Endangered Species Act/Northern Long-Eared Bat: U.S. Fish & Wildlife Service Proposes to Reclassify Listing to Endangered Status

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On Wednesday, March 23, 2022, the U.S. Fish & Wildlife Service (the Service) published a rule proposing to reclassify the northern long-eared bat (Myotis septentrionalis), a bat species found in all or portions of 37 U.S. States (including Arkansas), the District of Columbia, and Canada, as an endangered species under the Endangered Species Act (ESA, or "the Act"). See 87 Fed. Reg. 16,442 (Mar. 23, 2022). The northern long-eared bat is currently listed as a "threatened" species with a species-specific Section 4(d) Rule. *Id.*

The Service will accept comments on the proposal on or before May 23, 2022. The Service will hold a public informational meeting on April 7, 2022, followed by a public hearing.

Background

Under the ESA, the Service may determine that a species is an endangered or threated species because of any of five factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a). The ESA defines an "endangered species" as a species that is in danger of extinction throughout all or a significant portion of its range. In turn, a species is "threatened" if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(6) and (20).

Previous Action

On April 2, 2015, the Service finalized a rule listing the northern long-eared bat as a threatened species. Section 4(d) of the ESA provides that whenever a species is listed as threatened, the Secretary "shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species," and "may by regulation prohibit with respect to any threatened species any act prohibited" under the ESA for endangered species. 16 U.S.C. § 1533(d). This is commonly referred to as a Section 4(d) Rule. On January 14, 2016, the Service finalized a Section 4(d) Rule that:

- Prohibited purposeful take of northern long-eared bats throughout the species' range
- Prohibited take of northern long-eared bat in their hibernacula, including disturbing or disrupting hibernating individuals when they are present as well as the physical or other alteration of the hibernaculum's entrance or environment when bats are not present if it impairs essential behavioral patterns

- Prohibited incidental take resulting from tree removal if it occurs within 0.25 mile radius of known hibernacula, destroys known occupied maternity roost tree, or destroys any other trees within a 150-foot radius of a known maternity tree
- Exempted from incidental take otherwise lawful activities in those areas not yet affected by white-nose syndrome (WNS)

On January 28, 2020, the Federal District Court for the District of Columbia remanded the Service's April 2, 2015 listing decision and ordered the Service to make and publish a new listing decision. See *Center for Biological Diversity v. Everson*, 435 F.Supp.3d 69 (D.D.C. 2020).

Proposed Endangered Status

According the Service, the "northern-long eared bat is a wide ranging bat species found in 37 States (Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming), the District of Columbia, and 8 Canadian provinces." 87 Fed. Reg. at 16,443. The bat usually overwinters in caves or mines and spends the remaining portion of the year in forested habitat. *Id.*

The Service identified four stressors that effect the northern long-eared bat: WNS, wind energy-related mortality, climate change, and habitat loss. 87 Fed. Reg. at 16,446. WNS is a disease caused by fungus that "leads to increases in frequency and duration of arousals during hibernation and eventual depletion of fat reserves needed to survive winter, and results in mortality." *Id.*

Tragically, "WNS has caused estimated northern long-eared bat population declines of 97-100 percent across 79 percent of the species' range." *Id.* The Service, therefore, proposes to "determine that the northern long-eared bat is in danger of extinction throughout all of its range." 87 Fed. Reg. 16,449. Thereby, listing the northern long-eared bat as an endangered species.

If the proposal to reclassify the northern long-eared bat is finalized, the Service will also remove the species-specific Section 4(d) Rule. In its place would be the full suite of ESA obligations and prohibitions. The Service noted, or example, that federal actions within the species' habitat that may require Section 7 conference or consultation include, but are not limited to:

- Management and any other landscape-altering activities on Federal Lands
- Issuance of Section 404 Clean Water Act permits by the U.S. Army Corps of Engineers
- Construction and maintenance of roads or highways by the Federal Highway Administration

87 Fed. Reg. at 16,450. The Service further noted that "[a]t this time, [it was] unable to identify specific activities that would not be considered to result in a violation of [S]ection 9 of the Act because the northern long-eared bat occurs in a variety of habitat conditions across its range." *Id*.

Public Comments

Final action under the ESA must be based on the "best scientific and commercial data available." The Service is therefore requesting comments and information from other governmental agencies, the scientific community, industry, and interested parties concerning species' biology, range and population trend, and other related items. *Id.* 16,442–43.

A copy of the Service's proposed rule can be found HERE.