EWAC®
Energy and Wildlife Action Coalition

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Comments regarding:

March 23, 2022 Proposed Rule to List the Northern Long-Eared Bat as an Endangered Species under the Endangered Species Act

Submitted by:

Energy and Wildlife Action Coalition

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Docket No. FWS-R3-ES-2021-0140

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the U.S. Fish and Wildlife Service's ("Service") March 23, 2022 proposed rule to list the northern long-eared bat ("NLEB") as an endangered species under the Endangered Species Act ("Proposed Rule").[2] EWAC provides these comments on the Proposed Rule based on the knowledge and experience of its membership.

EWAC respects the Service's work to protect endangered, threatened, and at-risk species, and recognizes the role of regulated industries in environmental stewardship. EWAC members have implemented meaningful commitments to mitigate the negative effects of human development activity, often partnering with the Service to go beyond regulatory requirements and take on voluntary efforts to promote the health and recovery of sensitive species. Where the threat to a species is not caused by development activity, conservation of these species under the Endangered Species Act ("ESA") poses a unique challenge to both the Service and the regulated community. This unfortunate situation is becoming more common as the effects of climate change and invasive species, including pathogens, are felt in the United States.

The NLEB is one such species. The primary threat to the species is white-nose syndrome ("WNS"), a devastating infectious disease that kills significantly greater numbers of NLEBs than all other threats to the species combined.[3] The unfortunate reality is that intensifying constraints on the regulated community will do little to conserve the NLEB and promote its recovery. Absent an efficient ESA compliance mechanism, the impact of an endangered listing on the renewable energy and electric transmission and distribution industries will be significant at a time when deployment of these resources is critical. Indeed, Executive Order 14057 declares it a priority to achieve a nationwide energy transition toward carbon pollution-free electricity sector, which will, out of necessity, require deployment of renewable energy and associated transmission and distribution lines.[4]

EWAC urges the Service to reduce the negative impacts of such a listing on the renewable energy and electric transmission and distribution sectors by using all ESA tools at the Service's disposal to protect the NLEB while also supporting the nation's transition to clean energy. It is important that the regulations the Service administers to protect the NLEB result in effective conservation by addressing true threats to the species while allowing the renewable energy and electric transmission and distribution sectors to undertake the crucial work to achieve the Biden-

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. 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, affordable, and increasingly clean electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] 87 Fed. Reg. 16,442 (Mar. 23, 2022).

[3] By the Service's own estimations, WNS has caused estimated NLEB population declines of 97-100% across 79% of the species' range. *See* Species Status Assessment Report for the Northern long-eared bat (*Myotis septentrionalis*) Version 1.1 at iv.

[4] Executive Order 14057: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,943 (Dec. 13, 2021).

Harris Administration's stated priorities of addressing climate change, modernizing the power grid, and pursuing environmental justice.[5] If the Service finalizes the Proposed Rule as written, the misguided emphasis on wind energy, and the absence of practicable ESA section 9 guidance will increase the regulatory burden on the electric power industry, hindering the development of new renewable energy projects, the modernization of transmission and distribution infrastructure, and the maintenance of safe rights-of-way.

Below, EWAC: (1) explains its objection to the Proposed Rule's singling out of the wind energy industry as a significant stressor on the NLEB's health as a species; (2) requests that the Service identify, consistent with agency policy, activities that would and would not constitute a violation of ESA section 9 to provide some certainty to the regulated community and ease the burden on Service resources; and (3) suggests methods by which the Service might alleviate the impacts this listing will have on both EWAC members and this Administration's clean energy goals.[6]

I. The Service inappropriately singles out wind energy as a threat to the NLEB and should revise the Species Status Assessment to more accurately describe wind energy impacts to the NLEB.

EWAC understands the appeal of using available data to attribute the decline of the NLEB to anthropogenic causes, as these causes may provide a more straightforward mechanism both to estimate and address impacts compared to other, less-measured sources of impact. This is particularly true where an industry has worked with the Service to gather and share data, as is the case with the wind energy industry. However, WNS, not anthropogenic causes of any type, is the overwhelming cause of the dramatic, species-level decline of the NLEB. The Service estimates that WNS is responsible for more than 90% of the NLEB's population decline,[7] thus deserving of its categorization as a having a very high impact on the species.[8] And yet, wind energy is categorized as having a "medium impact" on the species, despite the industry's comparatively minimal effect on the NLEB.[9] Singling out production of wind energy as a significant stressor for this species' struggle is misguided, contrary to best available scientific and commercial information, and ultimately harmful to both the bat's recovery and the industry's role in supporting the Biden-Harris Administration's climate initiatives.

The Service's Species Status Assessment Report ("SSA") makes several unsupported assumptions with respect to the NLEB population size and the projected impacts of wind energy,

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[5] *See* Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021). *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*; available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

[6] 59 Fed. Reg. 34,272 (July 1, 1994).

[7] *See* SSA at iv, estimating that WNS causes 97% - 100% population declines across nearly 79% of the NLEB's range.

[8] *Id.* at 43.

[9] *Id.*

some of which are described below. While the SSA estimates that 122 NLEBs are killed annually at wind energy facilities based on the 2020 installed megawatt capacity, the SSA provides little context on how the loss of 122 NLEBs relates to overall population trends or abundance, and as detailed in the next paragraph below, we question the accuracy of this estimate. To better understand how the Service has characterized wind energy impacts, EWAC reviewed recent habitat conservation plans approved by the Service. In these Service-approved plans, the overall losses of the NLEB predicted at a wind energy facility represent much less than one percent of a reduced NLEB population, even when taking into account WNS declines.[10] Given the extremely low impact of individual wind energy operations on the NLEB described in recent habitat conservation plans, when one extrapolates this impact across wind energy buildout within the NLEB's range, the cumulative potential impact of wind energy on the NLEB is still exponentially smaller than the impact of WNS on the species. Given this fact, the Service's characterization of wind energy as having a medium impact on the NLEB is unsupported by available information.

Further, the SSA inappropriately implies that mortality due to wind turbines has occurred at the same rate over the years, including years prior to WNS's widespread reach across the species' range, and that mortality will continue to occur at this rate moving forward.[11] The Service's only acknowledgment of an expected decrease in NLEB fatalities attributable to wind energy as populations continue to decline is to characterize wind energy as having a medium impact, instead of a high impact, on the species.[12] But simply changing the impact category in this way is not enough; categorizing wind energy as a moderate threat still overstates the impact the industry will have on the species, even if it is less egregious than claiming the impact would be severe.

Extrapolating harm to the NLEB based on metrics that take into account neither the current state of population declines nor the resulting declines in wind-caused bat mortalities results in inflated numbers that do not align with the data wind energy operators are collecting at

[10] Bitter Ridge Wind Farm, LLC, *Indiana Bat and Northern Long-Eared Bat Habitat Conservation Plan for the Bitter Ridge Wind Farm, Jay County, Indiana* (May 6, 2021) at 50 (citing to a 2016 Service resource to support a statement of 127,842 NLEB, and then assuming a 98% reduction due to WNS would mean a population of 2,557 bats before concluding the predicted take at the wind energy facility would result in a reduction in population that does not have a significant impact on the species-level health of NLEB); *see also* Headwaters II Windfarm LLC, *Indiana Bat and Northern Long-Eared Bat Habitat Conservation Plan for the Headwaters II Wind Farm, Randolph County, Indiana* (Aug. 2021) at 51; Meadow Lake Wind Farm LLC, *Indiana Bat and Northern Long-Eared Bat Final Habitat Conservation Plan for the Meadow Lake Wind Resource Area, White and Benton Counties, Indiana* at 36, 55, 59.

[11] For example, the Service uses mortality estimates from 2003 and carries forward those rates by multiplying them by the increased wind capacity in the United States over time. The SSA alleges that "higher wind fatality rates have since been reported," but these higher rates do not align with the data the industry has regarding the success of curtailment efforts and the *decrease* in bat mortality over the past decade. *See* SSA at 38.

[12] *See* SSA at 43, acknowledging "A "medium" impact level for wind mortality was decided on in part due to mortality rates being kept constant for projections in the model and as declines increase, presumably so will exposure to wind mortality, which reduces overall impact."

their project sites in connection with post-construction monitoring efforts.[13] Due to the dramatic decrease in the NLEB on the landscape, it is now far less likely that individual animals are encountering turbines at the same rate of occurrence as when WNS first appeared, which was already limited. While wind energy operators did discover NLEB fatalities prior to and early in the onset of WNS, published data show that no NLEB fatalities have been discovered during fatality monitoring since 2015.[14] This lack of fatality discoveries since 2015 is not attributable to a lack of monitoring or effort. Wind energy operators have conducted extensive post-construction monitoring to adhere to the Service's Land-Based Wind Energy Guidelines' recommendations, ESA section 10 permits, and in fulfillment of monitoring requirements imposed at the state level in many states.[15] These monitoring efforts are extremely intensive and the number of wind energy facilities on the landscape has increased significantly, which together provide a large pool of data.

The Service appears to dismiss this fact that fatality discoveries of the NLEB at wind energy facilities are declining, even though there are far more wind energy facilities on the landscape and more monitoring is being conducted as a result of this increase. The Service also fails to acknowledge the likelihood that, as the NLEB's numbers unfortunately continue to decline due to WNS, fewer NLEBs are likely to collide with wind energy infrastructure in the future. The Service does note "fatality rates are likely to decline as the abundance declines;" however, the Service then continues on to project significant increases in collisions with wind infrastructure 25 years in the future.[16] Given that wind energy development on the landscape has increased significantly since the onset of WNS and an increase in NLEB fatalities has not been seen (in fact, the opposite has occurred), the SSA projection is not supported by the available data.[17]

Put simply, the best available data makes clear the number of NLEB fatalities attributable to wind turbines is overestimated by the models relied on in the SSA. The disconnect between the Service's estimations and underlying assumptions and the trends in observed fatalities seen firsthand by EWAC-member organizations and their biological consultants must be reconciled and appropriately addressed in the SSA and final listing decision. The unsupported and disproportionate focus on wind energy as a stressor to the NLEB negatively impacts the Service's and public's view of wind energy development, which is detrimental to furthering the

[13] *See* Western Ecosystem Technologies, Inc. (WEST), *Regional Summaries of Wildlife Fatalities at Wind Facilities in the United States and Canada 2020 Report*, 1, 3 (2020) https://west-inc.com/wp-content/uploads/2021/07/WEST_2020_RenewWildlifeFatalitySummaries.pdf.
[14] *Id.*
[15] *See* U.S. Fish and Wildlife Service, *U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines*, (Mar. 23, 2012) https://www.fws.gov/media/land-based-wind-energy-guidelines; *see e.g.,* Amendment to the On-Shore Bird and Bat Pre- and Post-Construction Monitoring Protocol for Commercial Wind Energy Facilities in Ohio (June 12, 2011) https://ohiodnr.gov/static/documents/wildlife/wildlife-management/wind%20%20postconstructionmonitoringprotocol.pdf.
[16] SSA at 38, Tables A-3D1, A-3D2.
[17] *See* SSA at 51.

Biden-Harris Administration's climate goals. Wind energy has, and will continue to have, a key role in combatting climate change, which will ultimately benefit the NLEB.

II. EWAC recommends the Service provide no-take guidance and to allow for the public to comment on any such guidance.

As the Service is aware, ultimately it is the project proponent that determines whether take is reasonably certain to occur as a result of its activities.[18] Nevertheless, it is long-standing Service policy to "identify, to the maximum extent practicable, those activities that would or would not constitute a violation" of the ESA section 9 take prohibition (hereafter, "no-take guidance").[19] No-take guidance is a helpful tool to alleviate some of the regulatory uncertainty prompted by a listing, and is particularly helpful here where the impacts of an endangered listing will be felt broadly across industries in 37 states. In the Proposed Rule, the Service declined to propose no-take guidance for the NLEB due to the fact the species "occurs in a variety of habitat conditions across its range" and because of the likelihood that "site-specific conservation measures may be needed for activities that may directly or indirectly affect the species."[20] The Service did, however, state during its April 7, 2022 public listening session that guidance is forthcoming, likely this fall.[21] If the Service finalizes the proposed endangered listing, it must also provide no-take guidance in either any final rule or in standalone guidance documents. A failure to do so would unnecessarily increase regulatory uncertainty on existing and new renewable energy and electric transmission and distribution infrastructure and significantly impede the Biden-Harris Administration's stated clean energy and grid modernization goals.

Should the Service develop any no-take guidance, it should also provide the public an opportunity to comment on the proposed guidance to ensure that any ambiguities, confusion, or logistical concerns can be resolved prior to final publication.[22] Below, EWAC offers some suggestions for no-take guidance based on considerations unique to member operations and experiences.

a. No-take guidance for operation of wind energy facilities

As set forth above, since 2015, published data demonstrate that no NLEB fatalities have been discovered at wind energy facilities. This is despite the fact that wind energy development has increased rapidly since WNS began affecting NLEB populations and intensive monitoring efforts have been conducted throughout the NLEB range. The best available science, then,

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[18] United States Department of the Interior, Memorandum from Principal Deputy Director to Regional Directors 1-8, *Guidance on trigger for an incidental take permit under section 10 (a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified.* (Apr. 26, 2018) https://www.fws.gov/sites/default/files/documents/guidance-on-when-to-seek-an-incidental-take-permit.pdf.

[19] 59 Fed. Reg. 34,272 (July 1, 1994).

[20] 87 Fed. Reg. at 16,450.

[21] *See* U.S. Fish & Wildlife Service, *Northern Long-eared Bat Proposed Rule Public Hearing*, https://www.fws.gov/library/collections/northern-long-eared-bat-proposed-rule-public-hearing.

[22] No-take guidance arguably has a regulatory effect and therefore should be made available for public comment. *See e.g.,* CropLife America v. EPA, 329 F.3d 876 (D.C. Cir. 2003); General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002); Appalachian Power Co. v. EPA., 208 F.3d 1015 (D.C. Cir. 2000); Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd,* 136 S. Ct. 2271 (2016).

supports the conclusion that take of the NLEB at wind energy facilities is not reasonably certain (and is even unlikely) to occur, and the Service should account for this fact in its final listing decision and subsequent actions. The Service should acknowledge that feathering and curtailment of wind energy turbines during periods of higher risk have been demonstrated to effectively reduce impacts to bat species, including the NLEB,[23] supporting a conclusion that, where implemented, take is even less likely to occur.

EWAC recommends the Service establish no-take guidance for existing and new wind energy facilities. Where a project proponent has determined a potential risk to the NLEB exists within a project area, it is appropriate to conclude that take of the NLEB is unlikely to occur where:

> Turbines are feathered below a cut-in speed of 5.0 m/s during the fall migration period (August 1-October 15) from sunset to sunrise, whenever the temperature is above 50 degrees Fahrenheit.

If project proponents of wind energy facilities with risk to the NLEB implement this measure, the available data support a finding that take of the NLEB is unlikely to occur. The above measure will be beneficial for many wind energy facilities, but it will result in a loss of renewable energy power production and may not be workable for all projects in in the NLEB range.[24] In addition to the measure set forth above, EWAC also recommends the Service explicitly acknowledges in any no-take guidance that project proponents may implement approaches to avoid take that differ from the measure described above, based on project-specific circumstances, and that the specific no-take measure recommended above is just one way to avoid take of the NLEB.

To further ensure that any no-take guidance adopted appropriately considers turbine technology and other practical considerations, the Service should solicit public comment on no-take guidance measures.[25]

b. No-take guidance for electric transmission and distribution infrastructure

Maintenance and replacement of existing electric transmission and distribution infrastructure is critical to ensuring that all communities have access to safe, reliable, and affordable electricity. Key to operation and maintenance of this infrastructure is the maintenance of the associated rights-of-way. The existence of hazard trees or other vegetative growth can threaten the delivery of power and increase risks to human health and safety. Wildfire,[26] power outages, and other safety risks increase if overgrowth is allowed to remain in rights-of-way.

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[23] *See* Young, D.P., Jr., C. Nations, M. Lout, and K. Bay. 2013. *2012 Post-Construction Monitoring Study, Criterion Wind Project, Garrett County, Maryland*. *April-November 2012*. Prepared for Criterion Power Partners, LLC, Oakland, Maryland. Prepared by Western EcoSystems Technology, Inc. ("WEST"), Cheyenne, Wyoming, and Waterbury, Vermont. (Jan. 15, 2013); Good, R.E., A. Merrill, S. Simon, K. Murray and K. Bay. 2012. *Bat Monitoring Studies at the Fowler Ridge Wind Farm, Benton County, Indiana*, *April 1 – October 31, 2011*. Prepared for Fowler Ridge Wind Farm. Prepared by WEST (Jan. 31, 2012).

[24] It is also important to recognize that the loss of power production caused by curtailment at a project must be replaced by power generation from another source to meet power production needs and other requirements (e.g., state renewable standards).

[25] For example, rolling temperature averages and other considerations may warrant inclusion in any no-take guidance to accommodate various turbine technologies.

[26] Wildfires are also a risk to the NLEB; such fires can destroy critical habitat and protected individuals.

Operators of electric transmission and distribution infrastructure are required by law to maintain rights-of-way to ensure safe and reliable electricity.[27]

EWAC acknowledges that ESA section 9, through the regulatory definition of "harm," prohibits significant habitat modification where such habitat modification results in death or injury to an identifiable member of a listed species.[28] However, not all habitat modification rises to the level of "harm" in violation of ESA section 9. Entities maintaining electric infrastructure rights-of-way in the NLEB range have done so for decades and have had a negligible effect on the NLEB's suitable habitat, if they have had any effect at all. Moreover, the Proposed Rule recognizes that "habitat loss alone is not considered to be a key stressor at the species level, and habitat does not appear to be limiting."[29]

Any no-take guidance should make clear that maintenance activities such as side-trimming and hazard tree removal throughout the growing season are unlikely to result in take of the NLEB because the species is not habitat limited, and removal or trimming of individual trees or small numbers or trees along existing rights-of-way would not be expected to result in harm. Providing this clarification is important; otherwise, electric transmission and distribution operators may be put in a situation where they have to weigh the risk of ESA violation against taking action to ensure they are meeting the safety and reliability requirements enacted to protect valuable property and save lives.

c. **No-take guidance relative to habitat clearing**

EWAC members construct and operate renewable energy projects (wind and solar), electric transmission and distribution facilities, energy storage, and other electric generation facilities within the NLEB's range. Development of these facilities can require clearing of habitat that may be suitable for the NLEB. As noted above, not all habitat modification equates to "harm" in contravention of the ESA section 9 take prohibition, and the NLEB – a habitat generalist – is not habitat limited. Any no-take guidance should provide the regulated community with guidelines on when clearing of potentially suitable habitat is unlikely to result in take. Doing so will provide clarity to the regulated community and reduce the burden on the Service to provide technical assistance or to process permits on a case-by-case basis.

As a point of reference, the Service has published various documents throughout its regions where it has concluded that modification of potential habitat is unlikely to result in take of bat species that have more specific habitat needs than the NLEB. For example, in the Service Midwest Region's "Section 7 Technical Assistance: Summary of Indiana Bat Ecology," it states:

> As Indiana bat maternity areas contain multiple primary roost trees, it is extremely unlikely that loss of 10 acres or 10% of a forested stand (whichever is smaller) [during the inactive season] would eliminate all primary roost trees within a

[27] Federal Power Act, 16 U.S.C. § 8240 (Electric reliability). *See also* North American Electric Reliability Corporation, *U.S. Reliability Standards*, "All Reliability Standards" for a list of all standards put forth by the Electric Reliability Organization (subject to review and approval by the Federal Energy Regulatory Commission) as authorized under the Federal Power Act, available at: https://www.nerc.com/pa/Stand/Pages/USRelStand.aspx.
[28] *See* Babbitt v. Sweet Home Chapter of Comty.s for a Great Or., 515 U.S. 687, 710 (1995) (O'Connor, J., concurring) (defining "significant habitat modification" to include "habitat modification that kills or physically injures animals... [or interferes] with essential behaviors... includ[ing]... breeding, feeding, and sheltering.").
[29] Proposed Rule at 16,446.

> traditional homerange of an Indiana bat maternity colony. Similarly, loss of this magnitude is not likely to noticeably degrade the quality of a roosting or foraging area or render a travel corridor unsuitable. For these reasons, we believe it is extremely unlikely that loss of 10 acres or 10% (whichever is smaller) of a forest stand would lead to detectable adverse effects.[30]

Additionally, several districts of the U.S. Army Corps of Engineers ("Corps") recently worked with the Service to complete a programmatic informal consultation for activities requiring Corps permitting.[31] The informal consultation includes the NLEB and provides some bright line conclusions for evaluating habitat clearing for purposes of ESA section 7. There, the informal consultation identifies areas with no known records (Zone 1) and where there are acoustic and mist net capture records, but no known roosts and hibernacula (Zone 2), and it concludes that Corps-permitted activities involving the clearing of habitat during the winter of acreages less than 10 acres (Zone 1) and 5 acres (Zone 2) are not likely to adversely affect the NLEB.[32]

The approaches above are based on guidance conservatively crafted for the Indiana bat, which is a habitat specialist. The NLEB, on the other hand, is known as a habitat generalist that utilizes a larger variety of roosts in comparison to Indiana bat. Thus, if the Service can agree that clearing of this magnitude will not result in adverse effects to Indiana bat and the NLEB, it follows that the Service should be able to provide some guidance on what clearing activities will not result in take of the NLEB, as the threshold for adverse impacts in the context of an ESA section 7 analysis is lower than the threshold for take under ESA section 9.

Given the definition of "harm," that the NLEB is a habitat generalist, and that the NLEB is not habitat-limited, EWAC recommends that the Service establish no-take guidance that instructs that clearing of less than a certain acreage or certain percentage of suitable habitat is unlikely to result in take if clearing is done during the inactive season or at any time following a determination of probable absence.[33] Because the NLEB is a habitat generalist that is not habitat limited, EWAC suggests the thresholds established for clearing NLEB habitat should be larger acreages and percentages than used by the Service to reach a "not likely to adversely affect" determination for the Indiana bat illustrated in the examples above.

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[30] *See* U.S. Fish and Wildlife Service, *Section 7 Technical Assistance – Summary of Indiana Bat Ecology*, available at: https://web.archive.org/web/20220121073506/https://www.fws.gov/midwest/endangered/section7/s7process/mammals/inba/INBAEcologySummary.html.

[31] U.S. Army Corps of Engineers, Kansas City District, *Finalization of the Missouri Bat Programmatic Informal Consultation Framework*, (May 1, 2019) https://www.swl.usace.army.mil/Portals/50/docs/regulatory/publicnotices/Missouri%20Bat%20Programmatic%20PN.pdf.

[32] *Id.* at Appendix 5.

[33] "Probable Absence" can be determined by: 1) Conducting presence/absence surveys across the project area in accordance with current Service protocol; or 2) Reviewing the treed area to be cleared to identify suitable roost trees and conducting follow-up emergence counts to confirm no bats observed emerging. Both concepts have precedent and established protocols in the Service's Indiana Bat Survey Guidelines. U.S. Fish and Wildlife Service, *Range-Wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines*, 3-4, 48 (Mar. 2022) https://www.fws.gov/sites/default/files/documents/USFWS_Range-wide_IBat_%26_NLEB_Survey_Guidelines_2022.03.29.pdf.

EWAC also urges the Service to consider the challenges of seasonal habitat clearing restrictions as well as variations in wooded habitat and migration timing. For example, within the northern regions of the NLEB's range, heavy precipitation and low winter temperatures can restrict the schedules of maintenance and construction crews. Habitat availability and the size of forest patches can also vary substantially between parts of the NLEB's range, as does migration timing. The Service should allow for flexibility within the no-take guidance to account for regional differences in severity of seasonal conditions, variations in habitat availability, and variations in migration timing. Again, any proposed no-take guidance should be published for public comment to allow the regulated community to provide input on practical considerations that may warrant inclusion into any final no-take guidance.

III. The Service should use all ESA tools at its disposal to ameliorate the impact of any final listing.

Despite the fact that, as noted above, the primary threats to NLEB are not due to human development activity, these same activities will unfortunately bear the brunt of the ramifications of this listing. EWAC urges the Service to promote solutions, such as those identified elsewhere in these comments that protect the NLEB while also ensuring the safe, reliable, and timely deployment of electric energy. If this species is to be saved from extinction, the Service should leverage the power and resources of the regulated community to find solutions that do not rely on project-by-project section 10 permits and habitat-focused compensatory mitigation.

There are many ESA tools available to the Service to help reduce the regulatory and administrative burdens that industry and the Service will both incur should the NLEB be listed as endangered. In addition to the no-take guidance recommended above, low-effect habitat conservation plans, programmatic incidental take permits, and programmatic biological opinions should all be encouraged throughout the NLEB range and should be administered in an efficient a way that is practicable, reasonable, and commensurate with the impacts to the species. Additionally, the Service should consider what other pathways may be available under its existing ESA section 10 authority. Immediate, creative and workable solutions are necessary to manage the impact of this listing for the regulated community and for the Service. Different solutions may work better for different industries. The Service should work with the regulated community to ensure that the available tools will be deployed effectively, and should ensure that the renewable energy and electric transmission and distribution industries are not held to a standard that goes beyond what the ESA, regulations, and relevant case law require.

The Service should also expand acceptable compensatory mitigation for the NLEB. Given that, as noted in the SSA, habitat is not a limiting factor for the NLEB and WNS presents the overwhelming threat to the species, the Service should accept funding for addressing WNS's impacts through research, treatment, or other novel approaches (e.g., increasing insect abundance near hibernacula) to fully or partially satisfy compensatory mitigation requirements for the NLEB associated with ESA section 10 permits. Additionally, mitigation solutions should include compensatory mitigation credit for companies who are advancing technology (e.g., acoustic deterrents and smart curtailment systems) to minimize impacts from wind energy. These efforts reduce threats to the species, while optimizing the production, transmission, and distribution of clean energy. Research is critical to understanding the NLEB and every study provides important data to help inform how best to conserve the NLEB. EWAC understands the Service has

historically accepted research funding as mitigation in exceptional circumstances.[34] The circumstances affecting the NLEB amount to unique and exceptional circumstances.

IV. Conclusion.

EWAC appreciates the Service's consideration of these comments and, in particular, EWAC's comments relating to how the Service can reduce the impact of a listing to foster efficient development, construction, operation, and maintenance of renewable energy and electric transmission and distribution facilities and to safeguard the ongoing transmission and distribution of safe, reliable, and affordable electric power to all communities. EWAC recommends the Service revisit its treatment of the wind energy industry in any final rule and SSA and limit its conclusion to those supported by the best available science. Finally, EWAC encourages the Service to work swiftly, using all of the tools at its disposal, to administer any final listing in a way that minimizes impediments to deployment of renewable energy and electric transmission and distribution infrastructure. EWAC welcomes the opportunity to discuss the comments in greater detail with the Service and further explore with the Service how the ESA could be administered in a way that could benefit both the NLEB and future listed species.

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[34] *See* 81 Fed. Reg. 95,316, 95,343 (Dec. 27, 2016), 81 Fed. Reg. 83,440, 83,479 (Nov. 21, 2016) (stating "These circumstances may exist when: (a) The major threat to a resource is something other than habitat loss"); withdrawn by 88 Fed. Reg. 36,469 (July 30, 2018). *See also* Kaheawa Wind Power II Habitat Conservation Plan and Kaheawa Pastures Wind Energy Generation Facility Habitat Conservation Plan, which allow research as part of the compensatory mitigation package.