

Recent Court Decision on ESA Threatened Listing for the **Northern Long-Eared Bat**

Why It Matters for Energy Developers and Infrastructure Projects | By: *John Timpone and Brooke Hines*

BACKGROUND

The northern long-eared bat (NLEB) is one of the species of bats most impacted by the disease white-nose syndrome. Due to declines caused by WNS and continued spread of the disease, the NLEB was listed as threatened under the Endangered Species Act on April 2, 2015. At the same time the U.S. Fish and Wildlife Service (USFWS) established an interim 4(d) rule that identified protections provided under the Act. The Service also opened a 90-day public comment period on the interim 4(d) rule. After reviewing comments the Service developed a Final 4(d) Rule, which was published in the Federal Register on January 14, 2016, and the rule went into effect on February 16, 2016 ([NLEB Federal Register Archives](#)). On January 28, 2020, the D.C. District Court (Court) ruled on a motion filed by plaintiffs (Center for Biological Diversity and Defenders of Wildlife, Sierra Club) which challenged the USFWS's 2016 listing of "threatened" with a 4(d) rule ([Court Opinion](#)).



Northern Long-Eared Bat (*Myotis septentrionalis*)
Photo credit: John Timpone

The Final 4(d) Rule specifically defines "take" prohibitions and exempts most incidental take for a variety of commercial and industrial projects within the species' range, subject to distances to known roost trees and hibernacula within areas affected by WNS ([WNS Zone Map](#)) as long as these activities include these measures:

- Activity occurs more than 0.25 mile (0.4 km) from a known, occupied hibernacula.
- Activity avoids cutting or destroying known, occupied roost trees during the pup season (June 1-July 31).
- Activity avoids clearcuts (and similar harvest methods, e.g., seed tree, shelterwood and coppice) within 150 feet (46 m) of known, occupied roost trees during the pup season (June 1-July 31).

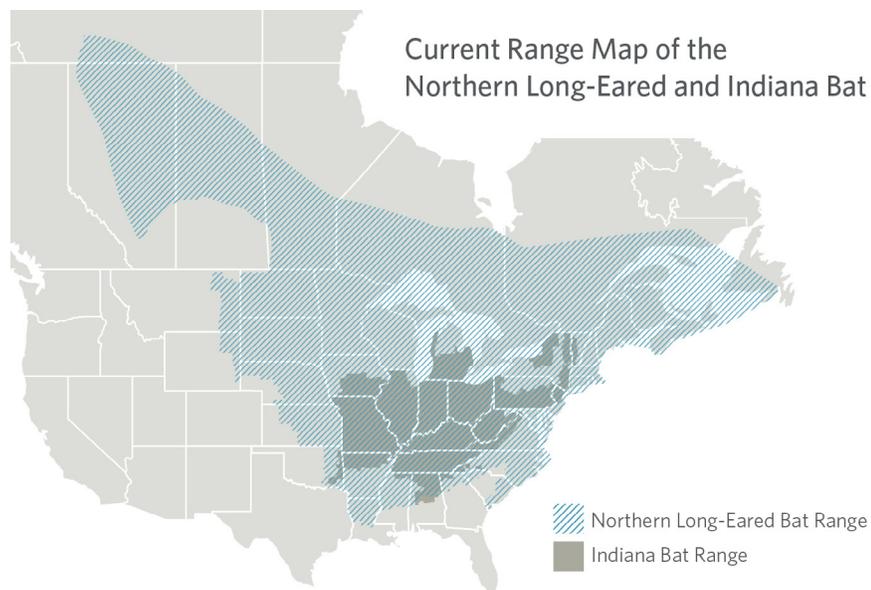
WHAT WAS THE RULING?

The Court's decision remanded the listing decision back to the USFWS for a new determination on the species' status. It stated that the 2016 decision to list the NLEB as "threatened" rather than "endangered" was arbitrary and capricious. The

USFWS based the Final 4(d) Rule on the premise that the species was primarily threatened by WNS, and therefore there was no need to protect its habitat. The Court noted that, in combination with disease, habitat destruction and other threats can cumulatively affect the bats, and thus are cause for concern. And though the court did not vacate the current listing status or the associated Final 4(d) Rule, there may be implications for developers of energy and infrastructure projects throughout the NLEB's 37-state range in both the near and long-term ([NLEB range map](#)).

WHAT DOES THE COURT RULING MEAN FOR PROJECTS?

The threatened status and the Final 4(d) Rule remain in effect until the USFWS completes the review of the NLEB listing and any associated rulemaking. As USFWS re-examines the data, it is likely they will ultimately consider the NLEB endangered throughout all or part of its range due to the continued decline in its population. And while the current [USFWS Range-wide Indiana Bat Survey Guidelines](#) can be used for NLEB presence/probable absence surveys in areas where projects are not covered by the Final 4(d) Rule, project proponents should be preparing to conduct presence/absence surveys for the NLEB similar to the Indiana bat (see map inset).



QUESTIONS?

Please contact [John Timpone](#) or [Brooke Hines](#).