

Testimony of Lou D'Amico
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US House Natural Resources Committee
Oversight Field Hearing

*The Northern Long Eared Bat: The Federal Endangered Species Act and Impacts
of a Listing on Pennsylvania and 37 Other States*

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My name is Lou D'Amico and I am the President and Executive Director of the Pennsylvania Independent Oil & Gas Association ("PIOGA"). I am grateful for the invitation to testify today before the Committee regarding the proposed listing of the northern long-eared bat (NLEB) as endangered under the Endangered Species Act (ESA) by the US Fish and Wildlife Service (FWS).

PIOGA is a non-profit trade association, with nearly 1000 members, representing Pennsylvania independent oil and natural gas producers, marketers, service companies and related businesses, landowners and royalty owners. PIOGA members are subject to federal and state laws for the protection of listed bat and other protected species. The association and our members have a direct interest in FWS's proposal to list the NLEB as an endangered species, given the oil and gas development and production operations that PIOGA's members are undertaking within the potential range of the NLEB in Pennsylvania. These operations, including clearing trees and building roads, are constrained and directed by environmental laws regarding permits and species protection, as well as by property and contract law.

The economic benefits from the oil and gas industry have been described as economically "transformative" for not only Pennsylvania communities, but for those across the country who are the beneficiaries of abundant and stable natural gas supplies. It is estimated that the oil and gas industry operating in the Marcellus Shale region employs 232,000 people with an average salary of \$83,000 per year. Between 2010 and 2012, approximately \$31.5 billion dollars were invested in the

region as a result of industry activity, with \$1.8 billion in state tax revenue generated since 2006.

In addition, the energy generated in the Marcellus Shale region is playing a pivotal role in what has been described as a manufacturing renaissance. A recent study from IHS Global Insight entitled, “America’s New Energy Future: The Unconventional Oil and Gas Revolution and the Economy – Volume 3: A Manufacturing Renaissance,” notes the revolutionary economic benefits that have accrued to households, communities, and manufacturers across the country as a result of this stable and plentiful supply of energy. The most recent update to the study includes the following significant national economic impacts of this development:

- Unconventional oil and gas will steadily increase U.S. competitiveness, contributing \$180 billion to the U.S. trade balance by 2022.
- Increased disposable household income by \$1,200 in 2012, rising to \$3,500 in 2025;
- Generated \$74 billion in government revenues in 2012, rising to \$138 billion in 2025;
- Attracted U.S. capital investments totaling \$121 billion in 2012, rising to \$240 billion by 2025;
- Contributed \$284 billion to the U.S. GDP in 2012, rising to \$533 billion by 2025; and Supported \$150 billion in earnings for U.S. workers in 2012, rising to \$269 billion by 2025.

PIOGA believes this background of Marcellus Shale development and its driving role in creating tremendously significant economic benefits both regionally and nationally are an important context as the committee considers the potential impacts of a listing decision regarding the NLEB.

I. The proposed listing of the NLEB is not based on the best available scientific and commercial data.

PIOGA, together with the Pennsylvania Chamber of Commerce, commented on FWS’s proposed listing of the NLEB. A copy of those comments is provided for the record as Attachment No. 1 to this testimony. In those comments, we expressed our deep concern that the proposal was not based on the best available scientific and commercial data, as the ESA requires. As we noted, the proposal is based on numerous unpublished studies and sources of data that have not been peer reviewed. We urge the Committee to use its influence to ensure that this substantial deficiency in the proposal is corrected. The ESA’s requirement that FWS base its listing decisions on the best available scientific and

commercial data available is the most important check on FWS's authority and FWS should not be allowed to ignore it.

II. Section 7(a)(4) conferencing reviews and conferences should not be required.

In the meantime, even though the proposal is not based on the best available data and even though it has not been finalized, this Committee should be aware that the proposal is already significantly adversely impacting the operations of our member companies. This is because FWS has instructed its field offices and other federal action agencies to conduct – pending the finalization of its proposed listing – costly and time consuming ESA Section 7(a)(4) conferencing reviews for all activities proposed to take place within the NLEB's 39 state range (including D.C.) to determine if the proposed activity likely will jeopardize the continued existence of the NLEB, and to initiate a conference *even if the activity is not likely to jeopardize the NLEB*. This conferencing requirement – which requires coordination between at least two federal agencies, evaluation of environmental studies and data, and legal and scientific analysis – has already needlessly and unlawfully imposed substantial expense and delays on oil and gas operators.

This conferencing requirement is also clearly contrary to FWS's regulations and guidance. FWS regulations define "jeopardize the continued existence of" to mean "to engage in an action that reasonably 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, numbers, or distribution of that species." 50 C.F.R. § 402.02. Moreover, FWS's Endangered Species Consultation Handbook (pp. 4-36) provides that jeopardy determinations must be based on the effects of the proposed action *to the entire population of a species range-wide*: "Adverse effects on individuals of a species . . . generally do not result in jeopardy determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range." As explained below, FWS has already reached conclusions that preclude a "jeopardy determination."

In February of this year, PIOGA joined with eight other organizations in filing an emergency petition with FWS for an exemption for the oil and gas industry from the conferencing requirement. A copy of that petition, which requested action within 30 days and to which FWS has not responded, is provided for the record as Attachment No. 2 to this testimony.

In the petition, PIOGA and the other organizations made the following points:

1. Section 7(a)(4) requires conferences between a project proponent and FWS only if it is determined that the *proposed activity* – not just any cause, such as a disease – is likely to jeopardize the continued existence of a species proposed for listing, pending the finalization of the listing.

2. In the course of developing its listing proposal for the NLEB, FWS has already concluded that oil and gas exploration and development activities do not have population-level effects on the NLEB, even when combined with the effects of all other land development activities throughout the NLEB's range. As FWS explained in its proposed listing, it is the white-nose syndrome "alone [that] has led to dramatic and rapid population level effects on the" NLEB. 78 Fed. Reg. 61072. **Accordingly, it is beyond dispute** that the white-nose syndrome and not the effects of oil and gas activities is responsible for the decline of the NLEB.

3. In light of this conclusion, neither the FWS nor the other federal action agencies can reasonably or lawfully determine that any proposed oil and gas activity will likely jeopardize the NLEB.

4. Therefore, the proponents of oil and gas activity should not be subjected to the section 7(a)(4) conferencing requirements before they can proceed with their projects.

Accordingly, PIOGA urges the Committee to use its influence to get FWS to immediately issue a programmatic finding of "no jeopardy" for all oil and gas exploration and development activities to be undertaken within the NLEB's range before a final listing decision is made for the species. This action is necessary to put an end to the substantial costs that FWS is needlessly and unlawfully imposing on oil and gas operators and, ultimately, on the consumers of their products. Alternatively, FWS should grant the previously requested exemption, which would produce the same result.

The FWS's recently finalized (July 1, 2014) "rule" or "policy" interpreting the phrase "significant portion of its range" does not support listing the NLEB or requiring the Section 7(a)(4) conferencing reviews, even if the policy were applied here, which it shouldn't. The lone population level risk to the NLEB – WNS – is confined to only a portion of the species' range, and the species has reportedly incurred significant effects from WNS *in only a fraction of that area*. Moreover, as numerous state government commentators have explained, WNS has had little or no effect on the NLE bat in many areas where it has been detected. Accordingly, the best available science demonstrates that the NLEB's population *outside of the limited areas where WNS reportedly has affected the species* is more than sufficient to be resilient to WNS or any other potential

impact. For example, the administrative record makes clear that (i) the species' viability does not depend on the productivity of the population in any portion of the NLEB's range and (ii) the population in the remainder of its range can maintain a sufficient growth rate to persist on its own.

Nor does the segment of the NLEB population that has been affected by WNS contain important elements of genetic diversity without which the remaining population may not be genetically diverse enough to adapt to changing environmental conditions. If anything, the fact that NLEBs outside of the Northeast have *not* experienced significant impacts from WNS in areas where the disease is present suggests that the opposite is true. Put simply, there is no basis for the FWS to invoke its new "significant portion of its range" policy to support listing the NLEB or requiring Section 7(a)(4) conference reviews.

III. The ESA is ill-suited to deal with the threat to the NLEB's existence caused by the white-nose syndrome.

The principal tool provided to FWS to aid in the recovery of listed species is habitat protection. Typically, FWS will designate critical habitat for a species and all federal activities in that habitat will then have to insure that they do not destroy or adversely modify that habitat. That conventional approach does not fit the challenge posed by white-nose syndrome to the NLEB.

Our members are concerned that if habitat protection is made the focus of a recovery plan for the NLEB, it will needlessly restrict their activities without benefitting the NLEB. As FWS has stated, the NLEB "is in danger of extinction, predominantly due to the threat of white nose syndrome" (emphasis added). 78 Fed. Reg. 61046. As FWS acknowledges, "[e]ven if all habitat-related stressors were eliminated or minimized, the significant effects of WNS on the northern long-eared bat would still be present." 78 Fed. Reg. at 61061. The key factor at issue is disease, not oil and gas operations or other activities. A listing that leads to a recovery plan which concentrates on the designation and protection of critical habitat as it relates to oil and gas development and other activities is contrary to the express purpose of [the] ESA, which is to conserve species.

We therefore urge the Committee to require FWS to work with the wide range of public and private organizations that are concerned about the NLEB to identify methods other than the listing the NLEB or the designation of critical habitat for the management of white-nose syndrome and protection of the NLEB from its effects.

Summary

PIOGA and our member companies believe the proposed listing is unsupported by the facts and law and is not justified by the best available scientific and commercial data. We also believe that FWS must utilize its six month extension to subject the data to rigorous and transparent review by those in the scientific community, which will confirm the lack of scientific and legal justification for listing the NLEB.

Accordingly, we also urge the Committee to require FWS to determine that Section 7(a)(4) conferencing reviews are unnecessary for oil and gas activities in light of the fact – documented by FWS no less – that oil and gas development activities will not place the NLEB in jeopardy anywhere, much less throughout its range.

Finally, PIOGA suggests that if any final rule resulting in the listing of the species is adopted, it may not lawfully restrict activities, such as oil and gas development, that have no casual connection to WNS or otherwise threaten or endanger the NLEB.