



## Northern Long-eared Bat - Interim Final 4(d) Rule

### *Questions and Answers*

#### **1. What action is the Service taking?**

On January 15, 2015, the Service published a proposed rule under section 4(d) of the Endangered Species Act (ESA) for the northern long-eared bat and opened a public comment period on the proposal. Rather than publishing a final 4(d) rule at this time, we are publishing an interim 4(d) rule in conjunction with the final rule to list the northern long-eared bat as threatened. We are also opening a 90-day public comment period on the interim rule to gather additional information as we work to refine and finalize the 4(d) rule.

#### **2. Is the 4(d) rule in effect now?**

The final listing and interim rule published in the *Federal Register* on April 2, 2015, and the rule goes into effect on May 4, 2015.

#### **3. What provisions are included in the interim 4(d) rule for the northern long-eared bat?**

For all areas within the range of the northern long-eared bat, all purposeful take is prohibited except:

- removal of northern long-eared bats from human structures, and
- actions relating to capture, handling, and related activities for northern long-eared bat by individuals permitted to conduct these same activities for species of bats (for a period of one year).

For areas of the country not affected by white-nose syndrome (i.e., areas outside the white-nose syndrome buffer zone), the interim 4(d) rule exempts incidental take from all activities.

For areas of the country impacted by white-nose syndrome, take from hazardous tree removal is exempt from ESA prohibitions.

For areas of the country impacted by white-nose syndrome, the measures provided in the interim 4(d) rule exempt take from the following activities:

- forest management practices,
- maintenance and limited expansion of transportation and utility rights-of-way,
- prairie habitat management,
- limited tree removal projects, provided these activities protect known maternity roosts and hibernacula,

as long as these activities include these measures:

- (i) Activity occurs more than 0.25 mile (0.4 km) from a known, occupied hibernacula.
- (ii) Activity avoids cutting or destroying known, occupied roost trees during the pup season (June 1–July 31).

(iii) Activity avoids clearcuts (and similar harvest methods, e.g. seed tree, shelterwood and coppice) within 0.25mile (0.4 km) of known, occupied roost trees during the pup season (June 1–July 31).

#### **4. What is a 4(d) rule?**

A 4(d) rule is one of many tools provided by the ESA to allow for flexibility in the ESA’s implementation and to tailor prohibitions to those that make the most sense for protecting and managing at-risk species. This rule, which may be applied only to species listed as threatened, directs the Service to issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.”

The 4(d) rule ensures private landowners and citizens are not unduly burdened by regulations that do not further the conservation of the species and are exempted from “take” prohibitions (defined in the ESA as to harass, harm, pursue, hunt, shoot, wound, kill, etc.), when conducting certain activities. The rule is often used to clarify or simplify what forms of take of a threatened species are and are not prohibited. Without a 4(d) rule, threatened wildlife species automatically get the same protections as endangered species under section 9 of the ESA and FWS regulations.

#### **5. Why is the Service publishing an “interim” 4(d) rule?**

The intent of the proposed 4(d) rule is to lessen ESA restrictions that do not provide conservation benefit for the bat. In the proposed 4(d) rule, we specifically asked for comments on “Whether it may be appropriate to except incidental take as a result of other categories of activities beyond those covered in this proposed rule and, if so, under what conditions and with what conservation measures.” Due to the complexity of this issue, the volume of comments and the limited time between proposing the 4(d) rule and the date that the final listing rule had to be published, we decided to publish an interim 4(d) rule. An interim 4(d) rule allows incidental take exemptions to be in place when the listing of the northern long-eared bat becomes final, but also allows us additional time to open another public comment period and engage with stakeholders to explore whether additional exemptions should be included in a final 4(d) rule.

#### **6. Why did the Service implement a 4(d) rule for the northern long-eared bat?**

The primary threat to the northern long-eared bat is white-nose syndrome. This disease, first discovered in the winter of 2006-2007, has decimated many cave-hibernating bat populations in the Northeast. Since that time the disease or the fungus that causes it has spread to 28 of the 37 states (plus the District of Columbia) within the range of the northern long-eared bat. However, there are other activities considered secondary threats that may harm or kill northern long-eared bats. These activities include: cave/mine modifications, human disturbance in roosts and hibernation areas, forest habitat modification, and wind power development.

Now that the northern long-eared bat is listed under the ESA, incidental take of a bat while conducting any of these otherwise lawful activities would be prohibited without a permit or authorization. However, a 4(d) rule allows the Service to avoid regulating activities that may benefit the species or cause only limited amounts of take. This would then allow the Service and our partners to focus on actions that are most important to conserving northern long-eared bats.

**7. Why does the Service believe the exempted activities identified in the interim 4(d) rule do not need to be prohibited to protect and conserve the northern long-eared bat?**

The primary factor threatening the northern long-eared bat is white-nose syndrome. Other human activities, including forest management, habitat modification, destruction and disturbance may cause limited mortality, but did not cause significant population declines prior to the onset of white-nose syndrome. The cumulative mortality from these activities is expected to be minimal and not enough to impact the species' conservation. Additionally, the prohibitions may also have caused some activities beneficial to the bat to be stopped, and place an undue regulatory burden on individuals not negatively impacting northern long-eared bat populations.

In particular, in areas of the northern long-eared bat's range that have not yet been affected by white-nose syndrome, as defined in the interim rule, incidental take by any means is not prohibited. In areas of the bat's range that may be affected by white-nose syndrome, we believe incidental take caused by some tree removal and tree-clearing activities, when combined with conservation measures that protect the bat's most vulnerable life stages, does not need to be prohibited to conserve the northern long-eared bat. In addition, we believe removing bats from human dwellings does not need to be regulated.

**8. How do I know if my activity is in an area of the country within the white-nose syndrome buffer zone?**

The Service has identified such areas as those counties within 150 miles of the boundaries of U.S. counties or Canadian districts where the fungus *Pseudogymnoascus destructans* or white-nose syndrome has been detected. We have chosen to use county boundaries to delineate the boundary because they are clearly recognizable and will minimize confusion. If any portion of a county falls within 150 miles of a county or district where WNS has been detected, the entire county will be considered affected.

For illustrative purposes, you may view the most recent map of such areas at the following website: <http://www.fws.gov/midwest/nleb/>. Contact your local U.S. Fish and Wildlife Service Ecological Services Field Office for assistance in determining if your activity falls within an area where there are northern long-eared bat WNS infections. Visit <http://www.fws.gov/offices/index.html> to find your local office.

**9. What does the Service mean by "forest management practices?" Does that include timber harvest?**

The Service considers forest management practices to include a suite of activities used to maintain and manage forest ecosystems, including, but not limited to, timber harvest and other silvicultural treatments, prescribed burning, invasive species control, wildlife openings and temporary roads. These activities must be carried out using the applicable conservation measures outlined in Question 3 and the interim 4(d) rule, along with applicable state water quality best management practices.

The conversion of mature hardwood, or mixed forest into intensively managed monoculture pine plantation stands is not exempted under this interim rule, as typically these types of monoculture pine plantations provide very poor-quality bat habitat.

#### **10. What is meant by “minimal tree removal?”**

The Service considers minimal tree removal to be cutting or removal of individual or a limited number of trees as long as the activity does not significantly change the overall nature and function of the local forest habitat and is carried out under the rule’s conservation measures. By “minimal,” we mean to limit the effect to an impact of one acre or less. This could be one acre of contiguous habitat, or a total of one acre within a larger tract that is entirely forested, or a mixture of forested and non-forested cover types. Activities that remove an acre or less of forested habitat are expected to have little or no impact on the ecological value and function and, therefore, would be considered to be “minimal” as defined by this rule. Examples of activities that might fall within this category are: firewood cutting, shelterbelt renovation, removal of diseased trees, culvert replacement, habitat restoration for fish and wildlife conservation, and backyard landscaping

#### **11. Does the interim 4(d) rule allow me to remove a northern long-eared bat from my home?**

Yes. Northern long-eared bats have been documented roosting in human-made structures including buildings, barns, pavilions, sheds, cabins, under building eaves, behind shutters and in bat houses. The Service considers that the overall impact of removing northern long-eared bats from these structures is not expected to adversely affect the species’ conservation or recovery. Removal activities must comply with any applicable state laws. The Service recommends minimizing the use of pesticides and avoiding the use of sticky traps around bat roosts. If bats are to be excluded from where they are roosting, the Service recommends those exclusions be done in the spring or fall if possible. The Service also recommends you contact a nuisance wildlife specialist for humane exclusion techniques.

#### **12. How do human activities impact northern long-eared bats, especially those populations already affected by white-nose syndrome?**

Several sources of mortality may be important factors affecting the northern long-eared bat’s ability to persist while experiencing dramatic declines caused by white-nose syndrome.

*Impacts to hibernacula:* Cave-dwelling bats are vulnerable to human disturbance while hibernating. Bats use up their energy stores when roused and may not survive the winter, or females may not successfully give birth or rear young. Improperly designed or installed gates or other structures to exclude people from caves and mines may restrict bat flight and movement and change airflow and internal cave and mine microclimates. A few degrees change can make a cave unsuitable for hibernating bats. Many agencies and organizations are working to protect caves and mines that are important hibernacula for cave-dwelling bats.

*Loss or degradation of summer habitat:* Many activities such as commercial and residential development, transportation and energy rights-of-way development, surface mining and wind facility construction permanently remove habitat and are prevalent in many areas of this bat’s range. Timber harvest and forest management can remove or degrade summer roosting and foraging habitat. When done during the active season, these activities can also directly kill or injure bats by cutting down their roosts.

*Wind farm operation:* Wind turbines kill bats, including northern long-eared bats, although only a relatively small number have been documented to date. However, there are many wind projects within a large portion of the bat's range, and many more are planned. The Service and others are working to minimize bat mortality from wind turbines on several fronts. We fund and conduct research to determine why bats are susceptible to turbines, how to operate turbines to minimize mortality, and where important bat migration routes are located. The Service, state natural resource agencies, and wind energy industry are developing a Midwest Wind Energy Multi-Species Habitat Conservation Plan, which will provide wind farms a mechanism to continue operating legally while minimizing and mitigating listed bat mortality. In other Service regions, individual HCPs that include the northern long-eared bat are in development.

### **13. How are private landowners affected by the interim 4(d) rule?**

Many factors dictate whether a wooded area provides northern long-eared bat habitat or whether the bats use the area. For private actions on private property, we do not presume that northern long-eared bats are present in all wooded areas throughout its range, and we do not require private landowners to conduct surveys. However, with the 4(d) rule in place, landowners have the added certainty that any incidental take resulting from the exempted activities are not prohibited.

### **14. How are states and tribes affected by the 4(d) rule?**

Similar to private actions on private lands, we do not require states and tribes to survey for listed species before conducting actions that do not have a federal nexus. But, if listed species are known to occur in an area and a proposed action is likely to cause incidental take, then development of a Habitat Conservation Plan, in conjunction with an application for an Incidental Take Permit, would be necessary. With the interim 4(d) rule in place, incidental take permits will not be required for activities exempted in the 4(d) rule.

### **15. How are federal agencies affected by the 4(d) rule?**

The ESA holds federal agencies to higher standards than private landowners, states and tribes. Under section 7 of the ESA, federal agencies must consult with the Service to ensure that any action they authorize, fund, permit or carry out does not jeopardize the existence of a listed species. This requirement does not change when a 4(d) rule is implemented. Federal agencies are still required to consult with the Service on actions that may affect the northern long-eared bat. However, with a 4(d) rule in place, any actions taken by an agency that are exempted in the 4(d) rule will not require an incidental take statement in a biological opinion.

### **16. How will the interim 4d rule help federal agencies comply with their section 7 consultation requirements for activities taking place in forested areas during the breeding season?**

We believe that with the interim 4(d) rule in place on the effective date of the final listing rule, and the advance work that we and other federal agencies have done during the proposal period, most federal agencies will be able to comply with their section 7 consultation requirements and the listing should not prevent or delay their activities. For example, the Service's Northern Long-eared Bat Interim Conference and Planning Guidance has assisted many federal agencies with assessing the impact their activities may have on the bat. We will continue to work with all

federal agencies to help them understand where and to what extent their activities may have an effect on the bat.

**17. Are there similarities between the northern long-eared bat and the endangered Indiana bat, whose range overlaps that of the northern?**

The Indiana bat was recognized as an endangered species in 1967 when populations were declining primarily due to human disturbance at hibernation sites. Indiana bats are found in 20 states across much of the eastern half of the country. Like northern long-eared bats, Indiana bats hibernate in caves and use forested habitat in the summer to roost and raise their young. We expect that any best management practices recommended for the northern long-eared bat would be very similar to recommendations for the Indiana bat.

Since the Indiana bat was listed, we have worked with a variety of federal, state and private partners to conserve the Indiana bat. For example, we have funded research, gated and protected hibernacula, protected summer habitat, and worked with various entities to minimize impacts from projects on the species. Since white-nose syndrome has affected Indiana bats, we have focused on also addressing this new threat to the species.

**18. How has the Indiana bat's endangered status affected development within its range, and do you expect the impacts to be similar for northern long-eared bat for activities not exempted under the interim 4(d) rule?**

Our approach to conservation of the Indiana bat is to work with states and federal partners at the planning stage to avoid and minimize impacts on the species and to mitigate remaining impacts. In this way, projects are not delayed, but carried out to be the least environmentally detrimental, with mitigation to offset unavoidable losses. If listed, we expect to work in a similar way to conserve the northern long-eared bat.

**19. Are entities with HCPs, completed consultations or other conservation agreements for Indiana bats covered for the northern long-eared bat?**

No, any existing vehicle (i.e., HCPs and section 7 consultations) that provides an exemption from ESA take prohibitions will need to be updated to include northern long-eared bats. If the 4(d) rule is adopted, actions exempted by the rule would not require a permit and thus would not need to be included in an HCP. For section 7 consultations, take from those actions would not be included in an incidental take statement.

**20. What are examples of a 4(d) rule aiding in the conservation of a threatened species?**

In 2014, the Service listed the Dakota skipper, a prairie butterfly, as threatened and implemented a 4(d) rule. The listing prohibits actions that threaten the Dakota skipper, but the 4(d) rule also provides flexibility to non-federal landowners for specific activities that do not negatively affect the species' conservation. The rule exempts from take prohibitions some actions associated with ranching, such as grazing, fencing, watering livestock and haying after July 15. Although some of these activities may impact some individual Dakota skippers, many can result in benefits to the species. For more information, go to

<http://www.fws.gov/midwest/endangered/insects/dask/DASKfinal4dRuleFAQs22Oct2014.html>

In March 2014, the Service finalized a special 4(d) rule for the lesser prairie-chicken concurrently with the listing of the species as threatened. The Service developed the 4(d) rule in

recognition of significant and ongoing efforts of states and landowners to conserve this ground-dwelling bird. The 4(d) rule allows the five range states to continue to manage conservation efforts for the species and avoid further regulation of activities such as oil and gas development and utility line maintenance that are covered under the Western Association of Fish and Wildlife Agencies' range-wide conservation plan for the lesser prairie-chicken. The special rule also establishes that conservation practices carried out through the USDA Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative and through ongoing normal agricultural practices on existing cultivated land are all in compliance with the ESA and not subject to further regulation.

## **21. How can the public have input into the 4(d) rule development process?**

You may submit comments on the interim 4(d) rule by one of the following methods:

(1) Electronically: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R5-ES-2011-0024, which is the docket number for this rulemaking. You may submit a comment by clicking on "Comment Now!"

(2) By hard copy: Submit by U.S. mail or hand-delivery to:

Public Comments Processing, Attn: FWS-R5-ES-2011-0024  
Division of Policy, Performance, and Management Programs  
U.S. Fish and Wildlife Service, MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

We request that you send comments only by one of the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us. Deadline for comments is July 1, 2015.

## **22. Where can I find more information?**

For more information about the northern long-eared bat, the final listing as threatened, the 4(d) rule and related information, visit the Service's web site at [www.fws.gov/midwest/endangered/mammals/nleb](http://www.fws.gov/midwest/endangered/mammals/nleb)