



National Association of Home Builders

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Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service
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Attention: Docket ID No. FWS-R3-ES-2021-0140

On March 23, 2022, the U.S. Fish and Wildlife Service (hereafter, the “Service”) published a proposed rule under the Endangered Species Act (ESA) to reclassify the status of the Northern Long-Eared Bat (NLEB) from “threatened” to “endangered.”¹ The Service explains within the preamble that the reclassification is the result of a January 2020 court order directing the Service to perform another listing determination to be finalized before the end of this year.² The National Association of Home Builders appreciates the opportunity to provide these comments and urges the Service, prior to finalizing any new rule, to take steps to minimize the disruptive impact upon NAHB’s members and other non-federal landowners resulting from the rescission of the NLEB 4(d) rule once this proposed rule is finalized.

The National Association of Home Builders (NAHB) is a Washington D.C. based trade association representing over 140,000 residential land developers, builders, and associate member firms organized in approximately 800 affiliated state and local associations located in all fifty states, the District of Columbia, and Puerto Rico. NAHB’s members include those who design, construct, and supply single-family homes; build and manage multifamily, light commercial, and industrial structures; develop land; and remodel existing residential homes. Collectively, NAHB’s membership employs over 1.25 million people and will construct about 80 percent of the new housing stock projected for 2022.

For NAHB members conducting land development or construction activities within the NLEB’s 37-state habitat range, the ramifications of today’s proposal would be the rescission of the current NLEB 4(d) rule that provides ESA §9 “take” exemption for certain activities.³ Recognizing the ongoing challenges and delays associated with obtaining ESA Section 10(a)(1)(B) incidental take permits, coupled with the vast area in which the NLEB may be found, the loss of this avenue will be particularly problematic for the industry.

¹ 87 Fed. Reg. 16442 (Wednesday, March 23, 2022).

² 87 Fed. Reg. 16443 (Wednesday, March 23, 2022).

³ 50 C.F.R. Part §17.40 (o) or, 81 Fed. Reg. §§1900-1922 (Thursday, January 14, 2016).

NAHB is further concerned by the Service's statement, "At 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".⁴ As the Service explains, due to the NLEB's wide habitat range and variety of habitat conditions, it suggests that site-specific conservation measures may be needed for activities that may directly or indirectly affect the species. It then lists nine broad categories of activities which may potentially result in a violation of the ESA's "take" prohibition unless they are authorized by Service. Such a statement is extremely disconcerting for NAHB's members – particularly since the NLEB's reclassification to endangered requires the Service to rescind the current NLEB 4(d) rule that exempts non-federal landowners from the ESA's §9 "take" prohibition if they comply with the NLEB 4(d) rule's tree-removal conservation measures.⁵ Specifically, NAHB is concerned that once this proposed rule is finalized, those residential developers and builders whose land development or construction activities lack the federal nexus to qualify for the ESA's §7 consultation process and have been relying upon the NLEB 4(d) rule will have no viable way to comply with the ESA.

Background

The NLEB was listed as a threatened species in 2015 and at the same time, the Service issued an accompanying rule under section 4(d) of the Act ("4(d) rule") that outlined prohibitions and/or requirements for certain activities to ensure the conservation of the species. Concerned that the NLEB was suffering catastrophic declines in the core of its range as a result of white-nose syndrome (WNS), several environmental groups sued the Service in hopes that it would revise what they claimed was a flawed "threatened" listing determination. In 2020, the court rejected the Service's initial "threatened" listing, and in March 2021, a federal judge ordered the U.S. Fish and Wildlife Service reassess whether the NLEB warrants listing as an "endangered" species by December 2022. Today's proposal is in response to that court order. After reconsideration, the Service has determined that the NLEB meets the Act's definition of an "endangered" species and therefore has proposed to reclassify it as an endangered species and remove its species-specific 4(d) rule.

Potential Impact of Rescinding the NLEB 4(d) Rule Upon the Homebuilding Industry

⁴ 87 Fed. Reg. 16450 (Wednesday, March 23, 2022).

⁵ 50 C.F.R. Part 17.40, 81 Fed. Reg. 1900 (January 14, 2016).

To better understand the potential impact of the NLEB's listing and 4(d) rule on the residential construction industry, NAHB's economists examined residential building permit data from the U.S. Census Bureau between the years 2000 to 2014 across the NLEB habitat range. Specifically, they examined building permits issued nationally and within the 1,772 counties identified by the Service as being located within the NLEB's WNS buffer zones. Using this data, they determined the percentage of annual building activity during June 1 and July 31 when the NLEB 4(d) rule prohibits tree removal near maternity roost trees as well as between April 1 and September 1 when NLEB populations are dispersed into their summer habitat. NAHB found that 20 percent of all building permits within these counties were issued during the NLEB 4(d) rule's tree removal avoidance period of June 1- July 31. And 58 percent of all building permits for counties located within the NLEB's WNS buffer zone were issued between April 1 and September 1.

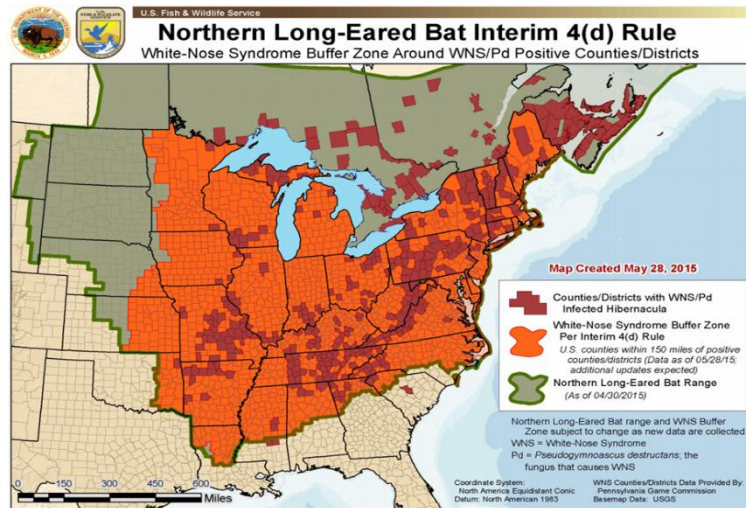


Figure 1: Northern Long-Eared Bat range & White-Nose Syndrome Buffer Zone.

The Service's 4(d) rule provides landowners, including NAHB's members, with an exemption from the ESA §9 "take" prohibition provided their land clearing and construction activities comply with the 4(d) rule's tree conservation measures. It also presents a viable ESA compliance tool while providing range wide conservation measures for the species. Clearly, rescinding the NLEB 4(d) rule and its exemption from the ESA's §9 "take" prohibition will have a disproportionate, disruptive, and unnecessary impact upon NAHB member's whose activities frequently lack the federal nexus necessary to obtain ESA incidental take authorization under the Service's programmatic Section §7 biological opinion on the final 4(d) rule.⁶ The Service is urged to minimize any disruptions by providing guidance and having a plan in place prior to finalizing the proposed rule.

The Rationale for Listing the Northern Long-Eared Bat as "Endangered"

The Service identifies the impacts of White-Nose Syndrome (WNS), a disease named for the white fungus that infects skin of the muzzle, ears, and wings of hibernating bats as being the foremost stressor for more than a decade and responsible for the continued NLEB population declines.⁷ In fact, the Service estimates WNS has caused NLEB population declines of 97-100 percent across nearly 80 percent of the species' habitat range⁸ and range-wide declines in NLEB summer occupancy of 80 percent over

⁶ U.S. FWS. (2016). Programmatic Biological Opinion on the Final 4(d) Rule for the Northern Long-Eared Bat and Activities Excepted from Take Prohibitions. FWS Midwest Regional Office.

⁷ 87 Fed. Reg. 16448 (Wednesday, March 23, 2022).

⁸ 87 Fed. Red. 16448 (Wednesday, March 23, 2022).

the past decade.⁹ Similarly, summertime NLEB mist-net captures rates by trained biologists have declined 43-77 percent compared to capture rates prior to the effects of WNS.¹⁰ According to the Service, there is no known mitigation or treatment strategy to slow the spread of the fungus that causes the disease or to treat WNS in bats, which makes conservation efforts difficult. While certain forest management activities and other actions can be beneficial to bat species,¹¹ most construction-related activities have been determined to play minimal roles in the species' status. The Service's species status assessment determined that impacts from habitat loss or fragmentation is *not* a limiting factor for the species, and more specifically, that the loss or fragmentation of NLEB summer habitat due to land clearing activities *is not considered a significant stressor for the species*. These factors (high degree of disease-related mortality and limited stress from tree-removal activities) make it all the more important to develop policies and programs to alleviate ESA approval processes for landowners.

For example, given the stated range-wide declines in NLEB population levels, there is a high likelihood that significant portions of the NLEB's summer habitat range no longer have populations of NLEB present. Furthermore, since the Service has declined to designate NLEB critical habitat, NAHB members and others have no efficient method of determining if NLEBs are present – aside from conducting repeated NLEB surveys.^{12, 13} Although the range has remained the same yet there are fewer individuals, the prospects of requiring landowners whose activities lack the required federal nexus to obtain incidental "take" authorization through the ESA's 7 consultation process to instead perform repeated NLEB surveys in the hopes of avoiding an ESA violation is inefficient and unnecessary. Particularly when the Service has consistently stated the primary threat to the NLEB's continued survival and the principal cause for the species continued decline is the ongoing effects of WNS and not habitat modification or loss from anthropogenic activities, including homebuilding.

Landowner Guidance to Minimize Impact of Rescinding the NLEB 4(d) Rule

Due to the potentially significant and unnecessary disruptive impacts the proposed rule will have upon the home building industry, NAHB urges the Service to take the following three steps prior to finalizing the proposed rule and rescinding the NLEB 4(d) rule. First, the Service should provide landowners whose property is located within the NLEB habitat range guidance that identifies what constitutes suitable NLEB summer habitat. Second, the Service must reiterate that simply modifying NLEB habitat (i.e., removing trees) does not constitute a "take" under the ESA or require NAHB members or other landowners to undertake the herculean task of preparing an application to obtain an ESA 10(a)(1)(b) incidental take permit. Third, since the Service has declared under this proposed rule, "[w]e are unable to identify specific activities that would not be considered to result in the violation of section 9 of the Act...", the Service must create feasible Section 10 compliance options for non-federal landowners before finalizing the proposed rule. NAHB suggests these compliance approaches will provide necessary

⁹ 87 Fed. Red. 16449 (Wednesday, March 23, 2022).

¹⁰ Ibid.

¹¹ 87 Fed. Red. 16448 (Wednesday, March 23, 2022).

¹² See FWS's NLEB "not-prudent" critical habitat determination (81 Fed. Reg. §24707 (April 27, 2016))

¹³ U.S. FWS. (2022). Range-Wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines. Last retrieved from https://www.fws.gov/sites/default/files/documents/USFWS_Range-wide_IBat_%26_NLEB_Survey_Guidelines_2022.03.29.pdf

certainty, flexibility, and ESA permit streamlining to ensure both economic development and species protection can coincide.

- I. **Define Suitable NLEB Summer Habitat.** The Service should provide guidance clarifying what areas constitute “Suitable NLEB Summer Habitat,” as a means to better target those areas within NLEB’s extensive habitat range are most likely to contain NLEB. Such guidance would allow landowners to better determine what types of properties are likely to be occupied by NLEB and therefore could result in “take” of the species during routine land clearing and construction activities.

There are several possible criterion the Service could use to define suitable NLEB summer habitat based upon NLEB field surveys and the Service’s own statements within the Northern Long Eared Bat Interim Conference and Planning Guidance.¹⁴ Examples include minimum forested patch size required to support NLEB populations, lack of connectivity of small isolated forest patches to other suitable habitat (e.g., small forest patches located more than 1,000 feet from other suitable habitat), and NLEB’s avoidance of trees within highly-developed urban areas.¹⁵ Given these known NLEB habitat limitations, NAHB proposes the following definition for suitable NLEB summer habitat: contiguous forest areas of equal to or greater than 20 acres, not located within urban areas, such as industrial and commercially developed areas and high density residential areas.¹⁶ Conversely, unsuitable NLEB summer habitat would be fragmented woodlands less than 20 acres and located more than 1000 linear feet from suitable NLEB summer habitat.¹⁷ Finally, the Service’s definition and guidance should include ways landowners could easily determine whether or not their property meets this definition.

- II. **Provide Guidance to Non-Federal Project Proponents Regarding Habitat Modification.** The Service’s failure to identify any man-made activities that are unlikely to result in a potential violation of the ESA’s §9 prohibition across the species’ 37-state range epitomizes all that is wrong with the Endangered Species Act. While NAHB understands the Service must rescind the NLEB 4(d) rule that provided a vital exemption from ESA §9 “take” to all non-federal landowners who complied with the NLEB 4(d) rule’s proscribed conservation measures when removing trees, the proposed rule fails to provide any guidance as to how nonfederal landowners can avoid violating the ESA when conducting land use activities that are identical to those allowed under the NLEB §4(d) rule. To avoid having the Service’s ecological services field offices inundated with requests for ESA §10(a)(1)(B) incidental take permits, at a minimum the Service must reiterate its existing 10(a)(1)(B) guidance that habitat modification in and of itself (i.e., removal of trees within NLEB habitat) does *not* necessarily constitute a “take” under the ESA.

¹⁴ U.S. FWS. (2014). Northern Long Eared Bat Interim Conference and Planning Guidance. FWS Regions 2.3.4.5.& 6. Washington, D.C.

¹⁵ Ibid.

¹⁶ U.S. FWS. (2015). Chesapeake Bay Field Office *Northern Long Eared Project Screening*. Retrieved July 1, 2015, from <http://www.fws.gov/chesapeakebay/EndSppWeb/ProjectReview/Step1.html>

¹⁷ U.S. FWS. (2014). Northern Long Eared Bat Interim Conference and Planning Guidance. FWS Regions 2.3.4.5.& 6. Washington D.C..

Specifically, the Service's 2018 memorandum from the (then) FWS's Principal Deputy Director to all FWS Regional Directors emphasized that modification of habitat for an endangered species does not constitute a "take" unless that same activity results in the injury and or death of an endangered species.¹⁸ In addition, the Service's Habitat Conservation Plan (HCP) Handbook includes a lengthy discussion of when landowners should *not* seek an incidental take permit under the ESA's Section 10(a)(1)(B) for activities resulting from habitat modification alone.¹⁹ Because it highly unlikely that many members of the public have copies of the 2018 memorandum or understand the nuances of the Service's Section §10 HCP Handbook or the directive that habitat modification alone does not constitute a "take" under the ESA, NAHB urges the Service to provide such guidance to non-federal landowners whose activities may occur within the habitat range of the NLEB.

III. Develop NLEB Range-Wide Programmatic ESA §10(a)(1)(2) Incidental Take Permits.

For private landowners whose tree clearing activities: 1) do not require a federal permit; 2) occur within WNS buffer zones; and 3) are likely to result in an unavoidable "take" of a NLEB, the Service should develop an NLEB range-wide "General Conservation Plan," as allowed under the ESA's §10(a)(1)(B) Incidental Take Permit Program. As the Service recognizes, landowners whose otherwise lawful land clearing activities occur within NLEB habitat risk violating the ESA's §9 "take" prohibition unless they receive a subsequent §10 incidental take authorization from the Service.

A required component of any ESA §10 incidental take permit is the development of a habitat conservation plan (HCP), which is typically the responsibility of the permit applicant. The development of an HCP is a complicated and expensive prospect for any landowner. At a minimum, development of an HCP requires the applicant to hire consultants to conduct biological studies to determine the range and distribution of the species to be covered by the HCP. Also, since issuance of an ESA §10(a)(1)(B) permit is subject to review under the National Environmental Policy Act (NEPA), landowners or their consultants are required to prepare and submit for review all required NEPA documents. Landowners seeking an §10 permit experience further delays because these permits are also subject to public notice and comment. In 2004, NAHB reviewed the Service's Habitat Conservation Plan database and found the average §10 permit takes over 1.76 years to complete. Permit applicants spend nearly half that time or 399 days preparing the required documentation for the HCP itself. Given all the permitting requirements and difficulties landowners face when seeking an ESA §10 authorization, the Service has long acknowledged the current §10 permitting process is too difficult and expensive for small landowners to complete themselves.

¹⁸ See U.S. FWS. (2018). Memorandum entitled, "Guidance on trigger for an incidental take permit under section 10 (a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified." Washington, D.C..

¹⁹ U.S. FWS. (2016). "Habitat Conservation Planning and Incidental Take Permit Processing Handbook." Washington D.C.. Retrieved on May, 23, 2022, from <https://www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire.pdf>.

The Service's response to these barriers was the development of the General Conservation Plan (GCP) policy in 2007.²⁰ Under the GCP policy, the Service, not the permit applicant, is responsible for developing the HCP and undertaking the required NEPA review. Importantly, the permits developed under the GCP policy must comply with all the same requirements as ESA §10 permits developed by private landowners. However, incidental take permits developed under the GCP policy are designed to be administered by the Service as a way to allow small landowners to seek permit coverage under §10. By allowing the Service to administer the ESA §10(1)(a)(B) permit, the Service is responsible for designing and approving the required HCP, including determining the geographical area of coverage under the permit and acceptable conservation measures. Since the habitat of the NLEB covers an extremely large range, the Service could develop a range wide NLEB GCP and allow individual small landowners like NAHB members to seek coverage under the overarching permit. The advantages of this approach benefit both the Service and NAHB members. For small landowners, the advantages include reduced permitting costs and potentially reduced permitting timeframes since the Service has already developed and approved the required HCP. The Service benefits by consolidating permit requests, standardizing requirements, and easing the Service's own workload. NAHB urges the Service to begin work now on developing a NLEB range wide ESA §10(a)(1)(B) incidental take permit following the Service's GCP policy.

NAHB appreciates the opportunity to provide these comments on the Service's proposed reclassification of the NLEB and rescission of the 4(d) rule. If you have any questions or would like to discuss any the issues raised, please contact Michael Mittelholzer, Assistant Vice President, at mmittelholzer@nahb.org or (202) 266-8660. Given NLEB's expansive habitat range and the significant number of residential construction projects projected to be built therein, NAHB believes it is imperative the Service address NAHB's concerns prior to finalizing the proposed rule.

Sincerely,



Susan Asmus, Senior Vice President, Regulatory Affairs
National Association of Home Builders

²⁰ U.S. FWS. (2007). Final General Conservation Policy, FWS Director Dale Hall. Washington, D.C.