



United States Department of the Interior



FISH AND WILDLIFE SERVICE

West Virginia Field Office
694 Beverly Pike
Elkins, West Virginia 26241

December 9, 2014

Mr. Ben Hark
West Virginia Department of Transportation
1900 Kanawha Boulevard East
Building 5, Room 110
Charleston, West Virginia 25305

Re: West Virginia Division of Highways, Appalachian Corridor H, Kerens to Parsons Section,
Randolph and Tucker Counties, West Virginia

Dear Mr. Hark:

This responds to your October 31, 2014, request for information regarding the proposed Appalachian Corridor H Kerens to Parsons Section in Randolph and Tucker County, West Virginia. These comments are provided pursuant to the Endangered Species Act (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668c, as amended), and the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712).

Based on your correspondence, the Service has determined that five federally listed species are within the range of the proposed project, and may be affected by the construction and operation of the proposed project. These include the endangered Indiana bat (*Myotis sodalis*), Virginia big-eared bat (*Corynorhinus townsendii virginianus*), and running buffalo clover (*Trifolium stoloniferum*); and the threatened Cheat Mountain salamander (*Plethodon nettingi*), and small whorled pogonia (*Isotria medeoloides*).

Additionally, on October 2, 2013, in the *Federal Register* (78 FR 61045 -61080) the Service proposed the northern long eared bat (*Myotis septentrionalis*) for listing under the ESA. If a decision is made to list this species, potential impacts from this project to this species may need to be addressed if this project is not completed by April 2, 2015. We encourage you to begin incorporating conservation measures to protect these species prior to any potential final listing decisions. Additional information regarding the northern long eared bat and conference procedures can be found at the following address:
<http://www.fws.gov/midwest/endangered/mammals/nlba/pdf/NLEBinterimGuidance6Jan2014.pdf>

Endangered Bats

Habitat for the federally listed Indiana and Virginia big-eared bats may occur within the proposed project area. Summer mist net surveys were completed in 2012 and no federally listed bats were

captured. Surveys are considered current for 5 years (the summer they are completed and the following four summer seasons). In this case, the survey expires on May 15, 2017.

Surveys completed for this portion of the project did not capture any federally listed bats. Therefore, the Service concurs that the project is not likely to adversely affect the Indiana and Virginia big-eared bats.

Proposed Northern Long-Eared Bat

Habitat for the proposed northern long-eared bat may occur within the proposed project area. Summer mist net surveys completed in 2012 captured 8 northern long-eared bats.

In your October 31, 2014, correspondence, you included a conservation plan for the northern long-eared bat. Within this plan, you noted that clearing of potential bat habitat will occur between November 15 and March 31 when bats are not present on the landscape to avoid direct adverse impacts to bats. Additionally, clearing will avoid potential roost trees when practicable and clearing has been minimized within the Monongahela National Forest through coordination with the U.S. Forest Service as outlined in the 2003 Memorandum of Understanding with the Forest Service. Thus, the Service concurs that the proposed project is not likely to jeopardize the northern long-eared bat.

Cheat Mountain Salamander

Habitat suitability inventories for the Cheat Mountain salamander were completed in 2001 for the Kerens to Parsons Section of Appalachian Corridor H. During these inventories, no suitable Cheat Mountain salamander habitat was found within the project area. Cheat Mountain salamanders seldom leave their territories and, as a result, move only a few meters during their lives. As long as the alignment has not changed from the time these surveys were completed, then the Service concurs that the core borings for the Kerens to Parsons Section 1B are not likely to adversely affect the Cheat Mountain salamander. If the alignment of the proposed project has been changed, surveys will need to be redone.

Listed Plants

A botanical survey for running buffalo clover was conducted in 2012 within the proposed alignment for the Kerens to Parsons Section. A second botanical survey was completed in 2013 within the proposed alternative alignment. A third botanical survey was performed in 2013 to investigate proposed access roads. None of these surveys found populations or individuals of running buffalo clover. The Service concurs that the proposed project is not likely to adversely affect running buffalo clover.

During botanical surveys, two populations of small whorled pogonia were discovered within the alignment of the Kerens to Parsons Section. As a part of informal consultation concerning this plant's presence along this project, the Service provided several recommendations to consider in order to protect the two populations.

In your October 31, 2014, correspondence, you included a Biological Assessment (BA) for these populations of small whorled pogonia that addressed these conservation recommendations. The BA reviewed the alternative alignments explored in order to avoid and minimize impacts to the pogonia populations to the maximum extent practicable. Of the alternatives examined, Avoidance

Alignment Shift 3 (Shift 3) was the preferred alignment that avoided impacts to the small whorled pogonia populations. Shift 3 avoided and minimized impacts to the populations of small whorled pogonia by:

1. Moving the project right-of-way over 800 feet downstream from the closest population.
2. Providing a shadow analysis which demonstrates there will be no effect to the current pattern of direct sunlight exposure on small whorled pogonia or its surroundings.
3. Ensuring that planned best management practices for erosion and sedimentation will have no impacts on the populations, nor will storm run-off be introduced into their environment.
4. Ensuring that project design will not impact the floodplain.
5. Implementing a monitoring and preservation plan that will be completed by species experts before, during, and after project construction.

As a result of this information contained within the BA, the Service concurs that the proposed project is not likely to adversely affect small whorled pogonia.

Bald and Golden Eagles

Bald and golden eagles receive Federal protection under the BGEPA and the MBTA. They are listed by the Service as Birds of Conservation Concern in the Appalachian Mountains Bird Conservation Region, within which the proposed project occurs.

The BGEPA provides for the protection of bald eagles and golden eagles by prohibiting, except under certain specified conditions, the taking, possession, and commerce of such birds. BGEPA prohibits anyone, without a permit issued by the Secretary of the Interior, from taking bald and golden eagles, including their parts, nests, or eggs. The BGEPA defines "take" as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb." BGEPA provides civil and criminal penalties for persons who violate the law or regulations.

Under 50 Code of Federal Regulations (CFR) § 22.3, disturb is defined as "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available: 1) injury to an eagle; 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior; or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior." The BGEPA's definition of disturb also addresses effects associated with human induced alterations at the site of a previously used nest during a time when eagles are not present. Upon an eagle's return, if such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death or nest abandonment, then this would constitute disturbance.

No known occurrences of bald or golden eagles occur within the project area. Direct adverse impacts to these species are not anticipated. The project proponent does not need to obtain any permits in regards to bald and golden eagles prior to construction.

Migratory Birds

The MBTA implements protection of all native migratory game and non-game birds with exceptions for the control of species that cause damage to agricultural or other interests.

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According to 50 CFR § 10.12, a migratory bird means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in the Service's regulations, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof. In total, 836 bird species are protected by the MBTA.

The MBTA prohibits the take of any migratory bird, part, nest, egg or product. Take, as defined in the MBTA, includes by any means or in any manner any attempt at hunting, pursuing, wounding, killing, possessing, or transporting any migratory bird, nest, egg, or part thereof.

The MBTA does not explicitly include provisions for permits to authorize incidental take of migratory birds. While it is not possible to absolve individuals or companies from MBTA or BGEPA liability, the Service's Office of Law Enforcement focuses its resources on investigating and prosecuting those who take migratory birds without identifying and implementing reasonable and effective measures to avoid take. The Service will regard a company's coordination and communication with the Service, as appropriate means of identifying and implementing reasonable and effective measures to avoid the take of species protected under the MBTA and BGEPA.

The potential exists, therefore, for avian mortality from habitat destruction and alteration within the project boundaries. However, because clearing for this project will take place between November 15 and March 31, which is outside the nesting season for most native bird species, the Service does not anticipate adverse direct impacts to migratory birds. Additionally, implementation of this seasonal restriction will avoid direct take of most breeding birds, their nests, and their young (*i.e.*, eggs, hatchlings).

No biological assessment or further section 7 consultation under the ESA is required with the Service for the proposed project. Should project plans change or amendments be proposed that we have not considered in your proposed action, or if additional information on listed and proposed species becomes available, or if new species become listed or critical habitat is designated, this determination may be reconsidered. If you have any questions regarding this letter, please contact Liz Stout of my staff at (304) 636-6586, ext. 15, or elizabeth_stout@fws.gov or at the letterhead address.

Sincerely,



John E. Schmidt
Field Supervisor



United States Department of the Interior



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West Virginia Field Office
694 Beverly Pike
Elkins, West Virginia 26241

October 18, 2013

Mr. Keith Johnson
Mountain State Biosurveys, LLC
6703 Ohio River Road
Lesage, West Virginia 25537

Re: Appalachian Corridor H Kerens to Parsons Section, 2012 Bat Mist Net Survey, Randolph and Tucker Counties, West Virginia

Dear Mr. Johnson:

The U.S. Fish and Wildlife Service (Service) has reviewed the report on the bat mist net survey conducted in the proposed project area and submitted on September 13, 2013. These comments are provided pursuant to the Endangered Species Act (ESA; 87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). The survey followed the protocol outlined in the Draft Indiana Bat Recovery Plan. The survey covered 15 miles of potential bat habitat and was conducted at 25 net sites from July 13 to August 6, 2012. No federally listed bats were captured. However, there were 44 northern long eared bats (*Myotis septentrionalis*) and 8 little brown bats (*Myotis lucifungus*) captured during the survey efforts. The Service is evaluating whether both of these species should be listed under the ESA. If a decision is made to list these species, potential impacts from this project to these species may need to be addressed at that time. We encourage you to begin incorporating conservation measures to protect these species prior to any potential final listing decisions.

Mist net surveys are considered current for 5 years (the summer they are completed and the following four summer seasons). In this case, the survey will expire on May 15, 2017. If a significant amendment is proposed to change or expand this project, or if timber will be removed after that date, a new survey may be necessary and the Service should be contacted.

The area was surveyed for caves and abandoned mine portals and none were found in the action area.

Based on the information provided to us, the Service has concluded that no federally listed endangered and threatened bats are expected to be impacted by the project. Therefore, no biological assessment or further section 7 consultation under the ESA is required with the Service. Should project plans change or amendments be proposed that we have not considered in

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your proposed action, or if additional information on listed and proposed species becomes available, or if new species become listed or critical habitat is designated, this determination may be reconsidered. If you have any questions regarding this letter, please contact Liz Stout of my staff at (304) 636-6586, Ext. 15, or elizabeth_stout@fws.gov or at the letterhead address.

Sincerely,



John E. Schmidt
Field Supervisor