

# Client Alert

February 2016

## Final Northern Long-Eared Bat Rule Improves Incidental Take Provisions

In early 2016, the US Fish and Wildlife Service (FWS or the Service) published the Final § 4(d) Rule for the Northern Long-Eared Bat (NLEB). 81 Fed. Reg. 1900 (Jan. 14, 2016). As a threatened species under the Endangered Species Act (ESA), NLEB does not automatically receive all the protections that endangered species receive. The Final § 4(d) Rule, which took effect on February 16, 2016, provides incidental take authorization that is more comprehensive and biologically focused than the Interim § 4(d) Rule that was issued last year. Rather than authorize incidental take of NLEB for only certain commercial sectors and activities, as the Interim Rule did, the Final Rule focuses on the proximity of activities to NLEB hibernacula and maternity roosts, and distinguishes between those activities that involve tree removal and those that do not. The more comprehensive approach reflected in the Final § 4(d) rule should benefit both the NLEB and commercial activities. Additionally, the Biological Opinion (BO) accompanying the Final Rule provides an optional framework that allows federal agencies to streamline ESA § 7 consultation in certain circumstances.

### Background

The NLEB ranges across much of the eastern and north central United States. The bat population rapidly declined as a result of white-nose syndrome (WNS), an infectious fungal disease that is found in much of the species' 37-state range.

NLEB was listed as threatened under the ESA in April 2015. 80 Fed. Reg. 17,974 (April 2, 2015). The listing decision included an Interim § 4(d) Rule. A § 4(d) rule provides conservation measures deemed by the Service to be "necessary and advisable to provide for the conservation of threatened species." 16 USC. § 533(d). A § 4(d) rule for a threatened species may impose take prohibitions, and may also authorize incidental take in prescribed circumstances. The Interim § 4(d) Rule for the NLEB exempted incidental take of the species that resulted from certain categories of activities.

### Final § 4(d) Rule

The Service concluded that, because WNS is the primary threat to the NLEB and because non-WNS threats (cumulatively) are not impacting the species at the population level, it would apply take prohibitions only to activities that the Service determined may impact the species in its most vulnerable life stages. Therefore, under the Final Rule, whether incidental take of NLEB is prohibited depends on several factors: whether the take occurs in areas affected by WNS; whether the take occurs within NLEB hibernacula (which may include caves, mines, and other locations where bats hibernate in the winter); and whether the take involves tree removal. As with the Interim § 4(d) Rule, the Final Rule provides that incidental take is not prohibited in areas *not* affected by WNS. In areas affected by WNS, prohibition of incidental take depends on whether the take is outside hibernacula and whether the take involves tree removal.

The Final Rule does not distinguish between categories of commercial activities, except to establish separate prohibitions for activities involving tree removal from those that do not involve tree removal. This is a positive change for industry because the Interim Rule's list of authorized activities was limited to

certain categories of activities (e.g., right-of-way expansion, maintenance, and forestry), and thus the Interim Rule excluded activities that posed no greater risks to NLEB simply because they fell outside the covered categories.

Additionally, the Final Rule allows purposeful take in some limited circumstances, including take for the protection of human health and safety (e.g., take of bats that may be infected with rabies) and removal of the species from human structures (so long as in compliance with state regulations).

Finally, and also of benefit to commercial activities as well as regulators, the BO issued with the Final § 4(d) Rule provides an optional framework that allows federal agencies to streamline ESA § 7 consultation in certain circumstances.<sup>1</sup> If federal agencies choose, they may rely on the BO to fulfill their project-specific § 7(a)(2) responsibilities under this framework. Although this framework still requires coordination with FWS, it does not require an additional concurrence by the Service in order to fulfill ESA § 7 consultation requirements. The framework applies only to NLEB. Accordingly, if other listed species are affected, federal agencies will still need to engage in consultation for those species.

### **Pending Legal Challenges**

In April 2015, the Center for Biological Diversity (CBD) filed suit in the US District Court for the District of Columbia challenging the Interim § 4(d) Rule for the NLEB, alleging that the Service should have undertaken a National Environmental Policy Act (NEPA) review before adopting the Interim § 4(d) Rule. *Center for Biological Diversity v. Ashe*, No. 1:15-cv-00477 (D.D.C. filed April 2, 2015).

The lawsuit was stayed pending the publication of the Final Rule. Now that the Final Rule has been issued, the stay has been lifted and a schedule set for any amendments or supplements to CBD's complaint. CBD has filed a notice of intent to challenge the Service's decision to list the NLEB as threatened (rather than endangered) and the Final § 4(d) Rule. It remains to be seen whether these additional challenges will be brought separately or together.

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<sup>1</sup> The BO addresses both the effects of the Final 4(d) Rule *and* the effects of activities that are excepted from take prohibitions under the Final 4(d) Rule over the next seven years.

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