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Sent via First Class U.S. Mail and E-mail

United States Department of the Interior
Fish and Wildlife Service
Attn: Lora L. Zimmerman, Field Office Supervisor
Pennsylvania Field Office
110 Randor Road, Suite 101
State College, PA 16801-4850
Lora_zimmerman@FWS.gov

Re: Proposed Coal Refuse Disposal Areas 7 and 8 in Morris Township, Greene County
USFWS Project #2012-1093
PNDI #20150624519754

Dear Ms. Zimmerman:

On behalf of the Center For Coalfield Justice, this letter responds to the Fish and Wildlife Service's ("Service") February 10, 2016 approval of Consol Pennsylvania Coal Company, LLC's ("CPCC") proposed land clearing activities at the proposed Coal Refuse Disposal Areas ("CRDA") 7 and 8 located in Morris Township, Greene County Pennsylvania.[1] The Center for Coalfield Justice ("CCJ") is a Pennsylvania-incorporated not-for-profit organization with federal § 501(c)(3) status located at 184 S. Main Street, Washington, PA 15301. CCJ is a membership organization with a mission to "improve policy and regulations for the oversight of fossil fuel extraction and use; to educate, empower and organize coalfield citizens, and to protect public and environmental health." The Center For Coalfield Justice has nearly two thousand members and supporters in Greene and Washington Counties and many who live in the proposed footprint of CPCC's proposed CRDA Nos. 7 and 8.

As noted in the final published rule notice, northern long-eared bats were primarily labeled as threatened due to the threat of white nose syndrome, which has been rapidly

[1] On February 10, 2016, the U.S. Fish and Wildlife Service wrote a letter to Jaculyn Duke, supervisor permitting – PA Coal Operations, stating: "Because your project is not located within 0.25 mile of a known northern long-eared bat hibernaculum or within 150 feet from a known, occupied maternity roost tree, any incidental take that might result from tree removal is not prohibited and no further consultation regarding this species is necessary."

decimating the northern long-eared bat population. CPCC's proposed project location is not only within the northern long-eared bat range, but it is within the white-nose syndrome buffer zone (WNS zone). Given it is within the WNS zone, the northern long-eared bat is entitled to some minimal protections when a company or individual proposes clear-cutting. In the final 4(d) rule ("Final Rule"), the Service determined "that conservation of the northern long-eared bat is best served by limiting the prohibitions to the most vulnerable life stages of the northern long-eared bat (*i.e.*, while in hibernacula or in maternity roost trees within the WNS zone and to activities, tree removal in particular, that are most likely to affect the species." 81 Fed. Reg. 1907 (January 14, 2016).

CCJ believes the Fish and Wildlife Service's approval of CPCC's proposed land-clearing activity was improper and antithetical to the Endangered Species Act's ("ESA") goal of conserving the ecosystems upon which imperiled species depend. In addition, CCJ believes the Service's approval was contrary to the Final Rule.

Contrary to the fundamental goal of the ESA and its implementing regulations and without any investigation, the Service has apparently authorized the incidental take of northern long-eared bats on the basis that the hibernacula and/or roost trees within the proposed project area are not "known." This is particularly alarming in light of CPCC's 2013 survey that found 68 northern long-eared bats within the proposed CRDA 7 and 8, 48 of which were reproductively active (i.e., pregnant, lactating, post-lactating) females. The Final Rule is clear: Within the WNS zone, incidental take that results from tree removal is prohibited when it occurs within 0.25 miles of known northern long-eared bat hibernacula or when it results from cutting or destroying known occupied maternity roost trees during the pup season (June 1 through July 31). *See* 81 Fed. Reg. 1907. The ESA and its implementing regulations protect threatened species like the northern long-eared bat by requiring the Service to develop and implement a recovery plan for listed species, 16 U.S.C. § 1533(f), and requiring all federal agencies to carry out their programs for the conservation of listed species, *id.* § 1536(a)(1). Particularly in light of CPCC's 2013 survey, it is not appropriate for the Service to claim ignorance as the basis for authorizing a taking of a threatened species. As a result, CCJ urges the Service to reconsider its February 10, 2016 approval.

Maternity roost trees exist within the proposed project area and the Service must prohibit land-clearing activities from June 1 through July 31.

In a letter dated February 10, 2016 the Service stated: "48 were reproductively active (i.e., pregnant, lactating, post-lactating) females, indicating the presence of a northern long-eared bat maternity colony within the project area." Yet in the next paragraph of the letter, the Service concluded: "Because your project is not located…within 150 feet from a known occupied maternity roost tree, any incidental take that might result from tree removal is not prohibited[.]" As an initial matter, there is a clear incongruity in finding the 2013 mist net survey conducted by CPCC indicates the presence of a northern long-eared bat maternity

colony within the project area but concluding that since there are no *known* occupied maternity roost trees within the project area, any incidental take is not prohibited. More importantly, the Service's determination – that no known occupied maternity roost trees exist within the proposed permit boundary or within 150 feet of the proposed permit boundary – is flawed.

The final 4(d) rule sets forth two separate mechanisms for identifying known occupied maternity roost trees. Under the Final Rule, the term "known occupied maternity roost trees" is defined as "trees that have had female northern long-eared bats or juvenile bats tracked to them *or the presence of females or juveniles is known as a result of other methods.*" 81 Fed. Reg. 1902 (January 14, 2016) (emphasis added). In other words, if female or juvenile northern long-eared bats are present, known occupied maternity roost trees are presumptively present. CPCC's 2013 mist net survey, which qualifies as other methods, revealed that 48 reproductively active female northern long-eared bats were present within the proposed project area. The Final Rule only requires the presence of females in order to conclude that maternity roost trees are presumptively present. Therefore, the presence of 48 *reproductively active females*, enough to suggest "the presence of a northern long-eared bat maternity colony," is unquestionably sufficient to trigger the presumption under the Final Rule that known occupied maternity roost trees are located within the project area.

In light of CPCC's 2013 survey, the fact this location has not been previously listed as a known maternity roost is of little importance given the definition of known occupied maternity roost trees. It appears that the Service ignored crucial language in the Final Rule. The Service incorrectly reads the final 4(d) rule to say that only previously identified known occupied maternity roost trees qualify for protection. The plain text of the ESA and its implement regulations require conservation and protection of the species.

The ESA defines conservation as "the use of all methods and procedures, which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). Once a species in listed, Section 7 of the ESA requires all federal agencies to "insure" that their actions neither "jeopardize the continued existence" of any listed species nor "result in the destruction or adverse modification" of its critical habitat." 16 U.S.C. § 1536(a)(2). An action would jeopardize the continued existence of a species if it "reasonable would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number, or distribution of that species." 50 C.F.R. § 402.02. Given that CPCC's 2013 mist net survey found that 48 reproductively active female northern long-eared bats were present within the proposed project area, it is reasonable to expect that CPCC's proposed land clearing activities at the proposed CRDA 7 & 8 will jeopardize the continued existence of the northern long-eared bat. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. During their maternity period, northern long-eared bats do not travel long distances. As acknowledged by the Service, "NLEB home ranges, consisting of maternity,

foraging, roosting, and community habitat, typically occur within three miles of a documented capture record or a positive identification of NLEB from properly deployed acoustic devices, or within 1.5 miles of a known suitable roost tree."[2] Studies of the bat have indicated they often jump from tree to tree in a maternity roost area, but the distance traveled between trees is often not far. One study states, "Most roosts were <100m apart. The longest distance traveled between roosts was 860m" or .5 miles.[3] Northern long-eared bats are also loyal to their summer home habitat.[4]

In order to overcome the presumption set forth in the Final Rule, specifically the definition of known occupied roost trees, CPCC must conduct additional surveys of the project area in order to prove that maternity roost trees do not exist within or near the proposed CRDA 7 & 8 areas. Since CPCC's 2013 survey establishes the presence of known occupied maternity roost trees within the proposed project area and CPCC has not submitted any evidence to rebut the presumption created by the definition of known occupied roost trees, the Service must, at the very least, prohibit tree cutting from June 1 through July 31. Protecting the northern long-eared bat during the maternity period is crucial as the mortality rate is highest during the juvenile stage.[5]

The Service should require CPCC to conduct additional studies to determine whether the hibernacula identified in CPCC's 2013 study is a winter hibernation site for the northern long-eared bat.

The Final Rule prohibits the taking of northern long-eared bats in and around the hibernacula within the white nose syndrome zone, including activities that may alter the hibernacula at any time of the year. *See* 81 Fed. Reg. 1905 (January 14, 2016). The Service's reliance on the results of trapping efforts conducted by CPCC at or near potential hibernacula is misplaced.

As acknowledged by the Service, "[h]ibernacula and surrounding forest habitats play important roles in the life cycle of the northern long-eared bat beyond the time when bats are overwintering. In both the early spring and fall, the hibernacula and surrounding forested habitats are the focus of bat activity in two separate periods referred to as "spring staging" and

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[2] Northern Long-Eared Bat Interim Conference and Planning Guidance, US Fish and Wildlife Service, Jan. 6, 2014. Page 3. https://www.fws.gov/northeast/virginiafield/pdf/NLEBinterimGuidance6Jan2014.pdf.
[3] "Roost Tree Use by maternity colonies of Indiana bats and northern long-eared bats in Southern Illinois." Timothy C. Carter and Feldhamer, Forest and Ecology Management, Page 264 (Aug. 31, 2005).
[4] Biological Assessment on the Northern Long-Eared Bat (Myotis septentrionalis) and Indiana Bat (Myotis sodalis), Indian Point Nuclear Generating Units 2 and 3 Proposed License Renewal. Prepared by Briana Grange, Division of License Renewal. July 2015. Pg. 6.
[5] Biological Assessment on the Northern Long-Eared Bat (Myotis septentrionalis) and Indiana Bat (Myotis sodalis), Indian Point Nuclear Generating Units 2 and 3 Proposed License Renewal. Prepared by Briana Grange, Division of License Renewal. July 2015. Pg. 6.

"fall swarming." *Id.* Furthermore, according to the planning guidance issued by Fish and Wildlife Service, "NLEBs migrate between their winter hibernacula and summer habitat. The spring migration period likely runs from mid-March to mid-May, with fall migration likely between mid-August and mid-October. Overall, the NLEB is not considered to be a long-distance migrant (typically 40-50 miles) although known migratory distances vary greatly between 5 and 168 miles."[6] Given the limited migratory distance and the presence of at least 68 northern long-eared bats within the proposed project area, it is likely that a hibernacula is also located with the proposed project area. Moreover, according to the Service's December 18, 2015 letter, at least one portal suitable for bat use is located within the proposed project area.

The results of the trapping efforts, so heavily relied upon by the Service in its February 10, 2016 approval, cannot be applied to the northern long-eared bat with confidence. First, the study itself was focused on the Indiana bat, not the northern long-eared bat.[7] At the time of the study, the northern long-eared bat had not even been proposed for listing. It was not until October 2, 2013, the last day of trapping efforts, when the Service proposed to list the northern long-eared bat as endangered. Second, the trapping efforts that were conducted between September 30, 2013 and October 2, 2013 are not sufficient to identify northern long-eared bats within the hibernacula. According to the Service, "[i]n general, northern long-eared bats arrive at hibernacula in August or September, entering hibernation in October and November, and emerge from the hibernacula in March or April. However, hibernation may begin as early as August." 81 Fed. Reg. 1904 (internal citations omitted). As explained in the Service's interim guidance, "within the hibernacula, surveyors find [northern long-eared bats] in small crevices or cracks, often with only the nose and ears visible."[8] Moreover, "[n]orthern long-eared bats have shown a high degree of philopatry (using the same site over multiple years) for a hibernaculum (Pearson 1962, p. 30), although they may not return to the same hibernaculum in successive seasons." 81 Fed. Reg. 1904 (January 14, 2016). Therefore, the trapping efforts conducted between September 30, 2013 and October 2, 2013 are insufficient to identify northern long-eared bat hibernacula within the proposed project area.

According to the Service, "[o]verwinter survival can be a particularly challenging period in the northern long-eared bat's life cycle." 81 Fed. Reg. 1904 (January 14, 2016). Given that CPCC's 2013 mist net survey found that 68 northern long-eared bats were present within the proposed project area, 48 of which reproductively active females, it is reasonable to expect that CPCC's proposed land clearing activities at the proposed CRDA 7 & 8 site, could modify bat hibernacula and jeopardize the continued existence of the northern long-eared bat. *See* 16 U.S.C.

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[6] Northern Long-Eared Bat Interim Conference and Planning Guidance, US Fish and Wildlife Service, Jan. 6, 2014. Page 4. https://www.fws.gov/northeast/virginiafield/pdf/NLEBinterimGuidance6Jan2014.pdf.

[7] Pennsylvania Game Commission Letter to Michael Baker, Jr., Inc., regarding potential impact to Northern long-eared bat. November 26, 2013.

[8] Northern Long-Eared Bat Interim Conference and Planning Guidance, US Fish and Wildlife Service, Jan. 6, 2014. Page 2.

§ 1536(a)(2); 50 C.F.R. § 402.02. Disturbances and permanent alteration to hibernacula and surrounding area presents a serious threat to the survival of this species. *See* Fed. Reg. 1904 (January 14, 2016) ("Human disturbance of hibernating bats has long been considered a threat to cave-hibernating bat species like the northern long-eared bat. Modifications to bat hibernacula can affect the microclimate (*e.g.*, temperature, humidity) of the subterranean habitat and thus the ability of the cave or mine to support hibernating bats, including the northern long-eared bat."). "Because of this complex interplay of hibernaculum characteristics and bat physiology, changes to hibernaculum can significantly impact their suitability as well as the survival of any hibernating bats."[9] Particularly in light of CPCC's 2013 study, CCJ urges the Service to require CPCC to conduct additional surveys to ensure proper protection of the northern long-eared bat and its hibernacula.

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Given the importance of bats for both agricultural pest control and ecological biodiversity, protection of this species, and bats generally, should be of utmost importance. For the reasons discussed herein, CCJ respectfully requests that the Service withdrawal its February 10, 2016 approval, prohibit land-clearing activities during the pup season (June 1 through July 31), and require CPCC to perform the appropriate studies to definitively determine whether northern long-eared bat hibernacula is located within the proposed project area.

Thank you for your consideration of this matter. CCJ would be willing to meet with the Service (and respective counsel if necessary) in order to discuss what more can be done to ensure the minimum level of protection required for the northern long-eared bat and its habitat. If you have any questions, please contact us anytime.

Respectfully,

Sarah E. Winner, Esq.
Staff Attorney

Katharine Richter
Legal Intern

[9] Northern Long-Eared Bat Interim Conference and Planning Guidance, US Fish and Wildlife Service, Jan. 6, 2014 at 28-29. https://www.fws.gov/northeast/virginiafield/pdf/NLEBinterimGuidance6Jan2014.pdf.