

Northern Long-Eared Bat “Uplisted” to Endangered Status

Article By:

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On November 30, 2022, the United States Fish and Wildlife Service (FWS) [published a final rule](#) reclassifying the northern long-eared bat under the Endangered Species Act (ESA), uplisting the bat from “threatened” to “endangered” status (see 87 FR 73488). Though initially set to become effective on January 30, 2023, FWS has [delayed the effective date](#) of the uplisting until March 31, 2023. Once effective, this reclassification will impact entities engaged in large construction projects and other developments across the U.S. — especially those that require tree removal.

Environmental groups have long sought to reclassify the northern long-eared bat due to the impact of white-nose syndrome — a fungal disease that the FWS states [has caused declines of 97% to 100% in affected bat populations](#). Environmental groups eventually challenged the FWS’s decision to list the bat as “threatened” rather than “endangered” in the U.S. District Court for the District of Columbia. In 2020, the court held that the FWS had relied on faulty data in making its initial listing decision and remanded the decision to the agency for a do-over (see *Ctr. for Biological Diversity v. Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020)).

Now, the FWS has concluded that the northern long-eared bat is in danger of extinction throughout all or a significant portion of its range — which includes 37 states in the eastern and north central United States and the District of Columbia — and qualifies as an endangered species under the ESA.

Until the new rule becomes effective, regulated entities continue to be governed by the [FWS’s 2016 guidance issued under Section 4\(d\) of the ESA](#). The “4(d) Rule” provides for “measures that are necessary and advisable to provide for the conservation of the Northern Long-Eared Bat,” prohibiting most purposeful take of the bat throughout its range but allowing incidental take resulting from otherwise lawful activities in areas not yet affected by white-nose syndrome (see 81 FR 1900). In areas already affected by white-nose syndrome, the 4(d) Rule prohibits incidental take resulting from tree removal occurring in proximity to bat habitat.

But when the new rule becomes effective on March 31, 2023, the 4(d) Rule will no longer apply. As a result, projects (1) that are located within the bat’s range and (2) that involve potential impacts to its habitat — tree clearing, for example — will require additional time and compliance costs to ensure compliance with the ESA.

Importantly, once the new rule is effective, Section 7 of the ESA requires federal agencies to consult with the FWS to ensure that permitted actions will not jeopardize any listed species. For example,

work requiring a permit under Section 404 of the Clean Water Act from the Army Corps of Engineers would trigger a requirement that the Corps first consult with FWS regarding potential impacts to the northern long-eared bat (and any other listed species). The FWS may then require the entity to apply for an incidental take permit and develop a habitat conservation plan as a condition of the Corps' permit.

Even if no other federal permit is required for a particular activity, Section 9 of the ESA generally prohibits any take of an endangered species. Any take without an incidental take permit issued by the FWS and an approved habitat consultation plan would likely be considered a violation of the ESA, subjecting the regulated party to civil and possibly criminal penalties.

However, the FWS has indicated that it is developing tools to replace the safe harbor previously available under the 4(d) Rule. One such tool is a "determination key" that will allow regulated entities to receive automatic verification for some projects. Another is the Interim Consultation Framework that will facilitate the transition between the 4(d) Rule and standard Section 7 consultation. The FWS anticipates that such tools will be available between March and June 2023.

The FWS has also attempted to identify — to the "maximum extent practicable" — activities that will or will not constitute a violation of the ESA under the new rule. For example, an activity is "unlikely to result in a violation" if it involves "insignificant amounts of suitable forested/wooded habitat removal provided it occurs during the hibernation period (i.e., the winter season) and the modification of habitat does not significantly impair an essential behavior pattern such that it is likely to result in the actual killing or injury of northern long-eared bats after hibernation" (see 87 FR 73488, 73502).

On the other hand, FWS has stated that activity "may potentially" violate the ESA if it involves the "[u]nauthorized destruction or modification of suitable forested habitat (including unauthorized grading, leveling, burning, herbicide spraying, or other destruction or modification of habitat) in ways that kill or injure individuals by significantly impairing the species' essential breeding, foraging, sheltering, commuting, or other essential life functions" (see 87 FR 73488, 73503). Similarly, an action may violate the ESA if it involves the "[u]nauthorized removal or destruction of trees and other natural and manmade structures being used as roosts by the northern long-eared bat that results in take of the species."

The question for regulated entities is whether the tree removal needed for their projects is "insignificant," and whether their activity significantly impairs the northern long-eared bat's life functions. These determinations are likely subject to the discretion of the FWS.

In sum, reclassification of the northern long-eared bat as "endangered" rather than "threatened" will mean additional time and compliance costs spent on projects taking place within the bat's range. These potentially include obtaining permits, allocating time for other government agencies to consult with FWS prior to permitting, conducting surveys, and developing habitat conservation plans. For regulated activity that cannot be completed by March 31, 2023, it would be prudent to request an informal conference with the FWS as soon as possible to explore site development options under the new rule. Such options could include mitigation plans that preserve potential habitat on site, limitations regarding the size and number of trees that may be removed, pre- and post-activity bat surveys on-site and near the site, efforts to identify any nearby hibernacula, and other conservation measures.

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