

**March 17, 2015**

**Comments regarding the January 16, 2015  
Notice of a Proposed Rule under Section 4(d)  
Of the Endangered Species Act  
For the Northern Long-Eared Bat**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

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Attn: FWS-R5-ES-2011-0024  
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The Energy and Wildlife Action Coalition (“EWAC”) submits these comments in response to the U.S. Fish and Wildlife Service (“Service”) January 16, 2015 notice of a proposed species-specific rule (“Proposed 4(d) Rule”) for the northern long-eared bat (“NLEB”) under Section 4(d) of the Endangered Species Act of 1973 (“ESA”). EWAC is a national coalition formed in 2014, whose member companies consist of electric utilities, electric transmission providers, and renewable energy companies operating throughout 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.

As stated in our December 18, 2014 comments in response to the Service’s 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 (originally published by the Service on October 2, 2013), the range of the NLEB includes all or portions of nearly forty states, and, given the broad nature of the species’ habitat preferences, its listing could significantly impact EWAC members. Should the Service determine that listing as a threatened species is warranted, EWAC encourages the Service to carefully consider these comments with regard to the Proposed 4(d) Rule. EWAC appreciates the opportunity to provide comments on the Proposed 4(d) Rule.

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

- Wind Energy Facilities Should Be Included in the Proposed 4(d) Rule, and EWAC Supports the American Wind Energy Association’s (“AWEA”) Proposed Set of Conditions for the Inclusion of Wind in the 4(d) Rule.

- New Electric Transmission and Distribution Rights-of-Way Should Be Included in a Final 4(d) Rule, and EWAC Supports Edison Electric Institute’s (“EEI”) Recommended Clarifications for a Final 4(d) Rule.
- New Photo-Voltaic (“PV”) Solar Facilities Should Be Included in a Final 4(d) Rule.
- The Service Has the Legal Authority to Include Wind Energy Facilities, New Electric Transmission and Distribution Rights-of-Way, and PV Solar Projects in a Final 4(d) Rule.
- A Map of the “WNS Buffer Zone” Should Be Included in a Final 4(d) Rule, and Future Changes to the WNS Buffer Zone Should Follow a Formal Rule-making Process.

**I. WIND ENERGY FACILITIES SHOULD BE INCLUDED IN THE FINAL 4(D) RULE, AND EWAC SUPPORTS AWEA’S PROPOSED SET OF CONDITIONS FOR THE INCLUSION OF WIND IN THE RULE.**

The wind energy industry is the only industry that the Service identifies as a non-primary threat factor that is not also included in the Proposed 4(d) Rule.<sup>1</sup> The Service notes that white nose syndrome (“WNS”) is the primary factor driving the listing, and the Service has stated that human threats—including forest management activities, wind energy development, and habitat modification, destruction and disturbance—constitute non-primary threat factors.<sup>2</sup> EWAC is aware of no basis for the exclusion of wind energy facilities. EWAC urges the Service to include wind energy facilities should the Service promulgate a final 4(d) rule for the NLEB.

The American Wind Energy Association (“AWEA”) has filed comments supporting the inclusion of wind energy facilities in any final 4(d) rule and has provided a proposed set of conditions for inclusion in the rule. The AWEA comments provide an analysis of research and findings specific to wind energy facilities’ impacts on the NLEB. Based on current research findings and mortality studies, AWEA concludes that wind energy facilities are appropriate for inclusion in any final 4(d) rule.

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<sup>1</sup> 80 Fed. Reg. 2371, 2373 (Jan. 16, 2015).

<sup>2</sup> 78 Fed. Reg. 61046 (Oct. 2, 2013); 80 Fed. Reg. 2371, 2373 (Jan. 16, 2015).

As stated above, the Service appears to be comfortable including other industries identified as non-primary threats, such as forest management, in any final 4(d) rule. While the Service has been hesitant to extend 4(d) exemptions to the younger wind energy industry, the body of research addressing the wind energy industry's impact on the NLEB is sufficient to establish that the potential negative impact on the species from wind energy development is minimal and no greater than the impacts of other industry activities exempted by the Service in the Proposed 4(d) Rule. The research cited by AWEA in its comments provides substantial support for the inclusion of wind energy facilities in any final 4(d) rule. AWEA's research findings arrive at similar conclusions as the extensive NLEB survey undertaken by Enbridge for its Sandpiper pipeline in the Midwest. Notably, research from both sources indicates that the NLEB population may be stronger than scientists had previously thought. In short, as further described in AWEA's comments, research has shown that wind energy development poses no greater threat to the NLEB than the other industries included in the Proposed 4(d) Rule and should be included in any final 4(d) rule.

AWEA's proposed set of measures for inclusion of wind energy facilities in any final 4(d) rule includes a suite of operational adjustments, best management practices, and conservation actions. The proposed set of measures is designed to be implemented as a comprehensive program, to which wind energy facilities deemed to have sufficient risk of "take" of NLEB would have to adhere in order to be exempted from the ESA Section 9 "take" prohibition. These measures would provide an option for the affected wind energy facilities to adjust their operations (through feathering and raising cut-in speeds) during migration season. The proposed set of measures also incorporates the vegetative management constraints similar to those provided for other industries under the Proposed 4(d) Rule. AWEA's set of measures also provide an adherence option that includes a conservation funding component for wind energy facility

operations and development. For those wind energy facilities electing to adhere to that compliance option, this component would provide up-front funding for WNS research and recovery programs—funding which would not be available if each wind energy facility must navigate the ESA Section 10 process while the disease continues to advance—and would provide immediate benefits to the NLEB. Moreover, the inclusion of AWEA’s set of proposed measures would allow the Service to devote its limited resources elsewhere to more critical needs. EWAC supports AWEA’s proposed set of measures for the inclusion of wind energy facilities in any final 4(d) rule.

AWEA’s comment letter includes a cost-to-benefit analysis of the consequences should the Service list the NLEB as endangered or exclude wind energy facilities from a final 4(d) rule. AWEA’s analysis considers the cost and time required to develop individual Habitat Conservation Plans (“HCPs”), including the significant (and, for many existing facilities, economically infeasible) lost revenue should the Service recommend a mode of avoidance (e.g., 6.9 m/s cut-in speed), the Service resources required to process these HCPs, and the expected de minimis impacts to the NLEB as demonstrated by research. The analysis highlights the significant cost and time savings, as well as conservation benefits, of including wind energy in a final 4(d) rule. EWAC encourages the Service to consider this analysis in finalizing its listing determination.

## **II. NEW ELECTRIC TRANSMISSION AND DISTRIBUTION RIGHTS-OF-WAY SHOULD BE INCLUDED IN A FINAL 4(D) RULE, AND EWAC SUPPORTS EEI’S RECOMMENDED CLARIFICATIONS FOR A FINAL 4(D) RULE.**

EWAC supports the Proposed 4(d) Rule’s provision for electric transmission and is appreciative of the Service’s responsiveness to industry concerns regarding the importance of safety and reliability considerations in the delivery of electricity. By allowing for vegetative management in existing rights-of-way and exempting “removal of hazardous trees for the

protection of human life and property,” the Proposed 4(d) Rule enables transmission companies to meet their obligations as required by the Federal Energy Regulatory Commission and the National Electric Reliability Corporation. However, to be truly effective, the Proposed 4(d) Rule would benefit from looking beyond currently existing facilities and the limited expansion of rights-of-way to expressly include the new rights-of-way necessary for transmission and distribution to meet service and reliability requirements.

Given the minimal impacts on the NLEB that result from the construction and maintenance of rights-of-way,<sup>3</sup> a final 4(d) rule should also include new rights-of-way to fully accommodate the needs of electric and transmission companies. New rights-of-way are necessary to provide service to new rural and tribal customers or make new service connections to new generation facilities. New transmission is not always able to capitalize on existing rights-of-way—sometimes safety and security reasons dictate that the safest, most reliable approach is the construction of new rights-of-way. Electric transmission carries with it significant public interests—embodied in the safety and reliability requirements—that must be taken into consideration. Transmission has limited ability to avoid the NLEB’s range and habitat, because transmission must be responsive to service demands and meet regulatory requirements for reliability and safety in the service area. Excluding new rights-of-way from any final 4(d) rule would be unreasonably burdensome to the transmission industry. Including the same conservation measures outlined in the Proposed 4(d) Rule for forestry practices and existing transmission rights-of-way for new rights-of-way will be sufficiently protective of NLEB hibernacula and summer maternity roosts. A final 4(d) rule, in conjunction with its inclusion of the expansion of existing rights-of-way, should include new

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<sup>3</sup> EWAC encourages the Service to consider the research submitted by Mark West Energy Partners L.P. in support of the position that re-vegetated linear projects have a negligible impact on the NLEB and, in some cases can be beneficial to NLEB habitat.

rights-of-way when utilization of current rights-of-way would be insufficient to satisfy service and reliability regulations.

The Edison Electric Institute (“EEI”) has also submitted comments supporting the inclusion of new electric transmission in the 4(d) rule, and EWAC supports EEI’s comments and incorporates them here by reference. EEI’s comments propose some minor clarifications for incorporation into a final 4(d) rule. EWAC believes a final 4(d) rule would benefit from these minor clarifications. These clarifications include the following:

- There are circumstances where removal of non-hazardous trees may be required to respond to an emergency situation. The Proposed 4(d) Rule’s emergency response provision includes activities that may affect hazardous trees. However, it is not clear that removal of non-hazardous trees that are involved in an emergency situation falls within the scope of the Proposed 4(d) Rule. EWAC supports EEI’s proposed language clarifying that non-hazardous trees may be removed where needed to respond to emergency situations.
- The Proposed 4(d) Rule uses the term “transmission corridors,” and in this letter we, too, speak generally in terms of transmission rights-of-way. EWAC believes that the Service would minimize uncertainty if the final 4(d) rule is written more precisely and clarifies that both transmission and distribution corridors are included in the scope of the rule.

EWAC respectfully requests that the Service include new electric transmission and distribution rights-of-way and incorporate the clarifications listed above (and included in EEI’s comment letter) into any final 4(d) rule. Inclusion of both new and existing infrastructure would allow the industry to consistently address the NLEB throughout all stages of infrastructure projects. The inclusion of new rights-of-way in a final 4(d) rule would also conserve Service time and resources, allowing the Service to focus on primary threats and other conservation actions for the NLEB and other bat species.

### **III. NEW PHOTO-VOLTAIC (PV) SOLAR FACILITIES SHOULD BE INCLUDED IN A FINAL 4(D) RULE.**

New PV solar facilities should be included in any final 4(d) rule. The current rapid expansion of PV solar energy development across the range of NLEB is being driven by falling technology prices, tax incentives, and federal and state energy policies. The vast majority of solar projects are not expected to impact the NLEB in that they are typically sited on open lands outside of NLEB habitat. However, there are times that some limited tree cutting and clearing is required, similar to forestry clear-cutting or utility line right-of-way maintenance or limited expansion—actions that are already included in the Proposed 4(d) Rule. EWAC proposes to include new PV solar energy facilities in any final 4(d) rule due to the similar and related nature of impacts on the NLEB. The conservation measures outlined in the Proposed 4(d) Rule for forestry and utility line maintenance and limited expansion would apply and be adequate to provide protection to NLEB hibernacula and summer maternity roosts.

### **IV. THE SERVICE HAS THE LEGAL AUTHORITY TO INCLUDE WIND ENERGY FACILITIES, NEW ELECTRIC TRANSMISSION AND DISTRIBUTION RIGHTS-OF-WAY, AND PV SOLAR FACILITIES IN A FINAL 4(D) RULE.**

The Service possesses great flexibility in designing a 4(d) rule that addresses the specific challenges faced by a species. As discussed in EWAC's December 18, 2014 comments on the Proposed Rule to List the Northern Long-eared Bat as an Endangered Species, ESA Section 4(d) provides the Service with broad discretion in designing the provisions of a species-specific rule.<sup>4</sup> Section 4(d) includes two sentences, each of which contains a separate grant of authority:

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

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<sup>4</sup> 16 U.S.C. § 1533(d).



regulation prohibit with respect to any threatened species any act prohibited under section [9(a)(1)] of this [Act]...<sup>5</sup>

The first sentence authorizes a 4(d) rule determined to be necessary and advisable to provide for the conservation of the species. “Conservation” is defined broadly in the ESA, and allows the use of “all methods and procedures” to achieve the purpose of the statute.<sup>6</sup> The second sentence grants a separate authority to adopt a 4(d) rule independent of the “necessary for the conservation” clause of the first sentence.

The Service and the courts have both supported this interpretation of Section 4(d). The Service itself has argued that Section 4(d) equips the Service with two separate sources of authority.<sup>7</sup> The Service has characterized 4(d) 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,” stating that “the Service need only provide a rational explanation for such rules.”<sup>8</sup> Courts have also held that the second sentence of Section 4(d) grants the Service broad discretion in crafting species-specific 4(d) rules.<sup>9</sup> The two statutory grants of authority allow and encourage the Service to design 4(d) rules that are tailored to species-specific threats and circumstances, and they permit a 4(d) rule to focus on the factors posing the greatest threats to a species, threats which could affect the species’ populations.<sup>10</sup> Therefore, should the

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* § 1532(3).

<sup>7</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>8</sup> *Id.*

<sup>9</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).

<sup>10</sup> *See, e.g., Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988) (upholding sea turtle 4(d) rule requiring shrimp trawlers to use “turtle excluder devices”).

Service decide to list the NLEB as threatened and promulgate a 4(d) rule, the Service has the discretion to tailor that rule to the unique circumstances surrounding the NLEB.<sup>11</sup>

**V. A MAP OF THE “WNS BUFFER ZONE” SHOULD BE INCLUDED IN A FINAL 4(D) RULE, AND FUTURE CHANGES TO THE WNS BUFFER ZONE SHOULD FOLLOW A FORMAL RULE-MAKING PROCESS.**

The Proposed 4(d) Rule introduces the concept of a WNS buffer zone, defined as “the portion of the range of the northern long-eared bat within 150 miles of the boundaries of the U.S. counties or Canadian districts where [WNS] has been detected. For current information regarding the WNS buffer zone, contact your local Service field office.”<sup>12</sup> Having the local Service field offices controlling the boundaries of the WNS buffer zones creates regulatory uncertainty for project proponents. Given the regulatory implications for a project falling within the WNS buffer zone, a project proponent must have regulatory certainty in order to anticipate costs related to ESA compliance. A map of the WNS buffer zone should be included in the text of a final 4(d) rule, and should the Service desire to amend the boundaries of the WNS buffer zone, such amendment should follow a formal rule-making process (including a notice and comment period), consistent with the Administrative Procedure Act, to afford those potentially affected by the WNS buffer zone regulatory certainty by which they can plan projects.

**VI. CONCLUSION.**

The Service should utilize the flexibility afforded under the ESA in designing a final 4(d) rule that addresses the primary threat faced by the NLEB and exempts industry activities that will

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<sup>11</sup> See 50 C.F.R. §§ 17.40(a), 17.40(l), 17.41(a). The 4(d) 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; (6) ditch maintenance activities that do not cause significant habitat loss and follow designated Best Management Practices. *Id.* at § 17.40(l). Similarly, the 4(d) rule 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 rule also provides that routine maintenance of roadside rights-of-way is exempt. *Id.* at § 17.40(a).

<sup>12</sup> Proposed 4(d) Rule at 2378.

not cause significant, population-level effects on the species. EWAC believes that the conservation benefits to the NLEB would be increased through the inclusion of wind energy, new electric transmission and distribution, and PV solar energy facilities in any final 4(d) rule promulgated for the NLEB. EWAC supports AWEA's proposed set of conditions for inclusion of wind energy development in the final 4(d) rule and urges the Service to include wind energy facilities in the rule. The wind energy industry has conducted significant research, the results of which demonstrate the low risk the wind energy industry poses to the NLEB and the identification of effective methods to further lessen the risk. The inclusion of wind energy facilities in the final 4(d) rule would provide significant and immediate benefits to the NLEB by incentivizing the application of operational adjustments and best management practices to significantly reduce already relatively insignificant impacts of the wind industry and potentially securing funds with which the primary threat of WNS could be studied and combated. Further, EWAC believes that provision for new electric transmission and distribution rights-of-way should be explicitly included in any final 4(d) rule for the species. EWAC supports EEI's comments in support of such inclusion and further clarifications. EWAC also posits that PV solar facilities should similarly be included in a final 4(d) rule as PV solar development would have minimal impacts to NLEB. These industries warrant inclusion in the final rule and consistent treatment of the NLEB throughout the lifespan of their projects. Development of a final 4(d) rule tailored to address the balance of threats to the NLEB is essential to provide a workable strategy for the successful conservation and recovery of the species. Finally, EWAC believes that any amendments to the WNS buffer zone should follow a formal rule-making process consistent with the APA.

EWAC would appreciate the Service's consideration of inclusion of wind energy facilities new electric transmission and distribution rights-of-way, and PV solar development in a final 4(d) rule. EWAC would also welcome the opportunity to meet with the Service to assist it in the

development and refinement of specific measures that would be appropriate for inclusion in a final 4(d) rule. We look forward to continued discussion on these issues. Please feel free to contact the following EWAC representatives:

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