



July 24, 2015

Public Comments Processing
Attention: FWS–HQ–MB–2014–0067
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS-PPM
Falls Church, VA 22041-3803

Re: Comments on Migratory Bird Permits; Programmatic Environmental Impact Statement Notice of Intent (FWS–HQ–MB–2014–0067)

To the US Fish and Wildlife Service:

The Avian Power Line Interaction Committee (APLIC) is pleased to submit comments on the US Fish and Wildlife Service's (FWS) Notice of Intent (NOI) to prepare a Programmatic Environmental Impact Statement (PEIS) to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA). APLIC leads the electric utility industry in protecting avian resources while ensuring reliable energy delivery. We work in partnership with utilities, resources agencies and the public to: develop and provide educational resources; identify and fund research; develop and provide cost-effective management options; and serve as the focal point for electric utility avian interaction issues.

Since its inception in 1989, APLIC has addressed a variety of avian power line interactions including electrocutions, collisions, and nests management. At present, APLIC membership includes 60 electric utilities, the Edison Electric Institute (EEI), FWS, National Rural Electrical Cooperative Association (NRECA), and Rural Utilities Service (RUS). Although a member of APLIC, the FWS did not participate in the preparation and submittal of these comments. FWS was a founding member of APLIC and is aware of the tremendous effort and progress this organization has made in addressing avian mortality through long term cooperative efforts. APLIC has developed guidance documents identifying causes and minimization methods for avian electrocutions and collisions, and released national Avian Protection Plan (APP) Guidelines in conjunction with the FWS in 2005. In partnership with the FWS, APLIC presents

APP training courses throughout the US, and funds research related to avian power line interactions and conservation.

Given the nearly 100 year history and the fact that no permit is currently available for incidental take of birds protected by MBTA, the NOI has significant nationwide implications for the electric utility industry. As such, APLIC members have a direct interest in MBTA permitting and how it will be implemented.

In concept, a permitting program under the MBTA holds great promise. Issuance of general permits could relieve workload burden on FWS staff, provide electric utilities with legal certainty that is currently lacking, and lead to improved conservation for migratory birds. APLIC was encouraged when FWS Director Dan Ashe made the initial public announcement regarding MBTA Incidental Take Permits (ITPs) at the June 17, 2014 APLIC 25th anniversary celebration. However, based on information presented during the recent NOI public scoping meetings, APLIC members are now increasingly concerned that the permitting process as proposed may not be feasible or worthwhile for utilities and any potential benefits of MBTA ITPs may be minimal at best. Therefore we offer the following information, comments and suggestions to support the initiation of this process and ensure continued success of our partnership with the FWS as it assesses MBTA ITPs.

Avian Protection Plan Guidelines

As mentioned above, APLIC and FWS released the jointly-developed national APP Guidelines. The APP Guidelines are voluntary and programmatic, and intended to enable electric utilities to comprehensively manage avian-power line issues. They provide a “toolbox” of resources utilities can use to create a program to meet their specific needs. In addition, APPs are living documents, which are modified and refined over time to improve their effectiveness. APPs also will vary in extent due to the size and geography of a utility’s service territory, avian species in the area, and frequency of avian-power line interactions. APPs include the following 12 principles:

1. Corporate Policy – APPs include a statement that identifies commitment, endorsed by management, and provides employees with guidance on expectations and accountability.
2. Training – All appropriate utility personnel (managers, supervisors, line crews, engineering, dispatch, substations, and vegetation management) must complete training on the company’s avian program procedures. This includes training on reporting, avian safe design, nest management, and laws and regulations protecting migratory birds. APLIC also helps develop training materials for electric utilities.
3. Permit Compliance – APPs identify all required federal and state permits and measures for compliance including nest relocation, temporary possession, depredation, and salvage.
4. Construction Design Standards – APPs identify company specific avian safe construction standards for designing new facilities and retrofitting existing facilities. The design standards should meet or exceed recommendations contained in APLIC’s *“Suggested Practices for Avian Protection On Power Lines: The State of the Art in 2006”* and *“Reducing Avian Collisions with Power Lines: The State of the Art in 2012.”*
5. Nest Management – APPs specify procedures and permits for addressing “problem nests,” those that pose safety, fire, or electrocution risks and training for field personnel on addressing active versus inactive nests.

6. Avian Reporting System – APPs include ways for utilities to report bird mortalities, nests, bird caused outages, and remedial actions. Utilities can use the FWS reporting system or one developed for their company.
7. Risk Assessment Methodology – APPs detail procedures for identification of areas that pose greatest risk to migratory birds. Avian risk assessments include bird populations, historical mortalities, nests, habitats, prey populations, structure designs, and bird caused outages.
8. Mortality Reduction Measures – APPs specify how to use the risk assessment to identify areas for remedial actions.
9. Avian Enhancement Options – APPs identify utility efforts to enhance populations and habitat. Examples include installation of nest platforms or boxes when appropriate, cooperative efforts with agencies or organizations, and habitat management.
10. Quality Control – A crucial component of APPs is the review and update of practices to ensure efficiency and effectiveness. This includes reviewing the effectiveness of retrofitting in reducing bird mortalities and associated outages; effectiveness of training in improving employee awareness, processes, and accountability; and effectiveness of the risk assessment in identifying high risk poles and line segments.
11. Public Awareness – Educating the public and other interested organizations on avian-power line interactions, utility efforts, and successes is an important APP component. Partnership opportunities with wildlife rehabilitation and wildlife protection organizations are another way for utilities to increase public awareness of avian-power line interactions.
12. Key Resources – Internal company resources are identified. These include engineers, biologists, standards, procurement, and field operations staff. External resources include federal and state agencies, Migratory Bird Joint Ventures, universities, non-governmental organizations, consultants, and avian protection products manufacturers and vendors. In addition, APLIC serves as a resource for the electric utility industry.

Each utility's APP will be unique based on risk, needs, and scale. APPs are programmatic and intended to guide a utility's overall avian program for all its facilities operations. Common themes to APPs include reduction of bird mortality and improving service reliability. APPs are not intended to be project-specific, e.g., each new line does not require an APP.

APLIC has found that components critical to a successful implementation of an APP include management support, agency involvement, engineering and biological expertise, adequate funding, documentation, accountability and employee training and participation/engagement.

General Conditional Authorization with Incidental Take

Should FWS establish a general conditional authorization for incidental take for MBTA specific to the electric utility industry, APLIC supports the use of a utility-specific APPs as the primary foundation for the application. APLIC manuals and the APP Guidelines should be the primary resources for conservation measures and technologies. We feel that utilities which utilize these existing tools would meet the criteria for a general conditional authorization and should not be subject to the burden of additional permitting under MBTA.

APLIC encourages a programmatic system-wide approach to incidental take permitting for electric utilities rather than focusing on individual poles or birds. This approach would align well with the APP Guidelines as the foundation of a permit.

Operations, maintenance and construction of new power lines (distribution and transmission) should be covered in any general authorization for electric utilities incidental take. APPs include conditions that require new facilities to be designed, sited, and constructed avian safe.

As a business case, APLIC utilities need certainty that their investment of time and resources will be productive, not burdensome on their customers, and contribute to the reliability of the bulk electrical system. Currently the Office of Law Enforcement (OLE) is pleased with most utilities' proactive avian conservation efforts and the timing of retrofitting schedules. Under the proposed incidental take permitting process, the implication is that, unless all poles are retrofit or built bird safe, they would not be exempt from enforcement actions. How can OLE or the FWS in general implement this type of permitting scheme? How could an electric utility apply for, monitor and comply with such a permitting scheme? The permit and power pole retrofitting expectations need to be clear and realistic.

Individual Permits

APLIC feels that individual project-specific permits are not feasible and are unnecessary for electric utilities. Requiring utilities to apply for individual permits for each project creates an unnecessary burden on the process, and could result in prohibitive costs and time which are then transferred to utility customers, as well as an inability to complete projects in a timely manner. APLIC feels that a general conditional authorization process would be a better fit for electric utilities. One permit should cover all applicable operation, maintenance, and construction activities by a company. For example, one permit should cover an electric utility's operations, maintenance and construction without individual project-specific permits needed for individual poles, lines or new projects.

Memoranda of Understanding (MOU) with Federal Agencies

APLIC does not support the use of MOUs between FWS and other Federal agencies to authorize take by third parties (e.g., private electric utilities). Our primary concern is that utilities may be subject to requirements in addition to those included in any FWS permits (e.g., project-specific MBTA take permits required by lead agency through NEPA permitting of a new transmission line). We support a single permitting pathway through the FWS for all MBTA take.

Voluntary Guidance for Electric Utilities

APLIC in partnership with FWS dedicated a great deal of effort to develop the APP Guidelines (2005) as well as to encourage and educate APLIC members and non-members in addressing avian mortality through planning and implementation of APPs. Although each utility's APP will be unique, the overall goal of any APP is to reduce avian mortality and improve service reliability. APLIC supports a voluntary guidance program for incidental take based on APPs as has been the case since the creation of APLIC. This approach would strengthen the incentives for utilities to implement voluntary best management practices such as the APP Guidelines for reducing avian mortality.

Establishing clarity regarding law-enforcement discretion would provide assurances to electric utilities which comply with a voluntary guidance program. Law enforcement has been inconsistent in their discretion in enforcing MBTA violations across and within industries and regions. Establishing a framework for enforcement actions within a voluntary compliance program would provide greater assurances and incentives for utilities concerned with migratory bird take issues. A simplified permitting pathway and voluntary guidance program is necessary due to the unique characteristics of individual utilities, both large and small, that impact the cost and feasibility of utilities' participation and potential program requirements.

General Comments Regarding Incidental Take

If a permitting program is established, it is critical that the process be simple, cost effective and user friendly. As demonstrated by the Eagle Conservation Plan model, a complicated and cumbersome permitting process is likely to discourage applicants. APLIC supports the development of an online application process for incidental take of migratory birds. For example, through the use of GIS and other electronic methods, an applicant would describe their service territory, proposed actions requiring permits, migratory bird species which may be impacted, and the conservation measures that are being implemented (e.g., APPs). This could also expedite the FWS's ability to respond to applicants and issue permits in a timelier manner.

The FWS should invite the Bureau of Land Management and the U.S. Forest Service to be cooperating agencies during the National Environmental Protection Act (NEPA) process to ensure that all agencies are consistent in their MBTA permitting requirements relative to FWS guidance. As stated previously a programmatic permit should cover all utility activities and separate permits should not be required by cooperating agencies for new lines where they are involved in project NEPA.

APLIC recommends that power pole retrofits, and new and rebuilt poles which are avian safe, all qualify as mitigation.

How will eagles be addressed as part of an incidental take permit under MBTA? Could an MBTA permit expedite an eagle take permit, or vice versa?

How will the FWS address ESA listed migratory birds? Will an applicant need to apply for two permits? Is there a way to combine permitting under the proposed MBTA general authorization?

APLIC and the FWS have spent considerable time clarifying and modifying Special Purpose Utility (SPUT) permit conditions. APLIC recommends that SPUT permits should remain in place. Currently, SPUT permits provide the foundation to several critical utility functions including migratory bird and eagle salvage when required, nest removal and modification in emergency situations, nest removal and relocation, and authorization to remove or transport migratory birds. In the absence of an incidental take permit, SPUT permits provide the only mechanism for these critical activities. APLIC feels that SPUT permits should remain in place.

APPs and SPUT permits generally have established monitoring and reporting requirements. An incidental take permit should utilize those existing requirements rather than introduce additional reporting requirements.

SPUT permits generally require annual disposition reports to be submitted to FWS Migratory Bird Permit Office. These reports quantify utility records of avian mortality on an annual basis. This report should establish the baseline of a utility's annual take of migratory birds and any additional calculation of take of migratory birds should not be required. Calculating mortality estimates for MBTA incidental take would be extremely cumbersome and difficult for both the utilities and the FWS.

Methods for reducing electric utility industry impacts to birds are well established by APLIC via the manuals addressing electrocution and collision and the APP guidelines. Integration of these resources into a permitting program should be seamless and not require additional mitigation or compensation, nor should FWS need to develop new guidance for electric utilities since these already exist through APLIC.

The size of a utility needs to be considered when evaluating mitigation methods for incidental take authorization. In some instances it may take decades to retrofit or modify existing utility systems. Large utilities may have millions of poles and span several states or FWS regions. Requiring that all utility poles must be retrofit to qualify for coverage with a permit is not feasible and contradicts prior FWS and APLIC guidance regarding risk prioritization. APLIC suggests that the FWS consider cost and logistics in proposing requirements for mitigation such as retrofits for electric utilities.¹

If current programs afford protection to avian species, the FWS should be authorizing take through those existing programs instead of developing an entirely new regulatory program.

Conclusion

In conclusion, APLIC requests continued involvement as the FWS moves forward with the National Environmental Policy Act process and development of the PEIS. As stated above, APLIC possesses particular expertise relative to electric utility standards and avian interactions with power lines. We have an interest in ensuring that the work we have done thus far regarding electric industry guidance and compliance with existing avian laws and regulations is carried forward in the current proposal. APLIC supports a path forward for a permit authorizing incidental takes of migratory birds however, we are very concerned that the permit as proposed will not be feasible, worthwhile or cost effective and efficient for utilities.

¹ For example, electric utilities differ in size, financial characteristics and other material characteristics (<http://www.nreca.coop/about-electric-cooperatives/co-op-facts-figures/u-s-co-ops-by-the-numbers/>). They range in size from serving about 7.3 million consumers to just 334 consumers. Utilities differ in the number of consumers per mile of line and the annual revenue collected per mile of line, in addition to the miles of line owned, individual traits that impact their engagement in avian mitigation activities.

If you have questions regarding these comments, please contact Mike Best, Pacific Gas & Electric and APLIC Chair, MBB8@pge.com, or Rick Loughery, Edison Electric Institute and APLIC staff, rloughery@eei.org.

Sincerely,

A handwritten signature in blue ink that reads "Mike Best" with a long, sweeping horizontal line extending to the right.

Mike Best
Chair, Avian Power Line Interaction Committee
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