

**Comments on the Fish and Wildlife Service’s Proposed Rule  
“Endangered Species Status for Northern Long-Eared Bat”**

**Docket ID No. FWS–R3–ES–2021–0140**

American Exploration and Production Council

American Farm Bureau Federation

American Gas Association

American Petroleum Institute

Associated Builders and Contractors

Associated General Contractors of America

Independent Petroleum Association of America

Interstate Natural Gas Association of America

National Association of Manufacturers

National Cattlemen’s Beef Association

National Mining Association

National Sand, Stone & Gravel Association

Public Lands Council

U.S. Chamber of Commerce

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Public Comments Processing  
Attn: FWS–R3–ES–2021–0140  
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**Re: Proposed Rule, U.S. Fish and Wildlife Service; Endangered and Threatened Wildlife and Plants, Endangered Species Status for Northern Long-Eared Bat; 87 Fed. Reg. 16422, Docket No. FWS–R3–ES–2021–0140**

To Whom It May Concern:

The U.S. Chamber of Commerce, American Exploration and Production Council, American Gas Association, Associated Builders and Contractors, Associated General Contractors of America, American Petroleum Institute, American Farm Bureau Federation, Independent Petroleum Association of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Cattlemen’s Beef Association, National Mining Association, the National Sand, Stone & Gravel Association, and Public Lands Council (the Associations) appreciate the opportunity to comment on the U.S. Fish and Wildlife Service’s (the Service’s) proposed rule, “Endangered and Threatened Wildlife and Plants: Endangered Species Status for Northern Long-Eared Bat.”<sup>1</sup> The proposed rule would change the status of the northern long-eared bat (NLEB) from threatened to endangered and eliminate the Section 4(d) rule for the species.

The Associations represent a broad range of business interests within the 37-state range of the species who work to be good stewards of the environment, are concerned about the impact of white-nose syndrome on the NLEB and have engaged in NLEB conservation efforts. The Associations support the Endangered Species Act’s (ESA) purpose of protecting species threatened with extinction and recognize the need for science-based, data-driven actions that conserve those species and the habitat on which they depend.

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<sup>1</sup> 87 Fed. Reg. 16,422 (March 23, 2022). The Associations note that the Federal Register notice for the proposed rule was signed by Madonna Baucum, Regulations and Policy Chief, Division of Policy, Risk Management, and Analytics of the Joint Administrative Operations based on authority delegated by Martha Williams, Director of the Service. The Director’s delegation authority appears to have been undertaken pursuant to Director’s Order No. 223, which was issued on July 21, 2020. Since Director’s Orders are valid for only 18 months, *see Preparation and Issuance of Director’s Orders*, 012 FW 1 § 1.7, it appears that this delegation of authority is no longer valid, which calls into question the validity of the Federal Register notice. We respectfully request that the Service address this issue.

The Associations are concerned about the collateral consequences of this listing on businesses of all sizes throughout the range of the NLEB if the proposed listing is not accompanied by carefully crafted, creative solutions to appropriately target protections for the species without creating an unworkable regulatory regime. Thus, we urge the Service to commit the time, effort, and resources to identify practical, efficient ESA compliance pathways that allow for conservation of the species in a manner that addresses the primary threat to the species—white-nose syndrome—and does not put an undue burden on businesses.

## **I. Interests of the Associations**

U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business organization. Our members range from the small businesses and chambers of commerce across the country that support their communities, to the leading industry associations and global corporations that innovate and solve for the world's challenges, to the emerging and fast-growing industries that are shaping the future. The listing of the NLEB as endangered will have potentially drastic economic and environmental impacts on many of our members who undertake valuable and necessary activities in the species' range.

American Exploration and Production Council. AXPC is a national trade association representing 28 of the largest independent oil and natural gas exploration and production companies in the United States. Dedicated to safety, science, and technological advancement, AXPC members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in which we live and operate. As part of this, AXPC members understand the importance of ensuring positive environmental and public-welfare outcomes and responsible stewardship of the nation's natural resources, including endangered and threatened species and their habitat.

American Gas Association. The American Gas Association (AGA), founded in 1918, is a national trade association that represents more than 200 local energy companies that deliver and distribute clean natural gas to local residential, commercial, institutional, and industrial customers throughout the country. There are more than 77 million residential, commercial, and industrial natural gas customers in the U.S., of which 95%—more than 73 million customers—receive their gas from AGA members. Today, natural gas meets more than one-third of the country's energy needs. AGA members rely on a timely and efficient environmental review and permitting process for gas pipeline installation and maintenance projects, which are essential to provide safe, reliable transportation of cleaner burning natural gas to businesses and residences. AGA members must install new natural gas utility lines on a regular basis, both to extend service to new customers and to replace older lines and improve system integrity and pipeline safety. Gas distribution lines and utility-operated intrastate natural gas transmission pipelines can cover many miles and often cross streams, wetlands, or other waters of the United States. Federal, state, and public utility commission laws and regulations require AGA member utilities to provide safe, reliable natural gas service to customers at just and reasonable rates, which requires maintaining, improving, and expanding natural gas distribution and transmission systems in a cost-effective manner. In light of regulatory requirements to maintain this extensive network of existing distribution mains and transmission pipelines and to construct new mains and pipelines, the listing of the NLEB as endangered, particularly in light of its expansive range, has the potential to result in a longer, more expensive environmental review and permitting process,

particularly when the construction or maintenance of natural gas infrastructure requires the issuance of a federal permit (e.g., under the Clean Water Act).

Associated Builders and Contractors. Associated Builders and Contractors (ABC) is a national construction industry trade association representing more than 21,000 member companies. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for both government and private sector customers. The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses. The proposed listing could impact land development and construction activities by these firms, leading to significant project delays and additional costs for contractors and taxpayers.

Associated General Contractors of America. The Associated General Contractors of America (AGC) is the nation's leading construction trade association. It dates to 1918, and it today represents more than 27,000 member firms representing construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing developments.

The successful management of threatened and endangered wildlife and plants within the scope of a project is of great importance to the construction industry. AGC members perform many construction activities on land and water, which range from large infrastructure projects that require a breadth of lengthy environmental reviews to small projects that may be covered, in part or in full, by general permits. Even small projects (e.g., that disturb as little as one acre of land) must consider the impact of the construction activities on ESA-listed species (threatened or endangered), and the habitat of listed species. Project proponents need to assess the impacts on listed species as early as possible in the construction process to avoid project delays.

American Petroleum Institute. API represents all segments of America's oil and natural gas industry which supports more than 11 million US jobs and is backed by a growing grassroots movement of millions of Americans. Our nearly 600 members produce, process, and distribute the majority of the nation's energy, and participate in API Energy Excellence®, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. API was formed in 1919 as a standards-setting organization and has developed more than 800 standards to enhance operational and environmental safety, efficiency, and sustainability.

American Farm Bureau Federation. The American Farm Bureau Federation (AFBF) is the nation's largest general farm organization, with almost six million farm and ranch members in all fifty states and Puerto Rico. AFBF is made up of farm and ranch families working together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for our nation and the world. AFBF members who are farmers, ranchers, and foresters are active in all of the

states where the NLEB is found, and the proposed listing could impact their ability to conduct routine agricultural operations on their land.

Independent Petroleum Association of America. The Independent Petroleum Association of America (IPAA) is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 91 percent of the nation's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids (NGL) production, and support over 4.5 million American jobs.

Interstate Natural Gas Association of America. The Interstate Natural Gas Association of America (INGAA) is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA's members operate approximately 200,000 miles of the interstate natural gas pipelines that serve as an indispensable link between natural gas producers and consumers. . The Federal Energy Regulatory Commission authorizes the construction and maintenance of an interstate natural gas pipeline following a comprehensive review of the proposed work. The NLEB uplisting potentially will impose significant costs—both in time and money—on INGAA members undergoing this comprehensive review given the size of the interstate natural gas pipeline network and the NLEB's wide range.

National Association of Manufacturers. As the nation's largest manufacturing association, the NAM represents nearly 14,000 small, medium and large manufacturers in every industrial sector and in all 50 states. Manufacturers in the US are committed to the communities in which they live and serve, and dedicated to protecting the health, safety and vibrancy of those communities. Through constant innovation, investment and dedication, manufacturers in the US have become leaders in environmental stewardship and sustainability, while continuing to be the engine that drives our economic growth and prosperity. The manufacturing sector in the US today is a clean and efficient operation that is technology driven and dedicated to the planet and its people. The NAM has members throughout the NLEB habitat and supports conservation efforts under ESA that prioritize those species under significant threat.

National Mining Association. The National Mining Association (NMA) is a national trade association that includes the producers of most of the nation's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA's members conduct mining operations on much of the eastern and southeastern range of the NLEB, and the proposed endangered listing impact their ability to produce resources critical to providing affordable and reliable electricity as well as impact the economic well-being of local communities that rely on this production.

National Sand, Stone & Gravel Association. The National Sand, Stone & Gravel Association (NSSGA) is the leading advocate for the aggregates industry. NSSGA members are responsible for the essential raw materials in asphalt and concrete and found in every home, road, runway, and public works project from schools to hospitals to water treatment plants. When aggregates producers are finished producing stone, sand, or gravel in the area, they return the land to other productive uses such as residential communities, parks, wildlife and nature

preserves, and drinking water reservoirs. There are about 10,000 aggregate operations in the U.S. Many of these operations are in the NLEB habitat area.

Public Lands Council and National Cattlemen’s Beef Association. Public Lands Council is the sole national association whose singular focus is to represent the interests of approximately 22,000 cattle and sheep producers who hold federal grazing permits throughout the West. National Cattlemen’s Beef Association is the nation’s oldest and largest trade association representing cattle producers. America’s farmers and ranchers will face significant detrimental impacts due to the sweeping forest management restrictions that are likely to follow an ESA listing of the NLEB. Livestock grazing, prescribed burns, tree cutting, and other ecosystem management techniques have been routinely used by agricultural producers, rural residents, and indigenous communities for centuries to reduce the frequency and intensity of wildfires. The listing of the NLEB will bring many if not all of these treatments to a halt, compounding the extreme wildfire risk caused by decades of forest mismanagement by state and federal agencies.

## **II. The Associations Support the ESA’s Objectives, Including Conservation of the Northern Long-Eared Bat**

Congress enacted the ESA to protect and recover imperiled species and the ecosystems on which they depend. The Associations support these objectives, and several organizations have supported initiatives to help conserve the NLEB. For example, many of the Associations’ members already implement conservation measures, including training operators, employees, and contractors on the biology of the species, activities that may affect it, and ways to avoid or minimize impacts; conducting pre-activity surveys by trained biologists; adhering to timing restrictions on clearing, side trimming, and herbicide applications; and avoiding work during the pup season, where feasible. They also maintain adequate distance from hibernacula buffer zones, particularly during roosting or breeding periods; preserve key summer habitat features such as dead snags; install artificial roosts to replace removed habitat; and improve nearby habitat. Some members have also dedicated substantial grants to fund research and efforts related to solving the root cause of the NLEB decline – white-nose syndrome.

The Service has recognized that many projects “already have ESA compliance in place that will remain if reclassification to endangered status is finalized.”<sup>2</sup> The Associations support this position and encourage the Service to streamline any administrative action that may be necessary for all existing ESA compliance approaches for the NLEB.

## **III. Basis for the Proposed Listing**

The Associations respectfully note our concern that the proposed rule may not provide sufficiently comprehensive justification and explanation to warrant a change in status from threatened to endangered. Without demonstrating that there has been a significant change of circumstances between the 2016 rule and the current proposed rule that would necessitate the upgraded status, it would be appropriate to maintain the current status of threatened and covered by protective regulations issued under Section 4(d) of the ESA. The disease rates upon which the

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<sup>2</sup> See U.S. Fish and Wildlife Service, Press Release, Proposal to reclassify northern long-eared bat as endangered, <https://www.fws.gov/press-release/2022-03/proposal-reclassify-northern-long-eared-bat-endangered>.

2016 threatened designation were promulgated (which were acknowledged in the final rule as “expected to continue” and “extend[ing] across the species’ range”)<sup>3</sup> remain unchanged, and thus the Service has not fully explained a basis for the proposed change in status from threatened to endangered. To the extent the reasoning and factual predicates for aspects of the proposed rule are incomplete, a final rule would be legally vulnerable. To mitigate legal risk and ensure a sounder substantive decision, we therefore urge the Service to reconsider the justification for the proposed rule and issue a revised proposed rule that fully compares the basis for the agency’s previous threatened listing and its current proposed endangered listing. The revised proposed rule should include comprehensive discussion of all factors relevant to the Service’s determination, including pertinent arguments for maintaining the current status designation and whether the species should be designated as endangered.<sup>4</sup> We also urge the Service to include a discussion on the regulatory and fiscal impacts a listing would have on affected businesses.

#### **IV. Implementation of the Proposed Listing Decision**

Thanks to the bipartisan Infrastructure Investment and Jobs Act, the United States will be undertaking a much-needed effort to, among other things, improve access to broadband, provide clean drinking water to millions of families, upgrade our energy grid, increase resiliency on our public lands and forests, and grow our economy. This includes the single largest investment in bridges since construction of the Interstate Highway System, historic investments in ecosystem restoration and wildfire risk-reduction projects, and the largest-ever investment in innovation, efficiency, and resiliency. It will require an “all hands-on deck” approach across the federal agencies, as many of these projects will require federal approvals and evaluations or touch federal lands. The efficient and timely completion of environmental evaluations, including ESA consultations performed by the Service for the NLEB, is essential for major projects undertaken by both the government and private sector.

In addition to these important federally authorized projects and permitted land uses, a vast range of critical ongoing and planned activities in the range of the NLEB have no federal connection. These projects include, for example, tree-removal on individual lots; residential, commercial, and industrial construction; agriculture; mining; and energy development and delivery. Indeed, smaller, maintenance-related projects on privately owned land may be among those activities most affected by the proposed listing.

The NLEB proposed uplisting has the potential to significantly complicate and delay many of these federal and non-federal projects and activities. Any activity that involves clearing or trimming of trees and shrubs that have a 3-inch diameter at breast height (dbh) or greater, particularly forested habitat trees within the range of the species, has the potential to be considerably affected. This includes, for instance, clearing for transmission line rights-of-way, switchyards, substations, pads and roads associated with upstream oil and natural gas development, renewable energy projects, pipelines, and other associated infrastructure; vegetation maintenance on existing rights-of-way; removal of dead timber and fine fuels in

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<sup>3</sup> 81 Fed. Reg. 1,900, 1,901, (Jan. 14, 2016).

<sup>4</sup> The Associations note that the proposed listing rule does not include the required “summary of the factors affecting the species.” 50 C.F.R. § 424.16(b). We urge the Service to revise the proposed rule and recirculate it for additional public comment once that summary has been included.

wildfire-prone areas; and conducting emergency repairs on such infrastructure. Winter-only clearing is not a viable option for most planned projects. Further, organizations with operations in multiple Service regions have encountered inconsistent guidance regarding the NLEB between and even within regions. In the absence of the tailored protections established by the 4(d) rule, the potential for inconsistent and possibly conflicting guidance would be even more acute. Without clear, consistent guidance and a streamlined approach to ESA compliance, the companies and individuals undertaking these activities would face significant regulatory uncertainty and, potentially, an unduly lengthy and complex incidental take permitting process.

Thus, it is imperative that the Service promptly undertake innovative solutions to ensure that the ESA compliance process for activities that may affect the NLEB is transparent, efficient, and manageable while still affording the species the regulatory protections that it requires in light of its status. The Associations provide the following recommendations for the Service's consideration.

#### **A. Identification of Specific Activities Unlikely to Result in Incidental Take**

When an activity does not have a federal nexus, the Service recommends seeking an incidental take permit (ITP) when the activity “is reasonably certain to result in incidental take.”<sup>5</sup> Likewise, formal consultation under ESA Section 7 is required when a proposed federal action is “likely to adversely affect” (e.g., take) a listed species.<sup>6</sup> Therefore, one of the key evaluations for any activity in the range of the NLEB is whether it is likely to result in take. In the absence of clear guidance, this evaluation can be time consuming and fraught with uncertainty. And, if the species is listed as endangered, the Service will likely be inundated with requests from thousands of entities in the regulated community for assistance with this issue on a case-by-case basis, which will stress the agency at a time when its resources are already stretched thin. Thus, in the event of such a listing, using a final rule to identify activities that are unlikely to result in take would provide necessary clarity to the community and conserve the agency's resources.

However, in the proposed rule, the Service indicates that, “[a]t this time, we are unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act because the northern long-eared bat occurs in a variety of habitat conditions across its range and it is likely that site-specific conservation measures may be needed for activities that may directly or indirectly affect the species.”<sup>7</sup> The Associations respectfully request that, in any final listing decision, the Service identify activities for which take is not reasonably certain to occur to assist in the determination of whether an ITP is warranted or formal consultation is required, as applicable. In doing so, the Service should be mindful that a take in violation of Section 9 of the ESA requires actual death or injury of the individual.<sup>8</sup> Thus, in the event of such a listing, activities which are not likely to result in actual death or injury of a NLEB can and should be identified in any final rule as activities for which take is not reasonably certain to occur.

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<sup>5</sup> U.S. Fish and Wildlife Service and National Marine Fisheries Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook 3-2 (2016).

<sup>6</sup> 50 C.F.R. § 402.14.

<sup>7</sup> 87 Fed. Reg. at 16,450.

<sup>8</sup> *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 691 n.2 (1995).



For instance, the Associations believe the following activities are not likely to result in incidental take:

- Livestock grazing and routine ranch maintenance activities.
- Residential and commercial building construction, renovation, and demolition in urban areas.
- Vegetation clearing in non-forested areas.
- General agricultural activities including lawful application of pesticides.
- Maintenance and repair activities conducted completely within existing road or rail surface that do not involve blasting or other percussive activities.
- Mowing of existing rights-of-way.
- Maintenance, alteration, or demolition of structures if the results of a structure assessment indicate no signs of bats.
- Maintenance, repair, and replacement activities conducted completely within existing, maintained utility rights-of-way
- Construction of pads, roads, and rights-of-way associated with upstream oil and gas development
- Vegetation management activity that is consistent with an existing and compliant utility vegetation management plan such as routine tree trimming and cutting, and other vegetation management, in existing utility rights-of-way intended to address utility-related emergencies, threats to life and/or property, or situations that may result in the interruption of electrical or gas service.<sup>9</sup>

## **B. Species Specific Guidance Regarding Best Practices to Avoid Take**

For those activities that have the potential to cause take, the Service should consider promulgating guidance, concurrent with issuing any final rule, that identifies best practices to avoid take during those activities. Such guidance would allow businesses and individuals to better plan their proposed undertakings to streamline the ESA compliance process and better protect species. Any guidance about best practices will need to be appropriately tailored, by industry or region for example, so that it can be effectively implemented. Guidance should also be tailored to this specific species and where viable populations are being found, rather than simply appropriating off the shelf guidance designed for other more selective species that were threatened due to habitat concerns prior to the spread of white nose syndrome such as the Indiana Bat.

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<sup>9</sup> If the Service disagrees that one or more of these activities are not likely to cause take of the NLEB, the Associations request that the Service issue guidance regarding the best practices to avoid take for such activities.

For instance, a blanket assumption that clearing of any trees or shrubs with a 3-inch dbh of greater in any part of the NLEB's range would likely result in take is infeasible for many projects.<sup>10</sup> But it would also be unnecessary for the species because (1) not every tree of that diameter is suitable for the species and (2) even if individual trees are suitable, other environmental conditions in the vicinity may make the overall area unsuitable for NLEB. Moreover, because NLEB is a generalist in tree selection, absent widespread landscape-level changes in American forest habitat, there is ample summer habitat to support recovery of the NLEB, which the Service has acknowledged.<sup>11</sup> Other than forest activities that could directly take young/maternity colonies (clearing in June and July), impacts to summer habitat should not be a significant consideration in the recovery of this species. Thus, it is imperative that the Service identify with greater specificity those tree-clearing activities that are not likely to result in adverse effects to the species.

This is an especially important safety issue since limiting tree-clearing activities to the off-season means that these activities are restricted to months that traditionally yield the most inclement weather conditions. The slippery, sloppy, and freezing conditions typical during this timeframe can add a substantial amount of human-safety risk to these activities.

Moreover, notwithstanding the tremendous threat that wildfires pose to human life, livestock, ecosystems, and property, lack of active forest management comes with a heavy cost even in non-disaster scenarios. Banning or severely limiting the ability to conduct sustainable tree removal will result in increased costs to producers when sick or dead trees fall and take out infrastructure or animals. Banning or severely limiting prescribed burns or grazing in forests will result in the proliferation of invasive grasses, weakening the forest's resiliency to fire and crowding out the native forage that livestock and wildlife depend on to survive. Prohibiting or imposing steep regulatory barriers for these necessary activities will not prevent white nose syndrome—widely recognized by the Service and other scientists as the main driver of declining bat populations—from transmitting from bat to bat, but it will increase the harm to all the adjacent wildlife, forests, livestock, and people. Efforts to conserve the species must be based in science and weighed against the very urgent need to steward our forests, strengthen rural communities, and give farmers and ranchers the flexibility they need to continue providing a secure food supply for our nation.

Pesticide, herbicide, and insecticide application are critical for agricultural production, right-of-way vegetation management, and human health. The 4(d) rule asserted that pesticides may be harmful to the NLEB but determined that they are not likely to cause population-level concerns.<sup>12</sup> The 4(d) rule specifically exempted lawful application of these products from incidental take. The proposed rule and Species Status Assessment are silent on pesticides, raising the question whether the Service developed a view on whether pesticide, herbicide, or insecticide

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<sup>10</sup> Cf. USFWS, Range-wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines at 16 (March 2022) (defining NLEB suitable summer habitat as including live trees and/or snags  $\geq 3$  inches dbh that have exfoliating bark, cracks, crevices, and/or cavities). In practice, the assumption of suitable habitat appears to apply to all trees  $\geq 3$  inches dbh, regardless of the other features.

<sup>11</sup> 81 Fed. Reg. at 1,903 (“The northern long-eared bat is not habitat-limited and has demonstrated a great deal of plasticity within its environment (e.g., living in highly fragmented forest habitats to contiguous forest blocks from the southern United States to Canada’s Yukon Territory) in the absence of [white-nose syndrome].”).

<sup>12</sup> *Id.* at 1,906, 1,914, 1,916.

application could cause a take. While the Service has not provided new information that application is likely to cause a take, if the Service has made a new determination, the final rule should provide information and guidance.

### C. Clearance Protocols

Lengthy ESA compliance processes for the NLEB are neither necessary nor appropriate when the species does not occur in the vicinity of a proposed activity.<sup>13</sup> Thus, the Service should develop *reasonable* clearance protocols specific to the NLEB to confirm the absence of the species in an area. Those protocols should include an explicit statement from the Service that where implementation of the protocols adequately confirms the absence of the species, no ESA take authorization is required.

While the Service has issued range-wide Indiana bat and NLEB survey guidelines,<sup>14</sup> the Associations' members have significant concerns regarding those guidelines. As an initial matter, because there are differences between the two species' ranges, habitat requirements, and survey standards, the Associations recommend that the Service prepare separate guidelines for the Indiana bat and the NLEB. From an administrative perspective, the current guidelines have proven insufficient. The Associations' members have experienced a considerable lack of consistency as to how the guidelines are applied by various Service field offices, which has resulted in confusion with respect to project schedules and vegetation-management practices. In the absence of the 4(d) rule, problems with the guidelines will be exacerbated because most planned activities within the range of the NLEB will now be expected to undertake some level of presence/absence investigation and coordination with the Service. That marked increase in coordination requests alone will quickly overburden the Service and result in delays for the proposed activities.

Moreover, according to the current guidelines, additional surveys may be avoided if the project is not anticipated to result in adverse effects. But in the absence of guidance regarding what activities are not likely to result in adverse effects (see Sections IV.A and IV.B above), it will be difficult for many companies and individuals to determine whether additional surveys are warranted.

Thus, under the current approach, there will likely be a significant increase in the number of mist-net or acoustic surveys required for planned activities to proceed, both of which have drawbacks. Mist-net surveys require handling of the bats, so they must be conducted by qualified biologists who hold a Service Recovery Permit. They also can be conducted only during certain times of the year, and project proponents may have difficulty obtaining access to appropriate mist-net sites. These limiting factors could result in significant backlogs in required surveys. Acoustic surveys are notoriously unreliable with the potential for false positives and are largely ineffective due to the rarity of the NLEB, so the results of even large-scale, time-intensive efforts are not actionable. And both survey types require significant time and cost. It is unreasonable to

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<sup>13</sup> See, e.g., *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service*, 273 F.3d 1229, 1243-48 (9th Cir. 2001) (holding that the Service could not rationally conclude that take would occur when the subject species did not exist in the project area).

<sup>14</sup> Available at <https://www.fws.gov/library/collections/range-wide-indiana-bat-and-northern-long-eared-bat-survey-guidelines>.

expect, for instance, every farmer and rancher (or other entity leasing or utilizing surface for other activities) in the species' 37-state range with forested habitat on their property to conduct mist-net or acoustic surveys to determine NLEB presence or absence. Similarly, in some cases, the Service has required one biologist per potential roost tree for twilight "emergence" surveys. Contracting with qualified biologists on a one-per-tree basis is logistically challenging and costly, and indeed impracticable in many situations. The survey requirements for the NLEB alone have the potential to severely hinder farming and other ordinary economic activity, as well as much-needed infrastructure improvements, and thus must be made more practical and feasible.

To that end, the Service should consider clearance protocols that can be reliably and cost-effectively implemented by small businesses and agricultural producers. Non-experts are unlikely to be able to distinguish among bats, and it is unreasonable for the residents and businesses over a 37-state range to be forced to assume that any bat could be a protected bat and to implement costly- and sometimes unreliable- surveys to determine whether the ESA applies. The Service should provide, either in the final rule or shortly thereafter, guidance to the public that includes simple and economical measures to take upon identifying bats on their property to determine whether the bats in question are protected by the ESA. . Further, references to "known" and "occupied," hibernacula or roost trees that have been identified and portrayed on maps should be limited to those made available to the public prior to the initiation of the activity being assessed for its compliance with the requirements of the ESA.

In addition to streamlined clearance protocols, the Service should consider using available data to identify "block clearance" zones within the NLEB's range where the species is known not to occur. This approach would be similar to the approach that the Service has previously taken for the black-footed ferret. The use of block-clearance zones would greatly reduce the restrictions on individuals and businesses in areas where the NLEB is not at risk of adverse effects.

For instance, the Service currently includes North Dakota in the 37-state range of the NLEB. However, in a report for North Dakota State University, professor of biological sciences Dr. Erin Gilliam wrote (at 5), "Across three summers (2017-2019), [we] caught 459 bats in North Dakota, none of which were northern long-eared bats. A handful of bats were identified as possible northern long-eared bats, but genetic identification by Mandy Guinn (United Tribes Technical College) found that these were little brown bats. As a result, we were unable to collect any data on the roosting ecology of northern long-eared bats."<sup>15</sup> During acoustic sampling across the state, only three call sequences were identified as belonging to the species – well within the margin of error, given how difficult it is to distinguish the calls of one bat species from another. Thus, we urge the Service to identify North Dakota as a block clearance zone and seek out similar locations for the same treatment where the potential presence of the species is discountable.

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<sup>15</sup> Dr. Gilliam's report, Distribution and Roosting Ecology of the Federally Threatened Northern Long-Eared Bat, *Myotis septentrionalis* and the Little Brown Bat, *Myotis lucifugus* in North Dakota, is submitted along with these comments.

#### D. Programmatic Consultations

Where Section 7 consultation is appropriate, one option that the Service should pursue to streamline ESA compliance is the expanded and expeditious use of programmatic NLEB Section 7 consultations for various industries. The Service has already completed range-wide consultation and conservation strategy reviews for transportation projects with the Federal Highway Administration (FHWA), Federal Railroad Administration, and Federal Transit Administration for the NLEB and the Indiana bat.<sup>16</sup> The Service has noted that the programmatic consultation “will increase the consistency of both project design and review, reduce consultation process timeframes, reduce delays, and contribute meaningfully to conservation of both species.”<sup>17</sup> The FHWA has indicated that this programmatic consultation approach reduced the timeframe for formal consultation from approximately 135 days to 30 days.<sup>18</sup>

Where applicable and allowed by law, the Service could undertake similar programmatic consultations and standardized conservation strategies with other federal agencies that have authority over industries with predictable impacts, such as timber projects on National Forest System lands, telecommunication towers regulated by the Federal Communications Commission, hydropower projects or pipelines regulated by the Federal Energy Regulatory Commission, energy or mining projects on public lands managed by the Bureau of Land Management (BLM) and U.S. Forest Service (USFS), and permitted livestock grazing on public lands administered by BLM and USFS. When appropriately undertaken, such programmatic approaches would result in better species protection, reduced time and cost of consultation, better-informed project planning, and greater consistency and regulatory certainty.

The Service could also pursue wider use of the innovative approach taken by the Service’s Kentucky field office in its issuance of a biological opinion regarding its participation in voluntary Conservation Memoranda of Agreement (CMOA) for the Indiana bat and NLEB. In that biological opinion, the Service analyzed the impacts of its participation in an indefinite number of voluntary CMOA with federal and non-federal entities “that would provide recovery-focused conservation benefits for Indiana and northern long-eared bats associated with the removal of forested habitat that is suitable for these species throughout the Action Area over a 5-year period.”<sup>19</sup> The biological opinion analyzed the impacts of a capped amount of habitat removal, together with compensatory mitigation provided by project proponents, and provided

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<sup>16</sup> See <https://www.fws.gov/program/endangered-species/bat-consultation-conservation-strategy>. If the NLEB is listed as endangered, we encourage the Service to promptly reinstate this consultation to provide take coverage for the NLEB, which previously was unnecessary in light of the NLEB 4(d) rule.

<sup>17</sup> *Id.* Other examples include the Missouri Bat Programmatic informal consultation for activities requiring Department of the Army permits (<https://www.swl.usace.army.mil/Missions/Regulatory/Public-Notices/Article/1843026/missouri-bat-programmatic-mbp-informal-consultation/>); a programmatic consultation for road stream crossings in Maine that may affect the Atlantic salmon (<https://www.fws.gov/project/usfws-programmatic-stream-crossing-consultation>); and a programmatic consultation for routine actions by the Tennessee Valley Authority that may affect listed bats (<https://www.tva.com/environment/environmental-stewardship/environmental-reviews>).

<sup>18</sup> [https://www.environment.fhwa.dot.gov/pubs\\_resources\\_tools/publications/newsletters/mar18nl.aspx](https://www.environment.fhwa.dot.gov/pubs_resources_tools/publications/newsletters/mar18nl.aspx).

<sup>19</sup> See Biological Opinion for Kentucky Field Office’s Participation in Conservation Memoranda of Agreement for the Indiana Bat and/or Northern Long-eared Bat at iii (2015), available at <https://www.fws.gov/sites/default/files/documents/2015%20KY%20CMOA%20BO%20for%20Indiana%20Bat%20and%20Northern%20Long-ear%20Bat.pdf>.

incidental take coverage to both federal and non-federal project proponents. This creative approach could be expanded to other field offices to cover forested habitat removal in other states, or it could be adapted to address other types of impacts beyond habitat removal.

In the event of a final decision listing the species as endangered, the 37-state range of this species would result in substantial regulatory and financial impacts on businesses and individuals in the absence of an ESA compliance mechanism beyond project-by-project standalone consultations. Thus, the Service should take steps to ameliorate those impacts with workable solutions that continue to ensure the conservation of the species.

#### **E. Programmatic Habitat Conservation Plans and a General Conservation Plan**

While many ongoing activities and planned projects have no federal involvement, listing the NLEB as endangered would potentially result in a significant increase in the number of applications for ITPs and associated habitat conservation plans (HCPs) under ESA Section 10. The Service touts the fact that the wind industry currently has 16 HCPs in place with another 13 in development.<sup>20</sup> However, uplisting the NLEB would impact a multitude of industries in the species' range, not just the wind industry. Because obtaining an ITP can be a lengthy, expensive process that requires involvement by the Service and the preparation of an HCP, it will be infeasible for each project or activity that is reasonably certain to take the NLEB to obtain an individual ITP.

Thus, where appropriate, the Service should encourage and commit sufficient resources to the expeditious development of regional or industry-wide programmatic HCPs with associated ITPs that allow parties to opt in through certificates of inclusion. If it proves difficult to find a party willing to be the master permittee for one or more of these programmatic HCPs, the Service should consider exploring whether any industries are interested in the development of a general conservation plan (GCP), which is a Service-initiated process that allows parties to apply for and receive an individual ITP when they can demonstrate compliance with the conservation and mitigation requirements of the GCP. Streamlined ESA compliance options for projects without a federal nexus are vital to avoiding serious impairment of important projects and activities that, as the Service recognizes, are not the cause of the NLEB's decline.<sup>21</sup>

#### **F. Effective Compensatory Mitigation Options for HCPs**

As part of the ESA Section 10 ITP process, an applicant must demonstrate that it has minimized and mitigated the impacts of the taking to the maximum extent practicable.<sup>22</sup> The mitigation portion of this requirement usually involves compensatory mitigation.<sup>23</sup> The Service has recognized:

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<sup>20</sup> See <https://www.fws.gov/press-release/2022-03/proposal-reclassify-northern-long-eared-bat-endangered>.

<sup>21</sup> See 87 Fed. Reg. at 16,446.

<sup>22</sup> 16 U.S.C. § 1539(a)(B).

<sup>23</sup> The Associations note that mitigation, compensatory or otherwise, is not required under ESA Section 7. See U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook* at 4-53 (March 1998) ("Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take.").

Research and education . . . are not typically considered compensatory mitigation. This is because they do not, by themselves, replace impacted resources or adequately compensate for adverse effects to species or habitat. In rare circumstances, research and education that can be linked directly to threats to the resource and provide a quantifiable benefit to the resource may be included as part of a mitigation package. These circumstances may include: (1) When the major threat to a resource is something other than habitat loss . . . .<sup>24</sup>

In the case of the NLEB, where the major threat to the species is white-nose syndrome, not habitat loss,<sup>25</sup> we urge the Service to encourage and accept financial contributions toward research into preventing and reversing the effects of white-nose syndrome as a valid option for compensatory mitigation in HCPs. Where habitat is not a limiting factor and habitat loss is not the primary stressor, compensatory mitigation narrowly focused on habitat protection will have less conservation benefit for the species than mitigation targeted at ameliorating the main threat of white-nose syndrome. Thus, the Service should issue guidance explicitly allowing and encouraging funding of research into white-nose syndrome as an aspect of compensatory mitigation.

## **V. Conclusion**

In closing, the Associations recommend that, in any final rule listing the species as endangered, the Service carefully consider creative implementation strategies that will protect the NLEB while minimizing the regulatory restrictions on the public across the 37-state range of the bat. This should start in the final rule's identification of activities that are not likely to result in take. The Service should also include guidance on best practices to reduce take for activities that may result in take and should develop accessible clearance and survey protocols suitable for use by the general public to determine NLEB presence to determine whether the ESA protections apply. The Service should build on the work it has done with the wind industry to develop streamlined consultation and permitting approaches on regional or industry-wide bases to enable the public and the Service to focus on protecting the NLEB in an efficient manner. Finally, because the primary threat to this species is a pathogen for which no treatment is currently known, the Service should encourage research funding as compensatory mitigation as perhaps the most effective means of protecting the species.

Thank you for the opportunity to comment.

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<sup>24</sup> See Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494, 91,529 (Dec. 16, 2016). Although the Service made this statement in the context of the Bald and Golden Eagle Protection Act, it has similarly taken the position that research rarely constitutes compensatory mitigation for purposes of Section 10 ITPs for ESA-listed species.

<sup>25</sup> 87 Fed. Reg. at 16,446 (“However, habitat loss alone is not considered to be a key stressor at the species level, and habitat does not appear to be limiting.”).

Sincerely,

American Exploration and Production Council  
American Farm Bureau Federation  
American Gas Association  
American Petroleum Institute  
Associated Builders and Contractors  
Associated General Contractors of America  
Independent Petroleum Association of America  
Interstate Natural Gas Association of America  
National Association of Manufacturers  
National Cattlemen's Beef Association  
National Mining Association  
National Sand, Stone & Gravel Association  
Public Lands Council  
U.S. Chamber of Commerce