Articles + Publications | September 14, 2022

Locke Lord QuickStudy: Three's Company: USFWS Proposes ?Listing Tricolored Bat as Endangered, Joining Indiana and ?Northern Long-Eared Bats

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On September 14, 2022, the U.S. Fish and Wildlife Service (the "Service") published a proposed rule to list the tricolored bat (*Perimyotis subflavus*, "TCB") as endangered under the Endangered Species Act ("ESA"). This action, following on the heels of the proposed uplisting of the northern long-eared bat to endangered in March 2022, could have significant impacts on renewable energy and other energy and infrastructure projects in the 39 states where the TCB is found. Many planned or operating projects, especially wind energy projects, will need to either take steps to avoid take of the species or obtain an incidental take permit ("ITP") to avoid liability under the ESA.

TCB in a Flash

The TCB is found east of the Rocky Mountains in 39 U.S. states and the District of ?Columbia, in four Canadian provinces from the Atlantic Coast west to the Great Lakes, and in ?portions of eastern Mexico, Guatemala, Honduras, Belize, and Nicaragua. The Service first considered listing the TCB in December 2017 in response to a petition from an environmental NGO, and the species has been under consideration for listing since that time. ?

The Service is not proposing to designate critical habitat for the TCB at this time because habitat destruction and/or modification is not a major basis for the Service's proposed listing. In its proposed rule, the Service indicated that "range-wide impacts of the white-nose syndrome, a deadly disease affecting cave-dwelling bats" was the primary reason for listing the TCB. According to the Service, white-nose syndrome has caused estimated declines of more than 90 percent in affected TCB colonies and is currently present across 59 percent of the species' range. The Service also acknowledged that "other factors" may influence the viability of the TCB, including "wind-energy-related mortality, habitat loss, and effects from climate change."

Implications for Industry

If the Service's proposed rule is finalized, the take prohibition of ESA section 9 will apply to the TCB, and any incidental take would violate the ESA absent express authorization. The ESA defines "take" to include any activity that causes harm or harassment to TCBs. The wind energy industry is most likely to face challenges due to the

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potential for bat collisions and mortality caused by turbine operations, but other industries are at risk of incidental take as well. Activities such as clearing known or potential roost trees during the construction or maintenance of pipeline and transmission right-of-ways, solar or battery storage projects, or residential and commercial development could also result in take prohibited by the ESA.

The ESA does not require one to obtain a permit for activity that may result in incidental take of an endangered species, only for the incidental take itself. However, operating at risk will not be a realistic option for many developers, owners or operators of projects with bat risk, especially those that require financing. Lenders and investors are generally intolerant of ESA risk, but avoiding take, whether through curtailment of turbines or seasonal restrictions on tree clearing can be very disruptive to project economics, construction schedules or both. Thus, many projects in the range of the TCB may need to pursue incidental take authorization. Projects with particularly high risk of take that do not obtain take authorization may face a threat of litigation on multiple fronts. Although the Service cannot require projects to obtain an ITP, it can seek to enjoin the construction or operation of a project if it can establish that unauthorized take is reasonably certain to occur. Additionally, the ESA's citizen suit provisions allow project opponents or NGOs to seek such an injunction, as occurred with the Beech Ridge project in 2009.

Next Steps

Publication of the proposed rule in the Federal Register will occur on September 14, opening a 60-day public comment period that closes on November 14, 2022. Affected companies should strongly consider submitting comments and/or attending the upcoming virtual public information session and public hearing scheduled on October 12, 2022. Those with projects that are particularly at risk may be wise to begin addressing that risk before the listing is finalized, which likely will not occur until early 2023.

Obtaining an ITP is a time-consuming and expensive process that generally takes from two to five years. While options other than obtaining an ITP may be available for certain projects, many of these options require significant time to plan and implement. Of course, given the overlap in the species' ranges, many projects with TCB risk may also have northern long-eared bat risk and potentially Indiana bat risk as well, and the risk to these three species can generally be managed collectively. It is also worth noting that a federal listing, when finalized, can trigger automatic listing in many states as well, which can give rise to an additional layer of compliance and permitting liability.

Locke Lord has counseled dozens of clients in obtaining ITPs for Indiana bats and northern long-eared bats as well as TCB, or developing alternative compliance strategies to avoid the need for an ITP. We encourage you to contact the authors with questions regarding this proposed listing or to discuss your company's permitting or compliance strategy.

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