



TO: U.S. Fish and Wildlife Service

FROM: Energy and Wildlife Action Coalition

DATE: August 2, 2023

RE: Comments Regarding March 6, 2023 Interim Guidance and Range-wide Determination Key for the Northern Long-eared Bat

I. Introduction

On March 6, 2023, the U.S. Fish and Wildlife Service (“Service”) released three interim guidance documents (collectively, “Interim Guidance”) relating to the federally endangered northern long-eared bat (“NLEB”):

- *Land-based Wind Energy Interim Voluntary Guidance for the Northern Long-eared Bat* (“Wind Energy Guidance”);¹
- *Interim Voluntary Guidance for the Northern Long-Eared Bat: Forest Habitat Modification*;² and
- *Interim Consultation Framework for the Northern Long-eared Bat*.³

This document briefly summarizes input from members of the Energy and Wildlife Action Coalition (“EWAC”)⁴ on the Interim Guidance, the Service’s NLEB Range-wide Determination Key (“DKey”), and associated materials, for purposes of informing the Service’s preparation of the final

¹ U.S. Fish & Wildlife Service, *Land-based Wind Energy Interim Voluntary Guidance for the Northern Long-eared Bat* (Mar. 6, 2023), available at: https://www.fws.gov/sites/default/files/documents/Interim_Wind_Guidance_NLEB_6Mar23.pdf.

² U.S. Fish & Wildlife Service, *Interim Voluntary Guidance for the Northern Long-Eared Bat: Forest Habitat Modification* (Mar. 6, 2023), available at: <https://www.fws.gov/media/interim-voluntary-guidance-northern-long-eared-bat-forest-habitat-modification>.

³ U.S. Fish & Wildlife Service, *Interim Consultation Framework for the Northern Long-eared Bat* (updated June 29, 2023), available at: https://www.fws.gov/sites/default/files/documents/Interim_Consultation_Framework_29Jun23.pdf.

⁴ 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.

guidance documents. EWAC provides these comments and concerns based on the knowledge and experience of its membership.

II. Comments on the Interim Guidance.

- Uncertainty of interim process. EWAC is particularly concerned with the uncertainty surrounding how development projects will be affected once the Interim Guidance is replaced with final guidance documents. EWAC notes that several projects currently in development will not qualify for review under the Interim Guidance process due to their construction timelines. EWAC recommends that the Service have a plan to avoid the uncertainty in project planning that developers experienced with the initial uplisting of the NLEB.
- Timeline for guidance finalization. To reduce uncertainty in project planning, EWAC recommends that the Service endeavor to finalize the NLEB guidance this year (ideally, by November 2023) and release the final documents in advance of their effective date (anticipated April or May 2024). Allowing the regulated community an opportunity to review the final guidance documents in advance of their effective date would give project proponents time to adjust to and understand the impact of the final guidance documents. EWAC would greatly appreciate transparency and clarity from the Service concerning the forthcoming transition from the Interim Guidance to the final guidance documents.
- Access to the Service's GIS data. EWAC suggests that the Service should consider sharing its Information for Planning and Consultation ("IPaC") data relating to locations of NLEB roost trees, hibernacula, and other sensitive areas, and the dates of documented NLEB occurrences, with the public. EWAC understands that the Service often obscures exact locations to protect sensitive features, but providing stakeholders with access to the GIS location and temporal data used to inform the Service's IPaC analyses would enable project proponents to incorporate important bat habitat features into their GIS systems and better avoid take of NLEB as a result. From a project planning and siting perspective, there is a great need among the regulated community for better availability of the Service's roost tree and hibernacula data.
 - For example, the Virginia Department of Wildlife Resources provides a spatial dataset demonstrating NLEB roost tree, hibernacula, and capture regulatory buffers, and areas of year-round presence.⁵ EWAC has found this dataset extremely helpful for project planning purposes.
 - EWAC suggests that the Service provide large buffers or data points aggregated to create a heat map, if necessary to help protect sensitive locations.
 - EWAC members would particularly appreciate access to information relating to the dates on which NLEB were captured or detected.

⁵ Available at: https://dof.virginia.gov/wp-content/uploads/VA-DWR-Northern-Long-Eared-Bats-Virginia_2023-04-18.pdf.

- Reliance on data more than five years old. With the exception of documented hibernacula locations, the Service should not rely on data that is more than five years old. A five-year limit on the Service's use of data to inform its IPaC analyses would be consistent with the five-year limit applicable to the regulated community's reliance on survey results. In addition, data collected by the Service for a specific project should be incorporated into the Service's IPaC system so that the most recent and applicable information is utilized in project planning.
- Locations where NLEB are active year-round. The final guidance should specify the names of the counties and localities where the Service considers NLEB active year-round.

III. **Comments on the DKey.**

- Uncertainty of interim process. EWAC has concerns regarding the uncertainty of when the Service will release new versions of the DKey, and how the release of a new version would impact a project's DKey analysis. The Service should provide clarity on how long a project proponent can rely on the analysis it receives from a certain version of the DKey. For instance, if a project proponent were to use the current version of the DKey for a project that will begin construction in six months, but the Service releases a new version of the DKey three months before construction begins that provides a different answer, it is disruptive and costly if a project proponent must redo its analysis. As a result, it is EWAC's recommendation that the Service include some sort of provision in writing that provides timing windows in which a project proponent can rely on its DKey analysis to avoid these types of scenarios so that all parties are clear on the expectations.
- Data and modeling concerns. EWAC has concerns regarding the data and modeling the Service uses to inform its DKey analyses.
 - One EWAC member noted that a project in Georgia received a "no effect" determination from the DKey because there have been no NLEB occurrences documented in Georgia since 2017. However, during subsequent conversations with the Service, a Service representative stated that the agency modeled NLEB occurrences using modeling that originated from a graduate student's thesis. EWAC is concerned that the Service may be using more than NLEB occurrence records to inform its DKey analyses, including data and modeling that may not have been strenuously evaluated by experts or may not be available to the public. EWAC strongly recommends that the Service be fully transparent in what data is being relied upon to inform analyses, and that data must be obtained using scientific rigor, and ideally, peer-reviewed.
 - Additionally, EWAC members are concerned that the Service does not use absence data to inform its DKey analyses. EWAC considers absence data to be equally as important to a DKey analysis as presence data, and encourages the Service to clarify that it does in fact use absence data to inform its DKey analyses.

- EWAC requests that the DKey provide consistency among regions and states. One EWAC member noted that the questions in the DKey vary widely from state to state and region to region, and therefore, the determinations of the DKey vary. Understanding these variations is essential to developing projects. Therefore, EWAC also requests that the Service provide a guide to demonstrate how a project can reach a “no effect” or “not likely to adversely affect” determination for each state and/or region so that project developers can design early-stage projects to have the least amount of impacts to the species.
- Amount of tree removal. Based on members’ experiences using the DKey, it appears the DKey does not take into account the amount of tree clearing, or the ratio of tree clearing relative to the size of the overall project area, when making a determination of “may effect” versus “no effect.” For instance, one member’s standalone battery energy storage system (“BESS”) project, which is located on approximately six acres with less than one acre of clearing planned for the project, received a DKey determination of “may effect” simply due to the fact that suitable NLEB habitat existed within the less-than-one-acre clearing area. A screenshot of the project area is included as Attachment A. Given the small acreage of clearing planned for this project, that the project was located in an already developed area (i.e., surrounded on two sides by roadways, with clearing and commercial development in close proximity to the forested block), and in light of the size of the project as a whole, a “may effect” determination seems overly protective. This member contacted the local Ecological Services Field Office to inquire about why the project received a “may effect” determination despite its low clearing acreage, but the Service has not yet responded. Other members have encountered similar “may affect” results with clearing acreages of less than one-acre.
 - EWAC suggests that projects with small amounts of clearing should be able to avoid a “may effect” determination by implementing the avoidance measures set forth in the former NLEB 4(d) rule.⁶ Notably, the Interim Guidance allows projects subject to section 7 consultation to ensure that take is not reasonably certain to occur by adhering to the measures set forth in the former NLEB 4(d) rule (i.e., by conducting clearing activities outside of the NLEB active months, as long as there are no known NLEB occurrences in the area). Yet projects that are not subject to section 7 consultation but use the DKey to obtain an effects determination, such as the BESS example above, often receive a “may effect” determination even if the project would be able to implement the measures in the 4(d) rule protocol. To remedy this double standard, EWAC suggests that in the final guidance documents, the Service make section 7 consultation and non-section 7 consultation criteria identical such that both federal and non-federal projects can receive a “no effect” determination by following the protocol set forth in the former NLEB 4(d) rule.
 - If the Service is not amenable to that approach (however, given that this request is seemingly straightforward, it is EWAC’s hope that the Service would be amenable to the recommendation), EWAC alternatively recommends that

⁶ 4(d) Rule for the Northern Long-Eared Bat, 81 Fed. Reg. 1900 (Jan. 14, 2016).

the Service incorporate a screening system into the DKey to identify projects involving small amounts of tree clearing so that the DKey analysis can take the amount of tree removal into account. In EWAC's view, if a project involves two acres or less of clearing per ten acres of project area (i.e., where the acreage of clearing amounts to 20% or less of the project area), and the project is not within known NLEB location threshold distances, a "no effect" determination is appropriate.

- Hazard tree removal. 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 the safe and reliable operation and maintenance of this infrastructure (as required by state and federal law) is the maintenance of the associated rights-of-way. The existence of hazard trees or other vegetative growth, in close proximity to electrified equipment, can threaten the delivery of electricity and increase risks to human health and safety. Wildfires,⁷ power outages, and other safety risks increase if overgrowth is allowed to remain in rights-of-way. Operators of electric transmission and distribution infrastructure are required by law to maintain rights-of-way to ensure safe and reliable electricity.⁸ Therefore, the *Standing Analysis and Implementation Plan – Northern Long-Eared Bat Assisted Determination Key* ("Standing Analysis")⁹ 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 NLEB because the species is not habitat-limited, and removal or trimming of individual trees or small numbers of trees along existing rights-of-way would not be expected to result in harm. Providing these clarifications is important; otherwise, operators of power line infrastructure 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 save lives, ensure electric reliability and protect property.
- Tree trimming. Similarly, in the DKey and Standing Analysis, any discussion of tree trimming or limbing should recognize that precision trimming to operate and maintain rights-of-way (e.g., side-trimming) will not adversely affect the species.
 - In the Southeastern Coastal Plain and other similarly situated areas, if a project, located in forested wetland areas, has committed to employing best practices when conducting precision trimming, the DKey should yield a "not likely to adversely affect" determination except for activities occurring during the NLEB maternity or pup seasons near maternity roosts, and when temperatures are less than 50 degrees Fahrenheit.

⁷ Wildfires also pose a risk to NLEB; such fires can destroy critical habitat and protected individuals.

⁸ 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 set 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>.

⁹ U.S. Fish & Wildlife Service, *Standing Analysis and Implementation Plan – Northern Long-Eared Bat Assisted Determination Key* (Apr. 4, 2023), available at: <https://www.fws.gov/media/standing-analysis-nlebdetermination-key>.

IV. Comments on the Wind Energy Guidance.

- Hibernacula buffer distance. In the Wind Energy Guidance, the Service states that, “[f]or a project to be in compliance with this guidance, it must be outside a 10.0-mile (mi) known northern long-eared bat hibernacula buffer and outside the 3.0-mi recent summer occurrence buffer.”¹⁰ EWAC understands that the 10.0-mile hibernacula buffer distance is consistent with the buffer distance used for Indiana bat.¹¹ However, EWAC believes that the 10.0-mile buffer is unnecessarily large for both NLEB and Indiana bat, and that a buffer distance of 5.0 miles is more appropriate given that bat swarming and staging areas are expected to occur within 5.0 miles of a hibernacula. Therefore, EWAC recommends that the requirement for hibernacula buffer distance be reduced from 10.0 miles to 5.0 miles in the final guidance. Lastly, the number of bats hibernating in a cave should also be taken into account when providing setback guidance for NLEB, similar to the assignment of various priority levels for Indiana bat hibernacula.
- EWAC appreciates the Service’s stated commitment in the Interim Guidance to shift away from Evidence of Absence monitoring requirements, and encourages the Service to continue working with the American Clean Power Association, EWAC, and the collective industry to identify an appropriate alternative approach to ESA compliance monitoring. Consistent with those efforts, the monitoring required in the Technical Assistance Letter (“TAL”) should not be the same as the monitoring recommended for Section 10 permits, as the intent of the TAL is to avoid impacts. Therefore monitoring, if any, should be minimal compared to a permit where take is authorized. In other words, monitoring should be commensurate with the level of take.

V. Conclusion

EWAC appreciates the Service’s consideration of these comments and welcomes the opportunity to discuss the comments in greater detail with the Service.

¹⁰ Interim Wind Guidance at 2 (internal footnotes omitted).

¹¹ *Id.* at 2, n. 7.

Attachment A

