



May 23, 2022

Public Comments Processing
Attn: FWS-R3-ES-2021-0140
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat – [Docket No. FWS-R3-ES-2021-0140] – Submitted Electronically at <https://www.regulations.gov>

Dear U.S. Fish and Wildlife Service,

The Marcellus Shale Coalition (MSC), a regional trade association with a national membership, appreciates the opportunity to submit comments regarding the above-referenced proposed rulemaking. The MSC was formed in 2008 and is currently comprised of approximately 115 producing, midstream, transmission, and supply chain members who are fully committed to working with local, county, state, and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica, and related geological formations. Our members represent many of the largest and most active companies in natural gas production, gathering, processing and transmission, in the country, as well as the suppliers, contractors and professional service firms who work with the industry.

The MSC appreciates the opportunity to submit these comments on the U.S. Fish & Wildlife Service's (the "Service" or "USFWS") Proposed Rule to Reclassify the Northern Long-Eared Bat as an Endangered Species under the Endangered Species Act ("ESA"). 87 Fed. Reg. 16442 (Mar. 23, 2022) ("Proposal"). Because the listing classification of NLEB dramatically affects natural gas activities, including the potential to imperil a significant portion of the nation's energy supply, our members have been closely following Service's listing classification for the species since 2013 and have extensive experience with both the issues presented in the Proposal and the severe consequences that reclassifying the NLEB as endangered would have.

The MSC has reviewed the notice in the Federal Register from March 23, 2022, has consulted certified bat experts with experience in several applicable states, and has reviewed this proposed listing with our industry members. We offer the USFWS the following comments on the status review and proposed listing.

Technical and Legal Comments

1. The Proposal Does Not Satisfy the Best Scientific and Commercial Data Available Standard

The ESA requires the Service to list a species as “endangered” whenever it concludes that the species is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). In contrast, USFWS must list a species as “threatened” if it concludes that the species “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). When USFWS evaluates a species for listing or reclassification, the ESA requires the agency to perform a fact-intensive analysis based on “the best scientific and commercial data available.” 16 U.S.C § 1533(b)(1).

The Proposal does not meet the “best scientific and commercial data available” standard for at least two fundamental reasons: (1) it largely is based on unreliable hibernacula count data; and (2) it does not account for extensive datasets from years of summer surveys conducted across the species’ broad range. As a result, USFWS cannot defensibly conclude that it should reclassify the NLEB as an endangered species.

A. Hibernacula Counts Are Unreliable and Cannot Support the Proposal

USFWS primarily depends on information collected during hibernacula counts and projections modeled from those counts to support its proposal to reclassify the NLEB as an endangered species:

Winter hibernacula counts provide the most consistent, long-term, reliable trend data and provide the most direct measure of WNS impacts. Winter abundance (from known hibernacula) has declined rangewide (49 percent) and declined across all but one RPU (declines range from 0 to 90 percent). The number of extant winter colonies also declined rangewide (by 81 percent) and across all RPUs (40–88 percent). There has also been a noticeable shift towards smaller colony sizes, with a 96–100 percent decline in the number of large hibernacula (≥ 100 individuals) across the RPUs.

Proposal at 16446. This is inappropriate because hibernacula counts and modeling based on them cannot accurately be used to assess the NLEB’s status.

The Service has long-recognized that NLEBs cannot reliably be identified or counted when hibernating. USFWS unambiguously acknowledged this in 2013 when it first proposed listing the NLEB, explaining that hibernacula counts underrepresent the occurrence and abundance of NLEBs because the species prefers “roosting in small crevices or cracks on cave or mine walls or ceilings, [and] thus are easily overlooked during surveys and usually observed in small numbers.” 78 Fed. Reg. 61046, 61052 (Oct. 2, 2013); *see also id.* at 61064 (“Due to favoring small cracks or crevices in cave ceilings, making them more

challenging to locate during hibernacula surveys, data in some States (particularly those with a greater number of caves with more cracks or crevices) may not give an entirely clear picture of the level of decline the species is experiencing”). That alone obligates the Service to rely on better sources of data for its Proposal.

But USFWS’s own actions make this conclusion undeniable. The Service has such distrust of hibernacula surveys that it bars their use for species conservation purposes. Specifically, USFWS prohibits the use of hibernacula surveys to determine whether a cave, mine, or other portal is occupied by NLEBs. *See, e.g.*, FWS 2018 Range-Wide Indiana Bat Survey Guidelines at 2 (Apr. 2018) (“[I]nternal P/A surveys of potential hibernacula are not allowed for NLEB due to difficulty/low confidence in visually detecting their presence.”). The Service reiterated this policy just a few months ago: “The use of direct internal surveys is not adequate for NLEB due to the difficulty in visually detecting the species inside hibernacula (i.e., it typically roosts in deep cracks and crevices).” USFWS 2022 Range-Wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines at 59 (Mar. 2022) (emphasis in original). It is antithetical for USFWS to prohibit permit-holding bat biologists from surveying caves to determine NLEB occupancy because such surveys are undependable, while simultaneously relying on hibernacula counts as the best available science to support reclassifying the NLEB as endangered.

B. The Proposal Arbitrarily Relies on Incomplete Summer Data

Comprehensive summer survey data are readily available in the States throughout the NLEB’s range, but USFWS largely ignores these data. Instead, it arbitrarily looks to unreliable and scattered mobile acoustic surveys in an attempt to corroborate its winter count-based assessment of the NLEB’s status and its proposed reclassification of the species to endangered. Proposal at 16445-47.

This is problematic for several reasons. First, the Species Status Assessments that provide the analysis ostensibly supporting the Proposal demonstrate that USFWS considered only a limited subset of the best available summer data. In particular, the SSAs filtered the summer data to include only information that met narrowly-defined modeling criteria. *See, e.g.*, USFWS, Species Status Assessment for the Northern Long-Eared Bat Version 1.1 at v, 6, 23, 69, 102, and 122 (Mar. 22, 2022) (“NLEB SSA”); Shaw, et al., Analytical Assessments in Support of the U.S. Fish and Wildlife Service 3-Bat Species Status Assessment at 13 (Jan. 2022) (“3-Bat SSA”) (“Only datasets with at least 20 samples, 3 years total, and 3 years since arrival of WNS were modeled.”). Perhaps of greatest concern, the SSAs excluded consideration of a significant dataset from West Virginia—the State with one of the most robust NLEB populations. *See, e.g.*, 3-Bat SSA at 11 (“[A] subset of data with historic records (e.g., West Virginia) could not be associated with NABat grid cell identification and/or county information thereby limiting their utility.”).

Second, after dramatically reducing the summer dataset to fit its models, the analysis went even further by discounting important survey events as outliers. Again, this filtering resulted in the omission of key data from the heart of the NLEB's range. For example:

- For the Regional Generalized Linear Mixed Models, “[m]ost outliers were from West Virginia and Pennsylvania, and all instances with multiple captures (>15) within one netting event.” 3-Bat SSA at 16 and corresponding Figures.
- For the Representation Unit Model Results, “[m]ost outliers were from West Virginia and were all instances with multiple captures (>9) within one netting event.” *Id.* at 18 and corresponding Figures.

Third, the analysis ignored almost twenty years of comprehensive mist net survey data collected by USFWS-permitted bat biologists in States throughout the NLEB's range, instead choosing to use a far more limited dataset of mist net captures provided by USGS. This is inexplicable because the mist net data are readily available across the NLEB's range and, importantly, were collected by permitted bat biologists operating under a uniform survey protocol issued by USFWS that requires, among other things, Service review and approval of every survey plan before the survey occurs. *E.g.*, FWS 2018 Range-Wide Indiana Bat Survey Guidelines (Apr. 2018

Finally, rather than using actual capture data collected by permitted bat biologists in New York and West Virginia, the analysis used mobile transect acoustic data. This is concerning because, unlike mist net surveys that involve physical capture and visual species identification, acoustic monitoring depends on inherently subjective and unreliable interpretation of recorded bat call files. The bias this created is obvious from a simple comparison of the population trend estimates generated using summer capture data and the trend estimates generated using mobile acoustic data for each NLEB representation unit (“RPU”). In each case, the analysis estimated a much lower population trend using the mobile acoustic data than it estimated using the mist net data. For example, the analysis for the Eastern Hardwoods RPU – the area supporting by far the greatest concentration of NLEBs – estimated a negative population trend *44% worse* using the mobile acoustic data than when using the summer capture data. NLEB SSA at 126, Table A-3B4. This disparity cannot be reconciled with the ESA's “best available science” standard.

2. The Primary Contributor to the Decline of the NLEB is WNS

According to the Service's proposal, the primary contributor to the decline of the NLEB is the spread of White Nose Syndrome (WNS). While there are other factors that influence the viability of the NLEB, such as wind energy mortality, effects deriving from climate change, and habitat loss, such factors influence the NLEB's viability to a far lesser extent than the influence of WNS. In fact, “habitat loss alone is not considered to



be a key stressor at the species level, and habitat does not appear to be limiting.”¹

Further, the natural gas industry and its related activities are not a primary contributor to the decline of the NLEB, which is likely attributable to the temporary nature of natural gas projects and the minimal amount of tree clearing required. Notwithstanding the foregoing, the natural gas industry and MSC’s members are subject to various restrictions and processes at both the federal and state levels that support the USFWS’s goals in protecting threatened and endangered species, including, but not limited to, the NLEB.

Because WNS is the primary contributor to the decline of the NLEB the years of focusing on bat habitat loss and conducting seasonal tree clearing has not seemed to slow or stop the decline of the NLEB bat within the known range of Indiana bats. Further, USFWS should not designate expansive buffer zones, where tree clearing is prohibited, near areas with known summer habitat where the species has been found in recent surveys. For the reasons previously stated, unnecessarily restricting clearing in areas without documented presence of the species will have no bearing on the proliferation of WNS, the key factor influencing the viability of the species.

It is worth pointing out that the Service does indicate that wind energy has had a significant effect on the NLEB population. The proposal states, *“In 2020, northern long-eared bats were at risk from wind mortality in approximately 49 percent of their range, based on the areas where wind turbines were in place and operating (using known northern long-eared bat occurrences, average migration distance, and the spatial distribution of wind turbines) (Service 2021, p. iv). Most bat mortality at wind energy projects is caused by direct collisions with moving turbine blades.”* In fact, *“It is estimated that between 650,000 to more than 1,300,000 bats were killed at wind energy facilities from 2000-2011 in the U.S. and Canada (Arnett and Baerwald 2013). In 2012 alone, it is estimated that 880,000 bats were killed at U.S. wind energy facilities when 51,630 megawatts were installed (Smallwood 2013).”*² The MSC notes that because this industry requires permanent conversion of forest areas, while other energy industries, such as natural gas are temporary, the Service should distinguish between industries with respect NLEB protection and preservation. Further, the Service specifically notes wind farms in their NLEB Fact Sheet.³

3. The Pennsylvania field office has limited resources to manage the influx of consultations that would inevitably result from reclassification of the NLEB.

In the event that the NLEB is reclassified as endangered, one of MSC’s concerns is that the consultation requirements will be applied so broadly that the field office will be inundated with consultation requests and will not be adequately staffed to handle the resulting workload, from the natural gas industry (as Pennsylvania is one of the most

¹ Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat, 87 Fed. Reg. 16442 (March 23, 2022).

² https://wind-energy-wildlife.unl.edu/download/Bat%20Assessment%20Guidance%20for%20Wind%20Energy%20Facilities%20in%20Nebraska_March%202016.pdf

³ https://www.fws.gov/sites/default/files/documents/508_NLEB%20fact%20sheet.pdf

industry-active states within the NLEB's range) and from similarly situated utility industries. Due to being short-staffed state field offices, consultation may take several months for an individual project, causing delays in clearance acquisition, permit approvals, and would ultimately result in applicants complying with the seasonal tree clearing restrictions, performing a survey, or both. This consultation is required to be completed prior to initiating earth disturbance or prior to commencing a project and will likely result in significant delays and increased costs for project developers, even on routine operations and maintenance projects or emergency projects, due to requirements for additional acoustic surveys if the project developer is unable to complete tree clearing during the specified timeframe or alternative consultations may be needed with USFWS to confirm particular trees are not suitable habitats for the NLEB. Due to the opportunistic nature of the NLEB, any tree over 3" in diameter would be subject tree clearing restrictions as a regulated activity within the species range. MSC's members have also encountered inconsistencies in the application of regulations and policies among the Service's state field offices and such variability presents additional concerns as to unexpected project delays. Furthermore, the seasonal tree clearing restrictions mean that construction must be completed during the off-season (i.e., winter / wet weather), which presents material construction risks to worker safety, property and the environment. Wet weather will have higher risk of erosive events that could potentially lead to slope failures.

4. The Service's Proposed Listing Decision Underestimates the Potential Beneficial Impacts of Climate Change

The Service's proposed listing decision does not adequately consider the magnitude of potential benefits from climate change on NLEB populations. The Service's Species Status Assessment identifies several potential benefits from climate change for NLEBs, including shorter hibernation periods, lower energetic costs during hibernation, and more prey for energy-depleted bats. *See* Species Status Assessment at 105, 143. Each of these benefits could improve survival outcomes of WNS-infected bats. *Id.* Despite the magnitude of these potential benefits for the species' persistence, the Service largely dismisses them as "more speculative" than adverse climate change impacts it identifies. *See* Species Status Assessment at 105.

Discounting impacts so potentially consequential for the species' persistence is unreasonable. Because the adverse impacts the Service focused its climate change analysis on, like drought⁴ and excessive summer precipitation, are not population-level threats like WNS, this flaw in the Service's analysis likely biased its conclusion that "overall negative impacts are anticipated" from climate change. *See* 87 Fed. Reg. at 16446. The Service should reconsider its evaluation of climate change impacts to account for the magnitude of the potential benefits to NLEBs.

⁴ This focus is inconsistent with data showing annual average precipitation since 1901 has increased in the Northeast, Midwest, and Great Plains. *See* Species Status Assessment at 145.

Recommendations

1. The Service Should Develop a Uniform Protocol for Replacing Outdated NLEB Occurrence Records

Because of WNS-driven population declines, NLEBs are often no longer present where they once were. This sad reality makes historic NLEB occurrence data increasingly unreliable. To date, however, the Service continues to assume that positive NLEB survey results are accurate for all time, providing no expiration date or opportunity for rebuttal. *See U.S. Fish and Wildlife Service, Range-wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines at 2 (March 2022) (limiting validity of most negative survey results to five years; establishing no limit on the validity of positive results).* This approach has no rational connection to the best available science on NLEB population declines. Rather than continuing to pretend positive survey results remain permanently valid, even when those results predate the arrival of WNS, the Service should ground its practices in the best available science by establishing a nationwide protocol for rebutting NLEB occurrence data.

A nationwide protocol for rebutting positive survey results would benefit the species while releasing our members and other project proponents from unwarranted restrictions on unoccupied lands. Providing for the rebuttal of historic positive survey results would advance the NLEB's recovery by incentivizing oil and gas and other project proponents to conduct surveys in historic known locations. These additional surveys would refresh the Service's occurrence data, allowing it to better prioritize the conservation of remaining NLEB strongholds. At the same time, providing for the rebuttal of positive survey results would give project proponents the opportunity to streamline ESA compliance obligations in areas where the species perished long ago.

Establishing this nationwide protocol would involve a simple addition to the Range-wide Indiana Bat and Northern Long-Eared Bat Survey Guidelines. *Cf. U.S. Fish and Wildlife Service and California Department of Fish and Game, Survey Protocol for the Morro Bay Kangaroo Rat at 2 (April 1996) ("Survey results indicating the Morro Bay kangaroo rat is present are considered valid until new survey results show the species is no longer present on the site.")*. Recognizing that positive survey results predating WNS detections likely represent historical, not current, populations, the Service should provide separate procedures for rebutting surveys based on when the survey was performed. The protocol should provide that:

- The results of surveys performed before the first detection of WNS in the respective state generally should be rebutted by a negative survey performed in accordance with the Service's current range-wide survey guidelines. Unless Service biologists conclude otherwise for a particular area based on its location, quality and/or diversity of habitat, or other related factors, new negative survey results should be sufficient to rebut such pre-WNS surveys in light of the population-level effects of the disease on NLEBs, the transitory nature of the species, and the ephemerality of summer roosting habitat used by the species.

In light of the NLEB's population declines, it is no longer rational to hold out historic positive survey results as unimpeachable. Establishing a nationwide protocol would refresh known NLEB occurrence data, allowing the Service to best conserve the species while streamlining ESA compliance for our members delivering the oil and gas resources so critical to the nation's energy security and economic growth.

2. The Service should adopt a species-specific guidance document for the protection of the NLEB

The MSC recommends that the Service develop and adopt species-specific guidance for the protection of the NLEB, separate from existing guidance specific to the Indiana bat. As a result of the listing proposal, we are aware that the Service posted the "*Range-wide Indiana Bat and Northern long-eared Bat Survey Guidelines*" on March 22, 2022⁵. These guidelines only provide direction on surveys, including when and how they are to be completed, but they do not provide specific guidance for the protection of the NLEB.

State offices that do not develop separate guidance for the NLEB might simply elect to implement the existing guidance for the Indiana bat. However, the MSC recommends the Service not allow state offices to implement Indiana bat guidance. Due to their low numbers, the Indiana bat requires significantly more survey effort than would be needed for the NLEB. Over the past several years, the Pennsylvania Service offices have implemented in-depth summer survey requirements for Indiana bats. Should this requirement be imposed for NLEB as well, any proposed development within a forested area in Pennsylvania would be required to have a formal consultation with the Service combined with seasonal tree clearing restrictions. The impact to all land development activities in Pennsylvania would be significant and burdensome to both the natural gas industry and the regional Service offices.

Therefore, the MSC requests that a species-specific guidance document provide options, outside of seasonal tree clearing restrictions and surveys, that will protect the bat from extinction.

3. The Service Should Allow Funding of WNS Research and Treatment to Qualify as NLEB Mitigation

Conserving the NLEB requires addressing WNS, the primary threat to the NLEB. We urge the Service to let our members help conserve the bat by establishing contributions for WNS research and treatment as an accepted mitigation solution for NLEB impacts. Accepting such contributions as mitigation for NLEB impacts would leverage industry compliance with the ESA to address the primary threat to the species. The payoff would be immense: turbocharging efforts to develop and deploy effective, safe, and scalable treatments with the urgency WNS demands.

⁵ <https://www.fws.gov/library/collections/range-wide-indiana-bat-and-northern-long-eared-bat-survey-guidelines>

The Service's authority to accept contributions for WNS research and treatment as mitigation for NLEB impacts is clear. *See* HCP Handbook at 9-17 (identifying "Threat Reduction or Elimination," including "non-native removal," as accepted mitigation under ESA Section 10); U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83440, 83479 (Nov. 21, 2016; withdrawn July 30, 2018) (establishing research as a mitigation solution when "directly linked to reducing threats"). It is also imperative for the species' survival. Continuing to preserve the species' remaining strongholds is of course essential for the NLEB's recovery, but those efforts will accomplish little if WNS wipes the species off the landscape. Among potential mitigation solutions, only WNS research and treatment will directly save bat lives from the greatest threat to the species.

The Service's own investments in WNS research and treatment demonstrate how scientific advancements can combat WNS. *See* U.S. Fish and Wildlife Service Proposal to Reclassify the Northern Long-eared Bat as Endangered Under the Endangered Species Act: Questions and Answers at 5 (Jan. 2022) (explaining that innovative research has resulted in "promising treatments to slow the disease and improve survival of bats") [hereinafter, *Uplisting Questions and Answers*]. Standardizing the Services' approval of WNS research and treatment contributions as mitigation for NLEB impacts would release untapped private funding for this effort. The funds raised would be significant and could well make widespread treatments, and NLEB long-term persistence, reality. *Compare* Oil & Gas Coalition Multi-Species Habitat Conservation Plan at 224 (Dec. 2019) (projecting contributions of over \$16 million annually toward NLEB and other tree-roosting bat conservation; ultimately rejected by Service Region 5) *with Uplisting Questions and Answers* (Service awarded more than \$46 million to combat WNS from 2008-2021).

If approved, the Service and project proponents could structure WNS research and treatment mitigation solutions just like existing in-lieu fee programs or permittee responsible projects. Project proponents would satisfy their mitigation requirements by contributing funds for WNS research and treatment equal to the reasonable monetized value of the habitat impacts from a specific project. The Service or a Service-selected third party would then direct these funds in accordance with the National Plan for Assisting States, Federal Agencies, and Tribes in Managing White-Nose Syndrome in Bats (2011) and the White-nose Syndrome Implementation Plan (2015) to identify, test, and implement WNS treatments efficiently and effectively.

If ever there was species requiring innovative mitigation solutions, this is it. We urge the Service to let our members help recover the NLEB by approving research and treatment as mitigation solutions under the ESA.

4. The MSC provides the following additional recommendations for the Service's consideration:

- Develop specific NLEB conservation plans and measures.



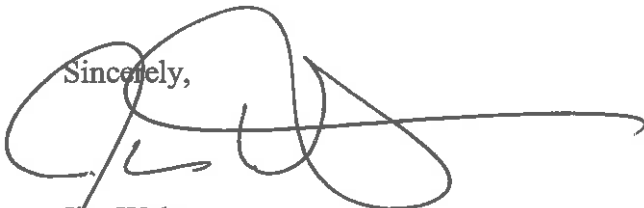
- Develop measures to protect/mitigate for tree clearing only in the vicinity of known hibernacula and during pup season (June-July).
- Offer more flexible, approved tree-clearing windows that would allow project developers to plan, permit, and construct their projects more efficiently and safely.
- Encourage the use of bat mitigation banks for tree clearing offset proposals. Only one bat mitigation bank has been approved in Pennsylvania.

5. The Service Should Involve Industry Partners in the Development of General Conservation Plans for the NLEB

We understand that Service Region 5 is currently developing a general conservation plan providing certain residential development projects with incidental take coverage for the Indiana and northern long-eared bats. We also understand the Region may develop a similar plan for traditional and renewable energy projects. We urge the Service to allow industry partners to participate in the development of these general conservation plans, which could provide a much-needed tool to reduce Service workloads while streamline projects that conserve NLEBs. Input from our members and other industry partners will be essential for the Service to design plans that cover the right activities and minimize and mitigate impacts of the taking to the maximum extent practicable. We urge you to provide project proponents frequent and meaningful opportunities to participate in the development of these and any similar general conservation plans.

The MSC appreciates the opportunity to comment, and we remain committed to working with the USFWS on this topic and any others that may arise. Please let us know if you have any questions regarding these comments.

Sincerely,



Jim Welty
Vice President, Government Affairs