

# WEST VIRGINIA FORESTRY ASSOCIATION

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Submitted via Federal eRulemaking Portal: <http://www.regulations.gov> to  
Docket No. FWS-R5-ES-2011-0024

U.S. Fish and Wildlife Service  
Public Comments Processing  
Attention: FWS-R5-ES-2011-0024  
Division of Policy and Directives Management  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

**Re: Proposed ESA § 4(d) Rule for the Northern Long-Eared Bat, 80 Fed. Reg. 2372 (Jan. 16, 2015) [FWS-R7-ES-2012-0009]**

Dear U.S. Fish and Wildlife Service Staff:

The following comments are provided on behalf of the West Virginia Forestry Association to the January 16, 2015 Federal Register publication of a proposed rule and Endangered and Threatened Wildlife and Plants; Listing the Northern Long-Eared Bat (NLEB) With a Rule Under Section 4(d) of the Act (Volume 80, Number 11 Fed. Reg. 2371).

The West Virginia Forestry Association (WVFA) is a non-profit organization funded by its membership. Our members include individuals and businesses involved in forest management, timber production, firewood production and wood product manufacturing. Our members are concerned with protecting the environment, as well as enhancing the future of West Virginia's forests through multiple-use management. Our Association encourages and promotes sustainable forest management, improved fire protection and suppression, true conservation of woodland resources in West Virginia.

We appreciate the U.S. Fish & Wildlife Service (USFWS) efforts to apply the ESA in a manner not impairing the forest management practices that provide the forested habitat the NLEB relies upon and recommend the improvements described below.

Based upon numerous analyses and incorporating the National Council for Air and Stream Improvement, Inc. by reference herein, the WVFA urges the USFWS to consider the following as a guide to appropriate agency actions concerning the Northern Long-Eared Bat, relative to the

prevalence of White Nose Syndrome and forest management as a benefit of habitat sustainability.

### Endangered Species Act

- The Fish and Wildlife Service (FWS) acknowledges that declines in NLEB populations which led to a proposed listing as endangered under the Endangered Species Act (ESA) are caused by White Nose Syndrome (WNS) and are unrelated to the practice of forestry.
- The NLEB has proven to be an incredibly opportunistic species that favors a mosaic of different forest age classes (mature forests alongside early to mid successional forests) for habitat—the precise conditions which sustainable forest management provides.
- Focusing resources on a cure for WNS should be a far higher priority than listing or imposing additional restrictions on landowners practicing sustainable forest management.
- Listing the NLEB as “threatened” at least allows the FWS to adopt rules under section 4(d) of the ESA specifying activities that may continue without violating the ESA even if the activity might inadvertently interfere with or harm individual NLEBs (“incidental take”).
- However, the 4(d) proposal, while recognizing that forest management generally may continue without ESA regulation, does create some unnecessary restrictions on forest management that put at risk NLEB conservation trends now occurring at the landscape level.

### Concerns with Proposed 4(d) Rule:

- Quarter Mile Radius Restrictions: The proposal disallows “incidental take” for forest management activities within a quarter-mile radius of any hibernaculum (cave) known to be occupied, or clearcutting within a quarter-mile radius of any known occupied roost tree.
- According to FWS, a quarter-mile radius equals a seasonal “no-management” zone of 128 acres.
- If the typical hibernaculum is occupied from autumn to spring, as FWS estimates—a period in excess of 6 months—the 4(d) rule would hold forest management activities within that area, like harvesting and planting, liable for any incidental NLEB takes during that period.
- In many parts of the NLEB range, forest management activities are best conducted on a seasonal basis; some sites are only accessible on a seasonal basis.
- The presence of an NLEB hibernaculum on or near forest land would, at best, prevent them from optimizing the scheduling of these forest management activities and, at worst, make forest management impossible.
- In effect, the obstruction to forest management which the “quarter-mile radius” provisions cause would have the unfortunate effect of placing landowners and NLEB conservation in conflict, rather than in cooperation.



### Forest Management Considerations:

- Forest management activities and the disruption they may cause to nearby NLEB's breeding and thriving, are relatively infrequent with approximately 2 percent of forests in States within the range of the NLEB impacted annually.
- Any evaluation of these infrequent disruptions must be weighed against the potential for long-term deterioration of NLEB habitat if the land management activity that created and fostered that habitat in the first place is prohibited, unreasonably obstructed, or placed within a framework of uncertainty.
- Family forest ownerships—approximately 62% of all privately held U.S. timberland, where holdings much smaller than 128 acres are the rule—would be particularly impacted by these restrictions.
- We reiterate that drawing the emphasis of federal policy away from developing and implementing a treatment program for WNS to imposing new controls on forest management and limiting landowners' options is counterproductive. On the contrary, it risks reversing the land management trends that enabled NLEB to thrive in its expanded range.

### Legal and Policy

- White Nose Syndrome Disease Is The Only Factor and It Must Be Managed:

The USFWS has determined, "that the northern long-eared bat is in danger of extinction, predominantly due to the threat of white nose syndrome." 78 Fed. Reg. 61046. The legal standard for review is whether the Service has considered the relevant facts and is postured to make a decision that is rationally based. At issue is whether there is rationally-based evidence that any of the other five factors is truly the risk and threat that must be managed. ESA management of habitat (Factor A), overutilization (Factor B), or Other (Factor E) will have no impact on the viability of the Northern Long-Eared Bat in the face of White Nose Syndrome, labeled as a novel epizootic. The species population within the identified range for the Northern Long-Eared Bat prior to white nose syndrome, a mere 7 years ago, was apparently quite robust. The single factor at issue is disease. The single factor at issue is disease, not human activity.

Since White Nose Syndrome is currently interpreted by the USFWS as the primary reason for the significant reduction in the Northern Long-Eared Bat population, focus upon an endangerment listing and accordingly pursuit of a critical habitat determination fails to meet the goals of the ESA. The promulgation of a rule establishing "Critical habitat" conservation would not address with specificity the disease and would not appreciably halt or reverse the species' decline. Additionally, an endangerment finding will significantly limit the ability of the researchers to gather information, because their activities could result in a "take" under the statute.

- The USFWS Fails to Identify In this Proposal the Work of the White Nose Syndrome Organization of Federal and State Agencies Whose Efforts Are Working to Manage WNS and Affected Species:



Section 4(b)(1)(A) of the ESA sets forth the basis for determinations with specific reference to taking into account “efforts, if any, being made by any State . . . to protect the species or other conservation practices.” Noticeably absent from the Service proposed listing is any reference to the activities of the states relative to White Nose Syndrome, the Northern Long Eared Bat, or the Eastern Small Footed Bat. The states are the regulatory authorities who are on the front lines of wildlife management and in fact were the ones who identified White Nose Syndrome very early in its presentation to bat colonies.

The business community of West Virginia pays tax dollars that are used to fund the WV Division of Natural Resources (“WVDNR”) and the WV Department of Environmental Protection. We strongly object to the failure of the USFWS to acknowledge the past and ongoing research that is occurring in West Virginia, and in other states, that is relevant to this proposal and which should be used to design a management plan for WNS and the affected species as opposed to the USFWS default to an endangerment proposal.

West Virginia and several other states are actively engaged in a national collaboration on research concerning White Nose Syndrome. The WVDNR, through the leadership efforts of Craig Stihler of the Wildlife Resources Section, monitors bat populations by conducting surveys of hibernacula, Virginia big-eared bats maternity colony counts, and acoustic routes statewide. These surveys helped document the spread of WNS and its impact on bat populations in West Virginia. In addition, the WVDNR continues to coordinate winter cave entrance surveys to document unusual bat behavior that may be a sign of WNS and compiles reports of unusual bat behavior received from the public. WVDNR biologists collect samples for and assist in the field with WNS research projects being conducted by various laboratories, colleges, and universities. WVDNR personnel participate in national working groups addressing WNS issues.

In conclusion to this section, the USFWS is urged to review its very own efforts and those of the states, and the White Nose Syndrome Organization concerning the management of the White Nose Syndrome and the species impacted. Listing the Northern Long Eared Bat as endangered will result in limited positive impact on the successful management of the species, because of the misdirected emphasis upon critical habitat. Instead, the Service is urged to focus upon developing a coordinated research strategy for White Nose Syndrome which would pursue feasible methods of managing the disease and the animals in the regions that have the best potential for success.

#### Science and Technical

Comments filed by the National Council on Air & Stream Improvement (NCASI) raise questions about the failure of the USFWS to acknowledge that there is no evidence that forest management activities are limiting the populations of northern long eared bats pre-WNS or post-WNS. WVFA incorporates the detailed comments by NCASI herein.

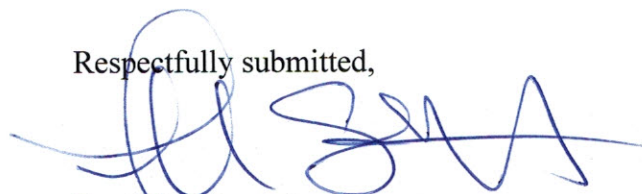
Section 4(d) of the Act allows the Service to implement special regulations that reduce or expand the normal protections for threatened species, if the Secretary of the Interior deems the special regulations are necessary and advisable to conserve the species. Such special regulations cannot be developed for endangered species. These special regulations may provide important flexibility to address species-human conflicts as the species approaches recovery and becomes more

numerous and widespread. This section would be well suited in regions where either WNS has not yet manifested itself or where protections may prove to have little to no impact on regional populations of NLEB.<sup>1</sup> The extensive amount of NLEB habitat under private ownership makes this section particularly relevant to reducing species-human conflicts.

In summary, we view it as a positive step that the USFWS has recognized the strong role forest management has played in developing viable NLEB habitat. However, even the 4(d) rule would impose burdens, falling especially heavily on small family ownerships and the management of forests in general, and those burdens would arguably do more harm than good in promoting NLEB survival. The USFWS is urged to develop a response to the listing petition that will incorporate a thorough assessment of states efforts and current research on the Northern Long Eared Bat and WNS.

The WVFA wishes to express our appreciation to the USFWS for the opportunity to submit these comments and would like to thank you for your consideration of these comments.

Respectfully submitted,



Frank M. Stewart  
Executive Director  
West Virginia Forestry Association, Inc.

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<sup>1</sup> *Ibid.* U.S. Fish and Wildlife Service 2003.