3(g)(1) above, one year of survey may be sufficient for some species under normal circumstances, but is in no way sufficient for all species in all circumstances. Unusual climatic conditions in a given year and other uncontrollable factors can substantially influence species’ presence. This artificial timeline neglects the goal of this assessment – to identify potential risks to wildlife such that they can be avoided or minimized. Without sufficient study, this is not possible, potentially leading to conflict, and projects being approved despite unacceptable risks and impacts. This also opens the door for abuse of this requirement, such as submitting a wildlife site characterization study in the middle of the breeding season for a species suspected to be present, thus setting the timeline for survey up to be interrupted and potentially incomplete.

900-1.3(g)(4): Add “detailed” before “pre-construction study.” A study is only as good as its design, including sample location and number and other details. We have reviewed many avian studies in New York state and elsewhere that are inadequate to evaluate risks to birds. Agency experts should have the opportunity to review these important aspects of study design.

900-1.3(g)(4): Add “and to the written approval and concurrence of” after “in consultation with.” “To consult” in this sense is a vague term, and in practice can be almost meaningless. It is important that this requirement include accountability, and ensure that the agencies explicitly concur with the work plan.

900-1.3(g)(4): Add “developed or approved by appropriate agencies, as available” after “follow existing protocols.” As written, this assumes that there are proven, effective survey protocols for all species, which may not be the case. More importantly, it does not set a bar for the effectiveness or legitimacy of a protocol beyond the fact that it exists.

900-1.3(g)(5): Add “The applicant shall also provide a post-construction Wildlife Fatality Monitoring Plan utilizing protocols developed by the Office of Renewable Energy Siting and NYSDEC.” The requirement for this plan and monitoring should be carried forward, e.g., to 900-1.3(g)(6) through (8).

900-1.3(g)(6): See Key Concern #3 and comments for 900-1.3(g)(2) above. Recommend allowing a minimum of 10 weeks for this review and conference.

900-1.3(g)(7): See Key Concern #3 and comments for 900-1.3(g)(2) above. Recommend allowing a minimum of 8 weeks for preparation of this determination.

900-1.3(g)(7): Remove the word “occupied” or indicate that habitat for listed species must be identified as well as occupied habitat.

900-1.3(g)(7): Add “, though permittee-responsible compensatory mitigation is the preferred means of mitigation, and options for such must be exhausted before payment to the mitigation fund is allowable. If required, such mitigation must be detailed in a Compensatory Wildlife Mitigation Plan.”

900-1.3: Suggest adding 900-1.3(j) to indicate that upon notification by any local or State agency that a project is engaging in pre-application work, the Office of Renewable Energy Siting shall create a centralized, publicly accessible website where all notices, agency documents, public comments, field study reports, and other pertinent documents shall be housed. Said notification shall include initiation of consultation with local agencies and meetings with community members, as described in 900-1.3(a) and 900-1.3(b), respectively. Rapid organization of this website and availability of project information is crucial to prevent barriers to substantive public participation given the aggressive timelines in the draft regulations.

900-2.13 Exhibit 12: NYS Threatened or Endangered Species: As recommended for 900-1.3(g) above, this section must consider impacts to a broader suite of species, using the more inclusive recommended definition recommended for “listed” under 900-1.2 above. This must also consider the importance of concentrations of wildlife, as discussed in recommendations for 900-1.3(g) above. As such, this section header should be changed to “Listed Species and Wildlife Concentrations.”

900-4.1(h): This should be struck in full, though we understand that this may not be possible due to the language of the Accelerated Renewable Energy Act. We reiterate the importance of mandatory pre-application field study requirements recommended for 900-1.3(g)(1) above in ameliorating this issue. As with issues identified above, any unforeseen and unavoidable events, staffing capacity issues, etc. should not preclude substantive review and feedback on an application. The deadline provided does not provide sufficient time for review in all cases, and opens the door for abuse of this condition. If not struck, provide a more realistic amount of time for such review, e.g., 120 days.

This could be ameliorated in part by allowing each coordinating agency (including the Office of Renewable Energy Siting and NYSDEC) to formally submit their comments as to the completeness of the application as they are able, which would be entered in the public record and serve as a determination

of completion whether all coordinating agencies have submitted comments or not. This alleviates some of the concerns about the difficulty of coordinating this important decision in a short time window, and allows each coordinating agency to operate on their own timelines, rather than running the very likely risk of a “bottleneck” at any one agency that would prevent a determination of completion and trigger an automatic decision.

900-8.3(c)(2): After “would require further inquiry.” add “This shall include environmental impact considerations, even if not covered by existing regulation.”

900-9.1(a)(1) and (2): Strike in full (see comment for 900-4.1(h) above).

900-10.1(f): Before (1), add new (1): “A copy of the Compensatory Wildlife Mitigation Plan, if required,” and renumber subsequent points.

900-10.1(f): Before existing (2), add new (3): “A copy of the Wildlife Fatality Monitoring Plan, if required,” and renumber subsequent points.

900-15.1(i): Add “(iv) NYSDEC Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects, June 2016.”

Thank you again for this opportunity to provide input, and for considering these recommendations.

Sincerely,

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