



EWAC[®]

Energy and Wildlife
Action Coalition

November 27, 2024

Comments regarding:

October 29, 2024 Proposed Multi-Bat Species General Conservation Plan for Routine Development Projects in New York, Pennsylvania, and West Virginia

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: FWS-R5-ES-2024-0039
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Docket No. FWS-R5-ES-2024-0039

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the United States Fish and Wildlife Service’s (“Service”) October 29, 2024 Proposed Multi-Bat Species General Conservation Plan (“Proposed GCP”) for Routine Project Development Projects in New York, Pennsylvania, and West Virginia (collectively, “Plan Area”) that covers take of the federally endangered Indiana bat (“INBA”) and northern long-eared bat (“NLEB”) and the proposed endangered tricolored bat (“TCBA”) (collectively, “Covered Species”).² EWAC provides these comments on the Proposed GCP based on the knowledge and experience of its membership.

I. EWAC Generally Supports the Use of Streamlined Solutions to Incidental Take Coverage Where the Solutions Are Developed by Stakeholders or with Their Input.

EWAC appreciates the Service’s efforts to create a streamlined incidental take permitting process to assist project proponents with Endangered Species Act (“ESA”) compliance. However, the Service must be careful to ensure that general conservation plans (“GCP”) are developed in close coordination with affected stakeholders and incorporate the input of those members of the regulated community that will be utilizing those plans. The 2007 Final General Conservation Plan Policy notes that a GCP may not be an appropriate tool where the scope and magnitude of activities exceeds the Service’s expertise and abilities.³ Thus, GCPs designed to cover specific types of development will be most successful when developed collaboratively, with stakeholder input from those who engage in such activities, to ensure that the GCP is workable for those that will be responsible for implementing it and “attractive” enough to garner widespread participation. Without stakeholder engagement during the development of these tools and incorporation of their input, key aspects of the GCPs, such as minimization and mitigation measures, may prove to be infeasible and result in low participation.

II. The Service Should Be Mindful that the Existence of the Proposed GCP Does Not Preclude the Use of Other Approaches to Meet ESA Section 10 Issuance Criteria.

EWAC recommends that the Service remind its local field offices in the Plan Area that the creation of the Proposed GCP does not mandate the use of the plan to obtain authorization under ESA section 10 (“Section 10”). So long as an applicant has met the issuance criteria set forth in Section 10, the applicant should be able to obtain an incidental take permit (“ITP”) even if that

¹ EWAC is a national 501(c)(6) trade association 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 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. 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 89 Fed. Reg. 85,983 (Oct. 29, 2024); U.S. Fish & Wildlife Service, *Multi-Bat Species General Conservation Plan for Routine Development Projects in New York, Pennsylvania, and West Virginia* (Oct. 2024) (hereinafter, Proposed GCP), available at <https://downloads.regulations.gov/FWS-R5-ES-2024-0039-0003/content.docx>.

³ U.S. Fish & Wildlife Service, Memorandum from Service Director to Assistant Regional Directors re Final General Conservation Plan Policy (Oct. 5, 2007), available at: [https://www.law.uh.edu/faculty/thester/courses/Environmental-Practicum-2016/1%20-%20Final%20General%20Conservation%20Plan%20Policy%20\(Hall%20Memo\).pdf](https://www.law.uh.edu/faculty/thester/courses/Environmental-Practicum-2016/1%20-%20Final%20General%20Conservation%20Plan%20Policy%20(Hall%20Memo).pdf).

applicant has proposed different measures than those set forth in the Proposed GCP.⁴ Applicants proposing other legally-sufficient approaches in an individual habitat conservation plan (“HCP”) should not be forced to adopt the conservation measures in the Proposed GCP. In some circumstances, the Proposed GCP measures may be unworkable, and an applicant must develop an HCP that is more tailored to the needs of its specific project. In the Proposed GCP, the Service recognizes that “[l]andowners and [p]roject [p]roponents that meet [the Proposed GCP’s] eligibility criteria *may choose* whether they wish to adopt the GCP when applying for an [ITP], or conversely, whether they prefer to develop their own plan using the project-specific HCP process.”⁵ Consistent with this language and to avoid any future confusion, EWAC requests that the Service provide clear written guidance to its field offices, clarifying that the Proposed GCP is just *one* of the ways to satisfy the conservation plan component of an ITP application.

III. The Proposed GCP is Inconsistent with the Latest Tricolored and Northern Long-Eared Bat Guidance.

EWAC is concerned that the Proposed GCP is inconsistent with the Service’s Northern Long-eared Bat and Tricolored Bat Voluntary Environmental Review Process for Development Projects (“Bat Guidance”) and that these inconsistencies create uncertainty for the regulated community.⁶ The Proposed GCP includes certain activities as “covered activities” based on the assumption that they would cause incidental take, even though under the Bat Guidance they would be considered to have “no effect” or “not likely to effect” the NLEB and/or TCBA.⁷ For example, the Bat Guidance identifies tree removal as an activity that is predetermined to have “no effect” or “not likely to adversely affect,” if the activity is limited in scope and occurs within a defined time;⁸ however, the Proposed GCP broadly identifies “vegetation clearing” and tree removal as an activity covered by the plan.⁹ If the Bat Guidance suggests that certain activities will have no effect or not likely to adversely affect certain species, then the Proposed GCP should not include these as covered activities for those species. The Service’s Habitat Conservation Planning and Incidental Take Permit Processing Handbook is clear that activities for which take is unlikely should not be included in an ITP.¹⁰ Rather, and consistent with the Bat Guidance, if the Bat Guidance indicates that the activity will have “no effect” or is “not likely to adversely affect” then “no further action is needed for those species.”¹¹ In the Bat Guidance, the Service states that the analysis the Determination Key (“DKey”) relies on “is based on the best available scientific and

⁴ See 16 U.S.C. § 1539(a)(2)(A).

⁵ Proposed GCP at 4 (emphasis added).

⁶ U.S. Fish & Wildlife Service, *Northern Long-Eared Bat and Tricolored Bat Voluntary Environmental Review Process for Development Project, Version 1.0* (Oct. 15, 2024), (hereinafter, “Bat Guidance”) available at: https://www.endangeredspecieslawandpolicy.com/assets/htmldocuments/NewBlogs/EndangeredSpecies/nleb_tcb_consultation_guidance_version-1.0_final.pdf.

⁷ Of the three Covered Species in the Proposed GCP, the Bat Guidance only covers the NLEB and TCBA, not the INBA; however, this does not change the following points on consistency and predictability.

⁸ Bat Guidance at 22.

⁹ Proposed GCP at 36.

¹⁰ U.S. Fish & Wildlife Service, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*, at 3-2 (Dec. 21, 2016), available at: https://www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire_0.pdf (stating “if incidental take of ESA-listed species is not anticipated from a landowner or project proponent’s activities, an incidental take permit is not needed or appropriate”).

¹¹ Bat Guidance at 8.

commercial information relevant to the species.”¹² Thus, any suggestion from the Proposed GCP that a risk of incidental take exists for activities that the DKey considers to have no risk, is inconsistent with the Service’s best available science.

In addition, the Proposed GCP imposes additional conservation measures that are over and above the “consistent” and “range-wide” standards already set forth in the Bat Guidance. For federal and non-federal actions, the Bat Guidance indicates that implementation of the Minimum Conservation Measures¹³ set forth in the Bat Guidance is sufficient to minimize and mitigate impacts to the NLEB and TCBA without requiring additional measures.¹⁴ Because the Bat Guidance is intended to apply range-wide for the NLEB and TCBA, to impose additional requirements through the Proposed GCP would conflict with the Bat Guidance’s goal of providing “regulatory predictability and consistency across [the NLEB and TCBA’s] wide ranges.”¹⁵ Consistency is important to the regulatory community as it provides certainty and predictability when managing risk under the ESA. The Service should ensure that any requirements imposed by the Proposed GCP be consistent with the Bat Guidance.

IV. The Service Should Consider How Solutions Like the Proposed GCP Could Be Replicated in Other Geographic Areas and Cover Additional Activities.

Should the Proposed GCP be finalized and result in significant participation and use, EWAC encourages the Service to consider how it can replicate solutions like the Proposed GCP in other parts of the Covered Species’ range and for other potential sources of impact, again through consultation with relevant stakeholders. In doing so, the Service should consider inclusion of conservation measures not centered on hibernacula protection, such as surveying and gathering data where limited data is available regarding bat activity around the project area and locating and protecting previously unknown colonies, may help with replication of the Proposed GCP in geographic areas where bats are more active in winter. EWAC further recognizes that the Service would need to consider adapting any future GCPs based on the Covered Species’ ecological setting and region-specific needs in those areas.

V. Conclusion.

EWAC appreciates the Service’s consideration of these comments. The incorporation of EWAC’s comments will result in a final GCP that is consistent with the Services’ existing guidance for the Covered Species and will encourage regulatory certainty for those managing risk under the ESA. EWAC would welcome the opportunity to discuss the comments in greater detail with the Service.

¹² *Id.* at 8.

¹³ See the Minimum Conservation Measures set forth on pages 9-10 of the Guidance.

¹⁴ *See id.* at 9.

¹⁵ *Id.*

Please feel free to contact the following EWAC representatives:

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