

USFWS Proposes to List Northern Long-Eared Bat as Endangered

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The U.S. Fish and Wildlife Service (“USFWS”) recently proposed to change the listing of the northern long-eared bat under the Endangered Species Act from threatened to endangered. The USFWS determined that the northern long-eared bat now meets the definition of an endangered species, meaning that it is currently in danger of extinction. In the United States, the species occupies thirty-seven states ranging from Maine west to Montana, south to eastern Kansas, eastern Oklahoma, Arkansas, and east to South Carolina. According to the USFWS, the bat population is threatened due to the impact of white-nose syndrome, forest management activities, wind energy development, and habitat modification.

If the listing status is changed, USFWS will also revoke the rule that was previously promulgated under Section 4(d) of the Endangered Species Act that exempts most lawful activity from the prohibition on incidental take of the northern long-eared bat. If the Section 4(d) rule is revoked, any incidental take without a permit would be considered a violation of the Endangered Species Act. The proposed rule was USFWS’s response to a court order requiring reconsideration of the northern long-eared bat’s classification.

The public comment period closed on May 23, 2022. Several environmental groups, including the Southern Environmental Law Center, supported the proposal. In contrast, the Edison Electric Institute, an association of U.S. investor-owned electric companies, opposes the proposed reclassification. EEI member facilities require year-round operations and maintenance work, including vegetation management, which is currently conducted in reliance on the existing Section 4(d) rule. EEI believes the loss of the Section 4(d) rule could result in restrictions on critical utility infrastructure maintenance and project delays. EEI encouraged USFWS to concentrate its efforts on the bat’s main threat to existence, white-nose syndrome, instead of revoking the Section 4(d) rule. The American Clean Power Association, a trade association of the clean power industry, did not oppose the change in the listing status given the impacts of white-nose syndrome on the northern long-eared bat; however, the Association commented that the USFWS’s analysis does not accurately assess the impact of the wind energy industry on the northern long-eared bat. The Association requested that the USFWS correct some of the inaccurate assumptions on which its listing determination would be based in light of USFWS’s indication that the information would be used for other decisions and activities under the Endangered Species Act.

The Section 4(d) rule remains in place until the USFWS finalizes the proposal, which it intends to do by the end of November 2022. For further information or questions about the proposed reclassification of the northern long-

heard bat and its impact on your business, please reach out to your Winston & Strawn contacts.

Please note that government orders on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date above.

Winston & Strawn Summer Associate Joshua Brown also contributed to this blog post.

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