



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

September 15, 2014

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U.S. Fish and Wildlife Service
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SUBJECT: REQUEST FOR INFORMATION CONCERNING THE ENDANGERED SPECIES
ACT SECTION 7 CONSULTATION FOR THE PROPOSED DAVIS-BESSE
NUCLEAR POWER STATION, UNIT 1, LICENSE RENEWAL

Dear Mr. Melius, Ms. Salveter, and Ms. Finfera:

I am writing you today to seek clarification in the consultation pursuant to section 7 of the Endangered Species Act of 1973, as amended (ESA) between the U.S. Nuclear Regulatory Commission (NRC) and the U.S. Fish and Wildlife Service (FWS) for the proposed license renewal of Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse), located in Carroll Township, Ottawa County, Ohio.

Background

In a letter dated February 27, 2014, the NRC requested the FWS's concurrence with its biological assessment for the proposed Davis-Besse license renewal in accordance with ESA section 7. The letter transmitted the biological assessment, which is incorporated as part of the NRC's draft Supplement 52 to NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (SEIS), regarding the license renewal of Davis-Besse. The NRC prepared the SEIS pursuant to the National Environmental Policy Act of 1969, as amended (NEPA). In the draft SEIS, the NRC concludes that the continued operation of Davis-Besse during the license renewal term may affect, but is not likely to adversely affect some Federally listed species and would have no effect on other Federally listed species.

Following this letter, NRC staff and FWS staff at the FWS Ohio Ecological Services Field Office began communications pursuant to the section 7 consultation. Between May and June 2014, NRC and FWS identified three additional species that have the potential to be affected by Davis-Besse license renewal, and NRC sent the FWS supplemental biological assessments via e-mail on May 6, 2014, and June 17, 2014. NRC also transmitted copies of historical bird mortality studies that were conducted at Davis-Besse to the FWS via e-mail on June 24, 2014.

On July 18, 2014, the NRC staff, FWS staff, and representatives of FirstEnergy Nuclear Operating Company (FENOC or the applicant) held a teleconference to discuss several outstanding questions that the FWS had concerning potential impacts to the Federally endangered Kirtland's warbler (*Setophaga kirtlandii*) from possible collisions with the Davis-Besse cooling tower or other tall plant structures. During the teleconference, FWS requested that FENOC undertake bird mortality monitoring on the Davis-Besse site for a period of three years to better determine the potential effects of license renewal on Kirtland's warbler. As part of such monitoring, FWS would want FENOC to develop a monitoring plan for its approval. The NRC documented the teleconference in an August 21, 2014, memorandum, which can be accessed through the NRC's Agencywide Documents Access and Management System (ADAMS) at Accession No. ML14213A002. Since the teleconference, NRC and FWS have remained in informal consultation.

According to the Services' (FWS and the National Marine Fisheries Services (NMFS)) joint regulations at 50 CFR 402.12(j), the Service will respond in writing within 30 days as to whether or not it concurs with the findings of the biological assessment. For all species included in the ongoing consultation except for Kirtland's warbler, the NRC believes that the Services' joint regulations at 50 CFR 402.13(a) apply:

If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

Regarding Kirtland's warbler, FWS has verbally requested that FENOC perform a three-year study. FWS, NRC, and FENOC have discussed this request, which arises, in part, from new studies conducted in Ohio that indicates that migratory birds are at a higher risk of collision with tall structures along Lake Erie than was previously thought. Although the NRC has not seen or reviewed these new studies, the FWS described these studies during the July 18, 2014, teleconference.

NRC understands that the provisions of the ESA allow for the FWS to request additional data during consultation. Specifically, 50 CFR 402.14(f) states the following:

When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's

request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

The NRC believes that the FWS's request for FENOC to perform a three-year study at Davis-Besse would constitute "additional data" in accordance with 50 CFR 402.14(f), which is a subsection of 402.14 "Formal Consultation." The provisions of 50 CFR 402.14 explain that though the FWS may request the Federal agency to initiate formal consultation, it is the Federal agency's responsibility to initiate formal consultation by written request.

NRC, therefore, requests the following information of FWS in order to conclude informal consultation and to determine whether initiation of formal consultation for Kirtland's warbler is appropriate.

NRC Requests of FWS

To facilitate the conclusion of informal consultation and NRC's possible initiation of formal consultation, the NRC requests the following of FWS:

- (1) A written response, preferably by letter, as to whether or not the FWS concurs with NRC's findings in its letter of February 27, 2014, in accordance with 50 CFR 402.12(j). The NRC requests that the response address each of the following species, for which NRC has made an ESA effect determination of "may affect, but not likely to adversely affect": Kirtland's warbler (*Setophaga kirtlandii*), piping plover (*Charadrius melodus*), red knot (*Calidris canutus rufa*), Indiana bat (*Myotis sodalis*), and northern long-eared bat (*Myotis septentrionalis*).¹
- (2) Copies of the studies that FWS described during the July 18, 2014, teleconference that identify new information regarding the risk to Kirtland's warblers from collisions with tall structures along Lake Erie. Such information will facilitate the NRC's requirement to provide the best scientific and commercial data available during formal consultation, if initiated, in accordance with 50 CFR 402.14(d).
- (3) Any additional information that the FWS has that would help NRC decide if formal consultation is appropriate.

Additionally, given that the provisions of 50 CFR 402.14(e) specify a timeline of 135 days between the Federal agency's request to initiate formal consultation and the Service's delivery of a biological opinion to the Federal agency and applicant, the requested three-year study would not fit within the 135-day timeframe. Although the formal consultation provisions allow the Service and the Federal agency to mutually agree to extend the consultation, a consultation involving an applicant cannot be extended for more than 60 days without the consent of the

¹ The NRC made a determination of "no effect" for the eastern prairie fringed orchid (*Platanthera leucophaea*) and lakeside daisy (*Hymenoxys acaulis* var. *glabra*). The NRC understands that FWS does not typically provide its concurrence with "no effect" determinations by Federal agencies and that an agency's finding of "no effect" requires no further informal consultation or the initiation of formal consultation. Accordingly, the written response need not address these species unless FWS finds NRC's "no effect" determinations inappropriate.

applicant. Accordingly, the NRC requests that you provide the following information in accordance with 50 CFR 402.14(e) to support the NRC's and FENOC's consideration of a prolonged formal consultation timeline:

- (1) the reasons why a longer period is required,
- (2) the information that is required to complete the consultation, and
- (3) the estimated date on which the consultation will be completed.

The NRC requests that you provide this information within 30 days of the date of this letter in order to provide enough time for NRC to review the information and consider whether initiation of formal consultation is appropriate.

If you have any questions regarding this letter, please contact Ms. Briana Grange, Biologist, of my staff at 301-415-1042 or by e-mail at briana.grange@nrc.gov.

Sincerely,

/RA/

David J. Wrona, Chief
Environmental Review
and Guidance Update Branch
Division of License Renewal
Office of Nuclear Reactor Regulation

applicant. Accordingly, the NRC requests that you provide the following information in accordance with 50 CFR 402.14(e) to support the NRC's and FENOC's consideration of a prolonged formal consultation timeline:

- (1) the reasons why a longer period is required,
- (2) the information that is required to complete the consultation, and
- (3) the estimated date on which the consultation will be completed.

The NRC requests that you provide this information within 30 days of the date of this letter in order to provide enough time for NRC to review the information and consider whether initiation of formal consultation is appropriate.

If you have any questions regarding this letter, please contact Ms. Briana Grange, Biologist, of my staff at 301-415-1042 or by e-mail at briana.grange@nrc.gov.

Sincerely,

/RA/

David J. Wrona, Chief
 Environmental Review
 and Guidance Update Branch
 Division of License Renewal
 Office of Nuclear Reactor Regulation

Docket No. 50-346

DISTRIBUTION: See next page

ADAMS Accession No.: ML14246A119

*concurring via email

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Letter to T. Melius, A. Salveter, and J. Finferra from D. Wrona dated September 15, 2014

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NUCLEAR POWER STATION, UNIT 1, LICENSE RENEWAL

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