BATS IN THE BALANCE: NORTHERN LONG-EARED BAT LISTING AND INTERIM 4(D) RULE

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The U.S. Fish and Wildlife Service ("Service") recently listed the northern long-eared bat (the "Bat") as a "threatened" species under the U.S. Endangered Species Act ("ESA") and issued an interim "species-specific" rule under Section 4(d) of the ESA (the "interim 4(d) rule"), which establishes several exemptions from the general prohibition against Bat "take."[1] The listing and interim 4(d) rule go into effect on May 4, 2015, but the Service has opened a 90-day comment period for the interim 4(d) rule before finalizing it. The listing is likely to affect the development and operation of wind, energy, and other industrial projects within a portion of the Bat's habitat range. However, the interim 4(d) rule carves out space for certain land-use activities to avoid ESA take prohibitions. Although the Service's actions may reflect an effort to balance the competing needs of preservation and development[2], they are already subject to a legal challenge from the Center for Biological Diversity ("CBD") and will likely face legal challenges from other environmental and industry groups.

THREATENED DESIGNATION

The ESA is designed to protect and preserve species of imperiled creatures, along with the ecosystems that support them.[3] Under the ESA, a species may be listed as "endangered" or "threatened" based on five factors that affect its survival, including disease or predation. In listing the Bat, the Service relied on the "disease" factor, determining that the Bat is threatened because of a disease commonly known as "white-nose syndrome." The Service acknowledged that, in conjunction with white-nose syndrome, other cumulative threat factors could also threaten the survival of the Bat, but determined that none of those other factors would independently threaten Bat populations across the species' range.[4]

As an ESA listed species, the Bat, under Section 9, is protected against "take" (e.g., harassment, harming, capture, killing) of a member of the species unless, beforehand, there is authorization to do so,[5] which may require preparation of a "habitat conservation plan" and "implementation agreement" to minimize and mitigate any "take" and its effects.

INTERIM SECTION 4(D) RULE

Section 4(d) of the ESA gives the Service discretion to issue regulations that are "necessary and advisable to provide for the conservation" of *threatened* species, including regulations that create exemptions from the general prohibition against any unauthorized take.[6] One use of a 4(d) rule is to relax ESA restrictions in an effort to minimize conflicts between threatened species and people. The Service's authority under Section 4(d) allows it to

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incentivize conservation activities for a threatened species and streamline regulatory requirements for activities that have minor impacts.[7]

Under the interim 4(d) rule, whether an incidental take is permissible without a take authorization primarily depends on whether the take occurs within 150 miles of the boundary of a US county or Canadian district that is "affected" by white-nose syndrome (the "buffer zone").[8] A county or district is considered to be "affected" (as a whole) if any part of it is within 150 miles of a county or district where white-nose syndrome has been detected.[9]

Click here to view a map of the white-nose syndrome buffer zone around WNS/Pd positive counties/districts.

Outside the buffer zone, the Service exempted the Bat from incidental take prohibitions[10] because cave and mine modifications, human disturbance in roosts and hibernation areas, forest habitat modification, and wind power development are secondary threats.[11]

Inside the buffer zone, incidental take is prohibited; however, the interim 4(d) rule conditionally allows incidental take resulting from a limited set of activities: (i) forest management practices (including, but not limited to, timber harvest and other silvicultural treatments, prescribed burning, invasive species control, wildlife openings, and temporary roads), (ii) maintenance and limited expansion of transportation and utility rights-of-way, (iii) prairie habitat management, and (iv) limited tree removal projects known to protect maternity roosts and hibernacula. These activities are only exempt if they occur more than 0.25 mile from a known and occupied Bat hibernacula; avoid cutting or destroying known and occupied roost trees during the Bat pup season; and avoid forest clearcuts within 0.25 mile of known and occupied roost trees during the Bat pup season.[12] Any purposeful take within the range of the Bat is prohibited, except for purposeful take related to the removal of Bats from human structures and the capture and handling of Bats (and related interactions with them) by individuals permitted to conduct these activities for species of bats (for a period of one year).[13]

Within the buffer zone, despite the exemptions under the interim 4(d) rule, there are a variety of circumstances under which project proponents will need to coordinate with the Service and (as applicable) other agencies issuing permits for the project to obtain a determination regarding whether ongoing or proposed activities are likely to adversely affect the Bat, and then, as necessary, obtain take authorization. The activities that could trigger this process include mining, drilling, wind energy activities, and forest conversion activities—such as infrastructure development—that result in forest loss.[14]

If a take authorization is required, it will impose conditions that are designed to minimize and mitigate the project's impact on the Bat. For example, authorization to take Bat during the development and/or operation of a wind energy project may require alteration in the project layout, operational adjustments such as feathering turbine blades below certain wind-speeds, or raising "cut-in" speeds during sensitive Bat life stages (e.g., the migration period).[15] These types of actions may avoid or minimize the likelihood of Bat collisions with rotating turbine blades. The proponent of a wind energy project might likewise be required to improve Bat habitat beyond the project's boundary to support the species' survival and recovery.

POTENTIAL CHALLENGES

Although the listing determination and interim 4(d) rule may be viewed as a compromise between industry interests and conservation interests, there are controversial issues that may lead to legal challenges. Industry

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groups, environmental organizations, and states have challenged other 4(d) rules in the past—with environmental organizations taking the position that the rules were not sufficiently protective and the industry groups asserting that they were overly restrictive.[16] CBD has already filed a complaint asserting challenges to the interim 4(d) rule.[17] The Service's decision to list the Bat as threatened and the interim 4(d) rule are subject to judicial review under the Administrative Procedure Act ("APA") to determine whether they are arbitrary and capricious.[18]

On April 2, 2015, CBD filed a complaint in the United States District Court for the District of Columbia,[19] alleging, among other things, that the Service's proposal of the interim 4(d) rule violated the National Environmental Policy Act ("NEPA") and that the rule is arbitrary and capricious under the APA because, in formulating it, the Service failed to prepare an environmental impact statement ("EIS") or environmental assessment ("EA") under NEPA.[20] The thrust of CBD's challenge is that the Service failed to "consider alternatives to the rule; analyze the rule's detrimental environmental impacts; engage in an open and informed decision-making process; and otherwise follow NEPA and its implementing regulations."[21] CBD requests that the court vacate the interim 4(d) rule and order the Service to engage in a NEPA process.

Additionally, as illustrated by the comment-and-response portion of the Bat listing notice, there are a number of other contentious issues that underlie the listing determination and interim 4(d) rule that, to one extent or another, may be joined in an APA-based challenge to the rulemaking:

- Whether the listing will (or must) reverse the species' decline.[22] The Service indicates that, while the primary cause of the Bat decline is white-nose syndrome, there is no known cure for this disease.[23] Because white-nose syndrome is incurable, some may argue that the listing does not promote the conservation of the species.
- Whether it is appropriate to put a conservation burden on activities that are not having a significant effect on the Bat, given that white-nose syndrome is the factor primarily affecting the Bat.[24]
- Whether, in adopting the listing, the Service relied on best-available scientific and commercial data. The Service notes, for example, that in making its listing determination, it was not aware of any "firm population size estimates." Additionally, the Service acted without "the benefit of a viability analysis."[25]

CONCLUSION

Although the interim 4(d) rule may represent an attempt by the Service to accommodate both conservation needs and industry group interests, the listing of the Bat as a threatened species will still impose a significant burden on wind, energy, and other industrial projects carried out within certain habitat range of the Bat. The ultimate viability of the "compromise" approach is in question, given that environmental groups have challenged the Service's actions.

NOTES:

[1] Copies of the rulemaking and associated materials are available at http://www.fws.gov/midwest/nleb/ (last visited Apr. 3, 2015).

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[2] For example, the Service has applied Section 4(d) in relation to the lesser prairie chicken to leverage the efforts of an interstate, species-wide conservation plan to promote a mitigation framework to aid the species' recovery. *See Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie Chicken*, U.S. Fish and Wildlife Service, http://www.fws.gov/southwest/es/documents/R2ES/LPC_Final_4d_rule_FR_20140327.pdf.

[3] The Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2012).

[4] Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 18006 (Apr. 2, 2015) (to be codified at 50 C.F.R. pt. 17); *see also*, *Service Protects Northern Long-eared Bat as Threatened Species under Endangered Species Act with Interim 4(d) Rule,* U.S. Fish and Wildlife Service, http://www.fws.gov/midwest/endangered/mammals/nlba/ (last visited Apr. 6, 2015).

[5] 16 U.S.C. § 1540.

[6] 16 U.S.C. § 1533(d).

[7] *Interim 4(d) Rule for the Northern Long-eared Bat Questions and Answers*, U.S. Fish and Wildlife Service, http://www.fws.gov/midwest/endangered/mammals/nleb/FAQsInterim4dRuleNLEB.html (last visited Apr. 6, 2015).

[8] Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 18024

[9] *Id.*

[10] Incidental take is defined as “taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 50 C.F.R. § 17.3.

[11] Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 18024.

[12] *Id.*

[13] *Id.* at 18027.

[14]*Id.* at 17990.

[15] Karen Uhlenhuth, *Bat decision could impact Midwest wind industry*, Midwest Energy News (Mar. 31, 2015) http://www.midwestenergynews.com/2015/03/31/bat-decision-today-could-impact-midwest-wind-industry/.

[16] *In Re* Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation, 709 F.3d 1 (March 1, 2013).

[17] Complaint, *Ctr. for Biological Diversity v. Ashe*, 1:15-cv-00252-EGS (D.D.C. Apr. 2, 2015).

[18] Administrative Procedures Act, 5 U.S.C. § 706 (2012). Courts have repeatedly considered “interim final” regulations that have legally binding force to be final agency action for judicial review purposes. *See, e.g.*, *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1019 (9th Cir. 2003) (recognizing interim final rule as a final agency action that supported a finding that the plaintiff had standing), rev'd on other grounds, 541 U.S. 752 (2004); *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996) (“'Interim' refers only to the Rule's intended

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duration—not its tentative nature."); *Thrift Depositors of Am., Inc. v. Office of Thrift Supervision*, 862 F. Supp. 586, 590 (D.D.C. 1994) (finding procedural challenge to interim final rule to be justiciable).

[19] Complaint, *supra* note 17.

[20] NEPA requires federal agencies, from an environmental perspective, to give certain consideration to the impacts of, and alternatives to, their activities. *National Environmental Policy Act of 1969,* 42 U.S.C. § 4332. Under NEPA, a federal agency must prepare and circulate for public review either an EA, if it is not certain whether its proposed action will have a significant environmental effect, or an EIS, if it determines that the action may significantly affect the environment. 40 C.F.R. 1502.1 (2012).

[21] Complaint, *supra* note 17, at 2.

[22] Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 18014.

[23] *Id.* at 18021.

[24] Uhlenhuth *supra* note 15.

[25] Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 18021.

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