



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
4625 Morse Road, Suite 104
Columbus, Ohio 43230
(614) 416-8993 / FAX (614) 416-8994

June 4, 2018

Timothy M. Hill, Administrator
Ohio Department of Transportation
Office of Environmental Services
1980 West Broad Street, Mail Stop 4170
Columbus, OH 43223

TAILS: 03E15000-2016-I-0365 (PID 98111)

Attn: Matt Raymond

RE: FRA-33-24.26 (PID 98111) – Active Season Tree Clearing

Dear Mr. Hill,

The U.S. Fish and Wildlife Service (Service) is responding to your request dated May 29, 2018 to verify that the proposed **FRA-33-24.26** project (the Project), PID 98111, may rely on the February 29, 2016, Framework Programmatic Biological Opinion (PBO) for the Ohio Department of Transportation (ODOT) Federal-Aid Highway Program and Its Effects on the Indiana Bat (*Myotis sodalis*) and/or Northern Long-eared Bat (NLEB) (*Myotis septentrionalis*)¹.

The Project, as proposed, will widen FRA-33 by adding an auxiliary lane to the outside of westbound and eastbound lanes between the I-270 and Hamilton Road (OH-317) Interchanges and rehabilitate the existing pavement by repairing concrete pavement joints and full depth or partial depth pavement replacement where warranted between 24.26 and 26.12. Other improvements include widening the bridges over Big Walnut Creek and the Big Walnut Creek Overflow Channel (four bridges in total), upgrading signs to reflect the new lane configurations on FRA- 33, relocating light towers affected by the widening, and minor traffic signal work at the Hamilton Road Interchange. We understand that the project will result in impacts to approximately 846 linear feet of streams and 0.009 ac of wetland. In addition, approximately seven (7) acres of suitable wooded habitat (SWH) for the Indiana bat and/or NLEB will be removed for the project.

During informal consultation with your office (concluded on December 31, 2015), the Service concurred with ODOT's determination that the FRA-33-24.26 project (PID 98111) *may affect but was not likely to adversely affect* the Indiana bat or northern long-eared bat; and the following avoidance and minimization measure was included in the project's environmental commitments:

This project is located within the known habitat ranges of the federally listed and protected Indiana bat and northern long-eared bat. No trees shall be removed under this

¹ Note: The Programmatic Biological Opinion on Final 4(d) Rule for the Northern Long-Eared Bat and Activities Excepted from Take Prohibitions is included in the ODOT PBO by reference.

project from April 1 through September 30. All necessary tree removal shall occur from October 1 through March 31. This requirement is necessary to avoid and minimize impacts to these species as required by the Endangered Species Act. For the purpose of this note, a tree is defined as a live, dying, or dead woody plant with a trunk three inches or greater in diameter at a height of 4.5 feet above the ground surface, and with a minimum height of 13 feet.

In February 2018 your office notified the Service that the FRA-33-24.26 project was not going to be awarded until after April 1, 2018. However, in a subsequent email from your office, dated February 27, 2018, we were informed that ODOT had hired a contractor prior to the project award date to ensure that trees would be cleared before April 15. In an email dated March 1, 2018, the Service granted an extension for tree clearing on the site through April 15. On April 18, 2018, the Service emailed your office to verify that all tree clearing activity had been completed, and we received an email confirmation from Megan Michael (ODOT OES) that it had. However, six weeks after ODOT confirmed that tree clearing had been completed, we received an email from Matt Raymond (ODOT OES) indicating that approximately one acre of trees remained to be cleared; and, therefore, the project now *may affect and is likely to adversely affect the species*.

This letter provides the Service's response as to whether the Project may rely on the PBO to comply with Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) for its effects to the Indiana bat and/or NLEB. ODOT has determined that this project will have no effect on any other federally listed species or designated critical habitat other than the Indiana bat and NLEB.

Conclusion

The Service has reviewed the May 29, 2018 email, as well as previous and subsequent supporting materials submitted by your office, which describe the effects of the proposed Project and include ODOT's commitment to implement minimization and compensation measures. These measures include the implementation of:

- CM-1b, which will offset the acreage of SWH to be removed in the Western Management Unit, as follows:
 - one (1) acre of SWH will be removed during the **active** season within 100 feet from the edge of pavement. ODOT has agreed to replace this acreage at a ratio of 5:1 to allow for active season removal of SWH and to compensate for the inability to comply with the original agreed upon ESA Section 7 avoidance measures proposed for the project.
 - Therefore, five (5) acres of credits will be subtracted from the acreage credit available at the Forrest Bat Conservation Area (BCA).

We confirm that the proposed Project's effects are consistent with those analyzed in the PBO. The Service has determined that projects consistent with the conservation measures and scope of the program analyzed in the PBO are not likely to jeopardize the continued existence of the Indiana bat and/or the NLEB.

Incidental Take

Indiana Bat

The Service anticipates that tree removal associated with the proposed Project will cause incidental take of Indiana bats. As described in the Framework Incidental Take Statement (ITS) of the PBO, such taking will be difficult to detect. The Service determined that it is appropriate to measure the amount or extent of incidental taking resulting from PBO projects using the proposed acreage of tree removal from Indiana bat suitable habitat as a surrogate for the numbers of individuals taken.

The proposed Project will remove one (1) acre of SWH for the Indiana bat, as defined by the 2016 PBO.

The Service will add the acreage of Project-related tree removal to the annual total acreage attributed to the PBO as a surrogate measure of Indiana bat take and exempted from the prohibitions against incidental taking. Such exemption is effective so long as your agency implements the reasonable and prudent measure (RPM) and accompanying terms and conditions of the PBO's ITS.

Northern Long-eared Bat

The Service anticipates that tree removal associated with the proposed Project will cause incidental take of NLEBs. However, the Project is consistent with the PBO, and such projects will not cause take of NLEB that is prohibited under the final 4(d) rule for this species (50 CFR §17.40(o)). Therefore, this taking does not require exemption from the Service.

Reporting Dead or Injured Bats

It should be noted that due to the six-week delay in notifying our office about the remaining tree clearing, the current request to remove suitable habitat is being made during a critical stage in the bats' reproductive cycle. In June and July pregnant female bats, roosting under exfoliating tree bark, give birth to individual, non-volant pups. These pups do not become volant until mid- to late-July. No survey was conducted at the project site to determine the potential presence or absence of these federally listed species; therefore, **if workers at the project site observe any bats flying from the trees being felled, all work should cease, and our office must be notified and consulted immediately for guidance on how best to proceed. Such inter-agency coordination can avoid or reduce the direct, mortal take of Indiana or northern long-eared bats as a result of the tree clearing activity.**

ODOT, its Local cooperators, and any contractors must take care when handling dead or injured Indiana bats and/or NLEBs, or any other federally listed species that are found at the Project site in order to preserve biological material in the best possible condition and to protect the handler from exposure to diseases, such as rabies. Project personnel are responsible for ensuring that any evidence about determining the cause of death or injury is not unnecessarily disturbed. Reporting the discovery of dead or injured listed species is required in all cases to enable the Service to determine whether the level of incidental take exempted by this PBO is exceeded, and to ensure that the terms and conditions are appropriate and effective. Parties finding a dead, injured, or sick specimen of any endangered or threatened species must promptly notify this Service Office.

Reinitiation Notice

This letter concludes consultation for the proposed Project, which qualifies for inclusion in the PBO issued to Ohio on February 29, 2016. To maintain this inclusion, a reinitiation of this Project-level consultation is required if:

1. the amount or extent of incidental take of Indiana bat is exceeded **or** bats are observed flying from trees during felling, as described in the first paragraph under "Reporting Dead or Injured Bats" above;
2. new information reveals that the Project may affect listed species or critical habitat in a manner or to an extent not considered in the PBO;
3. the Project is subsequently modified in a manner that causes an effect to listed species or designated critical habitat not considered in the PBO; or
4. a new species is listed or critical habitat is designated that the Project may affect.

Per condition #1 above, the anticipated incidental take is exceeded when:

- the Project removes trees from more than 1 acre of SWH for the Indiana bat **or** bats are observed flying from trees during felling, as described in the first paragraph under "Reporting Dead or Injured Bats" above.

In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

As of this date, our records indicate that projects coordinated under the 2016 PBO have resulted in take of 321.49 acres of SWH:

Management Unit	IT for this project	Cumulative IT to date
Statewide	1.00 acre	321.49 acres

If you have any questions regarding our response or if you need additional information, please contact Karen Hallberg at extension 23 in this office.

Sincerely,



Scott Pruitt
Acting Field Supervisor

cc (*all email only*):

M. Michael, ODOT, OES, Columbus, OH
C. Staron, ODOT, OES, Columbus, OH
S. Vonderwell, ODOT, OES, Columbus, OH
J. Kessler, ODNR, Office of Real Estate, Columbus, OH
P. Clingan, USACE, Ohio Regulatory Transportation Office, Columbus, OH
B. Beck, OEPA, Columbus, OH
N. Reardon, ODNR, Division of Wildlife, Columbus, OH
M. Pettegrew, ODNR, Office of Real Estate, Columbus, OH