



## Proposed 4(d) Rule for the Northern Long-eared Bat: Questions and Answers

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

The Service is proposing a rule under section 4(d) of the Endangered Species Act (ESA) for the northern long-eared bat that could be implemented in the event the species is listed as “threatened.” We are seeking public comment on the proposed rule, and we are reopening the comment period on our October 2013 proposal to list the northern long-eared bat under the ESA.

### 2. 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 when conducting activities that benefit conservation of the species. The rule is often used to clarify or simplify what forms of take (defined in the ESA as to harass, harm, pursue, hunt, shoot, wound, kill, etc.) 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. A 4(d) rule sets forth only those prohibitions and exemptions from prohibitions that benefit conservation of the species.

### 3. Why is the Service proposing a 4(d) rule for the northern long-eared bat at this time?

In October 2013, the Service proposed listing the northern long-eared bat as an endangered species under the ESA. Because one of the options the Service is now considering is listing the bat as threatened, we have the option of developing a 4(d) rule that would enable us to tailor the prohibitions of the ESA to those that make the most sense for protecting and managing the northern long-eared bat population. Developing a proposal for such a rule concurrently with the listing process means that if the northern long-eared bat is listed as threatened, we would have the ability to implement that rule at the same time we make the final listing determination. Avoiding delay in implementing a potential 4(d) rule would enable those undertaking conservation measures for the bat to benefit from the provisions of the rule immediately, thereby benefiting the species. It could also avoid unduly burdening those whose activities do not impact northern long-eared bats with unnecessary regulations.

A 4(d) rule would allow certain activities that may take northern long-eared bats to continue if they are compatible with conservation of the species. A 4(d) rule can be applied to species listed as threatened but cannot be applied to species listed as endangered. A 4(d) rule would allow us to tailor take prohibitions of the ESA to those necessary and advisable for the conservation of the northern long-eared bat.

**4. Has the Service already made a determination that the northern long-eared bat will be listed as threatened with a 4(d) rule?**

No, we have not. We are conducting an analysis to make a listing decision. There are four possible determinations from that analysis: listing is not warranted, listing is warranted as endangered, listing is warranted as threatened, or listing is warranted as threatened with a 4(d) rule. We are drafting a 4(d) rule now so that if we determine to list the species as threatened we have the ability to implement a 4(d) rule concurrently with and as part of the final listing determination. Our final determination will be completed no later than April 2, 2015. To meet this deadline and to have a 4(d) rule at the same time, we must begin developing a 4(d) rule now.

**5. Why consider 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 2007, has decimated many cave-hibernating bat populations in the Northeast. In seven years it has spread to 25 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.

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

**6. What provisions are included in the proposed 4(d) rule for the northern long-eared bat, and how do they aid in conserving the species?**

For areas of the country that may be impacted by white-nose syndrome, the measures provided in the proposed 4(d) rule exempt take caused by forest management practices, maintenance and limited expansion of transportation and utility rights-of-way, removal of trees and brush to maintain prairie habitat, and limited tree removal projects, provided these activities protect known maternity roosts and hibernacula. The proposed 4(d) rule also exempts take resulting from removal of hazardous trees, removal of northern long-eared bats from human dwellings, and some research-related activities.

In parts of the country not affected by white-nose syndrome, the proposed rule recognizes activities that result in incidental take of bats are not imperiling the species and will be exempt from the ESA's protections.

**7. Why does the Service believe the exempted activities identified in the proposed 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; and other threats may cause mortality, but they have not, independently, caused

significant, population-level declines. Therefore, we believe it is not necessary to regulate all of these sources of mortality to adequately conserve the species.

In particular, in areas of the northern long-eared bat's range that have not yet been affected by white-nose syndrome, incidental take by any means would not be 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.

The Service proposes that take incidental to certain activities conducted in accordance with the following habitat conservation measures, as applicable, will not be prohibited (i.e., excepted from the prohibitions):

- (i) Occur more than 0.25 mile (0.4 km) from a known, occupied hibernacula.
- (ii) Avoid cutting or destroying known, occupied maternity roost trees during the pup season (June 1–July 31).
- (iii) Avoid clearcuts within 0.25 (0.4 km) mile of known, occupied maternity roost trees during the pup season (June 1–July 31).

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

The Service proposes to identify such areas as those 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. For illustrative purposes, you may view the most recent map of such areas at the following website: <http://www.fws.gov/midwest/endangered/mammals/nlba/>.

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 white-nose syndrome is affecting the northern long-eared bat. 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 the 4(d) rule, and we expect such practices would adhere to applicable state water quality best management practices. The Service does not consider conversion of a mixed forest to a monoculture pine forest as forest management, as these types of pine forests provide poor 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 proposed rule’s conservation measures. Examples include thinning to reduce risk of wildfire or insect outbreaks, firewood cutting, shelterbelt renovation, removal of diseased trees, habitat restoration and backyard landscaping.

**11. Does the 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 structures where bats are roosting are to be removed, the Service recommends removing the structure outside the summer maternity season if possible.

**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 aroused 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 alter (improving or degrading) summer roosting and foraging habitat.

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 that will provide wind farms a mechanism to continue

operating legally while minimizing and mitigating listed bat mortality. In other Service regions, individual HCPs are in development that include the northern long-eared bat.

**13. How would private landowners be affected by the 4(d) rule, if it is implemented?**

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, in combination with the conservation measures, are not prohibited.

**14. How would states and tribes be affected by the 4(d) rule, if it is implemented?**

Similar to private actions on private lands, we generally do not require states and tribes to survey for listed species before conducting actions that do not have a federal connection. 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. If the 4(d) rule is implemented, incidental take permits will not be required for activities specifically exempted in the 4(d) rule.

**15. How would federal agencies be 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 even if a 4(d) rule is implemented. Federal agencies will still be required to consult with the Service on actions that may affect the northern long-eared bat, if it is listed as endangered or threatened. 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. 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. In winter, Indiana bats hibernate in tight clusters of up to 300 animals per square foot. In summer, female Indiana bats roost in maternity colonies of up to 100 or more, under the peeling bark of dead and dying trees. In contrast, northern long-eared bats do not hibernate in large clusters, and summer maternity colonies are a bit smaller than those of Indiana bats. 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.

**17. 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 this proposed 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.

**18. Will entities with HCPs, completed consultations or other conservation agreements for Indiana bats be 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 bat. 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.

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

1. 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 private 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 pose a threat to 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>

2. 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.

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

You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter Docket No. FWS-R5-ES-2011-0024. You may submit a comment by clicking on "Comment Now!" Please ensure that you have found the correct rulemaking before submitting your comment.

(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 and Directives Management; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike, Falls Church, Va. 22041-3803.

Comments must be received by March 17, 2015. All comments will be posted on <http://www.regulations.gov>. This generally means we will post any personal information you provide us. If you previously submitted comments or information on the October 2013 proposed rule to list the northern long-eared bat, please do not resubmit them. We have incorporated them into the public record, and we will consider them fully in our final determination.

**21. Where can I find more information?**

For more information about the northern long-eared bat, the proposed listing and related information, visit the Service’s web site at [www.fws.gov/midwest/endangered/mammals/nlba](http://www.fws.gov/midwest/endangered/mammals/nlba)