



May 23, 2022

Via electronic submission (<http://www.regulations.gov>)

Attn: FWS-R3-ES-2021-0140

United States Fish and Wildlife Service

MS: PRB/3W

5275 Leesburg Pike

Falls Church, VA 22041-3803

Re: FWS-R3-ES-2021-0140; Proposed Rule to Reclassify the Northern Long-eared Bat (*Myotis septentrionalis*) as an Endangered Species

Dear Sir or Madam:

GPA Midstream Association (“GPA Midstream”) appreciates this opportunity to submit comments on the U.S. Fish and Wildlife Service’s (“Service” or “FWS”) proposed rule to reclassify the northern long-eared bat (*Myotis septentrionalis*) (“NLEB”) as an endangered species under the Endangered Species Act (“ESA”) (hereinafter the “Proposed Rule” or “Proposal”¹).

GPA Midstream has served the U.S. energy industry since 1921 and has nearly 60 corporate members that directly employ more than 56,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids (“NGLs”), refined products, and crude oil from production areas to markets across the United States, commonly referred to as “midstream activities.” The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover close to 90% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2017–2019 period, for example, GPA Midstream members spent over \$50 billion in capital improvements to serve the country’s needs for reliable and affordable energy.

GPA Midstream members have extensive gas and NGL operations that cover the 37 state range of NLEB habitat area and will be directly impacted by the proposed rule. While GPA supports the Service’s efforts to protect threatened and endangered species when there is sound scientific justification for such a listing determination, GPA is concerned the Service’s Proposed Rule is not based on the best available science. At this stage, GPA opposes the Proposed Rule where it lacks foundation in best available science and unnecessarily impacts different industries engaged in low-impact activities. Instead, GPA urges the Service to reconsider its proposed

¹ 87 Fed. Reg. 16,442 (Mar. 23, 2022) (“Proposed Rule”).

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reclassification and re-focus its efforts on scientific exploration to better understand the populations most at risk of White Nose Syndrome (“WNS”).² Because oil and gas activities—midstream, in particular—sought to be regulated by the proposed reclassification do not contribute to any decline in the species and have little to no impact on the harm caused by WNS, such refocused efforts would allow the Service to more effectively expend resources focusing on specific populations and regions most impacted by WNS and understanding the root cause of WNS.

I. The Service Should Withdraw the Proposed Rule as Not Based on the Best Scientific Data Available

The Service must rely on the “best scientific and commercial data available” when conducting the fact-intensive analysis necessary to determine whether a species is threatened or endangered.³ Despite this mandate, the Service’s Proposed Rule specifically requests comments regarding the NLEB’s “biology, range and population trends” and “additional info concerning historical and current status, range, distribution, and population size of [the NLEB] including locations of any additional population.”⁴ And the 2022 Species Status Assessment (“SSA”)⁵ appears to rely on a large number of unpublished manuscripts and omits a large collection of cited, supporting papers. Not only does this make it difficult or near-impossible for GPA to verify information included in the SSA and provide meaningful comment to the Service, but it also illustrates the shortcomings of the Service’s purported “best available data.”⁶

This reliance on subpar data is concerning. The Service cannot and should not reclassify the NLEB as endangered without first fully understanding the NLEB’s range, distribution, and population size. The SSA acknowledges the lack of full understanding of the population’s range and relies heavily on hibernacula surveys that fail to account for the NLEB’s full population as individuals are “easily overlooked during surveys.”⁷ Indeed, the Service itself concedes that it lacks “perfect knowledge of current colony abundance and population trend because hibernacula

² See Katherine O’Neil, “New treatment offers hope for bats battling white nose syndrome,” *Science News for Students* (July 26, 2019), <https://www.sciencenewsforstudents.org/article/new-treatment-offers-hope-bats-battling-white-nose-syndrome> (describing successful bacterial treatment of WNS).

³ 16 U.S.C. § 1533(b)(1); *see also* 5 U.S.C. § 706 (an agency action that is contrary to law must be set aside by a reviewing court).

⁴ 87 Fed. Reg. at 16,443.

⁵ U.S. Fish and Wildlife Service, “Species Status Assessment Report for the Northern long-eared bat (*Myotis septentrionalis*)” (Mar. 22, 2022) (“SSA”).

⁶ *See also* SSA Peer Review Response 1 at 1 (“SSA Peer Review 1”), <https://www.regulations.gov/document/FWS-R3-ES-2021-0140-0004> (last visited May 23, 2022).

⁷ SSA at 16; *see also* SSA Peer Review Response 2 at 2 (“SSA Peer Review 2”), <https://www.regulations.gov/document/FWS-R3-ES-2021-0140-0004> (last visited May 23, 2022) (stating “*Myotis septentrionalis* are exceedingly difficult to count in winter hibernacula ... they may also readily use non-cave structure, i.e., emergent rock features, road-cuts” and suggesting that “modeling efforts using these data may reach an extirpation point prematurely.”).

are not surveyed every year nor concurrently, and there are likely many undocumented hibernacula; bats can be hidden in crevices or inaccessible locations within roosts that are surveyed, and some species are difficult to identify accurately.”⁸ And the SSA may have actually failed to account for the entirety of the NLEB’s northern range into Canada.⁹

Due to the NLEB’s purportedly expansive range—37 states and 8 provinces in North America—the Service must take care to fully understand the impacts of WNS in each portion of the NLEB’s range, how the NLEB is distributed within that range, and whether there are individual populations more appropriately listed as endangered, threatened, or not listed at all.¹⁰ This is especially true where the SSA, on which the Proposed Rule is based, may not have properly recognized that “populations occurring in the mid- to southern Atlantic Coast may not be tied to the WNS disease dynamic and thusly might represent bats that may remain viable.”¹¹ Indeed, the SSA accounts primarily for potential impacts to the population by WNS and wind energy development, but fails to discuss the nuance of spatially altered impacts to the NLEB, such as how habitat management may impact the species.¹² This is of particular importance to GPA and its members as they work to increase the foraging habitat for the NLEB through the development of re-vegetated linear projects. Not only is it counterproductive to impose lengthy regulatory processes on actions that primarily benefit the NLEB, but these positive actions—including other ongoing conservation projects—are not truly accounted for in the SSA’s analysis of impacts to the species.¹³ Because the range of the NLEB is so vast, the Service must first evaluate, and account for, in a revised SSA the differences between native populations throughout the United States as well as North America.

Moreover, the SSA does not meaningfully address the potential evolution of the species to better handle WNS. European bats survive when infected by the same WNS-causing fungus during hibernation due to a sufficient baseline level of key immune parameters developed in the

⁸ SSA at 101 (caveating the Service’s view that statistical models used in response to uncertainty make the data provided in the SSA the “best available”).

⁹ SSA Peer Review Response 3 at 19, 32 (“SSA Peer Review 3”), <https://www.regulations.gov/document/FWS-R3-ES-2021-0140-0004> (last visited May 23, 2022).

¹⁰ See also SSA Peer Review 1 at 2 (citing Kurta, A., and S. M. Smith, “Hibernating bats and abandoned mines in the Upper Peninsula of Michigan,” *Northeastern Naturalist* 21(4), 587–605 (2014)) (noting the stark differences in hibernation season lengths and habitat features between various portions of NLEB range).

¹¹ SSA Peer Review 2 at 2.

¹² SSA Peer Review 2 at 1.

¹³ 87 Fed. Reg. at 16,448.

species over time.¹⁴ Studies in the U.S. have similarly indicated that survivors of WNS have endured genetic changes and suggest that survivors “rapidly evolve to resist the fungal disease.”¹⁵

Finally, the Proposed Rule is deficient because it relies on a deficient peer review. The Proposal notes that the Service solicited peer review from five species experts, three of whom responded.¹⁶ That review, however, was deficient and must be redone. The peer reviews and the Proposal itself reveal that the Service requested peer review of only the NLEB SSA report; there was no request to review the 3-Bat SSA.¹⁷ This leaves a significant gap in the peer review performed because the 3-Bat SSA, which did not separately undergo peer review, provides the primary analysis for, and is incorporated by reference into, the NLEB SSA on which the Proposal is based. The Joint Policy on Peer Review,¹⁸ the Service’s August 22, 2016 Director’s Memo on the Peer Review Process, and the Office of Management and Budget’s December 16, 2004 Final Information Quality Bulletin for Peer Review demand more. It is imperative that the Service solicit peer review on the 3-Bat SSA, together with the NLEB SSA, before making a final determination on the Proposal.

Ultimately, these various errors and gaps or omissions in the underlying record require the Service to withdraw the Proposed Rule and complete a more thorough assessment of the species’ population and range. Additionally, the Service should review all published, non-speculative data regarding impacts of WNS consistent with ESA requirements.

II. Any Final Rule Must Ensure Prompt Regulatory Response from the Service

The primary threat to the NLEB is WNS, not the human activities potentially prohibited pursuant to the ESA if the Proposed Rule becomes final. It is therefore difficult to determine how the NLEB benefits from such a reclassification and the Service should weigh this factor more

¹⁴ Marcus Fritze, Sebastien J. Puechmaile, David Costantini, Jörns Fickel, Christian C. Voigt, Gábor Á. Cziráj, “Determinants of defence strategies of a hibernating European bat species towards the fungal pathogen *Pseudogymnoascus destructans*,” *Developmental & Comparative Immunology* (2021); *see also* Leibniz Institute for Zoo and Wildlife Research, “European hibernating bats cope with white-nose syndrome which kills North American bats,” *ScienceDaily* (Feb. 3, 2021), www.sciencedaily.com/releases/2021/02/210203123404.htm.

¹⁵ Sarah A. Gignoux-Wolfsohn, Malin L. Pinsky, Kathleen Kerwin, Carl Herzog, MacKenzie Hall, Alyssa B. Bennett, Nina H. Fefferman, Brooke Maslo, “Genomic signatures of selection in bats surviving white-nose syndrome,” *Molecular Ecology* (Jan. 21, 2021); *see also* Todd Bates, “Deadly White-Nose Syndrome Changed Genes in Surviving Bats,” *Rutgers* (Feb. 4, 2021), <https://www.rutgers.edu/news/deadly-white-nose-syndrome-changed-genes-surviving-bats>; *see also* SSA Peer Review 3 at 27–28 (noting that the SSA’s characterization of the NLEB’s ability to adapt is unfair and doesn’t display a “sound recognition of the evolutionary process” as the species is still generationally early in its fight against WNS).

¹⁶ 87 Fed. Reg. at 16,443.

¹⁷ SSA at 98 (indicating that when the SSA makes reference to “these bats” or “these species,” the Service is referring to one or all three of the three bats included in the 3-Bat SSA, which accounted for *Myotis lucifugus* (little brown bat), *Myotis septentrionalis* (NLEB), and *Perimyotis subflavus* (tricolored bat)).

¹⁸ 59 Fed. Reg. 34,270 (July 1, 1994).

heavily.¹⁹ Should the Service nevertheless make final its proposed reclassification, GPA recommends that the Service carefully consider creative implementation strategies that will minimizing the regulatory burden on the public across the 37-state range of the bat. At minimum, GPA urges the Service to publish guidance regarding those activities not expected to affect the NLEB. This would include those activities occurring within the habitat of an NLEB but that would not result in harm, or any form of prohibited take, of the NLEB. Such activities include the midstream oil and gas activities and routine clearing in areas uninhabited by the NLEB.

The listing of the NLEB as endangered will potentially result in a significant increase in the number of applications for incidental take permits (ITP) 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.²⁰ However, uplisting the NLEB will impact a multitude of industries in the species' 37-state range, not just the wind industry. Obtaining an ITP can be a lengthy, expensive process that requires involvement by the Service and the preparation of a habitat conservation plan (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 commit sufficient resources to the development of regional or industry-wide programmatic HCPs with associated ITPs that allow parties to opt in through certificates of inclusion as a result of this proposed action. Or, 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 developing 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 are not, as the Service recognizes, the cause of the NLEB's decline.²¹

The Service must ensure adequate and prompt action is taken to ensure that these non-impactful activities are not arbitrarily put on hold until a full regulatory process has commenced—a process unlikely to even identify the presence of the NLEB.

III. Designating Critical Habitat is Not Warranted

Finally, the record underlying the Service's proposed reclassification does not indicate that a critical habitat designation is prudent or determinable at this time. As discussed above, the Service's SSA includes a variety of omissions and errors regarding the NLEB's range and distribution and GPA therefore agrees that a critical habitat designation is not prudent or

¹⁹ 87 Fed. Reg. at 16,448.

²⁰ See Georgia Parham, "Service proposes to reclassify northern long-eared bat as endangered under Endangered Species Act" (Mar. 22, 2022) <https://www.fws.gov/press-release/2022-03/proposal-reclassify-northern-long-eared-bat-endangered>.

²¹ See 87 Fed. Reg. at 16,446.

determinable at this time. GPA reminds the Service that it must ensure valid and timely notice and comment is available to the public for any proposed designation in the future.

IV. FWS Should Delay the Effective Date of an Endangered Listing by Six Months

If FWS still concludes that the NLEB warrants reclassification as an endangered species after obtaining and fully evaluating the best scientific and commercial data available, the Service should delay the effective date of the final listing decision by six months. Doing so would provide Service staff, other federal agencies, and the regulated community much-needed time to prepare for the far-reaching consequences that would result from the change. In particular, it would help protect billions of dollars in public and private infrastructure investment, much of which relies on time-limited funds, that otherwise would be jeopardized by the sudden loss of the current special 4(d) rule for the NLEB, the related programmatic biological opinion, and the programmatic consultations with the Federal Highway Administration, the Federal Railroad Administration, and the Federal Transit Administration that cover transportation projects throughout the species' 37-state range.

Fortunately, taking this crucial step is well within the Service's discretion. The March 1, 2021 district court order governing this proposed rule only requires FWS to "issue a new proposed rule and final listing determination . . . within eighteen (18) months of the completion of the SSA for the Bat."²² The court did not specify any particular timeframe for the final listing decision to take effect, however. Accordingly, consistent with the terms of 50 C.F.R. § 424.18(b)(1), the Service has ample authority to establish an appropriate effective date for its final rule. For the reasons stated above, that effective date should be no sooner than six months after FWS publishes the final listing decision in the Federal Register.

GPA urges the Service to withdraw its proposed reclassification of the NLEB and reconsider the best plan of action in light of the NLEB's largest threat, WNS, as opposed to regulated activities that would bear the brunt of the classification's effects with little to no benefit to the NLEB's future survival. GPA Midstream appreciates the opportunity to submit these comments on the Proposed Listing and is standing by to answer any questions you may have.

²² Court Order at 6, *Ctr. for Biological Diversity v. Everson*, No. 1:15-cv-00477 (D.D.C. Mar. 1, 2021).

Respectfully submitted,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive style with a large, looping initial "M".

Matt Hite
Vice President of Government Affairs
GPA Midstream Association