

**December 18, 2014**

**Comments on the Proposed Rule  
To List the Northern Long-eared Bat  
As an Endangered Species**

Submitted by:

**Energy and Wildlife Action Coalition**

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Public Comments Processing

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## **I. INTRODUCTION**

The Energy and Wildlife Action Coalition (EWAC) respectfully submits these comments in response to the U.S. Fish and Wildlife Service's (Service) November 18, 2014 announcement of the reopening of the comment period on the Proposed Rule to List the Northern Long-eared Bat as an endangered species under the Endangered Species Act of 1973, originally published by the Service on October 2, 2013 (Proposed Rule). EWAC was formed in 2014 with member companies consisting of electric utilities, electric transmission providers, and renewable energy companies across the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. The range of the Northern Long-eared bat (NLEB) includes portions of nearly forty states, and given the general nature of its habitat preferences, its listing would significantly impact EWAC members. EWAC appreciates the Service's reopening of the comment period and the opportunity to provide comments on the Proposed Rule.

We provide our comments in greater detail below, but have summarized them here for your convenience:

- Listing of the NLEB as a threatened species or an endangered species is not warranted. However, should the Service determine that listing is warranted, EWAC urges the Service to list the NLEB as a threatened species rather than an endangered species.
- If the Service does list the NLEB as a threatened species, EWAC urges the Service to draft a Special Take Rule in accordance with ESA Section 4(d).

- Section 4(d) gives the Service wide latitude within which to craft an effective Special Take Rule.
- A Special Take Rule would allow the Service to resolve the tension between its January 2014 Northern Long-eared Bat Interim Conference and Planning Guidance and legal obligations that electric utilities and transmission companies have under the authority of the Federal Energy Regulatory Commission, the Environmental Protection Agency, and State Regulatory Agencies.
- EWAC members and others, in coordination with the Service, have already developed and implemented, or are in final discussions with the Service on, best management practices, operational activities, and conservation measures that would be appropriate for inclusion in a Special Take Rule.
- EWAC members would welcome an opportunity to meet with the Service to further discuss ways in which a Special Take Rule could minimize impacts to the electric generation, transmission, and wind energy industries while also minimizing impacts to NLEB.

**II. LISTING THE NLEB AS AN ENDANGERED SPECIES OR THREATENED SPECIES IS NOT WARRANTED. HOWEVER, SHOULD THE SERVICE ISSUE A FINAL RULE TO LIST THE NLEB, EWAC URGES THE SERVICE TO LIST THE NLEB AS THREATENED RATHER THAN ENDANGERED.**

EWAC firmly believes that listing the NLEB as either a threatened species or an endangered species is not warranted. We support the comments of others that have addressed in detail the reasons why listing the NLEB is not warranted.<sup>1</sup> However, should the Service determine that listing is warranted, EWAC urges the Service to make a determination that the NLEB is a threatened species rather than an endangered species.

A threatened species listing would also allow the Service to promulgate a “Special Take Rule” under ESA Section 4(d). EWAC believes that a thoughtfully drafted Special Take

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<sup>1</sup> American Wind Energy Association, Midwest Association of Fish and Wildlife Agencies, Southeastern Association of Fish and Wildlife Agencies, Northeastern Area Association of State Foresters, Southern Group of State Foresters, etc.

Rule could go far to alleviate the impacts of a potential listing on the electric generation, transmission, and renewable industries while still promoting conservation of the NLEB.

### **III. SPECIAL TAKE RULE CONSIDERATIONS**

If the Service does determine that the NLEB should be listed as a threatened species, EWAC believes a Special Take Rule would be especially appropriate for the NLEB. The major potential threat to the NLEB is White Nose Syndrome, not impacts from the industries of concern to EWAC members. However, given the nature of the Endangered Species Act (ESA), the moment a listing of the NLEB becomes effective, EWAC member operations within the NLEB range could potentially be constrained. Routine operations such as vegetation management could experience significant delays and interference in order to maintain compliance with the ESA upon the effective date of the listing. A Special Take Rule could include provisions by which electric generation transmission, and wind energy operations could continue without delay or interference. For example, a set of best management practices or operational measures could be included in a Special Take Rule that, if followed, would allow for a project to continue under the Special Take Rule without risking an ESA Section 9 violation.

#### **A. THE SERVICE HAS BROAD DISCRETION UNDER ESA SECTION 4(D) WITHIN WHICH TO DRAFT A SPECIAL TAKE RULE**

ESA Section 4(d) provides the Service with broad discretion in designing the provisions of a Special Take Rule. ESA Section 4(d) contains two sentences with two individual grants of authority to the Service to promulgate Special Take Rules:

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such

species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title...<sup>2</sup>

The first sentence authorizes the Special Take Rules that are necessary and advisable to provide for the conservation of the species. The second sentence grants a separate, independent authority for the Service to adopt Special Take Rules without the “necessary for the conservation” clause of the first sentence.

In the most recent polar bear litigation, the Service itself argued that Section 4(d) provides the Service with these two separate grants of authority.<sup>3</sup> The Service characterized Special Take Rules promulgated under the second sentence as “decisions by the Service, in its discretion, to extend some, all, or none of the Section 9(a)(1) prohibitions to threatened species and the Service need only provide a rational explanation for such rules.”<sup>4</sup>

Courts have also held that the second sentence of ESA 4(d) gives the Service broad discretion. The D.C. Circuit has consistently found that:

“there is a reasonable reading of § 1533(d) that would not require [the Service] to issue formal ‘necessary and advisable’ findings when extending the prohibitions to threatened species. According to this interpretation, the two sentences of § 1533 give separate grants of authority. The second sentence gives [the Service] discretion to apply any or all of the [Section 9] prohibitions to threatened species without obliging it to support such actions with findings of necessity. Only the first sentence of § 1533(d) contains the ‘necessary and advisable’ language and mandates formal individualized findings.”<sup>5</sup>

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<sup>2</sup> 16 U.S.C. § 1533(d).

<sup>3</sup> Defendants’ Motion for Summary Judgment, *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F.Supp.2d 214 (D.C. Dist. 2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Sweet Home Chapter of Cmities. For a Great Oregon v. Babbitt*, 1. F.3d 1, 8 (D.C. Cir. 1993), modified on other grounds on reh’g, 17 F.3d 1463 (D.C. Cir. 1994), rev’d on other grounds, 515 U.S. 687 (1995); *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F.Supp.2d 214 (D.C. Dist. 2011).

The Service has regularly exercised this discretion -- some examples include the Special Take Rules for the Preble's meadow jumping mouse,<sup>6</sup> the streak horned lark, and Mazama pocket gophers.<sup>7</sup> Therefore should the Service decide to list the NLEB as threatened and promulgate a Special Take Rule, the Service has the discretion to tailor Special Take Rules to the unique circumstances surrounding the NLEB.

**B. A SPECIAL TAKE RULE COULD RESOLVE THE CONFLICT BETWEEN THE ELECTRIC GENERATION AND TRANSMISSION INDUSTRIES' OBLIGATIONS TO COMPLY WITH FEDERAL AND STATE REGULATORY REQUIREMENTS AND THE SERVICE'S JANUARY 2014 NORTHERN LONG-EARED BAT INTERIM CONFERENCE AND PLANNING GUIDANCE.**

The Service's January 2014 Northern Long-eared Bat Interim Conference and Planning Guidance includes several constraints on vegetative management of trees 3 inch dbh or greater. These constraints are at odds with EWAC members' safety and reliability obligations under Federal Energy Regulatory Commission (FERC) requirements. Namely, operators of electric industry infrastructure must perform vegetative management to ensure the safety, reliability, and durability of their operations in accordance with National Electric Reliability Corporation (NERC) Standards.<sup>8</sup> For example, these obligations must be

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<sup>6</sup> 50 C.F.R. §§ 17.40(a), 17.40(l), 17.41(a). The Special Take Rule for the Prebles meadow jumping mouse exempts the following legally conducted activities: (1) rodent control inside or within 10 feet of any structure; (2) established, ongoing agricultural activities that do not change in their scope; (3) maintenance and replacement of existing landscaping; (4) existing uses of water pursuant to a perfected State water right; (5) noxious weed control; and (6) ditch maintenance activities that do not cause significant habitat loss and follow designated Best Management Practices. *Id.* at § 17.40(l).

<sup>7</sup> Similarly, the Special Take Rules for the Mazama pocket gopher and the streaked horned lark each allow for noxious weed control and an accepted set of agricultural practices. *Id.* at §§ 17.40(a), 17.41(a). The Mazama pocket gopher Special Take Rule also provides that routine maintenance of roadside rights-of-way is exempt. *Id.* at § 17.40(a).

<sup>8</sup> NERC is a nonprofit regulatory authority that regulates the bulk power system in North America to ensure reliability, and NERC is subject to FERC oversight and regulation. The NERC Transmission Vegetation Management standards (FAC-003-3) were approved, with modifications, by FERC. Order No. 785, Federal Electric Regulatory Commission (Sept. 19, 2013); FAC-003-3 — Transmission Vegetation Management, *available at* <http://www.nerc.com/files/FAC-003-3.pdf>.

met timely and, in many instances, may not be limited or postponed to particular seasons. Storm events that require extensive tree clearing and cutting can, and most times do, occur during periods when NLEB may be present, and the events require immediate action by utilities to restore electricity service. Moreover, in northern climates, weather conditions may not permit conducting safe and effective vegetative management in the winter. The removal of “danger trees”—any trees that are growing into a power line or are at risk of falling into a power line—is often done on an emergency basis and during summer months when access is possible, the heaviest electricity system demands occur, and fire risk is heightened. Importantly, NLEB may be present during these same summer months when tree removal may be required to meet reliability requirements. Finally, preventive maintenance of transmission lines and rights-of-way that may require vegetation clearing often must occur throughout the year in order to ensure continual safe and reliable transmission.

In sum, planned maintenance, emergency maintenance, and preventive maintenance cannot be isolated to months when the NLEB is absent if the FERC safety and reliability obligations are to be met. If the Service continues to rely on its January 2014 Northern Long-eared Bat Interim Conference and Planning Guidance in a post-listing environment, then the vegetative management constraints provided in that Guidance put EWAC members at risk of violating federal reliability requirements. A Special Take Rule could resolve this conflict and allow for vegetative management where required by FERC or other statutes or regulations.

**C. THE ELECTRIC GENERATION, TRANSMISSION, AND WIND ENERGY INDUSTRIES HAVE OR ARE DEVELOPING SEVERAL BEST MANAGEMENT PRACTICES AND OPERATIONAL STANDARDS IN COORDINATION WITH THE SERVICE THAT MINIMIZE IMPACTS TO NLEB THAT WOULD BE APPROPRIATE FOR INCLUSION IN A SPECIAL TAKE RULE.**

Many EWAC members and/or other members of their trade associations operating within the range of NLEB have already established and implemented, or are developing measures in coordination with the Service that avoid and minimize impacts to NLEB. Should the Service move forward with drafting a Special Take Rule, EWAC members believe that these measures would fit well within a Special Take Rule and honor the very type of collaborative decisions that the Service seeks to foster.

In addition to the potential of resolution of conflict with FERC regulations described in Section III(B) above, many electric generation and transmission companies already implement best management practices that minimize impacts to habitat and, in some cases, help maintain habitat. EWAC believes a Special Take Rule incorporating an acceptable set of best management practices for clearing and maintenance of rights-of-way for electric and transmission facilities, and other associated infrastructure is within the Service's discretion.

Similarly, many operating wind facilities are already implementing best management practices, operational adjustments and other conservation measures (pursuant to incidental take permits, bird and bat conservation strategies or in coordination with technical assistance from the Service) designed to significantly reduce (and primarily, for brief periods, avoid altogether) impacts to bat species, including the NLEB. A Special Take Rule should allow for those projects to continue without interruption or risk of enforcement for NLEB take. EWAC believes a Special Take Rule incorporating an

acceptable set of best management practices and operational measures for the operation and maintenance of wind energy facilities is within the Service's discretion. Should the Service list the NLEB as a threatened species and consider a Special Take Rule, EWAC members would appreciate the opportunity to work with the Service to develop an acceptable set of measures for the electric, transmission, and wind energy industries for inclusion in a Special Take Rule.

**D. EWAC MEMBER INDUSTRIES CAN HAVE LARGE TRACTS OF FORESTED LANDS ASSOCIATED WITH THEIR FACILITY LANDHOLDINGS THAT REQUIRE SILVICULTURAL MANAGEMENT AND ACTIVITIES.**

Many EWAC members operating within the range of NLEB have large land holdings and have already established and implemented or are developing silvicultural management plans for their forested landholdings. These plans include sustainable forest management practices that restore and enhance habitat suitability for a wide variety of wildlife species that includes the NLEB. If the Service continues to rely on its January 2014 Northern Long-eared Bat Interim Conference and Planning Guidance in a post-listing environment, then the vegetative management constraints provided in that Guidance again put EWAC members at risk of violating federal and state requirements. A Special Take Rule that removes the "take" prohibition from such silvicultural activities would be warranted.

**IV. CONCLUSIONS**

We welcome your invitation to comment on the Proposed Rule. While EWAC does not believe a listing is warranted, should the Service decide to list the NLEB, EWAC believes a threatened species listing would be protective of the NLEB and through a Special Take Rule, resolve potentially significant conflicts with other statutes and regulations. EWAC believes a Special Take Rule could be extraordinarily effective for the regulated community

and would appreciate the Service's consideration of the suggested measures described in Section III. EWAC would also welcome the opportunity to meet with the Service to further develop and refine measures that would be proper for inclusion in a Special Take Rule.

We look forward to continued discussion with the Service. If you have any questions regarding these comments please feel free to contact the following EWAC representatives:

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