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**Comments of the Independent Petroleum Association of America and the
American Petroleum Institute on the Interim 4(d) Rule for the Northern
Long-Eared Bat**

Introduction

On March 17, 2015, the Independent Petroleum Association of America (IPAA) and the American Petroleum Institute (API) filed comments on the proposed 4(d) rule for the Northern Long-Eared Bat (NLEB). In those comments, IPAA and API requested that oil and gas activities be exempted from the prohibition against incidental take, given the insignificant impact of those activities on the existence and conservation of the NLEB.

On April 2, 2015, the United States Fish and Wildlife Service (FWS) published an Interim 4(d) Rule for the NLEB (Interim Rule) with a request for comments.¹ In the background information, FWS gave an explanation as to why it chose to exempt certain forest management activities—in particular, timber harvesting—from the prohibition against incidental take, while refusing to exempt forest conversion activities, like those associated with the development of oil and gas, from the prohibition.

IPAA and API are filing these comments to further demonstrate, based on the new explanatory information about the treatment of timber harvesting, that the record compiled by FWS does not support disparate treatment of timber harvesting and oil and gas activities. As shown below, there is no rational basis for the distinction that FWS attempts to draw between these two types of activities in terms of their potential impact on NLEB habitat. Accordingly, IPAA and API renew their request that the final 4(d) rule for the NLEB exempt oil and gas activities from the prohibition against incidental take. A failure to do so will impose unnecessary and costly burdens on the oil and gas industry and FWS itself and will not result in a measurable conservation benefit for the NLEB.

¹ 80 Fed. Reg. 17974 (Apr. 2, 2015).

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.

FWS Failed to Make a Rational Distinction Between Timber Harvesting and Oil and Gas Activities For Purposes of the Interim Rule

In its discussion of “the present or threatened destruction, modification, or curtailment of the NLEB’s habitat or range,” FWS notes that “[d]uring the summer, northern long-eared bat habitat loss is primarily due to” two types of activities—i.e., forest conversion activities and forest management activities.² FWS then concludes that even though these two types of activities may “present potential adverse effects to the northern long-eared bat, they are not considered the predominant threat to the species.”³ Indeed, FWS states that “[e]ven if all the [“potential adverse effects” from forest conversion and forest management] were eliminated or minimized, the significant effects of WNS on the northern long-eared bat would remain.”⁴

After concluding that neither forest conversion nor forest management activities presents a significant threat to the NLEB, FWS nonetheless attempts to draw a distinction between the habitat loss that can be caused by the two types of activities in order to justify its disparate treatment of them under the Interim Rule. In the Interim Rule, FWS exempts a suite of forest management activities, including timber harvesting, from the prohibition against incidental take, but does not exempt any forest conversion activities, including oil and gas development activities. FWS claims, in effect, that an exemption for timber harvesting is “necessary and advisable for the conservation and management” of the NLEB, but that an exemption for oil and gas activities is not. However, for the four reasons explained below, there is no rational basis in the record for concluding that it is “necessary and advisable for the conservation and management” of the NLEB to exempt timber harvesting from the incidental take prohibition, but not oil and gas development activities.

Reason 1 - Both types of activities result in the same type of effect on NLEB habitat—i.e., “loss of forest.” FWS notes that “loss of forest” can occur as result of oil and gas development activities “due to the practice of forest clearing for well pads and associated

² 80 Fed. Reg. 17993.

³ *Id.*

⁴ *Id.*

infrastructure (e.g., roads, pipelines and water impoundments).”⁵ By definition, “loss of forest” also occurs as a result of timber harvesting, which FWS describes as including “a wide variety of practices from selected harvest of individual trees to clearcutting.”⁶

Reason 2 - The types of effects that can occur to NLEB habitat from the “loss of forest” are the same for both types of activities. “Loss of forest,” whether occurring as a result of oil and gas development activities or as a result of timber harvesting, “may result in: loss of suitable roosting or foraging habitat; fragmentation of remaining forest patches, leading to longer flights between suitable roosting and foraging habitat; removal of (fragmenting colonies/networks) travel corridors; and direct injury or mortality (during active season clearing).”⁷

However, as the extent of tree removal typically involved in timber harvesting is much greater than the extent of tree removal typically involved in oil and gas development activities, the severity of the effects from timber harvesting is much greater than the severity of the effects from oil and gas development activities. Thus, if it is not necessary to the conservation of the NLEB that timber harvesting be subject to the incidental take prohibition, it is obviously not necessary that oil and gas development activities be subject to that prohibition.

Reason 3 - The conservation measures that FWS has included in the Interim Rule to limit incidental take from timber harvesting “during [the] more vulnerable life stages” of the NLEB would work equally well to limit incidental take from oil and gas development activities during those same “vulnerable life stages.”⁸ Thus, FWS’ conclusion that timber harvesting, “when conducted in accordance with the conservation measures [in the Interim Rule] will provide protection for the northern long-eared bat during its most sensitive life stages,” and that timber harvesting may therefore be exempted from the incidental take prohibition, should apply to oil and gas development activities as well.⁹

Reason 4 – Given that that the habitat impacts from oil and gas activities are far less than the habitat impacts from timber harvesting, the two rationales given by FWS for treating timber harvesting differently than oil and gas development activities are not sufficient. The first rationale is that because only “approximately 2 percent of forests in States within the range of the northern long-eared bat are impacted by forest management activities annually,” it is reasonable to “anticipate that habitat modifications resulting from [timber harvesting] will not significantly affect the conservation of the northern long-eared bat,” and that it is therefore appropriate to exempt timber harvesting from the incidental take prohibition.¹⁰ As we pointed out in our comments on the proposed rule, however, significantly less forest—as much as 150 times less—is impacted annually by oil and gas development activities.¹¹ It follows, then, that it is also reasonable to “anticipate that habitat modifications resulting from [oil and gas development

⁵ *Id.* at 17991.

⁶ *Id.* at 17991, 17992.

⁷ *Id.* at 17991.

⁸ *Id.*

⁹ *Id.* at 18024.

¹⁰ *Id.*

¹¹ In our earlier comments, we noted, for example, that during 2008-2012, approximately 1,486 acres of Pennsylvania state forest lands were “converted to facilitate gas development.” This figure includes the acreage converted for “roads, infrastructure, well pads, and pipelines.” 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.

activities] will not significantly affect the conservation of the northern long-eared bat,” and that it is therefore appropriate to exempt oil and gas development activities from the incidental take prohibition.

The second rationale is that timber harvesting, when done in conformity with proper forest management principles, “is not usually expected to result in a permanent loss of suitable roosting or foraging habitat for northern long-eared bats;” “[o]n the contrary, [timber harvesting] is expected to maintain a forest over the long term for the species” through the planting and growth of new trees to replace those that have been harvested. As a result, FWS concludes that “[c]ontinued [timber harvesting] . . . is vital to the conservation and recovery of the northern long-eared bat” and should therefore not be subject to the prohibition against incidental take. This rationale only makes sense if one assumes that timber harvesting will only continue if it is exempt from the incidental take prohibition. But any such assumption would obviously be ill-founded. Whether timber harvesting will continue is driven by far larger considerations than whether it has to be conducted in such a way as to avoid incidental take of the NLEB. Moreover, as FWS itself acknowledges, “activities that may cause [incidental] take of northern long-eared bat,” but that are not exempt from the incidental take prohibition, “may still be done, but only after consultation with” FWS.¹² Thus, even if timber harvesting were not exempt from the incidental take prohibition, there is absolutely no reason to conclude that it would not continue.

FWS tries to distinguish timber harvesting from oil and gas development activities by pointing to the fact that the “loss of forest” caused by timber harvesting is generally temporary [even though “temporary” in this context may mean decades], while the “loss of forest” caused by oil and gas development activities is generally permanent. However, that is simply not true. The impacts of oil and gas development activities on forest habitat are seldom, if ever, permanent. For example, the clearing of a well pad location is not necessarily a permanent impact. The well will have a finite production period at the end of which the pad will often be restored to its natural condition. But even if the impacts were permanent, that fact standing alone would not justify FWS’ disparate treatment of the two types of activities. The issue is not whether the “loss of forest” is temporary or permanent, but whether it is significant in relation to the conservation of the NLEB. Given the small amount of forest acreage impacted by oil and gas development activities, and the fact that those activities are typically subject to a requirement to reclaim or restore at least a portion of that acreage, the record simply does not support a conclusion that whatever permanent “loss of forest” may be caused by those activities is significant in relation to the conservation of the NLEB. There is thus no sound reason for concluding, for the sake of the NLEB, that oil and gas development activities must be more closely regulated by FWS than timber harvesting.

In light of the foregoing discussion, the most appropriate regulatory approach is to publish a final rule that will extend the exemption from the incidental take prohibition to all human activities, including oil and gas development activities, within the areas of the NLEB’s range impacted by white-nose syndrome that can be undertaken while incorporating the following measures, which are currently required with respect to the exemption for timber harvesting (and other exemptions) under the Interim Rule:

¹² *Id.* at 18024.

- (i) The activity occurs more than 0.25 mile (0.4 km) from a known, occupied hibernacula.
- (ii) The activity avoids cutting or destroying known, occupied roost trees during the pup season (June 1–July 31).
- (iii) The activity avoids clearcuts (and similar harvest methods, e.g. seed tree, shelterwood and coppice) within 0.25mile (0.4 km) of known, occupied roost trees during the pup season (June 1–July 31)

In addition, the final 4(d) rule must make clear that “known” and “occupied,” as referenced above, refer to hibernacula or roost trees as the case may be that have been identified and portrayed on maps that are made available to the public prior to the initiation of the activity being assessed for its compliance with the requirements of the final 4(d) rule.

FWS Failed to Examine Existing Regulatory Mechanisms

In determining whether to list a species, FWS must examine the adequacy of existing regulatory mechanisms to deal with the threats facing the species. If those mechanisms are adequate, then listing may not be necessary or appropriate. FWS has recently reaffirmed this principle in its decision not to list the greater sage grouse in the states of California and Nevada. That same factor should also be examined when FWS is considering, pursuant to its section 4(d) authority, what conservation measures may be “necessary and advisable for the conservation and management” of a threatened species. To the extent that existing regulatory mechanisms are adequate to deal with a particular threat to the species, then it is not necessary or advisable to impose the prohibition against incidental take on the activities that are responsible for that threat.

In the case of the NLEB, FWS has identified oil and gas development activities as a potential—though not primary—threat because “[h]abitat necessary for establishing maternity colonies and foraging may be lost due to the practice of forest clearing for well pads and associated infrastructure,” and because loss of such habitat may have “negative additive impacts [on the NLEB] where the species has been impacted by WNS.”¹³ In deciding not to exempt such activities from the incidental take prohibition, however, FWS gave no consideration whatsoever to the adequacy of existing regulatory mechanisms to deal with the potential threat posed by those activities to NLEB habitat.

As shown by the example of Pennsylvania, however, which is discussed below, and in our earlier comments, oil and gas activities in Pennsylvania’s state forests are carefully regulated to minimize impacts from oil and gas development activities and to insure the continued viability of the forests. Indeed, Pennsylvania’s regulations governing oil and gas activities in state forests are an exercise in “forest management,” which FWS defines as “the practical application of biological, physical, quantitative, managerial, economic, social, and policy principles to the regeneration, management, utilization and conservation of forests.”¹⁴ Thus, oil and gas activities, when conducted in accordance with Pennsylvania’s regulations, should actually be considered forest management activities, rather than forest conversion activities (just as timber

¹³ *Id.* at 17990, 17991.

¹⁴ *Id.* at 18025.

harvesting, when not done in accordance with forest management principles, would be considered a forest conversion activity, rather than a forest management activity) and, for that reason alone, should be exempted from the incidental take prohibition. Moreover, even if oil and gas development activities, as regulated by Pennsylvania, are not considered forest management activities, it is evident that when done in compliance with those regulations, there is no basis for concluding that such activities would be detrimental to the “long-term stability and diversity” of Pennsylvania’s forests. Therefore, there is no rationale why oil and gas activities should be more closely regulated by FWS than timber harvesting. Other states are similarly concerned about maintaining the “long-term stability and diversity” of their forests.

As noted in the April 2014 Shale-Gas Monitoring Report (Monitoring Report), it is the mission of Pennsylvania’s Department of Conservation and Natural Resources (DCNR) to “ensure the long-term health, viability, and productivity of” state forests.¹⁵ DCNR’s “overarching goal is to manage state forests sustainably under sound ecosystem management”—i.e., under the principles of forest management, as defined by FWS. In that regard, DCNR is well aware that “[n]atural gas development . . . affects a variety of forest resources and values, such as . . . wildlife habitat” through “[f]orest conversion and fragmentation,”¹⁶ and has therefore put both regulatory and monitoring mechanisms in place to minimize the impacts of such development. Where oil and gas development “is permitted to occur,” DCNR “strives[s] to minimize the surface impact to the greatest reasonable extent and to mitigate for the impact whenever possible.”¹⁷ For example, shale-gas leases restrict surface disturbance in sensitive areas and limit overall surface disturbance to approximately 2 percent of the acreage within the lease tract.¹⁸ In addition, “[s]ince the onset of shale-gas development on state forest lands, [DCNR] has worked with gas operators to limit forest fragmentation resulting from infrastructure construction.”¹⁹ Moreover, with respect to reclamation and restoration of disturbed areas where “loss of forest” may have occurred, DCNR’s goal is “to reduce the impact of shale-gas development by restoring areas converted for gas infrastructure to their original habitat or creating habitat for plants and wildlife.” DCNR notes that “[w]ith proper planning and effective, thoughtful implementation, suitable habitat can be created for many species of plants and wildlife during partial and complete restoration of gas-related sites.”²⁰ On this record, as explained in even more detail in the Monitoring Report, it is impossible for FWS to rationally conclude that existing regulatory mechanisms are inadequate to minimize and mitigate the impacts to NLEB habitat from oil and gas development activities, and that there is therefore a need for an additional layer of regulation to be imposed on those activities by FWS.

Conclusion

FWS’ decision to treat oil and gas development activities differently than timber harvesting is unsupported by the record and uninformed with respect to the adequacy of existing regulatory mechanisms to deal appropriately with whatever threat such activities may pose to NLEB habitat. Accordingly, in the final 4(d) rule, FWS should extend the exemption from the

¹⁵ Monitoring Report at p. 12.

¹⁶ *Id.* at p. 1 and 3.

¹⁷ *Id.* at p. 1.

¹⁸ *Id.* at p. 3.

¹⁹ *Id.* at p. 210.

²⁰ *Id.* at p. 208.

incidental take prohibition to oil and gas development activities.²¹ As stated above, we believe that the most reasonable approach is to extend the exemption from incidental take prohibition to all activities that can be carried out in the area subject to the final 4(d) rule in conformity with the protective measures described in the Interim Rule as protective measures for forest management and other activities identified in the Interim Rule.

Sincerely,



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²¹ Some oil and gas development activities are already covered by the exemption for minimal tree removal activities and for maintenance of existing utility and transportation corridors.