

Alert to Project Developers: New Reclassification Announcement Under Endangered Species Act



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On Tuesday, November 29, 2022, the U.S. Fish and Wildlife Service (USFWS) [issued a press release](#) announcing a Final Rule establishing the northern long-eared bat (NLEB) as “endangered” under the Endangered Species Act (ESA). This reclassification goes into effect on [January 30, 2023](#). The NLEB was listed as “threatened” under the ESA in 2015, largely due to the widespread impacts of white-nose syndrome, a deadly disease that affects hibernating bats across North America. In reviewing data on the spread and impacts of white-nose syndrome, the USFWS indicated in its press release that the disease has caused “estimated declines of 97 to 100% in affected [NLEB] populations.”

Under the ESA, federal agencies are required to consult with the USFWS to ensure that a proposed project that is either funded or authorized by the agency will not jeopardize a threatened or endangered species. Further, private actions—*i.e.*, project development that may adversely impact a threatened or endangered species, also require consultation with the USFWS and implementation of certain protective measures that may be documented in a USFWS-approved Habitat Conservation Plan (HCP), which is a planning document that seeks to accommodate

economic development, while also protecting listed species. Under an HCP, limited and unintentional take of listed species is authorized when such takes occur incidental to otherwise lawful activities.

Since the NLEB's listing as "threatened" in 2015, compliance with the ESA could be achieved under the Section 4(d) rule, which incentivizes conservation actions and also streamlines the ESA regulatory process. The effect of [reclassifying the NLEB to "endangered"](#) removes the opportunity to utilize a species-specific Section 4(d) rule provision in project planning and permitting, requiring that a proposed project instead be reviewed under the otherwise applicable ESA evaluation and permitting process, including an HCP for projects with no other federal nexus.

While not a safe harbor for compliance, the [Federal Register](#) notice lists activities that are unlikely to result in a violation of the ESA Section 9 prohibition on "take" of a listed species. This list includes, among other activities:

- (i) Minimal tree removal and vegetation management activities that occur at any time outside of suitable forested/wooded habitat and more than five (5) miles from known or potential habitat for the NLEB;
- (ii) Insignificant amounts of suitable forested/wooded habitat removal, given that such removal occurs during the hibernation period and the modification does not significantly impair an essential behavior pattern of the NLEB that is likely to result in actual killing or injury after hibernation;
- (iii) Tree removal that occurs at any time in highly developed urban areas;
- (iv) Herbicide application activities that adhere to the product label, occur outside of suitable forested/wooded habitat, and are more than 5 miles from known or potential habitat for the NLEB; and
- (v) Activities that may result in the removal or modification of human structures, provided that the structure assessment shows no signs of bats and the structure does not provide roosting habitat for the NLEB.

It is important to note that while the listed activities are "unlikely" to result in a "take" of the NLEB and thus serve as a guidepost for project development, including such attributes in a project is not a substitute for agency review, as otherwise required under the ESA. Due to the NLEB's extensive habitat throughout the United States, with the largest populations occurring in the north-central and north-eastern states, reclassifying the NLEB as endangered could have a significant impact on project development timelines and costs within these regions.

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