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**Docket No. FWS-R5-ES-2011-0024**

**Comments of the Independent Petroleum Association of America and the American Petroleum Institute On Listing the Northern Long-Eared Bat With a Rule Under Section 4(d) of the Endangered Species Act**

**1. Introduction**

The United States Fish and Wildlife Service (FWS) is currently considering whether to list the northern-long-eared bat (NLEB) as endangered or threatened under the Endangered Species Act (ESA). The Independent Petroleum Association of America (IPAA) and the American Petroleum Institute (API) believe, as stated in their previous comments, that a listing is not necessary and will have little impact on the future of the NLEB.

These comments, however, are focused on the 4(d) rule that FWS has proposed to adopt if it ultimately determines that the NLEB should be listed as threatened. If a 4(d) rule is adopted, IPAA and API urge FWS to expand the exceptions to the prohibition against incidental take of the NLEB to include oil and gas activities conducted in accordance with applicable state and federal law. Such activities, as confirmed by FWS itself, are not having negative population-level effects on the NLEB. Indeed, recent studies indicate that the yearly impact on NLEB habitat from natural gas development activities, as illustrated by the well-documented situation in Pennsylvania, is approximately 150 times smaller than the yearly impact to NLEB habitat caused by the forest management activities that FWS has already proposed to except from the incidental take prohibition. Thus, it would be irrational for FWS to prohibit incidental take from

oil and gas activities; such a prohibition would not slow the spread of the disease known as White-Nose Syndrome (WNS), which FWS has identified as the real threat to the NLEB, or measurably aid in the recovery of the NLEB, but it would impose unnecessary and costly burdens on the oil and gas industry and on FWS itself.

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

## **2. Background**

As noted above, FWS has determined that the “primary threat” to the existence of the NLEB is WNS.<sup>1</sup> No other factor imposes an existential threat to the species. If, as a result of the impact of WNS, FWS ultimately lists the NLEB as threatened, rather than endangered, FWS is also proposing to adopt at the same time a 4(d) rule for the NLEB.

Under the proposed rule, all incidental take of the NLEB in certain defined areas known as the WNS buffer zone, subject to certain exceptions, would be prohibited unless done pursuant to an Incidental Take Permit. The exceptions are incidental take resulting from four principal categories of activities: 1) forest management; 2) maintenance and limited expansion of existing rights-of-way and transmission corridors; 3) prairie management; and 4) projects resulting in minimal tree removal. Incidental take resulting from these activities would be excepted, provided that the activities are conducted in accordance with certain specified conservation measures.

In its proposal, FWS specifically requested comment on “[w]hether it may be appropriate to except incidental take as a result of other categories of activities beyond those covered in this proposed rule.”<sup>2</sup>

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<sup>1</sup> 78 Fed. Reg. 61046, 61075 (Oct. 2, 2013).

<sup>2</sup> 80 Fed. Reg. 2371, 2372 (Jan. 16, 2015).

### 3. Comments

(a) **Habitat loss from oil and gas activities does not pose a population-level threat to the NLEB and thus incidental take from those activities should not be prohibited**

After careful consideration, FWS has already concluded that habitat loss from oil and gas activities (and the resulting incidental take, if any) does not pose a population-level threat to the NLEB. In its listing proposal on October 2, 2013, FWS identified natural gas development from shale (but not oil development) as one of several activities “that may modify or destroy habitat for ... the northern long-eared bat.”<sup>3</sup> In its analysis, FWS focused on the impacts of natural gas development in “the Marcellus Shale region,” which is the site of intense natural gas development activity, and “which includes large portions of New York, Pennsylvania, Ohio, and West Virginia.” FWS noted that “nearly 2,000 Marcellus natural gas wells have been drilled or permitted, and as many as 60,000 more could be built by 2030, if development trends continue.” As a result, FWS concluded that NLEB “[h]abitat loss and degradation ... could occur in the form of forest clearing for well pads and associated infrastructure (e.g., roads, pipelines, and water impoundments.”<sup>4</sup> However, even with this level of current and projected activity, FWS concluded that natural gas development “alone do[es] not have significant population-level effects” on the NLEB.<sup>5</sup> In other words, FWS concluded that whatever NLEB habitat loss is occurring as a result of natural gas development is not significant enough to threaten the survival of the NLEB.

In addition, in 2011, FWS published *A National Plan for Assisting States, Federal Agencies, and Tribes in Managing White-Nose Syndrome In Bats*. Significantly, the Plan does not suggest that the threats to the NLEB from WNS should (or could) be managed by prohibiting the incidental take of NLEB from oil and gas activities.

In sum, FWS has already concluded that: 1) WNS (the spread of which is not furthered in any way by oil and gas activities) is the “primary threat” to the NLEB; 2) habitat loss from oil and gas activities (and the resulting incidental take), even in areas of intense natural gas development activity, does not pose a population-level threat to the NLEB; and 3) prohibition of whatever incidental take may result from the habitat modification caused by oil and gas activities is not necessary to the management of WNS. It follows, then, that lawful oil and gas activities should be exempt from the prohibition against incidental take in the 4(d) rule. Imposing such a prohibition will be of no conservation value to the NLEB, but will impose unnecessary and costly regulatory burdens on the oil and gas industry.<sup>6</sup>

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<sup>3</sup> 78 Fed. Reg. 61061.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Congress has provided the Secretary of the Interior extremely broad authority to craft a special rule for the NLEB See 15 U.S.C. § 1533(d). In addition, the Court of Appeals for the DC Circuit has explained that “there is a reasonable reading of §1533(d) that would not require the FWS to issue formal ‘necessary and advisable’ findings when extending the prohibitions to threatened species.” Thus, “[a]ccording to this interpretation, the two sentences

**(b) FWS’s own reasoning requires that the exceptions to the 4(d) rule be expanded to include incidental take from oil and gas activities –**

FWS has proposed that “incidental take caused by forest management,” including, notably, timber harvest and prescribed burns, “not be prohibited.” In making this proposal, FWS recognized that “when ... forest management activities are performed, bats could be exposed to habitat alteration or loss or direct disturbance (i.e., heavy machinery) or removal of maternity roosts (i.e., harvest).”<sup>7</sup> Indeed, timber harvest would typically involve the removal of many thousands of trees. FWS nonetheless concluded that excepting these activities is appropriate because “habitat modifications resulting from activities that manage forests would not significantly affect the conservation of the northern long-eared bat.” FWS reached this conclusion for three reasons. First, it noted that only a small percentage—i.e., 2%—“of forests in States within the range of the northern long-eared bat are impacted by forest management activities annually.” Second, it noted that “[of] this amount, in any given year a smaller fraction of forested habitat is impacted during the active season when pups and female bats are most vulnerable,” and that “[t]hese impacts are addressed by the above conservation measures proposed for inclusion in this rule.”<sup>8</sup> Third, it noted that “most types of forest management should provide suitable habitat for the species over the long term.” The clear implication of FWS’s reasoning is that, given the nearly 425 million acres of forest habitat within the NLEB’s 38 state range (only a small fraction of which is used by the NLEB), activities that result in the loss or degradation of only a small percentage of that habitat, do not require regulation of the incidental take that may result from those activities, particularly if the impacts of those activities on that habitat will be diminished over the long-term.<sup>9</sup>

Applying FWS’s reasoning to the pertinent facts about oil and gas activities, it is clear that incidental take from those activities should also be excepted. As demonstrated by the April 2014 Shale-Gas Monitoring Report (Monitoring Report) prepared and published by the Pennsylvania Department of Conservation and Natural Resources (DCNR), the impact of natural gas development on NLEB habitat is significantly less than the impact of forest management activities on NLEB habitat.<sup>10</sup> Indeed, in Pennsylvania, the annual impact is approximately 150

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of § 1533(d) represent separate grants of authority. The second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it to support such actions with findings of necessity. Only the first sentence of § 1533(d) contains the ‘necessary and advisable’ language and mandates formal individualized findings.” *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993). Given that oil and gas activities represent such a small impact on the forested habitat, oil and gas activities could be excepted under either of these two authorities.

<sup>7</sup> 80 Fed. Reg. 2375.

<sup>8</sup> *Id.*

<sup>9</sup> The comments filed by the Marcellus Shale Coalition note that “[b]oth state agencies and forest management certification organizations support the conclusion that the oil and gas activities are among the activities commonly used to manage and maintain forest systems.” Comments, p. 3. Thus, even if the 4(d) rule is not revised to specifically except oil and gas activities from the incidental take prohibition, FWS should make clear that such activities fall under the proposed exception for forest management activities.

<sup>10</sup> The Monitoring Report is available at [http://dcnr.state.pa.us/cs/groups/public/documents/document/dcnr\\_20029147.pdf](http://dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20029147.pdf).

times less than the annual impact of forest management activities generally throughout the NLEB's range. Thus, FWS's conclusion that forest management activities may not be anticipated to result in "habitat modifications" that "would significantly affect the conservation of the northern long-eared bat" applies with even greater force to oil and gas activities.

The Monitoring Report is the product of DCNR's Shale-Gas Monitoring program, which was designed to "track, detect, and report on the impacts" "of shale-gas development" on the Pennsylvania "state forest system and its associated uses and values."<sup>11</sup> Pennsylvania is at the epicenter of the efforts to develop gas from the Marcellus shale formation, which underlies significant portions of Pennsylvania, New York, Ohio, and West Virginia. In addition, the Report covers the period of 2008-2012, which was a period of intense shale-gas development. Thus, in a sense, the Report provides a worst case scenario of the impacts of natural gas development on NLEB habitat. The Report makes the following findings with respect to the impacts of shale- gas development activities:

- Pennsylvania has 2.2 million acres of state forest lands.<sup>12</sup>
- Of that acreage, approximately 1.5 million acres are underlain by Marcellus shale.<sup>13</sup>
- Of that acreage, 44% (or 673,000 acres) is available for shale- gas development.<sup>14</sup>
- During 2008-2012, 578 gas wells were drilled on 191 pads, for an average of 3 wells per pad.<sup>15</sup>
- During 2008-2012, approximately 1,486 acres of forest were "converted to facilitate gas development." This figure includes the acreage converted for "roads, infrastructure, well pads, and pipelines."<sup>16</sup> On an annual basis, that amounts to 297 acres of forest converted per year, which is only 0.000135% of total state forest system acreage.
- During 2008-2012, Pennsylvania acquired 33,500 acres to add to the state forest system, including 8,900 acres in the area available for oil and gas leasing.<sup>17</sup> This translates into a net gain of 32,014 acres of forest lands during a period of intense shale gas development activity.
- Shale-gas development is closely regulated to insure "the long-term health of the forested system;"<sup>18</sup> DCNR "strive[s] to minimize the surface impact" of shale-gas production "to the greatest reasonable extent and to mitigate for the impact whenever possible."<sup>19</sup>
- Since 2010, further leasing of state forest lands for shale-gas development has been prohibited by executive order.<sup>20</sup>

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<sup>11</sup> Monitoring Report, p. 4.

<sup>12</sup> *Id.* at p. 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 34.

<sup>16</sup> *Id.* at p. 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at p. 12.

<sup>19</sup> *Id.* at p. 1.

<sup>20</sup> *Id.* at p. 38.

- Pennsylvania’s shale-gas lease agreement is “designed to minimize surface impacts of exploration and development, especially development;”<sup>21</sup> the agreement “limit[s] the number of well pads that any given lease tract may contain, thus limiting overall surface development impacts;”<sup>22</sup> it limits to 2% the amount of surface area covered by any lease that may be disturbed; and it requires that “whenever feasible, roads, pipelines, impoundments, compressor stations, well pads, and associated oil and gas infrastructure ... use existing disturbances in or order to minimize forest conversion.”<sup>23</sup>
- Shale-gas developments are also subject to reclamation requirements, thus insuring that their long-term impacts on the forest will be diminished.

In short, the Monitoring Report demonstrates that, in accordance with FWS’s own reasoning, no rational basis exists for selectively excepting forest management activities from the incidental take prohibition in the proposed rule, but not oil and gas activities. Regulating the incidental take of NLEB from oil and gas activities will be of no measurable conservation value to the NLEB, while imposing significant costs on the oil and gas industry, and a significant drain on the limited resources of FWS.

Moreover, one of the factors that FWS is required to consider in determining whether to take regulatory action under the ESA is the adequacy of existing regulatory mechanisms to address any identified threat. In the case of habitat loss from oil and gas activities, FWS has made no effort to perform that analysis. However, as illustrated by the regulation of shale-gas development in Pennsylvania, there are already established regulatory regimes in place that minimize and mitigate the impacts of such development on forest habitat, and that insure the sustainability and long-term health of such habitat. Thus, unless and until FWS can demonstrate, on a state-by-state basis, that existing regulatory regimes are inadequate to minimize and mitigate the conversion of forest habitat as a result of oil and gas activities, FWS cannot justify imposing the prohibition against incidental take on oil and gas activities.

**(c) The exception for “projects resulting in minimal tree removal” should be clarified to include oil and gas exploration and development projects –**

FWS has proposed “that incidental take that results from projects causing minimal tree removal, when carried out in accordance with the conservation measures, will not be prohibited.”<sup>24</sup> The primary reason for the proposal is that FWS does not “believe that [such projects] materially affect the local forest habitat” for the NLEB; in FWS’s view, such projects “do not significantly change the overall nature and function of the local forested habitat,” and “in some cases increase habitat availability in the long term,” and should therefore be excepted.<sup>25</sup>

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<sup>21</sup> *Id.* at p. 25.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 80 Fed. Reg. 2375.

<sup>25</sup> *Id.*

Measured by that standard, the development of a well pad, or of a pipeline right-of-way, is covered by the exception. Such projects typically involve the removal of only “limited numbers of trees,” particularly relative to the trees remaining in the local forest habitat. Further, as demonstrated above by the discussion of the findings in the Monitoring Report, the removal of those trees “does not significantly change the overall nature and function of the local forested habitat.” The final rule should therefore make it clear that such projects are covered by the exception.

#### **4. Conclusion**

As explained above, the best scientific and commercial information available demonstrates that prohibiting all incidental take of the NLEB that may be caused by oil and gas activities is neither necessary nor advisable as a conservation measure for the NLEB. Such a prohibition will do nothing to prevent the spread of WNS, which is the primary threat to the existence of the NLEB, nor measurably contribute to the recovery of the NLEB, while imposing significant costs on an industry whose impacts on forested areas are insignificant in relation to the survival of the NLEB, and are, in any event, already minimized and mitigated through existing regulation. FWS should therefore expand the exceptions in any 4(d) rule that is adopted for the NLEB to except incidental take from oil and gas activities carried out in accordance with applicable state and federal law.<sup>26</sup>

Respectfully submitted,



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<sup>26</sup> If FWS believes that imposing broader exceptions requires additional public comment, despite the fact that such exceptions would be a logical outgrowth of the rulemaking, FWS could easily justify issuing an interim final rule that includes broader exceptions and subsequently complete such a rule after receiving additional public comment. If FWS took such action, it could also carefully consider whether its actions are consistent with the National Environmental Policy Act.

