

Bat Species Status Ruling Leaves Cos. Hanging

By **Brooke Wahlberg** and **Rebecca Barho**

On Jan. 28, the U.S. District Court for the District of Columbia overturned a decision by the U.S. Fish and Wildlife Service, or FWS, to list the northern long-eared bat as threatened rather than endangered, and remanded the decision back to the agency.[1] The threatened listing will remain intact while the FWS undertakes a new listing decision.

In its decision, the court found that the FWS' reliance on the fact that white nose syndrome, or WNS, had not yet affected 40% of the bat's historic range was unreasonable, as it disregarded that the core part of the bat's range was heavily affected by WNS. In addition to remanding the threatened listing decision back to the FWS, the court also vacated a portion of the FWS' and National Marine Fisheries Service's final policy on interpretation of the phrase "significant portion of its range," or SPR, in the Endangered Species Act's definitions of "endangered species" and "threatened species." [2]

Specifically, the court found that the SPR policy's directive that the services will not analyze whether a species is endangered in a significant portion of its range if the services have determined that the species is threatened throughout all of its range [3] failed step one of the test set forth by the U.S. Supreme Court in *Chevron USA Inc. v. Natural Resources Defense Council*. [4]

The parties have not briefed, and the court did not rule, on the second half of the litigation challenging the propriety of the FWS' Section 4(d) rule for the bat. Despite being promulgated under the Obama administration, the 4(d) rule has been regarded as industry-friendly, and its provisions reflect that the primary cause of population-level impacts to the bat are a result of WNS, not human activities.

Whether or not the 4(d) rule claims will be litigated will be influenced by the FWS' next steps. Depending on how the FWS chooses to proceed, the implications could be significant beyond the boundaries of the bat's range.

Implication for Projects in the Northern Long-Eared Bat's Range

The immediate implication of the holding for those developing, constructing or operating projects within the bat's range is uncertainty surrounding the species' status and resulting regulatory impact.

Under the current 4(d) rule, which is available only for threatened species, most incidental take is exempted from the take prohibitions of Section 9 of the Endangered Species Act, or



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ESA, unless clearing of wooded areas occurs within 0.25 miles of a known hibernaculum, or within 150 feet of a known maternity roost tree between June 1 and July 31.[5] An endangered listing or broader 4(d) rule (prohibiting all types of take) would have long-term implications for industries, and significant implications across the United States.

While it could take some time for the FWS to revisit its northern long-eared bat listing decision,[6] there are two primary potential outcomes of the agency's review: a proposed listing as endangered, or a proposed listing as threatened. Although perhaps dependent on what administration is in place at the time of a new listing proposal, given the impacts WNS has had on the bat in the years since the original listing decision, many believe it would be difficult for the FWS to make anything but an endangered determination.

Should the FWS propose to list the bat as endangered, then take of the bat would be broadly prohibited by ESA Section 9, and no 4(d) rule exempting take would apply. As a result, any habitat and collision-related take would be prohibited under the ESA, and project proponents may be compelled to obtain incidental take permits, or undergo ESA Section 7 consultations in order to receive authorization for such take.

It is also possible, of course, that the FWS could repropose the listing as threatened. In this case, the challenges to the 4(d) rule would likely move forward, unless the FWS decides to withdraw the current 4(d) rule ab initio. Third parties may, bolstered by the court's emphasis on WNS, petition the FWS for an emergency listing of the northern long-eared bat. It is also possible that the FWS could bring an interlocutory appeal on the remand of the listing decision while litigation continues over the 4(d) rule.

Given the similarities between the species, the endangered Indiana bat serves as an indicator of how the regulated community could be impacted if the FWS lists the northern long-eared bat as endangered or adopts a 4(d) rule that broadly prohibits take. Both species rely on deciduous woodlands for spring, summer and fall habitat, rely on caves and mines for winter habitat, and can migrate through riparian corridors and agricultural areas.

Importantly, however, the northern long-eared bat is known to occur in 39 states, compared to the Indiana bat's known range of just 22. While some industries have developed, in concert with the FWS, methods to streamline ESA compliance with respect to projects that may or are reasonably certain to cause take of the Indiana bat, other industries have had difficulty finding workable solutions due to the unique threat of WNS.

For example, the Federal Highway Administration has developed a programmatic consultation for transportation projects occurring within Indiana bat and northern long-eared bat habitat that provides tree removal restrictions, hibernaculum setbacks and, sometimes, compensatory mitigation.[7] Pipelines and transmission lines have gone through numerous Section 7 consultations for both species.

For projects without a federal nexus triggering consultation, the FWS Midwest region alone has issued multiple incidental take permits under ESA Section 10 — including seven to wind energy developers for the Indiana bat (most of these permits include the northern long-eared bat, and one includes two additional bat species), and dozens more incidental take permit applications are in some state of processing for wind energy projects.[8]

These permits typically require seasonal curtailment of power production and habitat preservation. Counties and timber harvest companies in the Midwest and Northeast are developing incidental take permits for timber harvest activities that may impact the Indiana bat and the northern long-eared bat.

One of the more challenging aspects of dealing with listed bat species is that they are small and hard to detect. Significantly, wind energy incidental take permits include conditions requiring costly monitoring efforts throughout the 30-year permit term to demonstrate permit compliance. The U.S. Court of Appeals for the Fourth Circuit has recently further amplified the concerns with quantifying bat impacts by invalidating a biological opinion issued in connection with the Atlantic Coast Pipeline's application for a Federal Energy Regulatory Commission license.[9]

In that case, the court invalidated the biological opinion in part due to the imprecision with which the opinion's incidental take statement quantified take of the Indiana bat, and held that the lack of more detailed quantification meant that the FWS could not evaluate incidental take statement compliance or the need for reinitiation of consultation.

Later, environmental nongovernmental organizations noted a similar approach had been used in a biological opinion for the Mountain Valley Pipeline, and sought injunctive relief alleging similar deficiencies.[10] Construction of both pipelines is currently delayed while the FWS reviews the biological opinions, and other legal issues are resolved.

Implications for Other Bat Species Also Affected by White Nose Syndrome

Other bat species populations that have been severely impacted by WNS are under review by the FWS. For example, the FWS made a positive 90-day finding for the tricolored bat in December 2017, and indicated in its May 2019 National Listing Workplan that a 12-month finding on the petition will be made in fiscal year 2021.[11] Moreover, the Center for Biological Diversity also included the tricolored bat in its November 2019 notice of intent to sue for the FWS' failure to meet its listing deadlines for over 250 species.[12]

The FWS workplan also included an entry for a 90-day finding on a petition to list the little brown bat. According to the workplan, a 90-day finding for the little brown bat will be made in fiscal year 2023. Of course, after last week's ruling, it is possible that environmental NGOs may petition for, and be granted an, emergency listing of these species based on WNS impacts.

Some have posited that the FWS may have been waiting to see how the northern long-eared bat litigation resolved before making findings with respect to the two species noted above, since, like the northern long-eared bat, the tricolored bat and the little brown bat have both been significantly impacted by WNS.

Both species have ranges that are at least as broad as the northern long-eared bat's, and they share similar habitats and extend to different states beyond the northern long-eared bat's range. If either of these two species are listed as endangered (or threatened with a 4(d) rule that includes a broad take prohibition), there would be significant impacts to multiple industries nationwide.

Implications for the SPR Policy

As noted above, the court invalidated a portion of the SPR policy, concluding that the policy failed to pass step one of the Chevron test. Specifically, the court found that the ESA's use of "significant portion of its range" in the statute was unambiguous, and that the SPR policy's instruction for the services to discontinue the listing analysis after concluding a species is threatened throughout its range — rather than to evaluate whether a species is endangered in a significant portion of its range — was inconsistent with the plain language

of the ESA.

The opinion and briefs note that the FWS relies on this interpretation of the SPR policy to make threatened determinations for 13 other species. These species occur in various parts of the country and include, among others, the Dakota skipper, the black pine snake, the eastern massasauga rattlesnake and the West Indian manatee.

The Center for Biological Diversity already raised the FWS' use of this portion of the SPR policy in a now-settled challenge to the FWS' Gunnison sage grouse listing determination.[13] It is likely the environmental community will rely on the northern long-eared bat ruling to bolster challenges to listings that rely on this portion of the SPR policy.

While it is possible the FWS will choose to bring an interlocutory appeal on this aspect of the ruling, the Trump administration had previously signaled an intent to revisit the SPR policy. In its Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions, the services included an entry indicating its intent to revise the SPR policy as early as January 2020.[14]

Conclusion

The effects of the court's holding in *Center for Biological Diversity v. Everson* could have far-reaching effects for the northern long-eared bat, other species suffering from WNS, and for species whose threatened listing was made in part or in whole in reliance on the now partially invalidated SPR policy. Project proponents operating in the bat's range may be best served by planning as though it will be listed as endangered until some of the uncertainty resulting from the ruling is resolved.

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[1] *Center for Biological Diversity v. Everson*, Case No. 1:15-cv-00477-EGS (Jan. 28, 2020).

[2] Final Policy on Interpretation of the Phrase "Significant Portion of its Range" in the Endangered Species Act Definitions of "Endangered Species" and "Threatened Species," 79 Fed. Reg. 37,578 (July 1, 2014).

[3] The Endangered Species Act defines an "endangered" species as one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The ESA defines a "threatened" species as one that is "likely to become endangered within the foreseeable future throughout all or a significant portion of its range." *Id.* at (20).

[4] *Chevron USA Inc. v. Natural Resources Defense Council*, 468 U.S. 837 (1984).

[5] Final 4(d) Rule for the Northern Long-Eared Bat, 81 Fed. Reg. 1900, 1921 (Jan. 4, 2016).

[6] The plaintiffs originally requested the court order the USFWS to remand the listing decision and publish a new listing decision within six months of the order. The court did not

include a deadline for a new listing decision in its order; therefore, it is possible, though not certain, the parties may negotiate the time frame in which the USFWS publishes a listing decision for the NLEB.

[7] <https://www.fws.gov/midwest/Endangered/section7/fhwa/index.html>.

[8] <https://www.fws.gov/midwest/Endangered/permits/hcp/r3hcps.html>.

[9] *Defenders of Wildlife v. U.S. Dept. of the Interior*, No. 18-2090 (4th Cir. 2019).

[10] *Wild Virginia Inc. v. U.S. Dept. of the Interior*, No. 19-1866 (4th Cir.)

[11] <https://www.fws.gov/Endangered/esa-library/pdf/5-Year%20Listing%20Workplan%20May%20Version.pdf>.

[12] <https://www.biologicaldiversity.org/campaigns/esa/pdfs/FWS-remaining-workplan-species-NOI.pdf>.

[13] *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, Case No. 1:15-cv-00130 (D.C. Colo. 2015).

[14] <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1018-BE27>.