

USFWS Issues Pro-Wind Energy Sector 4(d) Rule for Northern Long-Eared Bats

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The United States Fish and Wildlife Service (USFWS) recently released a final rule under § 4(d) of the Endangered Species Act (ESA) for the northern long-eared bat that contains a key exception for wind energy facilities.

In April 2015, USFWS listed the northern long-eared bat as threatened under the ESA in order to address white-nose syndrome, a disease which is responsible for the rapid and widespread decline in populations of the northern long-eared bat across much of the eastern half of the United States. In conjunction with the listing, USFWS issued an interim § 4(d) rule in order to except certain types of activities from the ESA's take prohibition ("take" is defined under the ESA to mean to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct").

On January 14, USFWS finalized a streamlined version of its § 4(d) rule. For areas of the country outside the white-nose syndrome zone, there are no prohibitions on incidental take (defined as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity"). Inside the white-nose syndrome zone, incidental take is prohibited only if it occurs (1) within a hibernacula (hibernation sites such as caves), (2) during tree removal activities within ¼ mile of a known, occupied hibernacula, or (3) during the removal of an occupied maternity roost tree or other trees within 150 feet thereof between June 1 and July 31.

Purposeful take (defined under the ESA as actions done for the reason of conducting some form of take) is also prohibited, except for defense of human life, bat removal from human structures, and removal of hazardous trees for protection of human life and property.

Activities within the white-nose syndrome zone not involving purposeful take or prohibited types of incidental take are not prohibited under the § 4(d) rule. Specifically, incidental take from the operation of utility-scale wind-energy turbines is *not* prohibited. USFWS concluded in the *Federal Register* notice that "there is no evidence suggesting that effects from wind-energy development has led to significant declines in this species, nor is there evidence that regulating the incidental take that is occurring would meaningfully change the conservation or recovery potential of the species." Due to the wind energy industry's implementation of voluntary conservation measures and best management practices to protect other bat species, USFWS found that prohibiting incidental take of the northern long-eared bat from wind energy projects is not "necessary and advisable for the conservation of [the] species."

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