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January 2, 2014

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Green Bay Ecological Services Office  
2661 Scott Tower Drive  
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Re: Docket No. FWS-R5-ES-2011-0024

Dear Mr. Fasbender:

The following comments are provided on behalf of the American Petroleum Institute and the Independent Petroleum Association of America in response to the October 2, 2013 Federal Register publication of a proposed rule and 12-month finding for the Petition to List the Eastern Small Footed Bat and the Northern Long-Eared Bat as Endangered or Threatened Species; Listing the Northern Long-Eared Bat as an Endangered Species (78 Fed. Reg. 60146).

## INTRODUCTION

### American Petroleum Institute (API)

The American Petroleum Institute (API) is the only national trade association that represents all aspects of America's oil and natural gas industry. Our more than 500 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API's mission is to influence public policy in support of a strong, viable U.S. oil and natural gas industry.

## Independent Petroleum Association of America (IPAA)

The Independent Petroleum Association of America (IPAA) is the national 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 is essential to the national economy.

### Summary of Comments

1. API and IPAA believe that the information offered in support of the proposal to list the Northern Long-Eared Bat does not meet the standard of the best scientific and commercial data available and thus the species does not merit listing as threatened or endangered at this time. At a minimum, USFWS is urged to provide an additional 6-month time period before finalizing this proposal to allow for further review and submittal of public comment to the proposal and the technical information available on the species and the White Nose Syndrome (“WNS”).
  - a. There has not been adequate scientific peer review of the USFWS studies and unpublished data cited in the record, nor does the record reflect the most recent data, such as that being gathered and assessed by the White Nose Syndrome Organization.
  - b. White Nose Syndrome disease is the primary reason for the significant reduction in the Northern Long Eared Bat, yet the USFWS is only proposing endangered listing which has as its primary tool habitat protection. Habitat protection will not appreciably halt or reverse the species’ decline or WNS.
  - c. The proposed agency action does not adequately record, recount, or incorporate the state and federal tax payer funded research on WNS or the Northern Long Eared Bat. The USFWS is urged to focus upon developing a research strategy for WNS coordinated with NGOs, educational institutions and private citizens which would pursue feasible methods of managing the disease and the animals in the regions that have the best potential for success.
2. Climate change references are so vaguely stated they are not supported by law. The following detailed comments are provided in two sections: A. Legal and Policy and B. Scientific and Technical.

#### A. Legal and Policy

##### 1. Need for Scientific Peer Review of USFWS Referenced Studies

The U.S. Fish and Wildlife Service (“USFWS”) notes in the Executive Summary of the proposal,

*We will seek peer review.* We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science to provide any additional scientific information to improve this proposed rule.

78 Fed. Reg. 61046. (October 2, 2013).

The July 1, 1994, Policy on Information Standards Under the Endangered Species Act (“ESA”) (published in the Federal Register on July 1, 1994 (59 Fed. Reg. 34271) provides the USFWS “will receive and use information on the biology, ecology, distribution, abundance, status, and trends of species from a wide variety of sources as part of their responsibility to implement the Act. Some of this information is anecdotal, some of it is oral, and some of it is found in written documents. These documents include status surveys, biological assessments, and other unpublished material (that is, “gray literature”) from State natural resource agencies and natural heritage programs, Tribal governments, other Federal agencies, consulting firms, contractors, and individuals associated with professional organizations and higher educational institutions. The USFWS also uses published articles from juried professional journals. The reliability of the information contained in these sources can be as variable as the sources themselves. As part of their routine activities, service biologists are required to gather, review, and evaluate information from these sources prior to undertaking listing, recovery, consultation, and permitting actions. . . . This review will be conducted to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.” (Emphasis added).

The nexus between this proposal’s statement that peer review and credible data is a goal and the information policy cited above is found within the Administrative Procedures Act. Adequate public notice and a meaningful opportunity to comment are essential to advance the ability of the public to provide the caliber of comment the USFWS claims it is seeking. The number of references to personal comments and unpublished data and reports is significant within this notice and even include the vague attribution “Service, unpublished data.” The following partial list of references related to the Northern Long-Eared Bat include underlined studies that advance theories and claims that rise to the level of warranting peer review. At a minimum, these underlined studies must be subject to peer review and analysis: unpublished data of Pennsylvania Game Commission; Brack, et al. unpublished manuscript; Maryland Department of Natural Resources 2011, unpublished data; Hemberger 2011, unpublished data; Graeter 2011, unpublished data; Graham, unpublished data; Veilleux and Moosman, unpublished data; Feller 2011, unpublished data; Brunkhurst 2012, unpublished data; Markuson 2011, unpublished data; Smith 2011, unpublished data; Reynolds 2012, unpublished data; Stihler 2012, unpublished data; NPS 2011, unpublished data; Herzog 2012, unpublished data; Dobony 2011, unpublished data; Brown, unpublished data; Kurta, pers. Comm.; Redell 2011, pers. Comm.; Kath 2013 pers. Comm.; Carter 2012, pers. Comm.; Pelren, pers. Comm.; Morris 2012, unpublished data; Hemberger 2012, pers. Comm.; Bunch 2011 unpublished data; Coleman 2013; Sasse 2012, unpublished data; Stark pers. Comm.; Lausen undated unpublished data; Riddle, pers. Comm. Geluso 2011, unpublished data; Wyoming Game and Fish Department 2012, unpublished data; French 2012 unpublished data; Graham 2011, unpublished data; Hemberger 2011, unpublished data, Service 2011, unpublished data; Feller 2011, unpublished data; Reynolds, 2011 unpublished data; Service, unpublished data).

To avoid absolute contravention of the Administrative Procedures Act and the ESA, appropriate peer review and reasonable access to a peer reviewed record of a duration to develop the “comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science to provide any additional scientific information to improve this proposed rule” must be provided. *Id.* at 61046. The determination to list a species must be based solely on the best scientific and commercial data available. In *Bennett v. Spear*, 520 U.S. 152, 176-77 (1997), the Court emphasized that the purpose of the administrative review process is “to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise” and “to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” There is a body of ongoing research that has been driven by the epizootic WNS. The quandary over the next step to preserve this impacted species must be more clearly defined with a scientifically identifiable strategy for conservation. API and IPAA strongly urge the USFWS to provide a meaningful opportunity to the scientific community to review the unpublished research that has not been subjected to peer review upon which the USFWS is basing this significant proposal for the Northern Long Eared Bat.<sup>1</sup>

## 2. 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 USFWS has considered the relevant facts and is postured to make a decision that is rationally based. At issue is whether there is evidence that any of the five factors is truly the risk and threat to the species, and, if so, that factor must be managed. The factors identified by the USFWS are: ESA management of habitat (Factor A), overutilization (Factor B), or Other (Factor E) management of which will have no impact on the viability of the Northern Long-Eared Bat in the face of WNS, labeled as a novel epizootic. Purported impacts of oil and gas industrial operations on the Northern Long-Eared Bat are not the issue relative to the future existence of this species of bat. Oil and gas operations throughout the country are not of a nature or size that typically would compromise habitat, hibernation, migration, roosting or reproduction. Oil and gas wells, pipelines, and processing facilities have a well- defined perimeter that does not represent a footprint that has historically compromised the population of the Northern Long-Eared Bat, prior to the WNS. Horizontal well development for oil and natural gas utilizes single well pads for more than one directional well minimizing impacts on forests. Evidence suggests that openings in the canopy such as those presented by access roads promote foraging.<sup>2</sup> 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, not oil and gas operations, or any other human activity.

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<sup>1</sup> Although these comments specifically focus upon scientific bases for the proposed listing of the Northern Long-Eared Bat, the same concern over peer review is applicable to the decision not to list the Eastern Small Footed Bat.

<sup>2</sup> Barbour and Davis (1969).

Since WNS 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. “Critical habitat” is that which is essential to the conservation of the species. ESA §3(4). 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. The USFWS is proposing a critical habitat determination path forward by proposing an endangered listing that will fail to “conserve” using “methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” ESA §3(3).

3. The USFWS Fails to Identify In this Proposal the Work of the White Nose Syndrome Organization a collective 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 USFWS proposed listing is any reference to the activities of the states relative to WNS, 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. Important taxpayer dollars are being invested in research, yet USFWS fails to take such into consideration in its proposal. In May of 2011, the U.S. Fish and Wildlife Services published “A National Plan for Assisting States, Federal Agencies, and Tribes in Managing White-Nose Syndrome in Bats.” The agencies included in the plan’s preparation are: the Association of Fish and Wildlife Agencies, which includes the Kentucky Department of Fish and Wildlife Resources, the Missouri Department of Conservation, the New York State Department of Environmental Conservation, the Pennsylvania Game Commission, the Vermont Department of Fish and Wildlife and the Virginia Department of Game and Inland Fisheries.<sup>3</sup> The core group of state agencies includes many of the states where the outbreak was first detected. In addition there are many state agencies that serve a role in the continued development of this plan lending their research and data collection efforts. Some states do not have a WNS plan specifically developed but are active participants in the USFWS efforts. Several states are actively engaged in a national collaboration on research concerning WNS as discussed further below. It is concerning that these efforts are being highlighted in public comments and not in the federal agency proposal itself.

Currently 10 states have voluntarily created WNS action plans.<sup>4</sup> All 10 plans share the common mission of creating a collaborative and cooperative land management effort to study

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<sup>3</sup> U.S. Fish and Wildlife Service, A National Plan for Assisting State, Federal Agencies, and Tribes in Managing White-Nose Syndrome in Bats, May 2011, Page 2 of the PDF, <http://www.whitenosesyndrome.org/national-plan/white-nose-syndrome-national-plan>.

<sup>4</sup>White-nose Syndrome.org, White-Nose Syndrome Planning, May 2011, <http://www.whitenosesyndrome.org/white-nose-syndrome-planning>. The website provides links to the following states' action plans: Alabama, Colorado, Georgia, Michigan, Missouri, New Mexico, North Carolina, South Carolina, Tennessee and Wyoming.

white-nose syndrome and attempt to limit the impact of the fungus<sup>5</sup> on native bat populations. All 10 states have included members of the USFWS as cooperators and members of the committees responsible for drafting the state plans.<sup>6</sup> All 10 states also follow the USFWS guidelines for proper handling and decontamination procedures for people who come into contact with bats or their habitats.

Coordinated research efforts among all state and federal agencies, NGOs, educational institutions and private citizens are the key aspects of all management plans. Many of the state and federal efforts are profiled annually, as evidenced by the September 3 – 6, 2013 6<sup>th</sup> Annual White Nose Syndrome Workshop.

The spread of WNS has been noteworthy in speed and geographic scope, but the future impacts are yet unknown as WNS varies in its impact amongst various species.<sup>7</sup> It has the potential to undermine the basic survival capability of more than half of the bat species in the U.S. and all species of bats that occur in the higher elevations of North America. Epizootic disease outbreaks have never been documented previously in hibernating bats, which differ from most other small mammals in that they live 15 to 25 years and only typically have one offspring per year, which makes these species incapable of rapid population recovery.<sup>8</sup> This makes the research and understanding of WNS a key task in all management and response plans. As recent as one month before this proposed listing, research reports were made at the 6<sup>th</sup> Annual Conference held in Idaho on topics to include: Status and Response Updates; Ecology and Genetics; Physiology of White Nose Syndrome; Epidemiology and Diagnostics Research; Conservation and Recovery Research and Disease Management. The science and data are continuing to evolve concerning WNS and its impacts on species. This proposal is premature and misguided in its proposed conclusion of an endangered listing.

In addition to research, several states are drafting or revising legislative language, as preserved on the White Nose Syndrome Organization website. Other states have existing statutory authority to manage bats. Additional update reports and confirmation of state program efforts is clearly needed to develop a thorough understanding of the state level efforts and protections. The USFWS is urged to conduct such an update and include a review of state efforts in a revised proposal concerning the Northern Long Eared Bat and WNS.

For example, Colorado revised Statute 33-2-102 to state that "The general assembly finds and declares that it is the policy of this state to manage all nongame wildlife, recognizing the private property rights of individual property owners, for human enjoyment and welfare, for scientific purposes, and to ensure their perpetuation as members of "ecosystems". This

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<sup>5</sup> White Nose Syndrome is caused by the recently described psychophilic (cold-loving) fungus currently known as *Geomyces destructans*. 78 Fed. Reg 61062

<sup>6</sup> PDF plans for each state are hyperlinked to <http://whitenosesyndrome.org/white-nose-syndrome-planning>, South Carolina, Page 1; Wyoming, Page 2; Tennessee, Page 2; Colorado, Page 2; Georgia, Page 1; Alabama, Page 1; North Carolina, Page 1; Missouri, Page 1; New Mexico, Page 1; and Michigan, Page 4.

<sup>7</sup> 78j Fed. Reg. 61061.

<sup>8</sup> *Id.*, Page 3.

legislation charges Colorado Parks and Wildlife with protecting all nongame wildlife including bats.<sup>9</sup>

Michigan is relying on the Natural Resources and Environmental Protection Act (NREPA; Public Act 451 of 1994; Michigan Compiled Laws Chapter 324) which was drafted to "protect the environment and natural resources of the state; to codify,... to regulate the use of certain lands, waters, and other natural resources of the state; to describe the purposes and duties of certain state and local agencies and officials." Section 40107(1) (c) states that "the department shall manage animals in this state. In managing animals, the department (MDNRE) may issue orders to... determine the animals or kind of animals that are protected." Further, Section 9.3(2) of the Wildlife Conservation Order specifies bats as protected animals and Section 9.1(4) specifies the only conditions under which they may be legally taken. Specific to the WNS response efforts in Michigan, NREPA Section 502 stipulates that "The department may... promulgate and enforce reasonable rules concerning the use and occupancy of lands and property under its control." Section 503 states "The department shall protect and conserve the natural resources of this state... and foster and encourage the protection and propagation of game and fish. The department has the power and jurisdiction over the management, control and deposition of all land under the public domain." Section 36502 provides that "The department shall perform those acts necessary for the conservation, protection, restoration and propagation of endangered and threatened species of fish, wildlife and plants in cooperation with the federal government."

Missouri's constitutional law, Article IV, Section 40(a) states that the Missouri Department of Conservation is charged with protecting and managing the fish, forest, and wildlife resources of Missouri. The Missouri Department of Conservation manages many important bat caves and issues wildlife collector permits regulating research and monitoring of the state's wildlife. Currently Missouri emphasizes the monitoring of the spread of WNS and continuing research into environmentally safe treatment options.<sup>10</sup>

The Indiana Department of Natural Resources, while not having a state action plan, does assert that it has statutory authority over all bat species native to Indiana and the Department of Natural Resources is actively working to stop the spread of WNS including active, passive, and online reporting, population monitoring and land management policies such as closing access to caves.<sup>11</sup>

Several other state plans also reference their power to regulate, research and collect permits concerning bats, including their right to reject federal permits if they don't meet the state criteria for safe or necessary research that might cause unnecessary disruption to bat populations.<sup>12</sup>

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<sup>9</sup> Colorado Parks and Wildlife White-nose Syndrome Response Plan, November 2012,

<http://whitenosesyndrome.org/white-nose-syndrome-planning>, then follow the Colorado hyperlink.

<sup>10</sup> White Nose Syndrome Action Plan, Missouri Department of Conservation, April 12, 2010.

<http://whitenosesyndrome.org/white-nose-syndrome-planning>, then follow the Missouri hyperlink.

<sup>11</sup> <http://whitenosesyndrome.org/partner/indiana-department-natural-resources-division-fish-and-wildlife>

<sup>12</sup> Cooperative White-Nose Syndrome Monitoring and Surveillance Plan for Tennessee, Page 19, Tennessee Code Annotated 70-2-213 requires persons wanting to take, capture and transport Tennessee's wildlife for scientific purposes to have a Scientific Collection Permit. Tennessee State Rule 0080-07-1 prevents the

Pennsylvania Game Commission, in response to decimation of specific species of bats, drafted a bulletin for the protection of the remaining populations of northern long eared bats, tri-colored bats and the little brown bats as of August 11, 2012.<sup>13</sup>

In conclusion, the USFWS is urged to review its very own efforts and those of the states concerning the management of the WNS and the Northern Long Eared Bat by the White Nose Syndrome Organization. Listing the species 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 USFWS is urged to focus upon developing a coordinated research strategy for WNS which would pursue feasible methods of managing the disease and the animals in the regions that have the best potential for success.

#### 4. Climate Change References Are So Vaguely Stated They Are Not Supported by Law.

The ESA does not support vaguely stated goals or challenges that have no tangible impact on the species being proposed for listing. Climate change as referenced in this proposal is only a passing reference and therefore not adequately reviewed. The ESA is an action-forcing conservation statute designed to ensure *meaningful* protections for species and habitat necessary for their conservation by, among other things, requiring that decisions under Section 4 to list species and designate critical habitat be supported by the “best scientific and commercial data available.” *See* 16 U.S.C. §1536(b)(1)(A). The Proposed Rule’s identification of climate change as a purported threat to the future of Northern Long Eared Bat is inconsistent with this requirement. On the basis of undocumented speculative climate change concerns, the USFWS offers a vague statement, “Although we do have information that *suggests* that climate change may impact both the northern long-eared bat and eastern small-footed bat and bats in general, we do not have any evidence suggesting that climate change in itself has led to population declines in either species.” 78 Fed. Reg 61070. (Emphasis added.)

Any conclusion about climate change based upon the record provided fails to recognize that projected climate-induced changes to Northern Long Eared Bat habitat are uncertain. The USFWS cannot reliably predict any particular changes in habitat which is the next step in an endangerment listing, and therefore cannot direct the public to studies that demonstrate the “best science” in support of a designation of the “specific areas” that *presently* qualify as critical habitat pursuant to ESA Section 4.

Congress did not intend for the ESA to be used as a vehicle to remedy the projected effects of, or to anticipate, global changes in climate. In previous Service decisions, however, which were peer reviewed, and one of which has been sustained in federal court, the Service determined that although the IPCC models project impacts out for 100 years, the resulting information *is not scientifically reliable beyond mid-century*. *See* 73 Fed. Reg. 28,212 (May 15, 2008) (polar bear listing decision); 75 Fed. Reg. 6438, 6448 (Feb. 9, 2010) (American pika); 77 Fed. Reg. 42,238 (July 18, 2012) (four beetle species); *In re Polar Bear Endangered Species*

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abuse and misuse of the natural resources found on state forests, see <http://whitenosesyndrome.org/white-nose-syndrome-planning>, then follow the Tennessee hyperlink.

<sup>13</sup> 42 Pa.B. 5310 (2012).

*Act Listing and 4(d) Rule Litig.*, 794 F. Supp. 2d 65 (D.D.C. June 30, 2011). A number of courts have determined that listing decisions under Section 4 of the ESA, which also provides for critical habitat designations are *not* to be based on speculation or a misplaced intent to err on the side of species conservation.

Under Section 4, the default position for all species is that they are not protected under the ESA. ... Although an agency must still use the best available science to make [a listing] determination, *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require an agency to “give the benefit of the doubt to the species” under Section 4 if the data is uncertain or inconclusive.

*Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see Ctr. For Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (“benefit of the doubt” concept does not apply in Section 4 listing context); *see also Bennett v. Spear*, 520 U.S. 154, 176 (1997) (“The obvious purpose of the requirement that each agency use the best scientific and commercial data available is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.”) (internal quotations omitted). Similarly, the USFWS may not “err” in favor of designating broad swaths of questionable habitat, but may designate habitat only where such habitat is clearly critical. Any less rigorous application of science would violate Section 4’s mandate that habitat be designated based on the best available science, as that mandate has been interpreted by courts.

The USFWS’s reliance on future possible climate change impacts to the Northern Long Eared Bat in the Proposed Rule is speculative. For these reasons, the USFWS should remove the portion of its climate change analysis which speculates as to the future for the Northern Long Eared Bat consistent with the ESA’s mandate that such designations be based on the best available science rather than “speculation or surmise.” 16 U.S.C. §1536(b)(1)(A); *Bennett*, 520 U.S. at 176.

5. Rulemaking Driven by a Listing Schedule Designed to Meet a Political Agenda Rather than an Agenda Based on Science is Unlawful.

USFWS notes in the proposal that,

On July 12, 2011, the Service filed a proposed settlement with the Center of Biological Diversity in a consolidated case in the U.S. District Court for the District of Columbia. The settlement was approved by the court on September 9, 2011. As part of this settlement agreement, the Service agreed to complete a status review for the eastern small-footed bat and the northern long-eared bat by September 30, 2013, and if warranted for listing, publish a proposed listing rule also by that date. 78 Fed. Reg 61047.

API and IPAA are keenly aware of the history of the above referenced litigation, and other law suits, over the implementation of the ESA. There have also been past and present Congressional efforts to resolve the ongoing debate over the efficacy of this dated statute. Our

members are citizens who seek protection of fish, wildlife, and plants.<sup>14</sup> We strongly object to a system of court orders that unlawfully removes from public debate and scientific peer review the policy decisions that need to be made about the dysfunction of the ESA and the protections that as a matter of statutory law and correctly promulgated regulation should be afforded of our fish, wildlife, and plants.

## B. Science and Technical

API and IPAA have identified several significant issues associated with the methodology/interpretation of the “best available data” in supporting the USFWS’ claim that the NLEB should be listed as an endangered species at this time. These issues are detailed below and API and IPAA request that USFWS fully address these issues prior to making a determination.

- I. API and IPAA agree with the USFWS assertion that ‘There is uncertainty as far as how WNS will impact susceptible species in some of the southern states...’<sup>15</sup> More research is needed to determine whether southern states do suffer similar rates of decline in NLEB. However, Fed. Reg. 78, 61064, states ‘we have no reason not to expect that where it spreads, it will have the same impact to the affected species.’ To the contrary, there is uncertainty due to variations in bat physiological and immune response to the disease with varying hibernation duration and cave microclimate as well as variations in the growth and prevalence of the fungus that causes WNS (*Pseudogymnoascus destructans* (Pd) in these changing conditions.<sup>16</sup> The most recent, though preliminary, information from the Kentucky Department of Fish and Wildlife indicates that bat fatality levels are not as high as in the Northeast, where the NLEB is experiencing mass mortality.<sup>17</sup> Winter length and frequency of disturbance can affect survival of hibernating bats, Boyles and Brack (2009)<sup>18</sup> and Ehlman et al. 2013<sup>19</sup> describe models that predict the possibility of lower mortality at lower latitudes, for both healthy and WNS infected bats, thus there is the possibility that shorter winters and consequently shorter hibernation durations could reduce the impact of WNS in the southern states. **Clearly, further time must be provided to allow for additional peer and public review of the most recent data.**

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<sup>14</sup> On December 13, 2013 the House Committee on Natural Resources held a hearing titled, “ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies”

<sup>15</sup> Utrup J. 2013. E-mail correspondence sent from A. Jain, Biologist, TRC – Environmental, Albuquerque, NM to J. Utrup, Fish and Wildlife Biologist, USFWS Green Bay Wisconsin Field Office (sent December 9, 2013).

<sup>16</sup> Hayman, David T.S., Paul M. Cryan, Juliet R. C. Pulliam, Colleen T. Webb. 2013. Environmental conditions inside winter hibernation sites predict white-nose syndrome mortality in bats. 6th Annual White-Nose Syndrome Workshop, September 3-6, 2013. Boise, Idaho.

<sup>17</sup> Hemberger, T. 2013. Phone Conversation between A. Jain, Biologist, TRC – Environmental, Albuquerque, NM and T. Hemberger, Wildlife Biologist, Endangered Species Biologist, Kentucky Department of Fish and Wildlife Resources (December 10, 2013).

<sup>18</sup> Boyles, J.G. and V. Brack Jr. 2009. Modeling survival rates of hibernating mammals with individual-based models of energy expenditure. *Journal of Mammalogy*, 90(1):9-16.

<sup>19</sup>; Sean M. Ehlman, John J. Cox, and Philip H. Crowley. *Journal of Mammalogy*, 94(3):572-583. 2013. DOI: <http://dx.doi.org/10.1644/12-MAMM-A-111.1>. URL: <http://www.bioone.org/doi/full/10.1644/12-MAMM-A-111.1>

2. The unique nature of the challenge to the NLEB due to WNS has resulted in unconventional conservation ideas, such as placing heating units in caves and creating artificial hibernacula in ME and TN which can be disinfected annually.<sup>20</sup> Captive hibernation such as Mayberry et al. (2013) is also currently being researched.<sup>21</sup> In addition, bio-agents and drugs are in development that would require rigorous testing if they are to be deployed in a timely manner (Cornelison 2013<sup>22</sup>, Hoyt et al. 2013<sup>23</sup>). However, these research efforts may result in accidental ‘take’ of the NLEB. Further, some research protocols may require ‘take’ of individuals in the course of tests to determine efficacy, which could be permitted for threatened species by the USFWS. However, if the NLEB is designated as an endangered species, such take would be prohibited by the ESA and current research and funding efforts by the states and nongovernmental organizations could be slowed or halted.<sup>24</sup> **A listing as ‘endangered’ will only frustrate current and future research efforts that are essential to gaining important information on the species and WNS.**
  
3. API and IPAA agree with the USFWS assertion that NLEB populations, prior to the onset of WNS, were generally stable and increasing and that ‘WNS (Factor C) alone has led to dramatic and rapid population level effects on the northern long-eared bat.’... the effects on the northern long-eared bat from Factors A...and E individually or in combination do not have significant effects on the species.’ (Fed. Reg. 78. 61072). Factor A is defined as ‘the present or threatened destruction, modification, or curtailment of its habitat or range’. Factor E is defined as ‘other natural or manmade factors affecting its continued existence’. Factors A, and E could thus be interpreted to include oil and gas industry activities such as construction, extraction etc. Consequently, in regions and states where WNS has not been confirmed, we believe that industry activities would continue to have no significant effect on NLEB populations and should be managed accordingly. An ‘endangered’ listing does not afford flexibility in management of these industry activities.<sup>25</sup> **Based on this analysis, API and IPAA believe that the USFWS**

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<sup>20</sup> Boyles, J.G. and Craig K.R. Willis. 2010. Could localized warm areas inside cold caves reduce mortality. 2010. *Front Ecol. Environ*; 8(2): 92–98, doi: 10.1890/080187

<sup>21</sup> Mayberry, H. Liam McGuire, Alana Wilcox, James Turner, Lisa Warnecke, and Craig Willis. 2013. Summer bats to winter bats: preparing captive *Myotis lucifugus* for hibernation. 16<sup>th</sup> International Bat Research Conference, 43<sup>rd</sup> American Conference on Bat Research. <[http://www.ibrc2013.com/pdf/ibrc\\_2013\\_abstracts.pdf](http://www.ibrc2013.com/pdf/ibrc_2013_abstracts.pdf)>

<sup>22</sup> Cornelison, C.T. 2013. Bacterially mediated contact-independent antagonism of *Geomyces destructans*. 6th Annual White-Nose Syndrome Workshop, September 3-6, 2013. Boise, Idaho;

<sup>23</sup> Hoyt, J.R., Tina L. Cheng, Kate E. Langwig, Winifred F. Frick, A. Marm Kilpatrick 2013. Beneficial bacteria on bats inhibit the growth of *Geomyces destructans*. 6th Annual White-Nose Syndrome Workshop, September 3-6, 2013. Boise, Idaho.

<sup>24</sup> U.S. Fish and Wildlife Service (USFWS). 2003. What is the difference between Endangered and Threatened? Accessed online, December 10, 2013. <<http://www.fws.gov/midwest/wolf/esastatus/e-vs-t.htm>>

<sup>25</sup> Mandell L. 2013. E-mail correspondence sent from A. Jain, Biologist, TRC – Environmental, Albuquerque, NM to L. Mandell, Fish and Wildlife Biologist, USFWS Green Bay Wisconsin Field Office (sent December 11, 2013); U.S. Fish and Wildlife Service (USFWS). 2010. A national plan for assisting states, Federal agencies, and tribes in managing white-nose syndrome in bats (draft). 16 pp. Available at: [http://www.USFWS.gov/WhiteNoseSyndrome/pdf/WNSNational%20Plan\\_DRAFT\\_10.21.2010.pdf](http://www.USFWS.gov/WhiteNoseSyndrome/pdf/WNSNational%20Plan_DRAFT_10.21.2010.pdf)

**has not provided sufficient evidence to determine that the NLEB should receive the same protection throughout its range.**

In summary, API and IPAA believe that the information offered in support of the proposal to list the Northern Long-Eared Bat does not meet the standard of the best scientific and commercial data available and thus the species does not merit listing as threatened or endangered at this time. At a minimum, API and IPAA urge the USFWS to provide an additional 6-month timeframe before finalizing this proposal to allow for further review of the proposal and the technical information on both the species and on measures to address the effects on the species from WNS. API and IPAA wish 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,



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