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Locke Lord QuickStudy: Small Bat, Big Implications: USFWS to ?Uplist Northern Long-Eared Bat From Threatened to ?Endangered

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In today's Federal Register, the U.S. Fish and Wildlife Service ("USFWS") published a proposed rule under the federal Endangered Species Act ("ESA") to reclassify the northern long-eared bat ("NLEB") from "threatened" status to "endangered." Though not unexpected, the uplisting will have major implications for industry, particularly the wind energy industry, most notably due to the resulting loss of the 4(d) rule that had provided blanket authorization for incidental take of NLEB in most areas. With the 4(d) rule no longer applicable, many operating and planned projects will need to implement potentially costly measures to avoid take of the species or obtain an incidental take permit ("ITP"), a process which involves significant time and ongoing expense for minimization, monitoring and mitigation.

How We Got Here

The NLEB is a small bat with a range that extends across 37 states including virtually all Midwest and Northeastern states, the District of Columbia, and all Canadian provinces. The USFWS first proposed to list the NLEB as endangered under the ESA in October 2013 due to the effects of white-nose syndrome ("WNS"), a disease caused by a fungus present in the caves where the species hibernates that causes 80-100% mortality among affected colonies. In April 2015 the USFWS issued its final rule listing the NLEB as threatened rather than endangered, but in January 2016 the USFWS issued a broad "special take rule" under section 4(d) of the ESA that significantly limited the applicability of the ESA's take prohibition to the species. As a result, incidental take of the species has not been prohibited except from activities in certain areas designated as "WNS zones" that would directly impact a NLEB hibernaculum or result in clearing of maternity roost trees during the pup season (June 1 through July 31).

The threatened listing and the 4(d) rule were challenged in court by a group of environmental organizations that argued that that the species should have been listed as endangered. In January 2020 the D.C. District Court sided with the plaintiffs and held that USFWS' decision to list the species as threatened was arbitrary and capricious. The court remanded the listing decision to the USFWS for a new determination of the species' status, but did not vacate the threatened listing or the 4(d) rule. For further detail regarding the history of the species' listing, the 4(d) rule, and the court's decision, please see our previous QuickStudy on this topic.

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It was evident from the court's opinion that an endangered listing would be the likely outcome of the Service's determination on remand, and stakeholders have been anxiously awaiting, or dreading, the USFWS' proposed rule for over two years now. As noted in the USFWS' announcement of the proposed rule, WNS has spread across nearly 80% of the species' range and nearly all of its U.S. range since the original threatened listing in 2015. Thus, today's proposed rule to uplist the species is unsurprising, but will present significant challenges to industry nonetheless.

Implications for Industry

The most significant implication of the uplisting from threatened to endangered is the reinstatement of the take prohibition of ESA section 9, as 4(d) rules apply only to threatened species, not endangered species. As a result, once the proposed rule becomes final, incidental take of NLEB will again be prohibited without individual authorization. This will restrict activities that result in harm or harassment to members of the species, including the clearing of potential roost trees which can be necessary for construction or maintenance of pipeline or transmission right-of-ways and for residential and commercial development. However, the most acute impact will likely be felt by the wind energy industry due to potential for direct mortality of NLEB from turbine operations.

Wind energy facilities within the NLEB's range will need to assess the risk that their project may result in NLEB fatalities through collisions with rotating turbine blades. Because this species is migratory, the vast majority of projects will face at least some risk of NLEB take during the fall migratory season even if located in agricultural landscapes that lack summer maternity habitat. Projects located in or near forested habitat or near hibernacula will face risk throughout the spring and summer as well. All projects with NLEB risk will need to implement measures to avoid take, which generally involves raising turbine cut-in speeds to 6.9 m/s or greater, obtain take authorization in the form of an ITP under section 10(a)(1)(B) or an incidental take statement under section 7, or run the risk of an unauthorized take in violation of the ESA.

Although the USFWS cannot require projects to obtain an ITP, it can obtain an injunction barring construction or operation of a project if it can establish that take is reasonably certain to occur. While it is unlikely the USFWS would pursue such a remedy except in the most extreme cases, the ESA contains citizen suit provisions that allow project opponents or NGOs to obtain such an injunction, as well. But perhaps the most practical concern to most project developers, owners and operators is that project lenders and investors are generally intolerant of ESA risk. Thus, avoiding the issue and operating at risk is not a realistic option for projects that require financing.

Obtaining an ITP is a lengthy and costly process. It generally takes between two to five years and requires the applicant to meet permit issuance criteria including minimizing and mitigating the impact of take to the maximum extent practicable. This generally requires raising cut-in speeds of turbines at night during the season(s) of risk for the project, conducting costly mortality monitoring for compliance, and implementing expensive mitigation projects, among other measures.

While various options besides obtaining an ITP may be available to certain projects, such as use of the USFWS's short-term template HCP, implementing avoidance measures to obtain a technical assistance letter, or relying on the section 7 consultation process, each of these matters requires significant time to plan and implement. Thus, developers, owners or operators of affected wind projects or other types of energy and infrastructure projects should begin planning their compliance strategies now to minimize the impact on their projects when the final rule

takes effect.

Next Steps

The proposed rule will be open for public comment until May 23, and we expect a final rule to take effect before the fall migratory season on August 1, although that is not certain and will depend upon the response to comments and other factors. Affected companies should strongly consider submitting comments and/or attending the upcoming virtual public information session and public hearing scheduled for April 7. Locke Lord has helped clients to obtain almost a third of the ITPs that have been issued to wind projects for take of listed bats and is currently advising on many more. We have also advised many companies in developing alternative compliance strategies to avoid the need for an ITP. We encourage you to contact us with questions or to discuss how we can support your company's permitting or compliance strategy.

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