

July 1, 2015

**Comments regarding the April 2, 2015 Notice of
Proposed Interim 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:

Public Comments Processing
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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”) April 2, 2015 notice of a final rule listing the northern long-eared bat (“NLEB”) as a threatened species under the Endangered Species Act of 1973 (“ESA”) and promulgating an interim species-specific rule (“Interim 4(d) Rule”) for the NLEB under ESA Section 4(d). EWAC is a national coalition formed in 2014 whose member entities 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.

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 significantly impacts EWAC members. EWAC submitted comments regarding the NLEB on December 18, 2014 and March 17, 2015 describing these impacts and making recommendations for inclusion in a 4(d) rule. While EWAC is disappointed that the Interim 4(d) Rule did not include wind energy development or new electric transmission and distribution rights-of-way (“ROW”), we are appreciative of the Service’s issuance of the Interim 4(d) Rule and further appreciate the Service’s effort to protect the NLEB while not inhibiting activities that are non-primary threats. The final 4(d) rule, however, should be more inclusive than the Interim 4(d) Rule, and EWAC encourages the Service to carefully consider these comments as it develops a final 4(d) rule. We welcome the opportunity to provide comments in anticipation of a final 4(d) rule.

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

- EWAC incorporates by reference its comments submitted on December 18, 2014 and March 17, 2015.
 - Wind energy development and operation should be included in a final 4(d) rule.
 - New electric transmission and distribution ROWs are appropriate for inclusion in a final 4(d) rule.
 - EWAC encourages the Service to provide certain clarifications with respect to existing ROWs to minimize confusion in the application of the final 4(d) rule.
- Wind energy development and operation and new electric transmission and distribution ROWs are appropriate for inclusion in a final 4(d) rule.

- At a minimum, AS TO ROWs, new electric distribution ROWs should be included in a 4(d) rule.
- Access roads, crane pads, and laydown areas for maintenance of electric transmission lines in regular and emergency situations should be included in a final 4(d) rule.
- The Service should establish an effective date for each update to the White-nose Syndrome (“WNS”) Buffer Zone Map.
- The final 4(d) rule should affirm that the Service does not anticipate that activities associated with photo-voltaic solar will result in the “take” of NLEB.
- The final 4(d) rule should clarify that all forest management activities that adhere to the conservation measures, not just those specific to the forest products industry, are included in the final 4(d) rule’s exemption.
- The final 4(d) rule should clarify the “minimal tree removal” threshold of one acre.
- The final 4(d) rule should clarify that the rule applies to included activities within the WNS Buffer Zone only where there are known, occupied hibernacula or roost trees, and that there is no affirmative duty to survey.
- The Service should instruct its Section 7 personnel to factor the final 4(d) rule into Section 7 consultations on included activities and not impose any reasonable and prudent measures for NLEB “take” impacts if the activities adhere to the final 4(d) rule’s applicable conservation measures and are therefore exempt from the “take” prohibition.
- The Service should continue its communication initiative across regions and field offices to ensure that all NLEB-impacted regions and offices consistently apply guidance, procedures, and policies across those impacted region, except where site-specific conditions or opportunities for innovation counsel otherwise.

I. EWAC INCORPORATES BY REFERENCE ITS COMMENTS SUBMITTED ON DECEMBER 18, 2014 AND MARCH 17, 2015.

Honoring the Service’s request to avoid repetition of comments submitted during prior comment periods, we will not restate our previously-submitted comments. We do, however, incorporate them here by reference and encourage the Service to revisit those comments as the Service proceeds in preparing the final 4(d) rule.

- A. EWAC continues to support the inclusion of wind energy development and operation in a final 4(d) rule.¹
- B. EWAC continues to support the inclusion of new electric transmission and distribution ROWs in a final 4(d) rule.²
- C. EWAC encourages the Service to provide certain clarifications with respect to existing ROWs to minimize confusion in the application of the final 4(d) rule.

Details regarding these points can be found in EWAC's March 17, 2015 comment letter. EWAC focuses this comment submission on information gleaned since the closing of the last comment period.

II. WIND ENERGY DEVELOPMENT AND OPERATION AND NEW ELECTRIC TRANSMISSION AND DISTRIBUTION ROWs ARE APPROPRIATE FOR INCLUSION IN A FINAL 4(d) RULE.

We have gathered that the Service has been hesitant to include wind energy and new transmission and distribution ROWs in the 4(d) rule, because it believes activities that would be regulated by the ESA (i.e., those that may potentially result in "take") are not appropriate for inclusion in a 4(d) rule. Indeed, the Service in its April 2, 2015 notice states, "At this time, other than those activities that are in compliance with the interim 4(d) rule . . . we are unable to identify specific activities that would not be considered to result in a violation of Section 9 of the Act."³ If this is in fact the Service's reasoning when determining whether activities are appropriate for inclusion in a final 4(d) rule, we respectfully disagree. A primary component of existing 4(d) rules is the provision of carve-outs for activities that would otherwise result in "take" and be subject to the ESA Section 9 "take" prohibition.

Several existing 4(d) rules exempt activities that could otherwise be subject to ESA regulation. For example, the 4(d) rules for the green sea turtle, loggerhead sea turtle, and olive ridley sea turtle exempt incidental take resulting from commercial shrimp trawlers, provided that turtle excluder devices (TEDs), are

¹ Additionally, EWAC continues its support for American Wind Energy Association's ("AWEA") proposed approach for the inclusion of wind energy development set forth in AWEA's March 2015 comments. We believe this approach not only conserves Service resources but also allows for upfront funding for important conservation-related research. Given the recent strides made in WNS research, having available funding at the outset could be invaluable for the recovery of the NLEB and other bat populations.

² Additionally, EWAC continues its support for Edison Electric Institute's comments supporting the inclusion of new transmission ROWs and other clarification set forth in its March 2015 comments.

³ 80 Fed. Reg. 17974, 18023 (Apr. 2, 2015).

in use to minimize the likelihood of take of the turtles.⁴ The 4(d) rule for the Preble's meadow jumping mouse includes, among other activities, rodent control, noxious weed control, maintenance, and replacement of existing landscaping (associated with commercial and residential development).⁵ The 4(d) rule for the California tiger salamander exempts control of ground-burrowing rodents and burrows and the management and maintenance of stock ponds, which the salamander has been known to populate.⁶ Most recently, the proposed 4(d) rule for the Georgetown salamander proposes to exempt incidental take provided that the activities are "conducted consistent with the water quality protection measures" set forth in an appendix to the City of Georgetown's development code.⁷ All of the exempted activities contained in the aforementioned 4(d) rules, without the 4(d) rule, could be subject to ESA regulation due to their potential to cause "take." Again, activities can and should be included in 4(d) rules even if those activities would not always avoid "take" through compliance with the 4(d) rule's conservation measures. Indeed, the likelihood that "take" may still occur is the primary reason an activity would be placed in a 4(d) rule and excluded from application of the "take" prohibition.

Wind energy development and operation and new electric transmission and distribution ROWs are prime examples of the types of activities appropriate for inclusion in a 4(d) rule. It would be consistent with existing 4(d) rules to include wind energy and new electric transmission and distribution ROWs as exemptions from the prohibition on incidental take, provided that these activities can be conducted consistent with conservation measures that are deemed acceptable by the Service (those measures could be included in the 4(d) rule itself or incorporated by reference). Moreover, the NLEB listing determination expressly identifies wind energy and electric transmission and distribution as non-primary threats to the species; we are not proposing that the Service include activities that are significantly contributing to the decline of the species.⁸ Further, and as we described in our December 18, 2014 comment letter, the Service has wide latitude to develop 4(d) rules. We continue to encourage the Service to include wind energy development and operation and new transmission and distribution ROWs in the final 4(d) rule. Additional support for inclusion of these activities is provided in our previous comment letters.

⁴ See e.g. 50 CFR 223.206(d)(2).

⁵ 50 C.F.R. § 17.40(l); see also Press Release, U.S Fish & Wildlife Service, Special Rule Announced for Preble's Meadow Jumping Mouse, available at <http://www.fws.gov/mountain-prairie/pressrel/01-14.htm> (discussing how the 4(d) rule includes activities such as landscaping associated with golf courses).

⁶ 50 C.F.R. § 17.43(c).

⁷ 80 Fed. Reg. 19050 (Apr. 9, 2015).

⁸ *Id.* at 18027.

III. AT A MINIMUM, AS TO ROWs, NEW ELECTRIC DISTRIBUTION ROWs SHOULD BE INCLUDED IN A FINAL 4(d) RULE.

As stated in both our December 18 and March 17 comments, and in Section II above, both new electric transmission and distribution ROWs are appropriate for inclusion and should be included in a final 4(d) rule. However, should the Service decline to include new transmission ROWs, EWAC believes that the Service should, at a minimum, include new distribution ROWs. Distribution lines are distinguishable from transmission lines by the function they serve.⁹ Distribution lines are customer-driven and built in response to customer demand. Companies must be responsive to service requests, and it is simply unworkable to encounter seasonal delays, much less a delay due to the Section 7 or Section 10 processes. Distribution ROWs, when compared to transmission ROWs, are relatively narrow in nature and therefore require minimal amounts of tree or vegetation clearing. The Rural Utility Service (RUS) and typical industry practice characterize distribution ROWs as generally 30' in width or less, but could be as much as 40' in width in certain terrains, with a voltage of 34.5 kV or less. Transmission lines are usually operated at voltages of 69kV and higher. The vegetation management associated with ROW clearing may, in fact, benefit the NLEB.¹⁰ While EWAC believes that both new transmission and new distribution ROWs should be included in the final 4(d) rule, we strongly support, at an absolute minimum, the inclusion of new distribution ROWs as an exempted activity in the final 4(d) rule.

IV. ACCESS ROADS, CRANE PADS AND LAYDOWN AREAS FOR MAINTENANCE OF ELECTRIC TRANSMISSION IN REGULAR AND EMERGENCY SITUATIONS SHOULD BE INCLUDED IN A FINAL 4(d) RULE.

The Interim 4(d) Rule notes that the NLEB is known to actually prefer “small forest roads.”¹¹ Nowhere, however, does the Interim 4(d) Rule explicitly mention the inclusion of access roads, crane pads or laydown areas to support maintenance or repair of existing transmission lines during regular or

⁹ Under the “North American Electric Reliability Corporation Glossary of Terms Used in NERC Reliability Standards,” “Distribution Provider” is defined as “one who provides and operates the ‘wires’ between the transmission system and the end-use customer. For those end-use customers who are served at transmission voltages, the Transmission Owner also serves as the Distribution Provider. Thus the Distribution Provider is not defined by a specific line voltage, but rather as performing the distribution *function* at any line voltage.” Available at http://www.nerc.com/files/glossary_of_terms.pdf.

¹⁰ As we referenced in our March 2015 comments, 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.

¹¹ 80 Fed. Reg. 17974, 17992 (Apr. 2, 2015) (stating that “in southwestern North Carolina, [researchers] found that northern long-eared bats rarely used forest openings, but often used roads. Forest trails and roads may provide small gaps for foraging and cover from predators. In general, northern long-eared bats prefer intact mixed-type forests with small gaps (*i.e.*, forest trails, small roads, or forest-covered creeks) in forest with sparse or medium vegetation for forage and travel...” [citations omitted]).

emergency situations. As we have mentioned here and in previous comment letters, the inclusion of transmission and distribution ROWs in a final 4(d) rule is imperative for transmission operators and distribution providers to safely, reliably, and effectively operate and maintain their lines. While in some cases access roads exist and are maintained adjacent to an existing ROW, in other cases lines may be located where access has been naturally re-forested, and the creation of a new or the re-establishment of an access point (or points) is necessary. Access roads are typically no more than 40' in width (and more often narrower), used infrequently, and commonly maintained at half of its initial width after the initial temporary clearing.¹² Although crane pads and laydown areas do not always require forest clearing, there are times when clearing is necessary, but is often minimal, widely distributed and ephemeral (allowed to re-forest, if previously forested). The Interim 4(d) Rule does not account for this possibility, and by not expressly including access roads, crane pads, and laydown areas, greatly reduces the efficacy of the Interim 4(d) Rule.

Perhaps more problematic, in the case of an emergency, a company must risk liability under the ESA to access the emergency situation. As we already explained in our March 2015 comments, the final 4(d) rule should clarify that *non-hazard* trees are included in the emergency exemption where non-hazard trees need to be removed in order to access the emergency. Consider a scenario in which a remote line is down due to severe weather, hurricane, or ice storm damage and customers are without power. In order to replace or repair the line, it may be necessary to clear trees to access the line. In order to allow companies to address emergencies without risk of ESA liability, access to hazard or emergency situations should be expressly included in a final 4(d) rule.

V. THE SERVICE SHOULD ESTABLISH AN EFFECTIVE DATE FOR ANY UPDATES TO THE WNS BUFFER ZONE MAP.

We appreciate the Service's acknowledgement that WNS is the primary threat to the NLEB and that the Service has tailored the Interim 4(d) Rule to prohibit incidental take only within, and adjacent to, areas affected by WNS. However, the monthly map updates can create significant logistical issues for those operating their projects. For example, the sudden inclusion in the WNS Buffer Zone area means that seasonal restrictions may immediately affect project timing and the mobilization of work crews and equipment. If a project manager does not become aware of the update until a few days after it has been published, he or she is potentially (and unwittingly) exposing the project to ESA liability. Indeed, the manager has already done so if he or she fails to immediately see the map update and adjust operations the

¹² For example, a 40' road may be needed initially for construction, but that road may be maintained at 20' for future use for operations and maintenance and otherwise be allowed to re-vegetate. This practice can vary by terrain.

moment the map is posted. Including an effective date for updates to the WNS Buffer Zone Map of 30-60 days after the WNS Buffer Zone update is published would allow for companies to more effectively manage operations without risking ESA liability or incurring large mobilization costs. EWAC also proposes that the Service, in its establishment of an effective date, allow those activities where construction is already underway and resources have been committed to conduct the activity (e.g., crew mobilization), to continue under the WNS Buffer Zone Map in place at that time the resources were committed.

VI. THE FINAL 4(d) RULE SHOULD AFFIRM THAT THE SERVICE DOES NOT ANTICIPATE THAT ACTIVITIES ASSOCIATED WITH PHOTO-VOLTAIC SOLAR WILL RESULT IN THE “TAKE” OF NLEB.

We understand that the Service does not anticipate that activities associated with the development of photo-voltaic solar facilities will result in take of the NLEB, and therefore the Service chose not to consider photo-voltaic solar for inclusion in the final 4(d) rule. EWAC would appreciate confirmation in the final 4(d) rule that our understanding on this point is correct.

VII. THE FINAL 4(d) RULE SHOULD CLARIFY THAT ALL FOREST MANAGEMENT ACTIVITIES THAT ADHERE TO THE CONSERVATION MEASURES, NOT JUST THOSE SPECIFIC TO THE FOREST PRODUCTS INDUSTRY, ARE INCLUDED IN THE FINAL 4(d) RULE’S EXEMPTION.

EWAC understands it to be the Service’s position that all forest management activities are included in the Interim 4(d) Rule, so long as the activities are being conducted in accordance with the conservation measures. This inclusion is not specific to the forest products industry, but also includes those forest management activities that are conducted by other industries on their private holdings and are adherent to the conservation measures. We would appreciate clarification in the final 4(d) rule.

VIII. THE FINAL 4(d) RULE SHOULD CLARIFY THE “MINIMAL TREE REMOVAL” THRESHOLD OF ONE ACRE.

The Interim 4(d) Rule includes “minimal tree removal projects” as exempted activities and considers “minimal” to mean one acre or less.¹³ The Interim 4(d) Rule continues to say that one acre may be interpreted to mean “[o]ne acre of contiguous habitat or one acre in total within a larger tract, whether that larger tract is entirely forested or a mixture of forested and non-forested cover types.”¹⁴ The Service’s goal is to minimize impacts to NLEB habitat; there is no basis for factoring the non-forested component of a

¹³ 80 Fed. Reg. 17974, 18026 (Apr. 2, 2015).

¹⁴ *Id.*

project area into this threshold determination. EWAC recommends that only forested areas count towards the one acre threshold and that this interpretation of “one acre” be clarified in the final 4(d) rule. EWAC also recommends that the Service expand upon the examples of minimal tree removal projects provided in the Interim 4(d) Rule and specify that the examples provided are not exhaustive.

IX. THE FINAL 4(d) RULE SHOULD CLARIFY THAT THE RULE APPLIES TO INCLUDED ACTIVITIES WITHIN THE WNS BUFFER ZONE ONLY WHERE THERE ARE KNOWN, OCCUPIED HIBERNACULA OR ROOST TREES, AND THAT THERE IS NO AFFIRMATIVE DUTY TO SURVEY.¹⁵

The Interim 4(d) Rule is clear on the point that incidental take occurring outside of the WNS Buffer Zone is exempted from the Section 9 “take” prohibition. The Interim 4(d) Rule is also clear on the point that incidental take that may result from activities listed in the rule, when those activities are conducted in accordance with the conservation measures set forth in section 17.40(o)(ii)(B)(1)(i)–(iii), are exempted from the Section 9 “take” prohibition. However, we believe the rule should also make clear that activities listed in the rule and conducted within the WNS Buffer Zone in locations where there are no known, occupied hibernacula and no known, occupied roost trees have no further obligations to avoid liability under ESA Section 9 with respect to the NLEB. Further, we recommend the final 4(d) rule clarify that, aside from querying the Service’s Ecological Services Field Office nearest the activity, there is no affirmative duty to conduct any surveys to determine the presence of known, occupied hibernacula and maternity colonies. In some cases, however, companies have already conducted surveys (e.g., surveys conducted prior to the Interim 4(d) Rule or for other listed bats) and those surveys demonstrate NLEB absence. The Service should also take into account surveys conducted in accordance with Service protocol.

X. THE SERVICE SHOULD INSTRUCT ITS SECTION 7 PERSONNEL TO FACTOR THE FINAL 4(d) RULE INTO SECTION 7 CONSULTATIONS ON INCLUDED ACTIVITIES AND NOT IMPOSE ANY REASONABLE AND PRUDENT MEASURES FOR NLEB “TAKE” IMPACTS IF THE ACTIVITIES ADHERE TO THE FINAL 4(d) RULE’S APPLICABLE CONSERVATION MEASURES AND ARE THEREFORE EXEMPT FROM THE “TAKE” PROHIBITION.

EWAC members have experienced certain instances where Service personnel have refused to consider the Interim 4(d) Rule in their ESA Section 7 analyses related to NLEB. The Service’s FAQ for the Interim 4(d) Rule recognizes that the Service may not require an incidental take statement where 4(d) rule

¹⁵ The Service document “Do I need a Permit? A Key to Northern Long-eared Bat Interim 4(d) Rule for non-Federal Projects” suggests that EWAC’s understanding is correct, however, we do not think the Interim 4(d) Rule is as clear on these points as it should be. Available at http://www.fws.gov/mountain-prairie/ea/NLEBInterim4d_March2015.pdf.

activities are conducted, but implies that a biological opinion (i.e., formal consultation) will be necessary.¹⁶ While we understand that a Section 7 analysis evaluates the effects of the action in addition to incidental take, implementation of the conservation measures contained in the 4(d) rule should be taken into consideration when evaluating a federal action under Section 7. A “not likely to adversely affect” finding is appropriate when the action agency concludes (and the Service concurs) that the federal action’s effects on listed species are expected to be “discountable, or insignificant, or completely beneficial.”¹⁷

The application of the conservation measures contained in the Interim 4(d) Rule could sufficiently minimize the effects of an action to warrant consideration in determining whether formal consultation is necessary. In that same vein, where a federal action is an activity included in the 4(d) rule and in the WNS Buffer Zone, the lack of known, occupied hibernacula or roost trees should receive similar treatment as under the Interim 4(d) Rule. That is, *no* conservation measures are required *nor* is there an affirmative duty to survey. It is conceivable that in these two scenarios—where there are known features and conservation measures are applied, or where there are no known features and thus no need for the conservation measures—there are instances where “not likely to adversely affect” is the appropriate conclusion, and formal consultation would not be required. Moreover, where the Service does reach a “likely to adversely affect” or is proceeding with formal consultation due to other species, the Service should recognize that an activity that it is evaluating under Section 7 and that is included in, and is being conducted in accordance with, the Interim 4(d) Rule (“adherent activity”), from a legal standpoint, cannot be burdened by an incidental take statement (“ITS”) and reasonable and prudent measures. As there is no “incidental take” of NLEB to be found for an adherent activity, issuance of an ITS for NLEB is inappropriate and contrary to case law. The ITS cannot find “incidental take” of the NLEB because the Interim 4(d) Rule exempts the adherent activity from Section 9 “take” liability. Moreover RPMs are only intended “to minimize the impacts [of the incidental taking].”¹⁸ As there is no incidental take of NLEB from an adherent activity, there are no incidental take impacts to minimize. In short, even if formal consultation is warranted (unlikely for the NLEB, but perhaps for other ESA-listed species), it should not and cannot impose any conservation measures beyond those in the Interim 4(d) Rule (or final 4(d) rule) for included activities. The Service’s

¹⁶ Interim 4(d) Rule for the Northern Long-eared Bat, Questions and Answers, U.S. Fish & Wildlife Service, *available at* <http://www.fws.gov/midwest/endangered/mammals/nleb/FAQsInterim4dRuleNLEB.html> (Question no. 15).

¹⁷ Service Consultation Handbook, p. 3-12.

¹⁸ 50 CFR §402.02.

Section 7 staff should be advised of the proper role of the 4(d) rule in limiting any Section 7 consultation on federal agency actions related to NLEB.

XI. THE SERVICE SHOULD CONTINUE ITS COMMUNICATION INITIATIVE ACROSS REGIONS AND FIELD OFFICES TO ENSURE THAT ALL NLEB-IMPACTED REGIONS AND OFFICES CONSISTENTLY APPLY GUIDANCE, PROCEDURES, AND POLICIES, EXCEPT WHERE SITE-SPECIFIC CONDITIONS OR OPPORTUNITIES FOR INNOVATION COUNSEL OTHERWISE.

We understand that, since the NLEB listing announcement, the Service has been conducting regular teleconferences across regions and field offices to share experiences concerning the NLEB. EWAC commends the Service's initiative and encourages the Service to continue its coordination efforts to ensure consistency in procedures and policies across the Service while still retaining the ability to respond to site-specific conditions or pursue opportunities for innovation. EWAC members work with Service offices across the NLEB range, and we find that coordination across offices and regions helps ensure consistent regulation of member activities and simultaneously fosters innovative thinking as the Service encounters new regulatory scenarios and expenses.

XII. CONCLUSION.

EWAC would appreciate the Service's consideration of these recommendations as it finalizes the 4(d) rule for the NLEB. We look forward to continued discussion on these issues. Please feel free to contact the following EWAC representatives should the Service seek assistance in the development or refinement of measures specific to EWAC member industries:

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