



Interim Consultation Framework for the Northern Long-eared Bat

Valid from March 31, 2023 through April 1, 2024

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INTRODUCTION

The northern long-eared bat (NLEB) was listed as threatened under the Endangered Species Act (ESA) in 2015 (80 Federal Register [FR] 17974), and a special rule pursuant to section 4(d) of the ESA was finalized in 2016 (81 FR 1900). The 4(d) rule applied take¹ prohibitions to the northern long-eared bat.

The final rule addressed both purposeful take and incidental taking² of the NLEB, with certain differences distinguished based on the occurrence of WNS as follows:

- The final 4(d) rule prohibited purposeful take of NLEBs throughout the species’ range, except when (1) necessary to protect human health; (2) in instances of removal of NLEBs from human structures³; or (3) the authorized capture and handling of NLEBs by individuals permitted to conduct these same activities for other bat species until May 3, 2016.
- The final 4(d) rule did not prohibit incidental take resulting from otherwise lawful activities in areas not yet affected by WNS (i.e., areas outside of the WNS zone).

¹ The ESA and its implementing regulations (50 CFR 17) define take as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.

² “Incidental taking” is defined at 50 CFR 17.3 as “any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, an otherwise lawful activity.”

³ Human Structures were defined as houses, garages, barns, sheds, and other buildings designed for human entry.

- Within the WNS zone, the final 4(d) rule prohibited incidental take of NLEBs in their hibernacula, which may be caused by activities that disturb or disrupt hibernating individuals when they are present as well as the physical or other alteration of the hibernaculum's entrance or environment when bats are not present.
- Incidental take of NLEBs outside of hibernacula resulting from activities other than tree removal was not prohibited provided they did not result in the incidental take of NLEBs inside hibernacula.
- Incidental take resulting from tree removal was prohibited if it: (1) occurs within 0.25 miles (0.4 km) of known NLEB hibernacula; or (2) cuts or destroys known, occupied maternity roost trees or any other trees within a 150-foot (45-meter) radius around the known, occupied maternity tree during the pup season (June 1 to July 31).
- Removal of hazardous trees for the protection of human life and property was not prohibited.

Many activities where incidental take was not prohibited could have resulted in adverse effects to the species both within and outside the WNS Zone. Therefore, the U.S. Fish and Wildlife Service (Service) provided a framework for streamlined section 7 consultation for federal actions consistent with the 4(d) rule that may affect the NLEB but would not result in prohibited take. The Service completed an intra-Service consultation and issued a non-jeopardy programmatic biological opinion (2016 PBO) for both the 4(d) rule and implementation of the streamlined framework. Federal agencies could rely upon the finding of the 2016 PBO to fulfill their project-specific section 7(a)(2) responsibilities.

However the 4(d) rule and 2016 PBO were rendered obsolete on March 31, 2023, which was the effective date for the reclassification of the NLEB to endangered (87 FR 73488, November 30, 2022; 88 FR 4908, January 26, 2023), as 4(d) rules are only available for threatened species. All take occurring on or after March 31, 2023 is now prohibited by section 9 of the ESA. All new and ongoing federal⁴ actions that are likely to adversely affect the species and reasonably certain to result in incidental take must complete formal section 7 consultation via the rendering of a biological opinion and be exempted from section 9 prohibitions through the issuance of an incidental take statement (ITS) by the Service and compliance with the ITS terms and conditions.

The Service anticipates there may be thousands of incomplete projects that relied upon the finding of the 2016 PBO to fulfill their project-specific section 7(a)(2) responsibilities, and many new projects have been developed to comply with the 4(d) rule. Because the Service expects concern over the timeliness of completing the required consultations for many projects, we developed the Interim Consultation Framework to help federal agencies insure that their actions are not likely to jeopardize NLEBs while streamlining formal consultation for federal actions consistent with the former 4(d) rule.

⁴ Federal actions include all activities or programs authorized, funded, carried out, or permitted -- in whole or in part -- by Federal agencies in the United States or on the high seas.

THE INTERIM CONSULTATION FRAMEWORK

Section 7(a)(2) of the ESA requires federal agencies to consult with the Service to insure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats. “To jeopardize the continued existence of a listed species” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of the species (50 CFR §402.02).

The Interim Consultation Framework provides a mechanism to improve the efficiency and consistency of completing formal section 7 consultation for the NLEB for projects consistent with the former 4(d) rule and provide for exemptions from section 9 prohibitions for incidental take that is reasonably certain to occur before April 1, 2024. The goal of the Interim Consultation Framework is to facilitate the transition from the 4(d) rule and 2016 PBO to more commonly used Section 7 consultation procedures. After this interim transition period, the Service will review the best available information, including any information developed during the implementation of the Interim Consultation Framework, and may recommend additional conservation measures for the NLEB in areas where the species is reasonably certain to occur.

The Interim Consultation Framework consists of this document and its appendices: Standing Analysis, Biological Assessment Form (BA Form), and Biological Opinion and ITS Form (BO and ITS Form).

The Standing Analysis evaluates several categories of potential activities and determines that the potential federal actions covered by the Interim Consultation Framework are not likely to jeopardize the continued existence of the NLEB. Because the Standing Analysis has already analyzed the effects of the covered activities, it enables an efficient and consistent formulation of the individual BO and ITS that will address each qualified project.

Agencies that need to initiate or reinstate formal consultation for the NLEB will use the BA Form to provide information about the project. The local Ecological Services Field Office will then complete the BO and ITS Form to ensure the action complies with the Standing Analysis and is therefore not likely to jeopardize the continued existence of the NLEB. The BO and ITS Form will outline the reasonable and prudent measures and associated terms and conditions necessary for the agency and/or applicant to be exempt from the take prohibitions under section 9 of the ESA.

Interim Consultation Framework Requirements

The following requirements and limits apply to the Interim Consultation Framework:

1. It fulfills section 7 consultation requirements for only the NLEB. Action agencies must consult or confer under section 7, as appropriate, for other federally listed and proposed threatened and endangered species and designated and proposed critical habitat.

2. The Standing Analysis evaluates potential federal actions that are consistent with the 4(d) rule using four general activity types updated from the 2016 PBO: 1) forest management, 2) prescribed fire; 3) habitat removal; and 4) other activities that may affect the NLEB. We anticipate the four general activity types will cover a wide variety of federal actions including, but not limited to, authorizing, funding, or carrying out:
 - Forest management practices including the manipulation and management of trees
 - Prescribed fire activities in forests or the intersection of grassland and forested habitat
 - Vegetation management in rights-of-ways and other areas, including mowing, tree clearing, and tree trimming
 - Construction, maintenance, operation, and/or removal of infrastructure such as roads and trails, communication towers, transmission and utility lines, oil and gas pipelines, solar power facilities, canals, levees, or dikes, commercial, residential and recreational developments
 - Military operations
 - Agricultural activities that involve tree clearing and receive federal funding such as constructing buildings or making farm improvements or participating in the Environmental Quality Incentives Program
 - Use of pesticides following the label
 - Habitat restoration and enhancement
 - Dredging and filling of wetlands or waterbodies
3. All projects must fully comply with conditions and requirements of the 2016 4(d) rule for the NLEB. Activities that do not comply with the conditions and requirements of the former 4(d) rule are not addressed in the Standing Analysis and must undergo-separate consultation. The following is a list of activities that do not comply with the conditions and requirements of the former 4(d) rule and would require a separate consultation:
 - a. Activities resulting in the disruption or disturbance of NLEBs in their hibernacula during hibernation. These could include entry into a known hibernacula or the following activities within 0.25 miles of a known hibernacula: prescribed fire, blasting, pile driving, drilling, and certain military operations. Smaller buffer sizes may be appropriate depending on the intensity of the activity. Projects with smaller buffer sizes are eligible for the Interim Consultation Framework with the approval of the local Ecological Services Field Office.
 - b. Activities resulting in the physical or other alteration of a hibernaculum's entrance or its environment at any time of year. These could include the following activities within 0.25 miles of a known hibernacula: prescribed fire, blasting, pile driving, drilling, certain pesticide use, and certain military operations. Smaller buffer sizes may be appropriate depending on the intensity of the activity. Projects with smaller buffer sizes are eligible for the Interim Consultation Framework with the approval of the local Ecological Services Field Office.

- c. Tree clearing activities within 0.25 miles of a known NLEB hibernaculum at any time of the year.
 - d. Tree clearing activities that result in cutting or destroying known, occupied maternity roost trees or any other trees within a 150-ft radius around the roost tree from June 1 – July 31, which was the generic pup season (i.e., the time of year when females care for young that are unable to fly) in the 4(d) rule.
4. In addition, the following list of activities are also not covered by the Standing Analysis and require separate consultation: 1) purposeful take of NLEBs; 2) wind facility development or wind turbine operation; and 3) broad-scale aerial applications of pesticides over suitable forested habitat.
 5. The Standing Analysis and Interim Consultation Framework only consider and address the effects of covered actions that are expected to occur from March 31, 2023 until April 1, 2024. In other words, the Standing Analysis and Interim Consultation Framework do not consider any effects (i.e., incidental take) of the covered actions that may occur after April 1, 2024. Therefore, after April 1, 2024, any action agency that was issued an individual BO that relied on this Standing Analysis and Interim Consultation Framework will need to reinitiate consultation if its continuing, discretionary action is expected to affect the NLEB (i.e., cause incidental take). If the action agency fails to reinitiate consultation on or before April 1, 2024, its individual BO will no longer be based on the best available information, which means the action agency's section 7 compliance and incidental take exemptions provided by section 7(o)(2) may lapse.

Steps to Complete Consultation under the Interim Consultation Framework

The Service has developed a series questions and associated tasks to guide agencies or applicants (any project proponent) that wish to use the Interim Consultation Framework. Federal agencies need to follow the steps described below to determine project eligibility and fulfil ESA compliance.

Step 1. Is your action funded, authorized, or conducted by a Federal agency (e.g., a new action, or a continuing action)?

No, no further action.

Yes, proceed to step 2.

Step 2. Have you previously consulted on your Federally funded, authorized, or conducted action for the northern long-eared bat either through the 2016 PBO or through a separate consultation with an Ecological Services Field Office? Such prior consultations may include the use of the determination key titled “Northern Long-Eared Bat (NLEB) Consultation and 4(d) Rule Consistency” in the Service’s Information for Planning and Consultation (IPaC) system. If:

Yes, Go to Step 2. A.

No, go to Step 3.

Step 2.A. Has any Federal agency retained discretionary involvement⁵ or control over the action?

Yes, Go to Step 3.

No, no further consultation required.

Step 3. Complete the Northern Long-eared Bat Range-wide Determination Key in IPaC to make an initial effects determination. When an action agency enters the project information into the [Information for Planning and Consultation \(IPaC\) website](#), one of the following three outcomes will be reached, and it will require a corresponding action be taken by the action agency:

1. If your completed review indicates a "No Effect" (NE) for NLEB, save your IPaC output letter for your record to document your compliance with the Endangered Species Act. No further action is required for the NLEB.
2. For Federal actions with a "May Affect, Not Likely to Adversely Affect" (MANLAA) determination for the NLEB through the determination key, the Service's concurrence letter becomes effective 15 days after your letter is been rendered, as specified in your concurrence letter. No further action is required for the NLEB.
3. If the output letter indicates additional coordination with the appropriate Ecological Services Field Office is necessary (i.e., you get a "May Affect" determination" without a concurrence that adverse effects are not likely) proceed to Step 4.

Step 4. The action agency determines if the project meets the requirements of the Interim Consultation Framework (see **Interim Consultation Framework Requirements**, above). If:

Yes, continue to Step 5.

No, the project does not meet the requirements of the Interim Consultation Framework and the action agency will need to undergo separate section 7 consultation. Contact the local Ecological Services Field Office.

Step 5. We are uncertain where the northern long-eared bat occurs on the landscape outside of known locations. Because of the steep declines in the species and vast amount of available and suitable forest habitat, the presence of suitable forest habitat alone is a far less reliable predictor of their presence. Based on the best available information, most suitable habitat is now expected to be unoccupied. Therefore, we conclude take is not reasonably certain to occur in undocumented habitat during this interim period. In addition, the Standing Analysis concludes

⁵ Section 7 applies to all actions in which there is discretionary Federal involvement or control. Federal discretionary involvement or control over an action does not exist when: 1) another statute requires an agency to implement an action strictly according to certain criteria and removes the power of the agency to consider extrastatutory factors, such as insuring that such action will not jeopardize listed species; or 2) when the Federal action is complete and the governing statute for such action does not authorize the agency to maintain any further discretionary control or involvement over the action.

adverse effects are extremely unlikely to occur in areas outside of known locations. This approach applies during the interim period while we work on potential methods to address this uncertainty. It is not precedent-setting for future consultations or for other species.

The Service is incorporating known locations into the Northern Long-eared Bat Range-wide Determination Key so users can receive automatic concurrence for projects in areas where take is not reasonably certain to occur. Due to time constraints, this process will not be automated until March 21, 2023. We urge you to wait until the determination key is updated to complete your project review. We will update these instructions and notify users as soon as the updated key is ready.

If you are unable to wait, you can contact the Midwest Regional Office at consultationr3es@fws.gov to determine if NLEBs bats are reasonably certain to occur in your action area. The email subject line must include the Project Code provided in the letter from Step 3. The Midwest Regional Office will respond with one of the following outcomes, and it will require a corresponding action be taken by the action agency:

1. Yes, the appropriate determination is “May Affect, Likely to Adversely Affect” (LAA). Continue to Step 6 or develop additional voluntary conservation measures to minimize adverse effects and repeat Step 3.
2. No, the best available information does not show that the action area overlaps a known NLEB location; therefore, the Service can concur with a MANLAA determination for the NLEB. The rationale is that an adverse effect (e.g. incidental take) cannot be logically reasoned as likely to occur (or reasonably certain to occur) if there is no information that shows actual NLEBs exist in the action area. The Midwest Regional Office will respond with concurrence, and no additional consultation is required for the NLEB. However, if you choose a different determination or wish to initiate formal consultation for the NLEB, you can respond to the email, and the Midwest Regional Office will forward the project to the appropriate Ecological Services Field Office listed in your output letter in Step 3. (Note that if NLEBs are later discovered, the action agency may be required to reinitiate consultation.)

Step 6. The action agency fills out the BA Form. Agencies can include multiple projects with LAA determinations in a single BA Form provided they include all of the individual project codes. The action agency provides basic information about the project(s), including a brief project description, any conservation measures that will be implemented, and additional information required for the Service to complete the BO and ITS Form. The action agency submits the BA Form to the local Ecological Services Field Office via electronic mail. Contact information for each State’s Ecological Services Field Office can be found here ([provide link](#)). The subject line should include: 1) the project code(s) and either 2) “LAA ongoing” for projects with prior consultations under the 4(d) rule (See Step 2), or 3) “LAA new” for new projects that have not completed consultation for the NLEB.

Section 7(d) of the ESA prohibits federal agencies and permit applicants from making any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. In the Standing Analysis, we found that projects that are consistent with the Interim Consultation Framework are not likely to jeopardize the NLEB. Therefore, we do not anticipate the need for agencies to formulate or implement any reasonable and prudent alternative for actions consistent with the framework. Furthermore, the project's consistency with the Interim Consultation Framework means that the Service will not add reasonable and prudent measures or terms and conditions to the project-specific ITS that are not already listed in the BO and ITS Form. However, the action agency will need to report any incidental take that occurs to the local Ecological Services Field Office while the project-specific BO and ITS are being developed so that the Service can track and monitor it. If the action agency monitors and reports any incidental take that occurs during the development of their project-specific BO and ITS, such take will be exempted from section 9 prohibitions provided the action complied with the conditions and requirements contemplated by the Standing Analysis. For these reasons, it is the Service's opinion that action agencies can proceed with actions consistent with the Interim Consultation Framework while the Service develops the project-specific BO and ITS.

Step 7. The Service reviews the information provided in the BA Form to determine if sufficient information is included to conclude consultation and to develop the BO and ITS Form. The Service will determine if enough site-specific and project-specific information been provided to meet the information standards of section 7(a)(2) and to determine if the project is consistent with the Standing Analysis. If:

Yes. The Service will issue the BO and ITS Form. For ongoing projects with prior consultations under the 4(d) rule (See Step 2 above), the Service will issue the BO and ITS form within 15 days. For new projects, the Service will issue the BO and ITS Form within 15 days provided the consultation is already complete for other species that may be affected by the action. For new projects that have not completed consultation for other species that may be affected, the standard consultation time frames apply. The Service will send the BO and ITS Form to the contact that sent the BA Form to the Field Office via electronic mail. The consultation is then concluded.

No. The Service will request additional information. Consultation will conclude after the Service receives sufficient information following the time frames listed above.

APPENDIX A. Interim Consultation Framework for the Northern Long-Eared Bat: Standing Analysis

APPENDIX B. Biological Assessment Form for Project-Level Consultation under the Interim Consultation Framework for the Northern Long-Eared Bat

APPENDIX C. Biological Opinion and Incidental Take Statement Form for Project-Level Consultation under the Interim Consultation Framework for the Northern Long-Eared Bat