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Docket No. FWS-R5-ES-2011-0024

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

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

Dear U.S. Fish and Wildlife Service Staff:

The forest products industry, as represented by the organizations signing these comments, presents its comments on the proposed Endangered Species Act ("ESA") § 4(d) rule that the U.S. Fish and Wildlife Service ("FWS") would apply if FWS determines the northern long-eared bat ("NLEB") to be a "threatened species." *See* 80 Fed. Reg. 2372 (Jan. 16, 2015). We appreciate FWS's effort to apply the ESA in a manner not impairing the forest management practices that provide the forested habitat the NLEB relies upon and recommend the improvements described below.

Background and Summary

The Forest Products Industry In The NLEB's Range – As you consider NLEB management and recovery policies, we believe it would be helpful to understand the breadth of the forest products industry throughout the range of the NLEB. While we summarize this breadth in terms of economic importance, we urge you to also consider this as evidence of conservation opportunity. Of the 38 states touched by the NLEB range, the forest products industry has a significant presence in 29.[1] These states contain a total of 372,535,969 acres of public and private timberland. The industry provides a total of 2.2 million direct, indirect, and induced jobs with a combined payroll of $80 billion. Annual timber sales and manufacturing shipments equaled $210.7 billion, with a combined contribution to the states GDPs of $89 billion. Forest-related industries made the largest contributions to their state manufacturing (on a percentage basis) in Arkansas, which was the highest in the South with 19.90 percent; Pennsylvania was the highest in Appalachia with 9.98 percent; Maine in the Northeast with 23.73 percent; and Wisconsin with 14.04 percent in the Midwest.[2]

[1] These states are AL, AR, FL, GA, IL, IN, KS, KY, LA, ME, MD, MI, MN, MS, MO, MT, NH, NY, NC, OH, OK, PA, SC, SD, TN, VA, VT, WV, and WI.

[2] The source for this paragraph, which is based on 2010 economic data, is *The Economic Impact of Privately-Owned Forests in the United States* (June 27, 2013). It was prepared by Forests2Market for the National Alliance of Forest Owners and is available at www.nafoalliance.org.

Because NLEBs Require Forested Habitats During Three Seasons, Forest Management Is An Essential Component Of NLEB Conservation – During the spring through fall, forested lands provide the habitats needed by the NLEB for foraging and roosting, and for maternity colonies to birth and raise young pups. *See* 78 Fed. Reg. 61046, 61054-61 (Oct. 2, 2013)("proposed listing rule"). Sustainable forestry produces the mosaic of tree stands over time that the NLEB relies upon for essential behaviors outside the winter hibernation season. Thus, forest management coincides with ESA interests in conserving the NLEB.

In the proposed listing, FWS did not identify forest management as a threat to NLEB populations under any of the listing factors, including under Factor A as adversely modifying the NLEB's habitat or under Factor E as a man-made factor threatening the NLEB's continued existence. *See* 78 Fed. Reg. 61058-61, 61068-72. Instead, FWS described the NLEB as a forest generalist when it comes to behaviors like tree roost selection and maternity colony selection (e.g., the NLEB does not depend on old-growth trees or any other particular successional stage). *See* 78 Fed. Reg. 61055, 61060. Consequently, timber harvesting and the landscape-level shifting of habitats over time are not a threat to the NLEB. For example, FWS noted that prescribed burning has "beneficial effects on NLEB habitat." 78 Fed. Reg. 61071.

Because forest management has beneficial-to-benign effects on the NLEB, it is logical and equitable for FWS to exclude forest management from being the cause of unlawful incidental take of NLEBs, as FWS proposes to do in the 4(d) rule. Sustainable forestry should be encouraged as part of the effort to recover the NLEB.

White-Nose Syndrome Is The Sole Threat To The NLEB At A Population Level – As FWS has described, if the NLEB warrants ESA listing at all, it is solely because it is imperiled by the disease threat posed by white-nose syndrome ("WNS").

> WNS is currently the predominant threat to the species, and if WNS had not emerged or was not affecting the northern long-eared NLEB population as to the level that it has, we presume the species would not be experiencing the dramatic declines it has since WNS emerged….
> [T]he northern long-eared NLEB has experienced a sharp decline, estimated at approximately 99 percent (from hibernacula data), in the northeastern part of its range, due to the emergence of WNS….
> WNS (Factor C) alone has led to dramatic and rapid population-level effects on the northern long-eared NLEB. White-nose syndrome is the most significant threat to the northern long-eared NLEB, and the species would likely not be imperiled were it not for this disease….

78 Fed. Reg. 61046, 61058, 61067, 61072 (Oct. 2, 2013); *see id.* at 61061-68 and 61075.

After the 2013 proposed listing of the NLEB as an "endangered species," FWS received information from States and others that raise legitimate questions over the extent and pace of NLEB population decline attributable to WNS. These questions indicate that NLEB warrants no ESA listing at this time or at most warrants "threatened" status rather than "endangered." FWS, in its most recent notices, continues to cite WNS as the almost-exclusive threat to the NLEB at a

population level. *See* 80 Fed. Reg. 2371-76 (Jan. 16, 2015); 79 Fed. Reg. 68657-59 (Nov. 18, 2014); 79 Fed. Reg. 36698-99 (June 30, 2014). "As discussed in the October 2, 2013, proposed rule (78 FR 61046), the primary factor supporting the proposed determination of endangered status for the northern long-eared NLEB is the disease, white-nose syndrome (WNS)." 80 Fed. Reg. 2373 (Jan. 16, 2015).

Overview Of ESA § 4(d) – ESA § 4(d), 16 U.S.C. 1533(d), grants FWS broad discretion with respect to extending or *not extending*, to a threatened species, the "take" and other prohibitions that ESA § 9 applies only to more-imperiled "endangered species." For "endangered species" only, ESA § 9 renders unlawful a series of "prohibited acts" (e.g., import, take, ship in interstate commerce). 16 U.S.C. § 1538. The ESA itself does not make it unlawful to "take" a member of a less-imperiled "threatened species." The default position under the ESA's text is that "take" of a threatened species is lawful. The ESA creates "two levels of protection" so threatened species could be treated differently from the more-imperiled endangered species. S. Rep. No. 93-307 at 3 (1973), 1973 U.S.C.C.A.N. 2989, 2992.

Section 4(d) is composed of two sentences:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [§ 9(a)(1) of this Act, such as "take"] ... with respect to endangered species[.]

16 U.S.C. 1533(d). The intended relationship between those two sentences is not immediately clear. FWS's interpretation has differed over the years including, as will be discussed below, in the preamble to the proposed 4(d) rule for the NLEB.

The Proposed 4(d) Rule For The NLEB – FWS's proposed special 4(d) rule for the NLEB differs depending on whether an area is inside or outside of a "WNS buffer zone." Outside an overly-broad WNS buffer zone, proposed 50 C.F.R. 17.40(n)(1) would exclude from being a prohibited take any "incidental (non-purposeful) take of NLEBs resulting from otherwise lawful activities," such as forest management. 80 Fed. Reg. 2378.

Inside a WNS buffer zone, proposed § 17.40(n)(2) would exclude from being a prohibited take any incidental take occurring from "[i]mplementation of forest management, maintenance and expansion of existing rights-of-way and transmission corridors … and minimal tree removal projects," if they satisfy three "conservation measures." The three conservation measures are that: (1) the activity "[o]ccur more than .25 mile … from a known, occupied hibernacula"; (2) the activity "[a]void cutting or destroying known, occupied maternity roost trees during the pup season (June 1-July 31)"; and (3) the activity "[a]void[s] clearcuts within .25 … mile of known, occupied maternity roost trees during the pup season (June 1-July 31)." *Id.*

Summary Of Principal Comments – The thrust of our comments can be summarized as follows. Our first preference is for FWS to determine that the NLEB does not warrant ESA listing. Second, if FWS finds that listing is warranted, we support a "threatened" listing (rather

than an "endangered" one) – and with a 4(d) rule adjusted for forest management as described in these comments. Third, we provide suggestions for improving the details of the 4(d) rule, and to better protect the rule in any ensuing litigation. Fourth, we urge FWS to eliminate the WNS buffer zone as described below. In summary:

a. Active forest management can and does promote NLEB habitat and is an essential component of NLEB conservation.

b. White-nose syndrome (WNS) is the sole threat to the NLEB at a population level.

c. The NLEB does not warrant listing, but if FWS determines listing is warranted, the agency should list as threatened.

d. FWS should properly describe its legal authorities under section 4(d), specifically that Congress has given the agency great flexibility to craft incidental take rules that are not strictly limited by a need to promote conservation.

e. The 4(d) rule needs to be simplified to focus on activities that do not contribute to WNS and clearly exempt all forest management activity from take.

f. There are no scientific or rational reason to exempt conversion to pine from 4(d) relief.

g. FWS should eliminate the .25 mile restrictions on forest management.

h. FWS should eliminate the WNS buffer zone or at least narrow the range.

Subject-By-Subject Comments

I. If ESA Listing Of The NLEB Is Warranted, We Support A Threatened Listing

As a first preference, we urge FWS to find that ESA listing of the NLEB is not warranted.

If the NLEB must be listed in some category, we suggest that science and policy factors support a "threatened" listing. We greatly appreciate FWS's consideration of a threatened status in the January 2015 proposed rule.

A "threatened species" listing gives FWS far greater flexibility to tailor restrictions to the conservation needs of a particular species, without impairing a wide range of productive human activities that do not have meaningful adverse effects on the NLEB's persistence. As FWS knows, this flexibility springs from the interplay among three ESA provisions. First, the ESA and FWS rules broadly define "take," and the "harm" form of "take" in particular, to include a wildlife death or injury that is the unintended or incidental result of a habitat modification activity ("incidental take"). *See* 16 U.S.C. 1532(20); 50 C.F.R. 17.3; *Babbitt v. Sweet Home*

Chapt. of Cmties. for a Great Oregon, 515 U.S. 687 (1995). Second, Congress itself made it unlawful for any person to "take" a member of an endangered species of wildlife anywhere in the U.S. *See* 16 U.S.C. 1538(a)(1)(B). Third, in contrast, the ESA itself does not make it unlawful to "take" a member of a threatened wildlife species. Instead, FWS has great leeway under ESA § 4(d) on which parts, if any, of the ESA § 9 prohibitions should be extended to a particular threatened species.

If FWS concludes that ESA listing of the NLEB is warranted, we support a "threatened" listing and the adoption of a special 4(d) rule that recognizes WNS as the threat to the continued existence of the NLEB and addresses take from that perspective.

II. FWS Should Clarify Its Intended Qualifying Standard For An ESA § 4(d) Exception From A Take Prohibition. FWS Should Conclude That, Under Any Reasonable Standard, Forest Management Should Be Excepted From Being A Culpable Source Of ESA "Take"

This section explains our recommendation that FWS improve the preamble to the final 4(d) rule by better articulating a broad regulatory standard that FWS is employing to justify the incidental take exceptions.

We make this recommendation to reduce litigation risks. The incidental take relief has a greater likelihood of being set aside in court if the rule is based on an overly narrow regulatory interpretation of ESA § 4(d).

A. As A Statutory Interpretation Matter, ESA § 4(d) Provides FWS With Great Leeway To Allow Incidental Take Of A Particular Threatened Species, Even The Rule is Not Designed To Promote Conservation Of The Species

ESA § 4(d), quoted in the Background section, is composed of two sentences. FWS's interpretation of the relationship between those two sentences has differed over the years. This, in turn, has affected FWS's reading of how it will implement the ESA § 4(d) authority to not extend the "take" prohibition to certain activities that may cause incidental take of individuals of a threatened species. This problem arises again in the preamble to the proposed 4(d) rule for the NLEB.

ESA § 4(d)'s first sentence provides that FWS "shall issue such regulations as [it] deems necessary and advisable to provide for the conservation of" the particular threatened species. 16 U.S.C. 1533(d). The second sentence employs the more discretionary term "may" – it provides that FWS "may [or may not] by regulation prohibit with respect to any threatened species any act prohibited under" ESA § 9 (e.g., "take") "with respect to endangered species." *Id*. FWS has struggled with recognizing that the second sentence freely allows FWS to allow incidental take of a particular threatened species as a result of lawful activities, as opposed to using this authority only when FWS can reasonably conclude that the exception is "necessary and advisable to provide for the conservation of" the particular threatened species.

The vast majority of the case law supports the former interpretation. The influential D.C. Circuit sustained the federal government's own interpretation that "the two sentences of § 1533(d) represent separate grants of authority." *Sweet Home Chapter of Cmties. for a Great Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993). Under *Sweet Home*, a rule declining to extend ESA § 9's full take prohibition to a threatened species is freely allowable under § 4(d)'s second sentence "without obligating it to support such actions with findings of necessity" to advance "conservation" – words found only in 4(d)'s first sentence. 1 F.3d at 7-8. The first sentence concerns "regulations that impose protective measures *beyond* those contained in § 1538(a)(1)," but the first sentence does not apply to a 4(d) rule allowing some incidental take. 1 F.3d at 8.

In the litigation over the 4(d) rule for the polar bear, District Judge Sullivan "reject[ed] plaintiffs' reading" that § 4(d) "establishes a strict standard that all special rules promulgated under Section 4(d) must be 'necessary and advisable to provide for the conservation of [the] species." *In re Polar Bear Endangered Species Act Listing And § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 228 (D.D.C. 2011). The district court rejected that reading as a statutory interpretation matter because a D.C. Circuit precedent convincingly holds that FWS has broader discretion to not extend, or only partially extend, the "take" prohibition under the second sentence in ESA § 4(d).

> [Under] *Sweet Home Chapter of Cmties. for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), …. "there is a reasonable reading of § 1533(d) that would not require [the Service] to issue formal 'necessary and advisable' findings when extending prohibitions to threatened species…. The second sentence gives [the Service] discretion to apply any or all of the [Section 9] prohibitions to threated species without obliging it to such actions with findings of necessity. Only the first sentence of § 1533(d) contains the 'necessary and advisable' language and mandates formal individualized findings."

818 F. Supp. 2d at 228.[3]

Another district court judge in D.C. has commented on FWS's great discretion under ESA § 4(d).

> [T]he ESA itself only prohibits the take of endangered – not threatened – species. *See* 16 U.S.C. § 1538(a). Moreover, Congress delegated to the Secretary the authority to determine the extent to which the ESA protects threatened species…. Thus, because the ESA does not explicitly prohibit the take of threatened species, the Court finds that the

[3] The *Polar Bear* 4(d) decision also considered and rejected a related argument. In 50 C.F.R. 17.31, FWS has by blanket rule presumptively extended the ESA § 9 prohibitions to all threatened wildlife species, requiring a special rule to allow certain incidental takes of a particular threatened species. The court concluded that general rule does not limit FWS's discretion on special 4(d) rules, and does not set a floor or base level for required conservation. 818 F. Supp. 2d at 229-30 ("Accordingly, the Court finds that the Service was not required to demonstrate that diverging from the general regulation at 50 C.F.R. § 17.31(a) is necessary and advisable to provide for the conservation of the polar bear.").

> 1991 Rule is not so contrary to Congress's mandate under the ESA such that FWS could be said to be [arbitrary].

Wild Earth Guardians v. Salazar, 741 F. Supp. 2d 89, 105 (D.D.C. 2010).

The case law in several other circuits is in accord with the precedents within the D.C. Circuit on FWS's extraordinarily broad discretion under ESA § 4(d) with respect to the regulatory regime for a threatened species. Earlier, district courts within the Ninth Circuit had similarly found that ESA § 4(d) allows FWS to partially apply the ESA "take" prohibition to a threatened species, but not extend "take" to certain activities:

> The language of 4(d) makes it clear that NMFS "may" impose a take prohibition. The unavoidable implication is that NMFS may, in its discretion, choose not to impose a take prohibition. NMFS's decision to craft a limited take prohibition under 4(d) must be, a fortiori under this analysis, within its discretion. The rule does not state that NMFS may choose only to apply a blanket take prohibition, or no take prohibition at all. It is logically within the agency's discretion, therefore, that applying any number of different varieties of (otherwise legal) take prohibitions is also within NMFS's discretion. The court is not persuaded that choosing to promulgate a limited take prohibition under § 4(d) was arbitrary and capricious, and therefore grants defendant's motion for summary judgment.

Wash. Envtl. Council v. Nat'l Marine Fisheries Serv., 2002 WL 511479 at *8 (W.D. Wash. 2002) (emphasis added).

Like the D.C. Circuit, the Fifth Circuit has noted that the second sentence in § 4(d) "provides discretionary authority to prohibit by regulation the taking of *any* threatened species" – the second sentence "is not conditioned upon any showing that" it would advance conservation interests. *State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327, 333 (5th Cir. 1988) (emphasis in original).

These opinions carry out the ESA legislative intent. The ESA committee reports reflect that FWS has considerable discretion with respect to threatened species under ESA § 4(d). The House Report describes ESA § 4(d) as granting the Secretary great discretion to allow or disallow "take" of a threatened species, and describes 4(d)'s two sentences in terms showing they are independent:

> (d) The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he *may also* make specifically applicable any of the prohibitions with regard to threatened species that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the *threatened* list, the Secretary has an almost *infinite number of options available* to him with regard to the permitted activities for those species. *He may, for example, permit taking,* but not importation of such species.

H.R. Rep. No. 93-412, at 12 (1973) (emphasis added). The Senate also intended to create "two levels of protection" that impose prohibitions only for endangered species, and give the Secretary

"discretion" and "[f]lexibility in regulation" that can be "tailored" to the circumstances of a particular threatened species. S. Rep. No. 93-307 at 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992.

In contrast to the above-cited decisions, an early Eighth Circuit opinion read ESA § 4(d) to be a substantial constraint. *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985). The 2-1 opinion in *Clark* misreads the ESA, and is an unpersuasive outlier. As Senator Simpson noted, it fails to come to grips with the two sentences in § 4(d) and the legislative intent that less-imperiled threatened species be subject to different protections than endangered species.

> *Clark* ... is based on a misunderstanding of the differing levels of protection accorded endangered and threatened species under the Act.... [T]he broad flexibility which the Secretary enjoys in promulgating regulations to protect threatened species, includ[e] the authority to permit taking of individual members of such species.

S. Rep. No. 100-240 at 17 (1987) (additional views of Sen. Simpson).

Besides being wrongly decided, *Clark* is distinguishable because it concerned regulations allowing trapping of threatened wolves (an activity directed against wildlife). That setting involved the limitation imposed in the ESA definition of "conservation" that trapping and other forms of "regulated taking" are allowed only "in the extraordinary case where population pressures" mean the species' numbers are above the carrying capacity of the ecosystem. 16 U.S.C. § 1532(3); *see* 755 F.2d at 612-18. In contrast, the proposed exclusions from incidental take in the NLEB 4(d) rule do not concern an activity directed against wildlife.

In sum, under the vast majority of the clear and convincing case law, the statutory text of ESA § 4(d) grants FWS the legal discretion to allow forms of "incidental take" of a threatened species. FWS is not obligated to show that such a rule is "necessary and advisable" for "conservation" of a listed species. Any more stringent test is one of FWS's making – it is not compelled by the statute.

B. The Importance Of FWS's Regulatory Interpretation Of ESA § 4(d) In The Preamble To A Special 4(d) Rule on Prohibited Activities

While FWS has very broad discretion in designing an ESA § 4(d) rule on prohibited activities as a *statutory* matter, FWS can artificially limit that discretion by statements in the preamble to a 4(d) rule on the standard FWS is applying to allow some incidental take. This type of policy limitation, and the litigation risks it creates, are well illustrated by the polar bear 4(d) proceedings.

There, District Judge Sullivan found that, under Administrative Procedure Act ("APA") review principles, FWS was limited to the regulatory basis or grounds stated in the preamble to the 4(d) rule on prohibited activities for the polar bear. After the court found the statute does not compel any finding that an incidental take rule is "necessary and advisable… for … conservation," the court stated that:

> in its Special Rule, the Service in fact adopted the standard urged by plaintiffs: "[The regulations promulgated under section 4(d) of the ESA provide the Secretary the discretion to determine what prohibitions, exemptions, or authorizations are *necessary and advisable* for a species, *so long as the regulation provides for the conservation of that species*." AR4D 12937 (emphasis added). Indeed, the Service premised its Special Rule on a finding that the rule is necessary and advisable to provide for the conservation of the polar bear. [Footnote 14 in the opinion then states in pertinent part that "this Court can only uphold an agency decision based on the grounds relied upon by the agency itself and not the *post hoc* rationalizations of agency counsel. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 … (1962) ("[A] reviewing court … must judge the propriety of [agency] action solely by the grounds invoked by the agency."] The Court finds that the Service's assessment of its obligations under Section 4(d), as set forth in its Special Rule for the polar bear, constitutes a reasonable and permissible interpretation of the ESA. Accordingly, the Court upholds the Service's interpretation under step two of the *Chevron* framework, and it will review the Special Rule for the polar bear pursuant to the "necessary and advisable" standard adopted by the agency.

Polar Bear, 818 F. Supp. 2d at 228-29. Thus, FWS's adoption of an unnecessarily strict limitation on 4(d) rules made the 4(d) rule on prohibited activities for the polar bear more vulnerable to legal attack.

Judge Sullivan ultimately concluded that FWS had articulated a sufficient "conservation" basis for the special rule excluding activities occurring outside the range of the polar bear (e.g., a greenhouse gas-emitting facility in the Lower 48 States) from being a culpable cause of incidental take of the polar bear. *See* 818 F. Supp. 2d at 230-34. Part of the district court's logic was that FWS reasonably concluded that the special 4(d) rule "would not sacrifice significant conservation benefits." 818 F. Supp. 2d at 23. This suggests FWS could permissibly apply a standard that allows some productive human activities that may entail incidental take, where the allowance does not significantly detract from conservation of the threatened species.

FWS learned lessons from the initial *Polar Bear* litigation. In the preamble to the *final* 2013 polar bear 4(d) rule, FWS refrained from asserting that the take exceptions promoted conservation. *See* 78 Fed. Reg. 11766 (Feb. 20, 2013). Rather, FWS relied on two ESA § 4(d) interpretations and analyses. First, FWS can freely allow incidental take of a threatened species under the second sentence in ESA § 4(d). Second, if the "necessary or advisable" language applies, it "'fairly exudes deference' to the agency" and: (1) the take exception did not detract from conservation, and (2) allowing incidental take suits against the multitude of activities that generate greenhouse gases was not "advisable" due to the litigation costs this would impose on productive industries. 78 Fed. Reg. 11772, 11780-82.

Thus, in the final polar bear 4(d) rule, FWS articulated broader regulatory interpretations of ESA § 4(d) and more-convincing justifications for in the incidental take exceptions. Perhaps as a result, environmental groups did not challenge in court the final 4(d) rule for the polar bear.

C. The Preamble To The Proposed Rule Contains Inconsistent Standards For A 4(d) Rule, Including Standards That Create Unnecessary Litigation Risks

In our view, the preamble to the proposed 4(d) rule for the NLEB creates unnecessary litigation risks that can and should be reduced by better language choices in the preamble to the final 4(d) rule. The draft preamble creates litigation risks by describing inconsistent and unduly restrictive standards for a 4(d) rule.

First, at some points, the draft preamble (correctly) supports the broad interpretation of ESA § 4(d) ratified by the judicial decisions quoted above. Under that interpretation, FWS can allow incidental take under § 4(d)'s second sentence without making findings that this allowance is necessary and advisable for conservation. For example, after describing the first sentence in ESA § 4(d), the preamble says "[f]urther, a 4(d) rule may identify activities that would not be prohibited" and that FWS has the "discretion" to allow some forms of incidental take. 80 Fed. Reg. 2371 and 2372.

Second, at other points and on the other end of the spectrum, the preamble seems to say that even the incidental take exceptions must promote the conservation of NLEBs.

> The Service concludes … that all of the … exceptions identified herein individually … are necessary and advisable for the conservation of the northern long-eared NLEB and will promote the conservation of the species across its range.

80 Fed. 2376; *see id*. at 2372 (asking for public comment on whether the "measures outlined in this proposed rule under section 4(d) of the Act are necessary and advisable for the conservation and management of the" NLEB).

Third, at other points, the preamble suggests an interpretation of ESA § 4(d) that is part way between the above two interpretations. FWS states that it "may issue a rule under section 4(d) of the Act that establishes specific exceptions that are tailored to the specific conservation needs of a particular species." 80 Fed. Reg. 2372 and 2373. Moreover, "we anticipate that habitat modifications resulting from activities that manage forests would not significantly affect the conservation of the" NLEB and the conservation measures "will limit overall take by protecting currently known populations during their more vulnerable life stages." 80 Fed. Reg. 2375. These portions can be understood to be saying that further restrictions on forest management are not necessary for NLEB conservation, that the small level of anticipated incidental take does not detract from NLEB conservation, and that it is not advisable to restrict forest management activities when sustainable forest management continues to provide habitat essential to the NLEB.

This mix of inconsistent standards in the preamble creates a risk that a court could find FWS acted arbitrarily and did not engage in reasoned decisionmaking.

Plus, the second standard – that a take exception must "promote" conservation of the threatened species – is too restrictive under the language of section 4(d) itself (giving FWS the discretion to do what it "deems … advisable … to *provide* for the conservation of the species"

(emphasis added)), under case law (e.g., *Sweet Home* and *Polar Bear*), and under FWS's interpretation in the final 4(d) rule for the polar bear. Further, if FWS were to adopt the second standard in the final 4(d) rule for the NLEB, this would create unnecessary risks that the regulatory relief could be set aside in court upon a finding that it does not in some way "promote" conservation of the NLEB.

These debatable points could cause increased expenses to FWS in defending the 4(d) rule in court and perhaps having to re-do the rule with a more-precise regulatory preamble (as happened in the polar bear situation). For the private sector, FWS's current approach increases litigation costs, decreases the reliability of 4(d) relief, and could alienate potential partners in helping to protect the NLEB. Consequently, we urge FWS to clarify, in the preamble to the final 4(d) rule for the NLEB, the regulatory test(s) being applied to justify the take exceptions and to specifically adopt the broader interpretations of ESA § 4(d) allowed by case law and prior FWS practice.

D. Recommended Standards For A 4(d) Rule, And How A Wide Range Of Forestry Management Practices Qualify For Incidental Take Relief Under Those Standards

We urge FWS to adopt one or both of the following regulatory interpretations of ESA § 4(d) in the preamble to the 4(d) rule for the NLEB. We also confirm below why a wide range of forestry management practices qualify for incidental take relief under each interpretation/standard.

1. FWS Should Find That Incidental Take Exceptions Are Freely Allowable Under The Second Sentence In ESA § 4(d), And That They Need Not Be Supported By "Conservation" Findings.

We encourage FWS to adopt and apply the ESA § 4(d) interpretation that the United States successfully argued in cases like *Sweet Home*, *Polar Bear*, and *Louisiana v. Verity*. Under this lawful interpretation, ESA § 4(d)'s second sentence provides FWS with great leeway to allow incidental take of a threatened species, without obligating FWS to make findings that the incidental take exception is necessary or advisable for conservation of the threatened species.

If FWS were to adopt this interpretation in the preamble to the final 4(d) rule for the NLEB, this would place the various incidental take exceptions on the strongest legal footing. Avoiding a self-imposed "conservation" constraint will reduce litigation risks. For example, there could be no challenge that FWS was arbitrary in finding that allowance of all forms of incidental take of the NLEB outside the WNS Buffer Zone promotes NLEB conservation, if FWS does not self-impose a "conservation" constraint.

Instead, this interpretation of ESA § 4(d) clearly allows a range of incidental take exceptions, including those that are in the proposed 4(d) rule. Because this interpretation has been argued by the United States in court, there should be few policy issues in again so interpreting ESA § 4(d). And because that interpretation has been approved by many courts, it is a safe interpretation.

2. If FWS Imposes Any "Conservation" Basis For Incidental Take, It Should Allow Incidental Take Where That Does Not Significantly Detract From NLEB "Conservation"

FWS has shown a policy reluctance to exercise the full extent of its ESA § 4(d) statutory authority to treat threatened species differently from endangered species with respect to take and incidental take. FWS frequently adopts some type of "conservation" constraint in individual 4(d) rules. There are two main variants on "conservation" – one of which is contrary to the intent of Congress and leaves FWS vulnerable to a judicial challenge and one of which creates better defensibility, but which is not preferred.

The unacceptable variant is where FWS finds that it will only allow incidental take where this promotes or advances or affirmatively assists in the conservation of the threatened species. That standard is too strict legally and as a policy matter. That standard creates litigation risks and places the 4(d) rule at risk of being invalidated (e.g., a court could conclude that, in almost all situations, prohibiting all forms of take best promotes the conservation and population growth of a listed species). FWS seemed to recognize this in the proceedings on the polar bear 4(d) rule, where the final rule did not justify the incidental take exclusion as having conservation benefits. *See* Section II.B, above. FWS should not utilize this strict standard in the preamble to the final 4(d) rule for the NLEB.

Under the more-acceptable variant, FWS could conclude that incidental take will be allowed where it does not materially detract from NLEB conservation. For example, FWS stated in the preamble to the proposed rule, "habitat modifications resulting from activities that manage forests would not significantly affect the conservation of the" NLEB. 80 Fed. Reg. 2375.[4]

Stating this concept a slightly different way, FWS could follow the approach in the preamble to the final 4(d) rule for the polar bear. *See* 78 Fed. Reg. 11766 (Feb. 20, 2013). FWS could again find that the ESA § 4(d) language on adopting rules deemed by FWS to be necessary and advisable for conservation of a threatened species provides FWS with considerable leeway.[5] FWS could find that, because the NLEB is almost exclusively threatened by WNS, constraints on activities that do not promote WNS are not "necessary" or essential for NLEB conservation nor do they detract from NLEB conservation.

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[4] FWS endorsed this interpretation when the preamble to the final 4(d) rule for the polar bear found that extending ESA incidental take restrictions to a multitude of greenhouse gas-producing activities "would not contribute to the conservation" of the polar bear – that such restrictions are "not necessary for polar bear … conservation." 78 Fed. Reg. 11780-81. This can be understood to be an FWS interpretation that it is appropriate to allow certain productive activities, without the risk of incidental take suits, where that would not significantly detract from (or not be necessary for) conservation of the particular threatened species.

[5] If all ESA 4(d) rules must be "deemed" by FWS to be "necessary and advisable … for the conservation" of a threatened species, the "'necessary or advisable' language 'fairly exudes deference' to the agency." 78 Fed. Reg. 11780 (quoting from *Webster v. Doe*, 486 U.S. 592 (1988)).

Finally, FWS could lawfully conclude what is "advisable" is a policy decision that allows consideration of the overall public interest.[6] FWS should consider the overall public interest and costs/benefits in discretionary ESA rulemaking in light of President Obama's Executive Order 13563 (Jan. 18, 2011). Under § 1 of that Executive Order, agencies are directed to: (1) adopt rules "only upon a reasoned determination that its benefits justify its costs"; (2) "tailor its regulations to impose the least burden on society"; (3) choose "approaches that maximize net benefits"; (4) consider "economic growth, innovation, competitiveness, and job creation"; (5) "promote predictability and reduce uncertainty"; and (6) choose the "least burdensome tools for achieving regulatory ends." 76 Fed. Reg. 3821 (Jan. 21, 2011). Those factors inform the meaning of "advisable."

Under this rationale, it is not "advisable" to place incidental take limits on the forest management practices that provide the forest habitat the NLEB relies upon for most of the year. Rather, it furthers NLEB conservation interests to create positive incentives to maintain lands in forested conditions, rather than creating economic disincentives by establishing overly broad constraints on forest management.

Based on these interpretations and findings, FWS could lawfully conclude that it has tailored the 4(d) rule to be responsive to the conservation needs of the NLEB, without imposing unneeded constraints on productive human activities like forest management, maintenance of rights-of-way, and minimal tree removal.

III. FWS Should Broaden The Incidental Take Relief For Forest Management In Several Ways

We urge FWS to broaden the incidental take relief in the proposed 4(d) rule in at least two ways. First, FWS should not exclude pine conversion from the incidental take relief. Second, FWS should narrow the extremely broad WNS buffer zones.

A. FWS Should Not Exclude Forest Type Conversion From Receiving Incidental Take Relief

Within a WNS buffer zone, the text of the proposed rule broadly allows any incidental take associated with "[i]mplementation of forest management, maintenance, and expansion of existing rights-of-way and transmission corridors." Proposed 50 C.F.R. 17.40(n)(2)(B)(1). Yet the preamble attempts to exclude forest management in the form of pine conversion from the benefit of the 4(d) rule.

> We do not consider conversion of a mixed forest into an intensively managed monoculture pine plantation as forest management covered under this proposed rule as

[6] FWS can reason that it is not "advisable" or "appropriate," and is "unnecessary," on policy grounds to extend the incidental take prohibition to a set of productive human activities. FWS invoked this interpretation in the preamble to the final 4(d) rule for the polar bear. 78 Fed. Reg. 11772, 11780-82.

> typically these types of monoculture pine plantations provide very poor-quality NLEB habitat.

80 Fed. Reg. 2374-75.

The exclusion of pine conversion from the benefit of the 4(d) rule is neither warranted nor supported by science.

First, there is no scientific basis for excluding pine plantations from the 4(d) rule. Identifying which stands are currently "mixed forests" is a near impossibility. Pine stands which have been planted in the past invariably contain some natural regeneration. Naturally regenerated pine stands (for example, shelterwood regeneration systems) will produce "mixed" stands, but may in fact have higher stocking densities than planted pine stands where spacing and basal area can be more readily controlled. Both "mixed forests" and pine plantations will exhibit a variety of stand densities and characteristics, including the potential for roost trees and maternity colonies, over the long term.

Managed-pine forest landscapes provide suitable habitat for bat communities (e.g., Miller 2003, Menzel et al. 2003, Elmore et al. 2004, Ford et al. 2006, Hein et al. 2009, Miles et al. 2006, Miller and Miles 2008, Bender et al. 2015), including NLEB (e.g., Perry and Thill 2007, Morris et al. 2009). In a recent study of bat communities in six managed-pine forest landscapes, Bender et al. (2015) concluded that "The forest mosaics that we sampled, consisting primarily of managed pine stands intermingled with non-production habitat types, supported a large proportion of the bat community associated with forests of the Coastal Plain which suggests the compatibility of timber production and bat conservation objectives." Legally, FWS's scope of discretion under ESA § 4(d) is certainly broad enough to allow any incidental take associated with pine conversion.

Second, pine conversion should not be unfairly singled out from the 4(d) exclusion. The proposed rule allows activities like "expansion of existing rights-of-way and transmission corridors," even though they clearly remove forested habitats. Since pine conversion retains forested habitats, it should not be singled out for adverse treatment.

Third, if pine conversion is excluded, this would lead to line-drawing issues (e.g., is substitution of Christmas trees covered? Is there a size limit?) and could lead to litigation from all sides. From policy and efficiency perspectives, it would be preferable to have FWS create a broad exclusion from incidental take covering all forest management practices. FWS should send the right signal that "retaining forested lands is good for the NLEB." FWS should not engage in micro-management of forestry.

Fourth, any attempted exclusion of pine conversion is unlikely to be effective in any event. As FWS knows, under the Supreme Court's decision in *Sweet Home*, 515 U.S. 687, "take" only reaches activities that have a close causal connection to the death or injury of an identifiable member of listed species. That is, "take" does not reach habitat modifications that are just generally adverse at the population level of a listed species. As a practical matter, this means that a forest owner could engage in pine conversion in winter months when NLEBs are not in the

woods (but are in hibernacula) without causing incidental take. Because pine conversion cannot be halted under ESA § 9, it makes more sense for FWS to attempt to build positive conservation relationships by broadly encouraging forest management, rather than having FWS dictate allowable forestry practices.

B. FWS Should Eliminate the .25 Mile Restrictions On Forest Management

We are aware of no scientific studies that have documented an adverse response of NLEB to forest management within 0.25 mile (0.24 km) of a hibernacula. Rather, many researchers have documented the northern long-eared bat foraging and day-roosting in forests with a recent history of management, including management with even-aged harvesting practices (e.g., Jung et al. 1999; Menzel et al. 2002; Owen et al. 2002, 2003, 2004; Perry and Thill 2007; Perry et al. 2007, 2008; Morris et al. 2009, 2010; Tichenell et al. 2011; Dodd et al. 2012; O'Keefe et al. 2013). Thus, there is no empirical basis for constraining forest management near hibernacula. Such a constraint would eliminate the use of an essential tools for maintaining landscapes that include a diversity of stand types, structural classes, and management conditions that benefit the forest bat community including northern long-eared bat.

Similarly, we are unaware of any scientific studies that have documented an adverse response of NLEB to forest management within 0.25 mi (0.4 km) of maternity roost trees. Rather, northern long-eared bats have been found to roost in a variety of tree species and forest conditions (e.g., Menzel et al. 2002, Ford et al. 2006, Perry and Thill 2007). In some landscapes supporting northern long-eared bats, clearcuts commonly occur near northern long-eared bat maternity roosts (e.g., Menzel et al. 2002; Owen et al. 2002, 2003, 2004).

Again, it makes more sense for FWS to attempt to build positive conservation relationships by broadly encouraging forest management, rather than having FWS dictate allowable forestry practices. These .25 mile buffers should be eliminated for forest management.

C. FWS Should Eliminate The WNS Buffer Zone Or At Least Narrow The Range

The WNS buffer zone(s) proposed by FWS is/are extremely broad, and should be eliminated or reduced in the final 4(d) rule. As shown on the map referenced in the preamble, the buffer zone) end ups covering almost all the forested land within the range of the NLEB. *See* "Northern Long-Eared NLEB Proposed 4(d) Rule – White-Nose Syndrome Buffer Zone Around WNS/Pd Positive Counties/Districts." That is, all of the forested land from Maine to the Carolinas is in the WNS buffer zone, and only some areas in Great Plains States (e.g., North and South Dakota) are outside the WNS buffer zone. The results are that almost all forest management gets covered by the constraints applicable within the WNS buffer zone, and that over 80% of the NLEB's range is within the WNS buffer zone.

FWS starts from the premise that there should be greater restrictions on incidental take in areas with some proximity to where WNS or the fungus causing WNS (*Pseudogymnoascus destructans*) has been observed. *See* 80 Fed. Reg. 2373-74. Yet, FWS has not provided a compelling reason for constraining activities that have nothing to do with WNS, such as forest management. Instead, FWS has stated that forest management and other human activities that do

not spread WNS do not detract meaningfully from the survival and conservation of the NLEB. *See* 80 Fed. Reg. 2373 (in the proposed listing, "the Service concluded that the proposed status determination of endangered species was primarily based on the impacts from WNS, and that the other threats, when acting on the species alone, were not causing the species to be in danger of extinction"); 78 Fed. Reg. 61046, 61058, 61061-68, 61072, 61075 (Oct. 2, 2013). Because activities like forest management are not a threat to the NLEB, FWS should eliminate the WNS buffer zones and related restrictions on forest management. To retain a WNS buffer zone and related restrictions for any activity that does not further WNS lacks any reasonable justification and is arbitrary and capricious.

If a WNS buffer zone is retained, it should be more narrowly drawn. FWS piles excessive breadth on excessive breadth to get to the end result that over 80% of the NLEB's range is in the buffer zone where there are greater restrictions on incidental take.

As FWS knows, WNS is spread in hibernacula. Yet, FWS, instead of drawing a protected zone around each hibernacula, starts with including the entire "counties known to harbor affected hibernacula." 80 Fed. Reg. 2373. The WNS buffer zone then extends "150 miles (241 km) of the boundary of U.S. counties or Canadian districts where the fungus *Pseudogymnoascus destructans* or WNS has been detected." *Id.*

FWS selected the 150 mile radius even though "northern long-eared bats are not considered to be long-distance migrants, typically dispersing 40-50 miles from their hibernacula." *Id*. Thus, if there is to be any WNS buffer zone, it should be 50 miles around each hibernacula with WNS, not 150 miles around each county containing a hibernaculum with WNS. A 50 mile radius would place much more acreage in the category where it is outside of the WNS buffer zone and outside the area where the more-stringent restrictions on incidental take apply.

FWS rationalized the 150 mile radius as being a "compromise distance between the known migration distances of northern long-eared bats and little brown bats," which can also transmit WNS. 80 Fed. Reg. 2373. Yet, this rationalization seems weak as, in the non-hibernation months, NLEBs would not encounter little brown bats beyond the 50-mile range of the NLEB.

In any event, we believe that the combination of: (1) WNS hibernaculum plus the entire county; and (2) 150 miles out from that county – produces too broad a WNS buffer zone. We support no WNS buffer zone – at least for the sustainable forestry that perpetuates the forested habitat that is essential for NLEBs during most of the year. Again, the objective of the FWS should be to recover the NLEB through control and eventual eradication of WNS, not through unnecessary regulation of forest management which may cause – at most – incidental take of individuals of the species.

IV. Conclusion

The organizations listed below thank FWS both for proposing a section 4(d) rule for the NLEB and providing the opportunity to comment. We particularly appreciate the repeated recognition not only that forest management is not a threat to the continued existence of the

NLEB, but also that forest management has a positive role in the bat conservation. We urge FWS to continue this recognition by making the adjustments to the final rule we have recommended above.

Sincerely,

Alabama Forestry Association
Allegheny Hardwood Utilization Group
American Forest & Paper Association
American Forest Resource Council
American Loggers Council
Appalachian Hardwood Manufacturers
Arkansas Forestry Association
Associated Logging Contractors (Idaho)
Black Hills Forest Resource Association
Empire State Forest Products Association
Federal Forest Resource Coalition
Florida Forestry Association
Forest Industry Labor Management Committee
Forest Landowners Association
Forest Resources Association
Georgia Forestry Association
Great Lakes Timber Professionals Association
Hardwood Federation
Hardwood Manufacturers Association
Hardwood Plywood and Veneer Association
Indiana Hardwood Lumbermen's Association
Kentucky Forest Industries Association
Kitchen Cabinet Manufacturers Association
Lake States Lumber Association
Louisiana Forestry Association
Louisiana Logging Council
Maine Forest Products Council
Maple Flooring Manufacturers Association
Massachusetts Forest Alliance
Michigan Association of Timbermen
Michigan Forest Products Council
Minnesota Forest Industries
Minnesota Timber Producers Association
Mississippi Forestry Association
Missouri Forest Products Association
Montana Wood Products Association
National Alliance of Forest Owners
National Hardwood Lumber Association
National Wood Flooring Association
New Hampshire Timber Harvesting Council
New Hampshire Timberland Owners Association
North Carolina Forestry Association
Northeastern Loggers' Association
Ohio Forestry Association
Oklahoma Forestry Association
Oregon Small Woodlands Association
Oregon Women In Timber
Penn-York Lumbermen's Club
Pennsylvania Forest Products Association
Railway Tie Association
South Carolina Forestry Association
Southeastern Lumber Manufacturers Association
Tennessee Forestry Association
Texas Forestry Association
Treated Wood Council
Virginia Forest Products Association
Virginia Forestry Association
West Virginia Forestry Association
Western Hardwood Association
Wisconsin County Forests Association
Wisconsin Paper Council
Wood Component Manufacturers Association
National Wooden Pallet and Container Association

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