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October 8, 2014

Ms. Wendi Weber
Regional Director
U.S. Fish & Wildlife Service
Northeast Region
300 Westgate Center Dr.
Hadley, MA 01035

Dear Director Weber,

Recently I learned that the West Virginia field office issued guidance entitled: *Guidance on Developing and Implementing an Indiana Bat Conservation Plan* (referred to as the “Bat Conservation Plan”). While your agency’s statutory mission of preserving species that are threatened is important to West Virginia, this guidance will have negative effects on many businesses operating throughout the state. The “Bat Conservation Plan” was issued without full analysis of the impact, and certainly did not go through the proper channels for policy changes as outlined below. It’s important that proper procedures are followed, and in the interim this policy change should be withdrawn.

This enforceable performance standard misleads the public with a discussion of two options, when only one option is functionally permissible. This single option result seemingly is designed to delay any regulated activities for a year, creating an unauthorized moratorium on oil and gas activities. Any “Nationwide Permit” (NWP) authorization is required to assess for endangered species pursuant to General Condition 18; which would then direct the U.S. Army Corps of Engineers (USACE) to review appropriate documentation to demonstrate compliance with the requirements of the Endangered Species Act. In executing this task, USACE must consult with the U.S. Fish & Wildlife Service.

The “Bat Conservation Plan” is the tool USACE will use for measuring whether the proposed activity will directly or indirectly jeopardize the continued existence of a threatened or endangered species; a permit condition in fact. This plan results in an immediate and direct effect on day-to-day business; and therefore represents a final agency action that should be subject to review and withdrawn immediately. The Supreme Court has stated that, “[a]s a general matter, two conditions must be satisfied for agency action to be final.” First, the action must mark the “consummation” of the agency’s decision making process, and it must not be provisional or temporary in nature. Second, the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow[.]”

The presentation of the "Bat Conservation Plan" to USACE was not provided adequate public notice and comment. Assessment of the merits of the plan, which imposes a de facto moratorium, was improperly denied to the public in direct violation of the Administrative Procedures Act (5 U.S.C. §704). Further, it is my understanding that the West Virginia field office is the only one which has adopted this policy, thus imposing significant burdens on only those operations controlled by that particular field office.

From a policy perspective, the "Bat Conservation Plan" is unnecessary and imposes significant costs on industry without justification. Your office has not indentifi0ed any basis for this state-specific protocol or explained why it believes such a protocol is appropriate when USFWS has already issued range-wide guidance for the Indiana Bat. The guidance is also at odds with your office and the practices of the other USFWS field and regional offices within the species' range. As a result, this plan contributes to a patchwork of agency guidance and conflicting procedures that creates competing and inconsistent agency expectations across neighboring jurisdictions, complicates project development, and stifles economic growth in my congressional district.

Given the aforementioned events, I request that the Guidance on Developing and Implementing an Indiana Bat Conservation Plan, issued by your Elkins' office, be withdrawn and replaced with the previously issued plan. A proper public notice and comment protocol must be implemented for the purpose of designing a new plan. These actions, as stated above, are unacceptable.

Should you have any questions or concerns, please not hesitate to contact me or Cory Toth of my staff at (202) 225-4172.

Thank you and I look forward to your prompt response.

Sincerely,



David B. McKinley, P.E.
Member of Congress

DBM/cat

cc: Mr. John Schmidt, Field Supervisor, West Virginia Field Office