



COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION

1401 East Broad Street Richmond, Virginia 23219

Stephen C. Brich,
P.E. Commissioner

MEMORANDUM

Date: April 19, 2023

To: Virginia Design and Construction Communities; VDOT Location & Design, Construction, Maintenance, and Local Assistance Divisions; VDOT District Project Development Engineers, District Construction Engineers, District Maintenance Engineers, and District Environmental Managers

From: Chris Swanson, P.E., Environmental Division Director

Subject: Uplisting of the Northern Long-Eared Bat

The purpose of this memo is to provide an update from VDOT's Environmental Division on the U.S. Fish and Wildlife Service's (USFWS) reclassifying (or "uplisting") the Northern Long-Eared Bat (NLEB) from "threatened" to "endangered" under the Endangered Species Act (ESA). As most of VDOT's projects receive federal funds or require other federal permits or authorizations, the focus of this memo is on Section 7 of the ESA. Projects that do not have federal funds or other permits or authorizations are still subject to other sections of the ESA. Additional information on the ESA is available on the USFWS website.

The NLEB uplisting became effective on April 1, 2023. As part of the uplisting, USFWS issued interim guidance and tools to guide the consultation process until April 2024 when final guidance is anticipated. Prior to the uplisting, impacts to the NLEB associated with tree removal could be coordinated with the 4(d) rule. Now that the NLEB is listed as "endangered", a 4(d) rule is no longer available. Active projects with federal funds, authorizations, or permits that relied on the 4(d) rule to comply with Section 7 of the ESA will need to re-initiate consultation with USFWS to varying degrees. The different pathways of consultation include:

- For ongoing projects with prior consultation under the 4(d) rule and no other threatened or endangered species or critical habitat, USFWS will issue a Biological Opinion (BO) within 15 days of receipt of the new streamlined Biological Assessment (BA) available on their website.
- For new projects that only have NLEB, USFWS will issue a BO within 15 days of receipt of the new streamlined BA available on their website.
- For new projects that have NLEB and consultation is already completed for other threatened or endangered species or critical habitat, USFWS will issue a BO within 15 days of receipt of the new streamlined BA available on their website.
- For new projects that have NLEB and consultation is not completed for other threatened or endangered species or critical habitat, standard consultation timeframes apply (these timeframes are documented by USFWS in other guidance and regulation).

The documents available on USFWS NELB website¹, provide a step-by-step decision guide on making these determinations and continuing your ESA coordination. There is no grandfathering of impacts previously covered by the 4(d) rule so every project will need to follow one of these pathways. The new guidance also has been embedded in USFWS’s Information for Planning and Consultation (IPaC)² website. To properly address the “endangered” listing, USFWS now considers additional project activities which may cause impacts to NLEB (also referred to as “take”). Examples of these activities include work on bridges, buildings, and culverts; roadside maintenance; percussive noise; vibration; and/or lighting impacts, in addition to tree removal.

USFWS also now considers portions of Chesapeake, Isle of Wight, Norfolk, Portsmouth, Surry, Southampton, Suffolk, and Virginia Beach to have year-round NLEB activity. USFWS has yet to make maps of the year-round areas available to the public; however, IPaC considers these locations in its outputs. So, while there may be a need to reinitiate consultation, IPaC remains the tool for beginning new ESA consultation for your project.

As part of the IPaC analysis and as discussed in the materials provided by USFWS on the website listed above, projects with federal funding, permits, or other authorizations have two pathways towards attaining compliance with Section 7: 1) Use the “FHWA, FRA, FTA Programmatic Consultation for Transportation Projects Affecting NLEB or Indiana Bat” Determination Key; or, 2) Use the “Northern Long-eared Bat Rangewide Determination Key”. Each of these determination keys start with a series of questions to determine if the given key is appropriate for your project. USFWS has advised VDOT that for projects with FHWA funding or other approvals, the first path listed above is appropriate. For other projects, the Rangewide Determination Key can be used.

Projects with no federal funding, permits, or approvals are not subject to Section 7 of the ESA, but still must comply with the law. Therefore, if non-federal actions are reasonably certain to cause incidental take³ of the NLEB, applications for an incidental take permit may be warranted. As part of its interim guidance, USFWS has issued *Interim Voluntary Guidance for the Northern Long-Eared Bat: Forest Habitat Modification*⁴ to guide these non-federal actions. As is the case with the federal projects, we expect more definitive direction from USFWS in its final guidance on NLEB due to be issued by April of 2024.

In the coming weeks, VDOT will assess its Instructional and Informational Memoranda (I&IMs) and internal forms to determine if any changes are warranted. Regardless of these updates, the tools and guidance are in place to reinitiate consultation and keep projects moving forward. While the USFWS tools provide a stepwise decision guide for your use, some aspects of the required consultation are highly nuanced and should be discussed with and coordinated by the project team’s ESA technical lead. The responsible entity for completing updated consultation, are assumed to be as follows:

Type of Project	Responsible Project Manager
Design-Bid-Build (DBB)	VDOT
Design-Build (DB)	Design-Build Contractor
Public-Private Partnership (P3)	P3 Private Partner

Note: This represents a continuation in existing roles and responsibilities for these project types.

USFWS has already hosted a number of webinars on this issue. Be sure your ESA leads are informed by these opportunities and the information on the USFWS website before consulting with the agency. VDOT’s Environmental Division will join the industry in monitoring developments over the next year to ensure that projects remain on schedule. When appropriate, we will provide updates in a manner similar to this memorandum.

¹ : <https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis>

² <https://ipac.ecosphere.fws.gov/>

³ Take as defined under the ESA means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Incidental take is an unintentional, but not unexpected, taking.

⁴ <https://www.fws.gov/library/collections/interim-habitat-modification-guidance>