

Fish and Wildlife Finalizes Long-Eared Bat Rule

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In 2015, the **United States Fish & Wildlife Service (“USFWS”)** announced that it was listing the Northern Long-eared bat (*Myotis septentrionalis*) as a threatened species under the Endangered Species Act (“ESA”). Citing the importance of bats to the nation’s ecology, specifically in controlling insect populations, USFWS’s decision to list the Northern Long-eared bat was primarily in response to white-nose syndrome, a fungal disease severely impacting North American bat populations. Along with the listing announcement, USFWS proposed an interim rule designed to limit the regulatory burden on land owners and other impacted parties within the Northern-long eared bat’s range. That rule became final on January 14, 2016.

The main driver behind USFWS’s decision to list the Northern Long-eared bat is the increasingly devastating impacts of so-called white-nose syndrome (“WNS”) on bat populations. WNS is a fungal growth that occurs around the noses and wings of hibernating bats and has been found in 25 states in the eastern portion of the United States. Large portions of bats infected by WNS exhibit abnormal behaviors during hibernation, which results in the bats’ fat stores being exhausted too rapidly, ultimately killing them. As of 2012, WNS was estimated to have killed between 5.7 million and 6.7 million bats in North America. Bat populations in some areas have been estimated to have decreased by as much as 90% as a result of WNS.

The final Northern Long-Eared Bat 4(d) Rule (the “Final Rule”) aims to protect populations of bats in areas impacted by WNS without creating an overly burdensome regulatory structure. The Final Rule regulates activities that may result in a “taking” (*i.e.* harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing or collecting) of bats. There are four main components of the Final Rule: (1) whether or not the proposed activity will result in a purposeful or incidental take; (2) whether the proposed activity is in a designated WNS Zone; (3) whether the activity will take place within a cave or mine where bats hibernate (*a/k/a* a hibernaculum); and (4) whether or not the activity will result in the removal of trees in the vicinity of a “maternity roosting tree” or a hibernaculum.

A purposeful take is when the reason for the activity is to conduct a take, as opposed to an incidental take, which is when the take is a consequence of another otherwise lawful activity, such as harvesting trees. Under the Final Rule, a purposeful take of Northern Long-eared bats is prohibited, unless the take is to remove bats from a human structure (*e.g.* a residence) or is the result of

permitted research activities. Incidental takings, on the other hand, are not prohibited, so long as the incidental take occurs outside the WNS Zone. The WNS Zone encompasses a large portion of the eastern part of the United States, stretching from Maine to North Carolina and west to portions of Nebraska and Kansas.

Within the WNS Zone, an incidental take is not prohibited so long as it does not (1) take place in or alter a hibernaculum or (2) involve the removal of trees. However, certain tree removal activities are not prohibited. First, the removal of hazardous trees to protect human life or property is not prohibited. Second, an incidental take from tree removal activities is not prohibited unless the trees to be removed are within 150 feet of trees known to have been occupied by female or juvenile bats and are thus considered “maternity roosting trees” or the trees are within a quarter mile of a hibernaculum. However, if either of these circumstances are present, the proposed tree removal may still be permitted. USFWS will determine if the activity can be carried out without harming or killing any bats or may issue a permit to allow the taking.

In sum, the Final Rule appears to strike a balance between the important goals of conservation and economic development. While the regulated community is subject to another layer of review in the course of development activities, particularly when tree removal is involved, a take permit will only be required in limited circumstances. Developers considering projects in wooded areas should have the area reviewed for the presence of Northern Long-eared bat and the proximity to a hibernaculum or a maternity roosting tree when conducting due diligence.

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