



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, MA 01035-9589



In Reply Refer To:
FWS/R5/ES-TE/048880

JUL 08 2011

Ms. Mollie Matteson
Center for Biological Diversity
P.O. Box 188
Richmond, Vermont 05477

Dear Ms. Matteson:

This responds to your January 21, 2010, petition for rulemaking submitted on behalf of the Center for Biological Diversity (CBD). As the designated lead Region for the U.S. Fish and Wildlife Service (Service) on white-nose syndrome (WNS) I am responding on behalf of the Service's Director. Your petition generally requests governmental action to address the threat posed by WNS to bats. More specifically, the petition requests that the petitioned agencies take the following actions:

1. Close to public access all caves and mines known or suspected to harbor bats on Federal lands throughout the continental United States to protect bats and associated cave ecosystems from the dire threat of white-nose syndrome.
2. Promulgate a rule governing take of endangered bats to specify that transferring materials, whether knowingly or unknowingly, between caves and mines in areas where WNS has occurred to caves and mines in areas where WNS has yet to occur and could potentially spread to threatened and endangered bat species, constitutes a violation of prohibitions in the ESA against "take" of listed species by any person.
3. Designate as "significant" all caves inhabited by bats, seasonally or year-round, on all Federal lands under the jurisdiction of the Department of Interior and Department of Agriculture.
4. Issue an advisory to all State, other public, and private owners of caves and bat-inhabited mines throughout the United States, recommending year-round closure to protect bats from the spread of white-nose syndrome.
5. Notify all owners of caves and bat-inhabited mines of threats to federally listed bats from cave visitation and associated potential spread of WNS, and of decontamination protocol recommended for caves that remain open.
6. Establish, as part of the national WNS action plan, a fund to purchase privately owned bat caves and mines for the purpose of protecting bats.

Petition at 29-30 (Sec. XI).

The Service is the lead Federal agency coordinating the response to WNS. Many of the requests in your petition are directed to us serving in that role, and also as a Federal

land manager. We respond to your requests on our own behalf; as you can understand, we cannot represent the positions of the other petitioned agencies.

We begin by apologizing for our delay in responding to you. Although we did not reply as quickly as you would have liked, our efforts in the interim, as further described below, demonstrate that we continue to seriously consider your concerns.

We also preface our reply by noting that your petition does not conform to the Department of the Interior regulations governing petitions for rulemaking. See 43 CFR Part 14. The regulations acknowledge that under the Administrative Procedure Act, "any person may petition for the issuance, amendment or repeal of a rule" (Id. at § 14.2.) but it also requires that the petitioner:

Identify the rule requested to be repealed or provide the text of a proposed rule or amendment and include the reasons in support of the petition.

Your requests, numbered 1, 3, 4, and 5 above, simply constitute requests for administrative action. You neither request rulemakings to accomplish the stated objectives nor provide the explicit text required by our regulations. Rather, you suggest that many of these can be undertaken through already existing regulations or authorities. Item 2 does explicitly request a rulemaking, but you have failed to provide the proposed text for a rule or an amendment to the existing regulations governing take under the Endangered Species Act (ESA). We, therefore, find that your petition fails to satisfy the Part 14 submission criteria, and deny it. Nevertheless, we explain our actions to date, which may address your underlying concerns.

The Service has been engaged in the WNS response effort since its discovery in 2007. The Service is leading a cooperative and coordinated response among Federal agencies, States, Canadian national and provincial agencies, the academic community, private nonprofit organizations, and other stakeholders. Today, more than 100 partner agencies and organizations are working together to determine the impacts of WNS on bat populations and ecosystems, identify the mechanisms by which the disease is transmitted and causes mortality, conduct surveillance for WNS and monitor its spread, and develop management and containment options for Federal, State, and private resource managers.

One of the Service's main priorities is to continue to provide resource managers with management recommendations, based on the best available science, to control the spread and minimize the effects of WNS. To this end, the Service, along with other Department of the Interior agencies, the U.S. Department of Agriculture, the U.S. Department of Defense, the Association of Fish and Wildlife Agencies, several Tribal agencies, and many other partners, has developed a national plan to guide the response effort. The national plan, issued in May 2011, formally establishes seven working groups and two oversight committees with representation from Federal, State, and Tribal resource management agencies. A technical advisory committee and a stakeholder committee are also being established. In coordinating the implementation of the national plan, the Service is collecting and distributing critical information to other Federal agencies, States, other partners, and the public; administering several of the working groups and sub-groups established through the national plan; and working with partners to identify and carry out collaborative investigations, surveillance, monitoring, and management actions. To aid in this coordination, the Service has sponsored annual symposia to bring partners together from government agencies, non-governmental organizations, and academic institutions to share information and plan response efforts. We appreciate your attendance at this year's symposium held in Little Rock, Arkansas, in May.

The Service has also dedicated considerable funding toward WNS in fiscal years 2007 to 2011 for coordination, research, and State assistance. The Service's coordination team comprises a national coordinator, assistant national coordinator, communications specialist, and eight regional coordinators. The Service has funded other Federal agencies and academic institutions to conduct major research into WNS and the fungus causing the disease. The Service continues to work with, and provide support to, States to conduct surveillance for WNS, monitor its spread, and prepare response plans for actions pre- and post-arrival of the disease. The Service will continue to monitor federally listed species and, because states have primary jurisdiction over bats not federally listed under the ESA, support state monitoring and management efforts through state wildlife grants and other programs.

There are a variety of ways in which the Service can accomplish its mission and objectives. For dynamic situations riddled with uncertainty, like WNS, flexibility is of the utmost importance. Although regulations have the force of law, they also can take a considerable amount of time to promulgate or amend. Depending on the situation, they can sometimes be overly rigid or draconian. We recognize that rulemaking(s) may properly play a role in responding to WNS, but at this juncture, with so many unknowns, we favor our current approach, which permits the involved agencies, entities and landowners to continue to communicate, coordinate and cooperate.

With all this in mind, we address the specific requests contained in your petition.

1. Closure of caves and mines

You requested all Federal agencies immediately close all caves or mines known or suspected to harbor bats.

The Service has satisfied this request. On September 2, 2010, the Service issued guidance on managing WNS in bats in the National Wildlife Refuge System (NWRS). The guidance directed that all caves and abandoned mines on refuges be closed to public entry until further notice. Any entry into a cave or mine for a refuge management activity requires implementation of current research and monitoring protocols for decontamination, disinfection, and containment to prevent the spread of WNS. A refuge management activity is an activity conducted by the Service or a Service-authorized agent to fulfill one or more purposes of the national wildlife refuge or the NWRS mission. Service-authorized agents include contractors, cooperating agencies, cooperating associations, refuge support groups, and volunteers.

2. Publication of guidelines specifying those actions constituting take of endangered bats

You requested the Service promulgate a rule specifying that transferring materials from caves and mines in areas where WNS has occurred to caves and mines in areas where WNS has yet to occur constitutes "take" of listed bats under the ESA. You requested this rule state that persons traveling between caves may be engaging in an illegal activity and, therefore, subject to penalties, that these restrictions apply to State and private landowners who allow people to access their caves, and that these restrictions apply to all caves harboring bats. You requested that the rule further specify the necessary actions to avoid take, including closing caves, avoiding travel between caves, and disposing of clothes, equipment, and other materials used within caves located in regions where WNS is known to occur.

The Service believes the fungus associated with WNS can be transported by humans from affected caves to unaffected caves. This was the basis for the Service's March 2009 cave advisory requesting a voluntary moratorium on recreational caving; the regulation of cave-related activities in affected and adjacent States; movement restriction for gear and clothing used in potentially affected regions; and,

routine use of decontamination procedures. However, the Service believes that defining the transfer of materials from a cave in an affected area to a cave in an unaffected area as "take" under the ESA requires a heightened certainty of causation -- a likelihood that any individual transferring materials between caves will transport the fungus, that the transported fungus will become established, that the fungus will infect listed bats, and that the infected bats will be injured or killed by WNS. We believe the best available scientific information supports our conclusion that human transmission poses a risk. That was the basis for our precautionary advisory. But the science, at this stage, does not provide sufficient certainty to justify the result you request - a blanket prohibition on transferring materials between caves. With that said, the ESA and its implementing regulations defining the terms "take," "harm," and "harass" already authorize the Service to take action when warranted. These definitions are expansive enough to consider the transfer of materials between caves prohibited activities, should the scientific evidence demonstrate with certainty that a person has, in fact, caused (or will cause) take of listed bats in this way.

Furthermore, a regulation such as the one you propose would be extremely difficult to draft. The scope you request is overly broad, seemingly applying to any person entering a cave, regardless of intent. Such a regulation would also be extremely difficult to enforce. Moreover, it would risk alienating key partners whose access to caves is essential in diagnosing WNS and assessing bat populations. We believe that reducing the risk of human transmission of the fungus associated with WNS is best accomplished through issuance of our cave advisory and our communications with the caving community and research communities and with our Federal, State, and Tribal partners.

3. Significant cave designation

You requested the designation as "significant" for all caves on Federal lands that are inhabited by bats, seasonally or yearlong.

Given the geographic scope, criteria to be considered (43 CFR 37.11), and need to consult with interested parties, we are unable to process a request for blanket designation that fails to identify specific caves and site-specific rationale for nomination. Site-specific nominations should be submitted to the refuge office that manages the land where the cave is located.

Your petition explicitly states that designation "will provide another basis for implementing closures and other measures to protect bats at risk." Wildlife conservation is a key component of the NWRS mission, and Service policy mandates that NWRS lands and waters are closed to public uses until they are specifically opened for such uses. As we have explained, the Service has already closed caves on the lands that we own or administer. Therefore, this added layer of protection is not necessary to accomplish your stated purpose.

4. Fish and Wildlife Service Advisory

You requested the Service issue a general advisory to all public and private owners of caves and bat-inhabited mines, including commercial caves, throughout the United States recommending year-round closure. You also requested the Service to advise all states to issue their own advisories to private landowners strongly recommending they close their caves.

Our March 2009 cave advisory recommends that cavers avoid all caves and mines containing hibernating bats, even in states where WNS is not known to occur. The advisory also encourages agencies and partners who manage cave resources to strongly consider limiting access to caves and mines. In addition,

the advisory fully supports State cave closures and asks cavers to follow all State and local cave closures and advisories. We believe our cave advisory largely satisfies your requests regarding this issue.

Additionally, the Service intends to revisit the advisory in the near future to determine whether any changes are needed. We plan to solicit the input of various stakeholders including CBD.

5. Fish and Wildlife Service notification to private cave owners

You requested the Service provide written notice to all owners of caves and mines, including commercial caves, harboring federally listed endangered bats of the threat of WNS and the potential for human transmission on gear or clothing. You recommended this notice include a statement that affirmative actions to open caves to public visitation, where such caves provide habitat for federally listed bats, may be in violation of Section 9 of the ESA. You asked the Service to work directly with owners of caves harboring federally listed bats to implement and maintain bat-safe closures that bar human access, except for authorized research staff, wildlife agency personnel, or emergency purposes. You also requested the Service to develop a recommended protocol of visitor decontamination and other measures aimed at minimizing the risk of spread of WNS for those commercial caves that remain open, and disseminate this protocol to commercial cave owners and commercial cave associations throughout the United States.

The practical difficulty in undertaking what you propose is the lack of ownership information for private caves. The Service simply does not know where all private caves are located, who owns or manages them, or how to contact these owners. The Service prefers to use its advisory, which is posted on its website, and its partners to educate landowners. For instance, the Service, States, and bat conservation organizations have a long history of working with private owners of bat hibernacula to install cave gates to control human access; this work continues. The States coordinate with private landowners when conducting cave and bat surveys. In addition, the Service is working with other Federal agencies and States to address the risk of human transmission of WNS at commercial caves through development of protocols for visitor decontamination and other measures. Furthermore, we will continue to use our best efforts through our regulatory work under the ESA to inform private owners of listed bat hibernacula of the threat of WNS and the potential for human transmission on gear or clothing.

6. Public acquisition of caves to protect bats

You requested the Service include, in its WNS national plan, the establishment of a fund to purchase privately owned bat caves and mines with particularly high ecological and/or strategic value in the effort to contain WNS, especially bat sites that currently have inadequate protection from potential human introduction of WNS.

We note that our May 2011 national plan includes summer and winter bat habitat protection and restoration as objectives. [See Plan at p. 16 (Section G, Goal 3, Action 4).] We did not include a provision requiring the establishment of a fund. Doing so may raise problems under our appropriations laws, and it is not clear how such a fund would function. The Service believes it is unnecessary to establish such a fund because existing authorities already allow us to conserve key habitat. Bat hibernacula have been successfully conserved through a variety of mechanisms by Federal, State, and local agencies and non-governmental organizations. The Service, for example, has provided grant funding to States for protection of important hibernacula. We have also provided funding and support for gating projects.

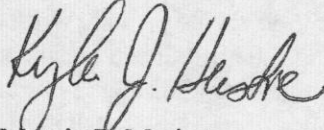
Ms. Mollie Matteson

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Through our ESA regulatory program, we continue to work with Federal agencies and project proponents to avoid and minimize impacts to listed bats and their habitats.

We appreciate your interest in the protection of the bats. If you have any questions, please contact Dr. Paul Phifer, Region 5, Assistant Regional Director, Ecological Services, at 413-253-8304, or Martin Miller, Region 5, Chief, Division of Endangered Species, at 413-253-8615.

Sincerely,



Acting

Marvin E. Moriarty
Regional Director

cc: Secretary of the Interior
Secretary of Agriculture
Secretary of Defense
Director, BLM
Director, National Park Service
Director, U.S. Fish and Wildlife Service