

Potential USFWS Reclassification of The Northern Long-Eared Bat to “Endangered:” What Could This Mean for Developers



By [Christina D. Bonanni](#), [Ian A. Shavitz](#)

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On Wednesday, March 23, 2022, the U.S. Fish and Wildlife Service (USFWS) issued a [Notice of Proposed Rulemaking](#) (Proposed Rule) to reclassify the northern long-eared bat (NLEB) from “threatened” to “endangered” under the Endangered Species Act (ESA). Such a reclassification could have significant ramifications for developers, most notably, the loss of the ability to utilize the Section 4(d) Rule to comply with the ESA.

The NLEB, which can be found in 37 states, has been beleaguered by white-nose syndrome, a deadly disease affecting cave-dwelling bats throughout the United States. The [USFWS cites](#) white-nose syndrome spreading into nearly 80% of the NLEB species’ entire range since 2015. Due to the decline in NLEB population, in 2015, the

USFWS listed the NLEB as “threatened.” Given the continued NLEB population decline, the USFWS now proposes to list the NLEB as “endangered.” As discussed below, such a reclassification could have significant ramifications for developers, most notably, the loss of the ability to utilize the Section 4(d) Rule to comply with the ESA.

BACKGROUND

Under the ESA, the listing of a species as threatened or endangered provides special protections for the species and its habitat. Specifically, the ESA prohibits the “take” of an endangered fish or wildlife species without a permit, where take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” such species.

Proposed actions by federal agencies or private parties that may impact such protected species or habitat could result in the need to secure an ESA “take” permit, undertake mitigation or avoidance measures, and/or prepare a Habitat Conservation Plan before proceeding with such an action. As such, undertaking an action where a listed species or its habitat is present and may be impacted can add regulatory and permitting requirements to a project that can delay a project by multiple years and add significant costs.

The Section 4(d) Rule

Section 4(d) of the ESA requires USFWS to promulgate regulations tailored to conserve threatened species. The goal of the Section 4(d) Rule is to help conserve species by authorizing activities with minor or even beneficial impacts to a listed species without requiring full agency review and permitting, and it allows federal agencies to customize prohibitions and regulate activities for those threatened species based on project-specific considerations.

In 1978, FWS promulgated the “blanket 4d rule,” which extends the prohibitions for endangered species to threatened species unless FWS promulgates a specific Section 4(d) rule for the species. In January 2016, the USFWS established a [species-specific Section 4\(d\) Rule](#) for the NLEB, which includes the following high-level provisions:

- Incidental take of NLEB outside of their hibernacula resulting from activities other than tree removal is not prohibited;
- Incidental take resulting from tree removal is prohibited if it occurred within a 0.25 mile radius of known NLEB habitat, or cuts or destroys known occupied roost trees, or any other trees within a 150-foot radius of such known occupied roost trees during the pup season of June 1 through July 31; and
- Incidental take of NLEB as a result of the removal of hazardous trees for the protection of human life and property is not prohibited.

The effect of the Proposed Rule reclassifying the NLEB from “threatened” to “endangered” would remove the species-specific Section 4(d) Rule provisions from consideration in project planning and permitting, requiring instead that a project go through the full ESA evaluation and permitting process. These developments would have significant implications on project development timelines. Moreover, given the predominance of white-nose syndrome in the north-eastern states, projects within the northeast could be subject to stricter assessment of

impacts to the NLEB should the reclassification occur.

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 will have a significant impact on project development timelines within those regions. Moreover, given the predominance of white-nose syndrome [in the north-eastern states](#), projects within the northeast could be subject to stricter assessment of impacts to the NLEB should the reclassification occur.

The USFWS is taking public comments on the proposed listing until May 23rd, 2022. The agency expects to make a final decision by the end of 2022.

For assistance in drafting and submitting comments, or for questions regarding this Client Alert, please contact Lippes Mathias' Environment & Energy Team Practice Leader, Ian Shavitz at ishavitz@lippes.com or Senior Associate, Christina Bonanni at cbonanni@lippes.com.

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