



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Kentucky Ecological Services Field Office
330 West Broadway, Suite 265
Frankfort, Kentucky 40601
(502) 695-0468

July 7, 2014

Mr. Thomas Smith
First Marine Properties, LLC
333 Broadway Street, Suite 924
Paducah, KY 42001

Re: FWS 2014-B-0370 & 2014-B-0371; Indiana Bat Conservation MOA for First Marine Properties, LLC in association with the Port at Calvert City and associated railroad spur project in Marshall County, Kentucky

Dear Mr. Smith:

Please find the attached Indiana Bat Conservation Memorandum of Agreement (MOA) between the Service and First Marine Properties, LLC (First Marine) accounting for adverse effects to the Indiana bat in association with the subject project. Please review for any questions or changes. If you do not have any, please have the responsible party sign, date, and return to our office via fax, email, or mail.

Execution of the attached MOA and the Indiana Bat Conservation Fund (IBCF) contribution that it requires will allow First Marine to be in compliance with the Endangered Species Act relative to the Indiana bat for the proposed project. If necessary to fulfill requirements of the U.S. Army Corps of Engineers and/or other federal nexus agencies obligations per section 7 of the ESA, please provide them with a copy of this letter, fully executed Conservation MOA, and proof of payment for their records.

In order to complete payment per the Conservation MOA (Section 6.4 of the MOA) please:

- 1) Make check or money order payable to **Kentucky Natural Lands Trust**,
- 2) Reference **First Marine; FWS 2014-B-0370 & 0371 IBCF** in the memo line,
- 3) Remit payment to:
Kentucky Natural Lands Trust
c/o Hugh Archer, Executive Director
433 Chestnut Street
Berea, Kentucky 40403
- 4) Provide proof of payment (copy of the check or receipt) to our office via fax, email, or mail.

Indiana bat (*Myotis sodalis*)

The May 2014 Biological Assessment prepared by Mainstream Commercial Divers, Inc. and the May 17, 2014 Biological Assessment prepared by H. Joe Cathey both state that there are no caves, rock shelters, or mine portals in the proposed project area. Therefore, we believe that it is not reasonably likely that the proposed project would adversely affect the Indiana bat as a result of impacts to potential hibernacula. Impacts to the Indiana bat as a result of impacts to its summer

roosting and foraging habitat are addressed in the Conservation MOA that is attached to this correspondence.

This Conservation MOA only covers the effects to the Indiana bat specified within the attached document. Potential effects to other federally listed species are being addressed in additional correspondences from the Service.

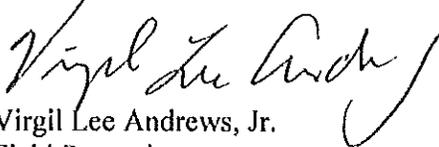
Northern long-eared bat (*Myotis septentrionalis*)

The Northern long-eared bat is currently proposed for federal listing under the ESA; a final determination on the proposed rule will be made no later than April 2, 2015. The entire state of Kentucky is considered potential habitat for the northern long-eared bat. During the summer, Northern long-eared bats typically roost singly or in colonies in a wide-variety of forested habitats, where they seek shelter during daylight hours underneath bark or in cavities/crevices of both live trees and snags, including relatively small trees and snags that are less than 5 inches in diameter at breast height (DBH). Northern long-eared bats have also been documented roosting in man-made structures (i.e., buildings, barns, etc.) during the summer. According to current winter occurrence data, Northern long-eared bats predominately winter in hibernacula that include caves, tunnels, and underground mine passages.

Your agency is required to confer with the Service if you determine that the proposed federal action is likely to jeopardize the continued existence of the Northern long-eared bat (50 CFR 402.10(a)). You may also voluntarily confer with the Service if the proposed action may affect a proposed species, like the Northern long-eared bat. At this time, no designated critical habitat has been proposed for the Northern long-eared bat. Although species proposed for listing are not afforded protection under the ESA, when a species is listed, the prohibitions against jeopardizing its continued existence and unauthorized take are effective immediately, regardless of an action's stage of completion. Therefore, we recommend that you contact our office to identify and address potential impacts to the Northern long-eared bat if the species is listed before the proposed project is completed.

If you have any questions regarding the information that we have provided, please contact Jessi Miller of my office at (502) 695-0468 extension 104.

Sincerely,


Virgil Lee Andrews, Jr.
Field Supervisor

**INDIANA BAT CONSERVATION
MEMORANDUM OF AGREEMENT
BETWEEN THE
U.S. FISH AND WILDLIFE SERVICE
AND
FIRST MARINE PROPERTIES, LLC**

This Memorandum of Agreement (MOA) is entered into by the United States Department of the Interior, U.S. Fish and Wildlife Service (Service) and First Marine Properties, LLC (First Marine) to promote the survival and recovery of the Indiana bat (*Myotis sodalis*), a federally listed endangered species. Together, the Service and First Marine are referred to as "Cooperators."

Section 1: PURPOSE AND OBJECTIVES

The Indiana bat is a federally listed endangered species native to a large portion of the eastern United States and the Commonwealth of Kentucky. This MOA will implement recovery-focused conservation measures that will be undertaken by the Cooperators and afford a measurable conservation benefit for the Indiana bat as set forth in the Service's Indiana Bat Mitigation Guidance as modified January 3, 2011 and hereby incorporated by reference. These measures will be implemented in association with the proposed project as detailed in section 4 of this MOA. All measures will be implemented according to the terms of this MOA. The Cooperators understand and intend that the benefits resulting from this MOA may also provide conservation benefits for other federal protected species and native fish and wildlife.

Section 2: AUTHORITY

This MOA is hereby entered into under the authorities of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) (ESA), Fish and Wildlife Act of 1956 (16 U.S.C. 742a. *et seq.*), and the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*). Section 5 of the ESA provides that, "The Secretary...shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species..." and "shall utilize land acquisition and other authority under the Fish and Wildlife Act, as amended, and the Migratory Bird Conservation Act, as appropriate". Section 7(a) (1) of the ESA further directs Federal agencies to "utilize their authorities in furtherance of the purposes of this Act [ESA] by carrying out programs for the conservation of endangered species and threatened species." The Fish and Wildlife Act of 1956 provides that the Secretary shall "...take such steps as may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources..." Finally, the Fish and Wildlife Coordination Act states that the Secretary is authorized "to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat..."

The authorization for any incidental take of the Indiana bat, as defined in section 9 of the ESA, and resulting from impacts that may be associated with the qualified project(s), as defined in section 4 of this MOA, is provided through the Service's incidental take statement and January 3, 2011 intra-Service biological opinion, which is incorporated herein by this reference. This biological opinion covers the Service's development of conservation agreements for the Indiana bat, which includes this MOA, that are based on implementation of the Indiana Bat Mitigation Guidance and provides incidental take of Indiana bats in the form of up to 2,500 acres of forested Indiana bat habitat per year through 2016.

Section 3: STATEMENT OF MUTUAL INTEREST

The mission of the Service is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Service's major responsibilities are for endangered species, threatened species, migratory birds, marine mammals, and freshwater and anadromous fish. The Service recognizes the ability and interest of First Marine to contribute to the conservation and recovery of the Indiana bat, and recognizes First Marine as a partner in the recovery and habitat conservation of the species. First Marine recognizes the Service's mission and its interest in developing partnerships to protect, restore, and manage important habitats on private and public lands for federal listed species. The Cooperators understand the collaboration for this MOA is voluntary.

Section 4: PROJECT DESCRIPTION

The proposed project consists of constructing a port at Tennessee River mile 11.0 and associated railroad spur in Marshall County, Kentucky. The following information was derived and calculated from the project proponent's agent, ICA Engineering's, July 3, 2014 correspondence and attachments.

The proposed project would result in the direct loss of 5.09 acres of forested habitat from one (1) Indiana bat habitat type as depicted in Table 1 below.

Table 1

Habitat Type	Forested Acreage Removed
Potential Habitat	5.09 acres

These Indiana bat habitat impacts are the impacts that are covered by this agreement and that were analyzed by the Service to assess the direct, indirect, and cumulative effects of the proposed project on Indiana bats.

Section 5: EFFECTIVE DATE AND TERMS OF AGREEMENT

This MOA is valid for First Marine's consideration for 90 days from the date of the Service's signature below, shall be deemed effective on the last date signed below, and shall remain in effect until all terms of the agreement have been fulfilled, except as modified in Section 8 hereof.

First Marine has determined that the removal of all Indiana bat habitat will likely occur during the timeframe when the Indiana bat is anticipated to be present (i.e., occupied), which is between the dates of April 1 – October 14. However, First Marine may also choose to conduct tree clearing during the timeframe when the Indiana bat is not anticipated to be present (i.e.; unoccupied), which is between the dates of October 15 – March 31. The Indiana Bat Conservation Fund contribution amount that is identified in section 6.4 of the MOA is based on the assumption that all tree removal associated with the project will be conducted during the occupied timeframe. If additional forested areas not considered in Section 4 of this agreement are to be removed, then First Marine must coordinate with the Service to determine if additional modification of this agreement is necessary, and, if found necessary, First Marine will seek such modification.

Section 6: SPECIFIC OBLIGATIONS OF THE COOPERATORS

First Marine and the Service agree to fulfill the following conditions to minimize the potential level of take of the Indiana bat, compensate for adverse effects on the Indiana bat that may result from construction of the project, and promote future conservation and recovery of the Indiana bat:

6.1 The Service will take the necessary steps to ensure that the project covered under this MOA meets federal requirements for compliance with the National Environmental Policy Act (NEPA) and ESA. If First Marine has NEPA requirements beyond the scope of this MOA, First Marine or other Federal action agency are responsible for those additional requirements.

With regard to the ESA, the Biological Opinion authorizes incidental take of Indiana bats associated with forested habitat removal. As such, paragraphs 6.3 and 6.4 are incorporated to ensure compliance with the Reasonable and Prudent Measures and Terms and Conditions of the biological opinion. First Marine acknowledges that any divergence from these measures and conditions may result in a violation of Section 9 of the ESA.

6.2 First Marine will take the necessary steps to ensure that the project covered under this MOA meets federal requirements for compliance with the National Historic Preservation Act (NHPA).

6.3 The project proposed by First Marine, as described in Section 4, will result in the incidental take of Indiana bats in the form of habitat loss totaling not more than 5.09 acres of potential Indiana bat summer habitat. First Marine may remove this habitat during the occupied and/or unoccupied time as stated in Section 5. Forested habitat associated with the proposed project, but not considered in this MOA, shall not be removed without further coordination with the Service.

6.4 First Marine shall contribute \$16,797.00 to the Indiana Bat Conservation Fund (IBCF) administered by the Kentucky Natural Lands Trust (KNLT). This contribution is based on 5.09 acres of potential Indiana bat summer habitat using the process identified in the Indiana Bat Mitigation Guidance. Funds shall be provided to KNLT within thirty (30) days of the last signature to this MOA. First Marine shall provide

the Service with a copy of the check or transaction receipt within seven (7) business days of payment that shows the date and amount of the deposit.

In summary, this MOA provides recovery based conservation benefits for the Indiana bat in form of contributions to the IBCF which, in turn, will fund Indiana bat habitat protection, conservation, restoration and/or priority monitoring and research projects for the Indiana bat.

Section 7: COOPERATION

Both the Service and First Marine acknowledge that it is their desire to facilitate the processes set forth in this MOA by open communication and cooperation. Both parties agree to exercise their rights and obligations under this MOA in good faith. If at any time First Marine has questions regarding this MOA or the Guidance, the Service agrees to make itself available for consultation in a timely fashion.

Section 8: MODIFICATION OR TERMINATION

Modifications to this MOA may be proposed by either party in writing and will become effective upon being reduced to a written instrument and being signed by duly authorized representatives of the Cooperators.

First Marine or the Service may terminate this MOA at any time within or prior to thirty (30) days of the last signature to this MOA upon written notification from the other signatory party. Failure to fulfill the provisions, as specified, within paragraph 6.4 will result in automatic termination of this MOA.

Section 9: OTHER PROVISIONS

9.1 The Cooperators hereto agree that they shall be liable for the negligent or wrongful acts or omissions of their employees, agents, and assigns only to the extent liable under applicable law. Nothing in this MOA shall be interpreted or construed as constituting a waiver by any party of sovereign immunity or statutory limitation on liability.

9.2 Each provision of this MOA shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of the MOA shall be prohibited or invalid under application law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this MOA.

9.3 No provision of this MOA shall be interpreted as or constitute a commitment or requirement that either party take actions in contravention of applicable laws, either substantive or procedural.

9.4 Nothing in the MOA shall be interpreted as or constitute a commitment or requirement that the Service obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. §1341, or any other law or regulation.

9.5 Third Parties Not to Benefit: This MOA does not grant rights or benefits of any nature to any party not named or identified in this MOA.

9.6 Merger: This MOA contains the sole and entire MOA of the parties. No oral representations of any nature form the basis of or may amend this MOA. This MOA may be extended, renewed, or amended only when agreed to in writing by the parties.

9.7 Waiver: Failure to enforce any provision of this agreement by either party shall not constitute waiver of that provision, nor a waiver of a claim for subsequent breach of the same type, nor a waiver of any other term of this agreement. The waiver of any provision must be express and evidenced in writing.

9.8 Assignment: No part of this agreement shall be assigned to any other party.

Section 10: NOTICES AND AUTHORIZED REPRESENTATIVES

Notices shall be made in writing to the persons at the addresses listed below and may be given by personal delivery, mail or by telecopy (FAX) to the duly authorized representatives listed below. If there are changes in a party's representative, each party shall notify the other party, in writing, within thirty (30) days of the change in their representative.

U.S. Fish and Wildlife Service
Virgil Lee Andrews, Jr.
Field Office Supervisor
330 West Broadway, Room 265
Frankfort, Kentucky 40601
502/695-0468 (telephone)
502/695-1024 (fax)

First Marine Properties, LLC
Attn: Mr. Thomas Smith
333 Broadway Street, Suite 924
Paducah, KY 42001
Contact: Mr. Matt Brawley
ICA Engineering
mbrawley@icaeng.com

Each party hereby indicates its acceptance of the terms of the MOA as outlined herein by its signature below. The parties hereto have executed this MOA as of the last written date below:

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

BY: Virgil Lee Andrews

TITLE: Field Supervisor

DATE: 7/7/14

FIRST MARINE PROPERTIES, LLC

BY: Thomas Smith

TITLE: CPA - POA

DATE: 7-8-14

FIRST MARINE PROPERTIES, LLC

333 BROADWAY, SUITE 924
PADUCAH, KY 42001
PH. (270) 442-9630

Check Number: 5910



REGIONS

73-174/839

DATE
Jul 8, 2014

AMOUNT

\$ 16797.00

Memo: FWS 2014-B-0370 & 0371 IBCF

Sixteen Thousand Seven Hundred Ninety-Seven and 00/100 Dollars

PAY
TO THE
ORDER
OF:

Kentucky Natural Lands Trust
C/O Hugh Archer, Executive Dir
433 Chestnut Street
Berea, KY 40403

AUTHORIZED SIGNATURE

THIS DOCUMENT CONTAINS HEAT SENSITIVE INK. TOUCH OR PRESS HERE. RED IMAGE DISAPPEARS WITH HEAT.

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