

September 13, 2022

Ms. Shauna Marquardt
Field Supervisor
Minnesota Ecological Services Field Office
4101 American Boulevard E
Bloomington, MN 55425-1665

Dear Ms. Marquardt

On behalf of the National Association of Home Builders (NAHB) I am writing to you to urge the U.S. Fish and Wildlife Service (FWS) to announce now what will be the conservation measures for the Northern Long Eared Bat (NLEB) before FWS rescinds the NLEB 4(d) rule. 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 approximately 80% of the new housing stock projected for 2022. NAHB members conduct residential land development and construction activities across the entire range of the NLEB, including those areas where FWS has identified NLEB populations are impacted by the disease white-nose syndrome (WNS). NAHB appreciates FWS's public statements that the current NLEB conservation measures established under the NLEB 4(d) rule will remain in place until the rulemaking reclassifying the NLEB as an endangered species becomes effective.^{1,2}

However, NAHB members are asking me when FWS will announce new NLEB conservation measures, and whether those new NLEB conservation measures will be substantially different from those under the current NLEB 4(d) rule. Importantly, NAHB members whose planned land development or construction activities for next spring and summer, occur within NLEB summer habitat, and require obtaining a federal Clean Water Act (CWA) 404 wetlands permits must first undergo ESA Section 7 consultation prior to obtaining their federal wetlands permit from the U.S. Army Corps of Engineers (Corps). Unfortunately, due to the extensive federal wetland permitting delays NAHB members have no way of knowing when the required ESA Section 7 consultation may be performed on their pending wetlands permit application, nor what NLEB conservation measures will be in place at that time.

In fact, some NAHB members have reported hearing from their Corps District that because FWS has not communicated what are the NLEB conservation measures following the rescission of the NLEB 4(d) rule, NAHB members should anticipate significantly longer restrictions on tree clearing activities (e.g., April to November) than is required under the NLEB 4(d) rule. Given to this uncertainty over future NLEB conservation measures some NAHB members are resorting performing NLEB surveys in the hopes of documenting absence of NLEB.³

¹ 81 Fed. Reg. 1900 (February 16, 2016).

² See FWS's Frequently Asked Questions – Northern Long-eared bat Uplisting Proposed Rule, <https://www.fws.gov/media/frequently-asked-questions-northern-long-eared-bat-uplisting-proposed-rule>

³ U.S. FWS, Range-Wide Indiana Bat & northern Long-Eared Bat Survey Guidelines, March 2022. Last retrieved on May 20, 2022, at https://www.fws.gov/sites/default/files/documents/USFWS_Range-wide_IBat_%26_NLEB_Survey_Guidelines_2022.03.29.pdf

NAHB members are considering conducting NLEB surveys even though both the 4(d) rule and the programmatic NLEB biological opinion (BiOp) do not require NLEB surveys for private landowners.^{4,5}

However, even this approach of conducting NLEB surveys has limited utility for planned residential activities next spring because the NLEB surveying season ended back on August 15th and does not begin again until May 15th. To better understand the potential impact on the residential construction sector of FWS changing the current NLEB conservation measures for *time of year restrictions* (TOYR) for tree clearing activities, NAHB's economists examined residential building permit data from the U.S. Census Bureau between the years 2000 to 2014 across the range of the NLEB. Specifically, NAHB examined building permits issued across the 1,772 counties identified by FWS as being impacted by WNS. Using this data, NAHB found the percentage of annual building activity during June 1 and July 31 when the current 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. As U.S. Census Bureau's residential permitting data demonstrates, any expansion of the TOYR for tree activities within NLEB habitat would mean significant disruptions to the residential construction sector.

FWS could avoid these and other unnecessary disruptions to the residential construction sector by announcing now FWS intends to keep the NLEB conservation measures in place under both the NLEB 4(d) rule and the programmatic NLEB BiOp even after FWS's proposed rule rescinding the NLEB 4(d) rule becomes effective. Again, NAHB believes the conservation measures contained within the NLEB 4(d) rule and under the programmatic NLEB BiOp (e.g., a TOYR tree clearing restriction between June 1st and July 31st and a 150-foot buffer around all known maternity roost trees) are sufficient to avoid and minimize activities from jeopardizing the continued existence of the species. Especially, since FWS has repeatedly acknowledged declines in NLEB populations are due to the impacts of WNS disease and not modifications to NLEB summer habitat.

I appreciate your consideration of NAHB's request for FWS to announce what will be NLEB conservation measures *before* the rescission of the 4(d) rule. If you have any questions or would like to discuss any the issues raised, I can be reached at mmittelholzer@nahb.org or (202) 266-8660. Given NLEB's expansive range, the extensive permitting delays NAHB members are experiencing under the CWA 404 program, and the significant number of construction activities to occur next year within NLEB summer habitat; NAHB believes it is imperative for FWS to reaffirm the existing NLEB conservation measures will remain in place following the removal of the NLEB 4(d) rule.

Sincerely,



Michael Mittelholzer, Assistant Vice President, Environmental Policy
National Association of Home Builders

⁴ 50 C.F.R. 17.40(o)

⁵ U.S. FWS, Programmatic Biological Opinion on Final 4(d) Rule for the Northern Long-Eared Bat and Activities Excepted from Take Prohibitions FWS Regions 2, 3,4,5, and 6. FWS Midwest Regional Office, Bloomington, MN. January 5, 2016.