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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R3-ES-2021-0140; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BG14

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-eared Bat; Delay of Effective Date

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; delay of effective date.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are delaying the effective date of a final rule we published on November 30, 2022, reclassifying the northern long-eared bat (*Myotis septentrionalis*) as an endangered species under the Endangered Species Act of 1973, as amended (Act). This delay is necessary for the Service to finalize conservation tools and guidance documents to avoid confusion and disruption with members of the public who would be regulated by the rule and Federal agencies in the implementation of section 7 of the Act.

DATES: The effective date of the final rule amending 50 CFR part 17, published November 30, 2022, at 87 FR 73488, is delayed until March 31, 2023.

ADDRESSES: This final rule is available on the internet at <https://www.regulations.gov>. For access to the docket to read the November 30, 2022, final rule or other background documents, including the comments received on that final rule, go to <https://www.regulations.gov> and search for Docket No. FWS-R3-ES-2021-0140.

FOR FURTHER INFORMATION CONTACT: Shauna Marquardt, Field Supervisor, U.S. Fish and Wildlife Service, Minnesota–Wisconsin Ecological Services Field Office, 4101 American Boulevard East, Bloomington, MN 55425; telephone 952–252–0092. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial

711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Background

On November 30, 2022, we published in the *Federal Register* (87 FR 73488) a final rule reclassifying the northern long-eared bat as an endangered species under the Act (16 U.S.C. 1531 et seq.). The rule was to be effective on January 30, 2023. However, with this rule, we are delaying the effective date to March 31, 2023, without opportunity for public comment. This delay will allow us to finalize conservation tools and guidance documents, thereby preventing confusion and disruption with other Federal agencies under section 7 of the Act.

Currently, the northern long-eared bat is listed as a threatened species under the Act (see 80 FR 17974; April 2, 2015) with a species-specific rule issued under section 4(d) of the Act (hereafter, “section 4(d) rule”) (see 81 FR 1900; January 14, 2016). When the November 30, 2022, final rule goes into effect, the reclassification of the northern long-eared bat to an endangered species will nullify the section 4(d) rule that currently tailors prohibitions and exceptions to the prohibitions necessary and advisable for the species. We recognize that the change to endangered status will result in questions and concerns about establishing compliance under the Act for forestry, wind energy, infrastructure, and many other projects within the 37 States that comprise the range of the northern long-eared bat. We are committed to working proactively with stakeholders to conserve and recover northern long-eared bats while reducing impacts to landowners, where possible and practicable. Thus, we are working to finalize tools that will help guide project managers through section 7 consultation once the reclassification of the northern long-eared bat takes effect to prevent delay for projects currently reviewed under the section 4(d) rule. We are also developing an online determination key that will provide predetermined consultation outcomes and automatic project concurrence for some projects as

well as voluntary guidance for wind facilities and private activities that involve habitat modification. Delaying the effective date will allow us to finalize these documents and communicate with external partners.

Over the last 3 years, we have completed consultation under section 7(a)(2) of the Act on 24,480 projects across the 37-State range for the northern long-eared bat. Many of these projects are not complete. Under the 4(d) rule, incidental take of the northern long-eared bat was not prohibited except in certain situations. With the final rule reclassifying the northern long-eared bat as endangered, incidental take of the species that is reasonably certain to occur as a result of some of these actions would now be prohibited, absent an incidental take statement (ITS) from the Service in accordance with section 7(o)(2) of the Act. Therefore, when the final rule becomes effective, numerous Federal agencies will need to reinitiate consultation with the Service, and the Service must develop and provide biological opinions and incidental take statements with terms and conditions to ensure any taking of the northern long-eared bat that occurs as a result of each of the subject actions is not a prohibited taking or likely to jeopardize the species. These projects would halt while the Service and the Federal action agency reinitiate consultation, which would affect projects covering the breadth of the species' 37-State range and nearly all aspects of the U.S. economy, including agriculture (i.e., crop production, animal feeding operations, grazing, irrigation), infrastructure (i.e., power generation and transmission, roads, bridges, communication towers, dams, levees, pipelines, wastewater treatment, water supply), residential and commercial development, forestry, military operations, and mining.

To date, we are aware of 3,095 projects for which we will need to provide an ITS when the November 30, 2022, reclassification rule goes into effect and the section 4(d) rule is nullified. These projects include road and bridge construction and maintenance projects across the 37-State range and forest management activities intended to prevent wildfires and sustain the health, diversity, and productivity of the Nation's forests, which also provide important northern long-eared bat habitat. This number does not include new projects or ongoing projects, of the 24,480

previously mentioned, that may be impacted by a lack of the conservation tools and guidance documents that are currently under development. Without these final tools in place, many new and existing projects that require consultation will likely experience project delays. The tools and guidance documents will also help private landowners evaluate their risk of taking northern long-eared bats; therefore, non-Federal projects may also be delayed as entities determine whether or not they need take coverage for their activities under section 10(a)(1)(B) of the Act. We would not be meeting the intent of the Act to provide required protections for listed species, and our agency's "due and timely execution of its functions" under the Act would be unavoidably prevented.

This 60-day delay of the effective date of the November 30, 2022, final rule (87 FR 73488)—based on the good cause articulated below—is for the purpose of preventing confusion and disruption for Federal agencies in the implementation of section 7 of the Act. During this period, we will finalize the guidance and tools that are under development and communicate with external partners to minimize project delays. We are, therefore, delaying the effective date of the final rule from January 30, 2023, to March 31, 2023.

II. Good Cause Under the Administrative Procedure Act

Our delay of the effective date of the reclassification of the northern long-eared bat as an endangered species from January 30, 2023, to March 31, 2023, without opportunity for public comment, effective immediately upon publication of this document in the *Federal Register*, is based on the good-cause exception provided in the Administrative Procedure Act (APA). Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), we have determined that good cause exists to forgo the requirements to provide prior notice and an opportunity for public comment on this 60-day delay of the effective date of the November 30, 2022, final rule (87 FR 73488), and to make this action announcing the delay effective immediately. Under the totality of the circumstances presented here, notice and comment would be both impracticable and contrary to the public interest because it would prevent the Service from performing its functions, create confusion and

disruption in the Act's section 7(a)(2) consultation process and result in unnecessary delays in project reviews. These unintended consequences would thwart the conservation purposes of the Act. See *Purdue Univ. v. Scalia*, No. CV-20-3006 (EGS), 2020 WL 7340156, at 8 (D.D.C. Dec. 14, 2020).

As noted above, we are currently developing tools that will aid in the conservation and recovery of the northern long-eared bat. These tools are necessary to for the Service to review a large number of projects in a short period of time and ensure that projects proceed while necessary and appropriate conservation measures are implemented. Our agency's "due and timely execution of its functions" under the Act would be unavoidably prevented if we allow the effective date to be triggered without the conservation tools and guidance described above. See S. Doc. No. 248, 79th Cong., 2d Sess. At 200 (1946). That is, if the November 30, 2022, final rule reclassifying the northern long-eared bat as an endangered species under the Act (87 FR 73488) becomes effective on January 30, 2023, the 4(d) rule will be nullified and a large number of projects will require re-initiation of consultation under section 7(a)(2) of the Act without proper guidance in place to streamline consultation while ensuring consistent application of measures for the conservation of the northern long-eared bat. Thus, at least 3,095 ongoing projects will be suspended and planned projects delayed, and we will not have met our obligations under the Act to provide required protections for listed species. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) (in enacting the Act, it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities").

Specifically, once the reclassification becomes effective, Federal agencies will have to work with the Service to determine whether and for which actions we need to provide an ITS per 50 CFR 402.14(i)(1) while also ensuring that these actions are not likely to jeopardize the species. The ITS would include terms and conditions for the Federal agencies to implement to ensure that the taking of the northern long-eared bat that occurs is not a prohibited taking when the November 30, 2022, final rule becomes effective. A lack of tools and guidance that would

streamline consultations could lead to confusion and disruption for Federal agencies with follow-on effects to Federal contractors and any project receiving Federal funds. Even if the November 30, 2022, final rule were to become effective only briefly during a public comment period, the level of uncertainty with respect to the Service's conservation direction would cause significant confusion and disruption in the section 7(a)(2) consultation process and impede the Federal agencies from executing their conservation mandates. We also expect confusion and project delays for non-Federal projects as entities determine whether or not they need take coverage for their activities under section 10(a)(1)(B) of the Act. The tools and guidance documents will also help private landowners evaluate their risk of taking northern long-eared bats.

In sum, we find that the totality of the circumstances here—the potential for many projects to be delayed and the threat to the Service's execution of its statutory functions, among other issues—indicate that there is good cause to forgo notice and comment procedures. It is impractical and contrary to the public interest for the Service to provide notice and an opportunity to comment on a 60-day delay of the effective date of January 30, 2023, for the November 30, 2022, final rule (87 FR 73488).

We also find that there is good cause to make this rule effective immediately instead of waiting until 30 days after publication for it to become effective. The APA normally requires this 30-day “grace period” to give affected parties time to adjust their behavior before a final rule takes effect. See, e.g., *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). However, the APA provides an exception to this 30-day grace period for good cause (5 U.S.C. 553(d)). There is good cause to allow this 60-day delay of the November 30, 2022, final rule's effective date to go into effect immediately because the November 30, 2022, final rule would go into effect on January 30, 2023, if this rule delaying the effective date were itself not to become effective for 30 days. That result would create the same issues as discussed above, i.e., prevent the Service from performing its functions, create confusion and disruption in the Act's section 7(a)(2) consultation process, result in unnecessary delays in project approvals, and thwart the

conservation purposes of the Act. Additionally, the northern long-eared bat is unlikely to be harmed by this delay because the species will continue to be protected under the Act as a threatened species and it is hibernating throughout the vast majority of its range (typically through the end of March) during this time.

We, therefore, conclude that we have good cause to issue this final rule, effective immediately, delaying the effective date of the November 30, 2022, final rule (87 FR 73488) from January 30, 2023, to March 31, 2023.

III. Authority

The authorities for this action are 16 U.S.C. 1361–1407, 1531–1544, and 4201–4245, unless otherwise noted; and 5 U.S.C. 551 et seq.

Martha Williams,
Director,
U.S. Fish and Wildlife Service.