



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Kentucky Ecological Services Field Office
330 West Broadway, Suite 265
Frankfort, Kentucky 40601
(502) 695-0468

February 17, 2012

Mr. David Waldner
Division of Environmental Analysis
Kentucky Transportation Cabinet
200 Mero Street
Frankfort, Kentucky 40622

Re: FWS 2007-B-0904; Indiana Bat Conservation MOA; Biological Assessment (BA) and effects determination for federally listed species in association with the Louisville – Southern Indiana Ohio River Bridges Project in Jefferson County, Kentucky and Clark County, Indiana; KYTC Item No. 5-118; INDOT Des. No. 9803640

Dear Mr. Waldner:

The U.S. Fish and Wildlife Service's (Service) Kentucky and Indiana Field Offices (FO) have reviewed your February 2, 2012 correspondence transmitting a revised BA dated January 16, 2012 for the above-referenced project. The following comments are provided by the Kentucky FO as the lead Service office for this Endangered Species Act (ESA) consultation in accordance with section 7 of the ESA and other applicable authorities.

This BA is a revision of the September 2011 BA, which was submitted to the Service on October 3, 2011, and addresses our comments dated November 22, 2011. The revised BA also addresses the alternative alignment, which is being referred to as the "Modified Selected Alternative" and is a revision of the alignment (FEIS Selected Alternative) that was addressed in a November 2008 BA. Like the FEIS Selected Alternative, the Modified Selected Alternative is comprised of Alternatives A-15 and C-1. Based on our review of the Modified Selected Alternative and our evaluation of its likely effects on federally listed species that occur or may occur within the project area, we do not believe that the proposed project modifications are likely to have adverse effects on federally listed species that would be additional to those already identified, because the proposed modifications would not (a) require disturbance of potential or known habitat for federally listed species that are likely to occur or that do occur in the project area, or (b) result in additional habitat or species impacts that were not already considered in the November 2008 BA and our analysis of the November 2008 BA.

In addition, the September 2011 revised BA also addressed several of our other previous concerns related to specific federally listed species and federally listed and candidate freshwater mussels. Our review found the BA and analysis to be adequate, and we believe it supports the conclusion of "not likely to adversely affect" for running buffalo clover, Short's goldenrod, federally listed mussel species, American burying beetle, Louisville cave beetle, Interior least tern, and piping plover. Based on our review of the information, the Service concurs with these determinations.

In a comment letter dated July 2009, the Service expressed concerns that the A-15 alignment portion of the proposed project is likely to have adverse effects on Indiana bats because the project would occur within the home range of a known Indiana bat maternity colony. Even though seasonal tree clearing was

proposed to avoid direct effects on Indiana bats, the Kentucky FO remained concerned that seasonal tree clearing could result in indirect and/or cumulative effects to Indiana bats and the maternity colony through changes to the landscape and the removal of potential foraging and roosting habitat while the bats are hibernating. As a result of these concerns, KYTC made a "may affect, likely to adversely affect" determination in the revised BA for the Indiana bat largely as a result of potential indirect effects to the species.

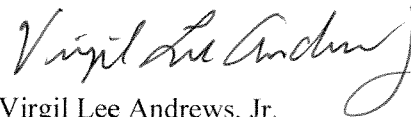
The Service agrees that the effects determination of "may affect, likely to adversely affect" for the Indiana bat is appropriate for the proposed project; therefore, we concur with this determination for the Indiana bat. Please note that our November 22, 2011 comment letter identified certain portions of the proposed project, in each state, that were not reasonably likely to have adverse effects on the Indiana bat and are listed as: (a) the entire Indiana portion of the project, and (b) the C-1 alignment within Kentucky. The Indiana and Kentucky FOs conducted independent reviews of these portions of the project and our analyses for these determinations are detailed within the November 22, 2011 letter.

For the Kentucky portion of the project, the Kentucky FO has maintained that the A-15 alignment portion of the proposed project is likely to adversely affect the Indiana bat, because that alignment occurs wholly within the known Indiana bat maternity colony home range and is likely to have adverse effects on Indiana bats through the loss and/or alteration of occupied Indiana bat habitat. In order to address these adverse effects on Indiana bats within Kentucky, KYTC proposes to enter into an Indiana Bat Conservation MOA (MOA) with the Kentucky FO to account for incidental take of Indiana bats.

Enclosed please find a copy of the Conservation MOA for KYTC signature. Upon review, please provide a signed copy to the Kentucky FO and Kentucky Natural Lands Trust (KNLT) so that KNLT may provide KYTC with an invoice for the amount specified in section 6.4 of the Conservation MOA. Execution of the Conservation MOA and the Indiana Bat Conservation Fund (IBCF) contribution that it requires will allow KYTC to be in compliance with the Endangered Species Act, relative to the Indiana bat. In order to fulfill ESA requirements associated with the Federal Highway Administration and/or other federal nexus agencies (e.g., ACE), please provide them with a copy of this letter, executed Conservation MOA, and proof of contribution for their records.

Thank you again for your request. Your concern for the protection of endangered and threatened species is greatly appreciated. If you have any questions regarding the information that we have provided, please contact Phil DeGarmo at (502) 695-0468 extension 110.

Sincerely,



Virgil Lee Andrews, Jr.
Field Supervisor

Cc: Mr. Michael Litwin, USFWS, INFO
Mr. Anthony Goodman, FHWA, KY

**INDIANA BAT CONSERVATION
MEMORANDUM OF AGREEMENT
BETWEEN THE
U.S. FISH AND WILDLIFE SERVICE
AND
Kentucky Transportation Cabinet**

This Memorandum of Agreement (MOA) is entered into by the United States Department of the Interior, U.S. Fish and Wildlife Service (Service) and Kentucky Transportation Cabinet (KYTC) to promote the survival and recovery of the Indiana bat (*Myotis sodalis*), a federally listed endangered species. Together, the Service and the KYTC are referred to as "Cooperators."

Section 1: PURPOSE AND OBJECTIVES

The Indiana bat is a federally listed endangered species native to a large portion of the eastern United States and the Commonwealth of Kentucky. This MOA will implement recovery-focused conservation measures that will be undertaken by the Cooperators and afford a measurable conservation benefit for the Indiana bat as set forth in the Service's Indiana Bat Mitigation Guidance as modified January 3, 2011 and hereby incorporated by reference. These measures will be implemented in association with the proposed project as detailed in section 4 of this MOA. All measures will be implemented according to the terms of this MOA. The Cooperators understand and intend that the benefits resulting from this MOA may also provide conservation benefits for other federal protected species and native fish and wildlife.

Section 2: AUTHORITY

This MOA is hereby entered into under the authorities of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) (ESA), Fish and Wildlife Act of 1956 (16 U.S.C. 742a. *et seq.*), and the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*). Section 5 of the ESA provides that, "The Secretary...shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species..." and "shall utilize land acquisition and other authority under the Fish and Wildlife Act, as amended, and the Migratory Bird Conservation Act, as appropriate". Section 7(a) (1) of the ESA further directs Federal agencies to "utilize their authorities in furtherance of the purposes of this Act [ESA] by carrying out programs for the conservation of endangered species and threatened species." The Fish and Wildlife Act of 1956 provides that the Secretary shall "...take such steps as may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources...." Finally, the Fish and Wildlife Coordination Act states that the Secretary is authorized "to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat..."

The authorization for any incidental take of the Indiana bat, as defined in section 9 of the ESA, and resulting from impacts that may be associated with the qualified project(s), as defined in section 4 of this MOA, is provided through the Service's incidental take statement and January 3, 2011 intra-Service biological opinion, which is incorporated herein by this reference. This biological opinion covers the Service's development of conservation agreements for the Indiana bat, which includes this MOA, that are based on implementation of the Indiana Bat Mitigation Guidance and provides incidental take of Indiana bats in the form of up to 2,500 acres of forested Indiana bat habitat per year through 2016.

Section 3: STATEMENT OF MUTUAL INTEREST

The mission of the Service is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Service's major responsibilities are for endangered species, threatened species, migratory birds, marine mammals, and freshwater and anadromous fish. The Service recognizes the ability and interest of KYTC to contribute to the conservation and recovery of the Indiana bat, and recognizes KYTC as a partner in the recovery and habitat conservation of the species. KYTC recognizes the Service's mission and its interest in developing partnerships to protect, restore, and manage important habitats on private and public lands for federal listed species. The Cooperators understand the collaboration for this MOA is voluntary.

Section 4: PROJECT DESCRIPTION

KYTC proposes the construction of Alternative A-15, the East End Modified Selected Alternative (A-15), which is part of a larger project known as the Louisville-Southern Indiana Ohio River Bridges Project. The A-15 project that occurs wholly within Jefferson County, Kentucky is the only portion of the larger project that is being considered in this MOA. Specific construction activities and plans associated with A-15 are provided within a Biological Assessment dated January 16, 2012. The following information was derived and calculated from the KYTC's February 2 & 7, 2012 correspondences and attachments.

The proposed project would result in the direct loss of 42.45 acres of forested habitat from one (1) Indiana bat habitat type as depicted in Table 1 below.

Table 1

Habitat Type	Forested Acreage Removed
Known Maternity Summer Habitat	42.45 acres

These Indiana bat habitat impacts are the impacts that are covered by this agreement and that were analyzed by the Service to assess the direct, indirect, and cumulative effects of the proposed project on Indiana bats.

Section 5: EFFECTIVE DATE AND TERMS OF AGREEMENT

This MOA is valid for the KYTC's consideration for 90 days from the date of the Service's signature below, shall be deemed effective on the last date signed below, and shall remain in effect until all terms of the agreement have been fulfilled, except as modified in Section 8 hereof.

As a project specific minimization measure, KYTC is committing to only remove habitat (i.e., tree clearing), within the identified work areas, between **August 16 – March 31** (unoccupied timeframe). This minimization measure addresses a specific adverse affect described in the Indiana Bat Mitigation Guidance (page 8, effect # 6) and is intended to further minimize the effect of take on maternal bats and their young. The Indiana Bat Conservation Fund contribution amount that is identified in section 6.4 of the MOA is based on the assumption that all tree removal associated with the project will be conducted during the unoccupied timeframe for maternal Indiana bats. If tree clearing must occur during the occupied timeframe (April 1 – August 15) for maternal Indiana bats, then KYTC must notify the Service in advance of tree clearing during the occupied timeframe and the MOA must be amended to appropriately account for the types of adverse effects to Indiana bats that would occur as a result of tree clearing during the occupied timeframe. In addition, if additional forested areas not considered in Section 4 of this agreement are to be removed, then KYTC must coordinate with the Service to determine if additional modification of this agreement is necessary, and, if found necessary, KYTC will seek such modification.

Section 6: SPECIFIC OBLIGATIONS OF THE COOPERATORS

The KYTC and the Service agree to fulfill the following conditions to minimize the potential level of take of the Indiana bat, compensate for adverse effects on the Indiana bat that may result from construction of the project, and promote future conservation and recovery of the Indiana bat:

6.1 The Service will take the necessary steps to ensure that the project covered under this MOA meets federal requirements for compliance with the National Environmental Policy Act (NEPA) and ESA. If the KYTC has NEPA requirements beyond the scope of this MOA, the KYTC or other Federal action agency are responsible for those additional requirements.

With regard to the ESA, the Biological Opinion authorizes incidental take of Indiana bats associated with forested habitat removal. As such, paragraphs 6.3 and 6.4 are incorporated to ensure compliance with the Reasonable and Prudent Measures and Terms and Conditions of the biological opinion. The KYTC acknowledges that any divergence from these measures and conditions may result in a violation of Section 9 of the ESA.

6.2 The KYTC will take the necessary steps to ensure that the project covered under this MOA meets federal requirements for compliance with the National Historic Preservation Act (NHPA).

6.3 The project proposed by the KYTC, as described in Section 4, will result in the incidental take of Indiana bats in the form of habitat loss totaling not more than 42.45 acres of known Indiana bat maternity summer habitat. The KYTC may remove this habitat during the unoccupied time from (August 16 - March 31). As stated in Section 5, if tree clearing is necessary during the occupied timeframe (April 1 – August 15), the KYTC must notify the Service so that the MOA and Indiana Bat Conservation Fund contribution amount can be amended accordingly. Forested habitat associated with the proposed project, but not considered in this MOA, shall not be removed without further coordination with the Service.

6.4 The KYTC shall contribute \$184,657.50 to the Indiana Bat Conservation Fund (IBCF) administered by the Kentucky Natural Lands Trust (KNLT). This contribution is based on 42.45 acres of known maternity summer habitat using the process identified in the Indiana Bat Mitigation Guidance. Funds shall be provided to KNLT within thirty (30) days of the last signature to this MOA and upon receipt of an invoice from KNLT. The KYTC shall provide the Service with a copy of the check or transaction receipt within seven (7) business days of payment that shows the date and amount of the deposit.

In summary, this MOA provides recovery based conservation benefits for the Indiana bat in form of contributions to the IBCF which, in turn, will fund Indiana bat habitat protection, conservation, restoration and/or priority monitoring and research projects for the Indiana bat.

Section 7: COOPERATION

Both the Service and KYTC acknowledge that it is their desire to facilitate the processes set forth in this MOA by open communication and cooperation. Both parties agree to exercise their rights and obligations under this MOA in good faith. If at any time the KYTC has questions regarding this MOA or the Guidance, the Service agrees to make itself available for consultation in a timely fashion.

Section 8: MODIFICATION OR TERMINATION

Modifications to this MOA may be proposed by either party in writing and will become effective upon being reduced to a written instrument and being signed by duly authorized representatives of the Cooperators.

The KYTC or the Service may terminate this MOA at any time within or prior to thirty (30) days of the last signature to this MOA upon written notification from the other signatory party. Failure to fulfill the provisions, as specified, within paragraph 6.4 will result in automatic termination of this MOA.

Section 9: OTHER PROVISIONS

9.1 The Cooperators hereto agree that they shall be liable for the negligent or wrongful acts or omissions of their employees, agents, and assigns only to the extent liable under applicable law. Nothing in this MOA shall be interpreted or construed as constituting a waiver by any party of sovereign immunity or statutory limitation on liability.

9.2 Each provision of this MOA shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of the MOA shall be prohibited or invalid under application law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this MOA.

9.3 No provision of this MOA shall be interpreted as or constitute a commitment or requirement that either party take actions in contravention of applicable laws, either substantive or procedural.

9.4 Nothing in the MOA shall be interpreted as or constitute a commitment or requirement that the Service obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. §1341, or any other law or regulation.

9.5 Third Parties Not to Benefit: This MOA does not grant rights or benefits of any nature to any party not named or identified in this MOA.

9.6 Merger: This MOA contains the sole and entire MOA of the parties. No oral representations of any nature form the basis of or may amend this MOA. This MOA may be extended, renewed, or amended only when agreed to in writing by the parties.

9.7 Waiver: Failure to enforce any provision of this agreement by either party shall not constitute waiver of that provision, nor a waiver of a claim for subsequent breach of the same type, nor a waiver of any other term of this agreement. The waiver of any provision must be express and evidenced in writing.

9.8 Assignment: No part of this agreement shall be assigned to any other party.

Section 10: NOTICES AND AUTHORIZED REPRESENTATIVES

Notices shall be made in writing to the persons at the addresses listed below and may be given by personal delivery, mail or by telecopy (FAX) to the duly authorized representatives listed below. If there are changes in a party's representative, each party shall notify the other party, in writing, within thirty (30) days of the change in their representative.

U.S. Fish and Wildlife Service
Virgil Lee Andrews, Jr.
Field Office Supervisor
330 West Broadway, Room 265
Frankfort, Kentucky 40601
502/695-0468 (telephone)
502/695-1024 (fax)

Kentucky Transportation Cabinet
Division of Environmental Analysis
200 Mero Street
Frankfort, Kentucky 40622
Contact: Mr. David Waldner
502/564-7250 (telephone)

Each party hereby indicates its acceptance of the terms of the MOA as outlined herein by its signature below. The parties hereto have executed this MOA as of the last written date below:

U.S. Department of the
Interior FWS

BY: Virgil Lee Andrews, Jr.

TITLE: Field Supervisor

DATE: 2/17/12

Kentucky Transportation
Cabinet

BY: [Signature]

TITLE: Secretary

DATE: 2/18/12

Approved as to Form and
Legality:

[Signature]

KYTC Office of Legal
Services

DATE: 02/17/12