



Developers Dodge Bullet with Northern Long-Eared Bat

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Developers have to deal with a number of environmental issues. These include stormwater management and potential impacts to wetlands, historic resources, and threatened and endangered species. The northern long-eared bat is the latest threatened species that developers must take into account before beginning construction.

In April 2015, the U.S. Fish and Wildlife Service (FWS) listed the northern long-eared bat as a threatened species under the Endangered Species Act (ESA). The bat exists in a large portion of the northeast, southeast and middle portion of the country, and it is affected by white nose syndrome (WNS). WNS is caused by a fungus in caves and abandoned mines where these bats hibernate. WNS causes them to wake early from hibernation at a time when they are no insects available on which the bats feed. Consequently, WNS has caused large populations of these bats to die.

Under the ESA, threatened species generally are afforded the same level of protection as endangered species, unless FWS issues what is known as a §4(d) rule for that particular species. Once that's done, the Service can exempt the potential impact of certain defined activities on that species from ESA Section 9's "incidental take" prohibition. Whether FWS does this is completely discretionary; there are about 200 threatened species, but only about two dozen §4(d) rules.

Because the northern long eared bat roosts in trees, and developers have to clear trees before they can begin construction, the impact of this new listing on development over a large portion of the country would have been severe without a §4(d) rule. FWS issued an interim §4(d) rule that was effective on May 4, 2015. Without going into detail, suffice it to say that the interim rule imposed significant burdens, including limiting most tree clearing to one acre or less within a 150 mile buffer zone from the nearest documented case of WNS and imposing ¼ mile buffer zones during clearing around known roost trees. The alternative to complying with the rule was to conduct a bat survey or, alternatively, restrict clearing to the winter months (September-April) when the bats are not active.

The National Association of Homebuilders and others filed comments with FWS pointing out how the interim rule did not work. They noted that most clearing takes place in April through September -- precisely when the bats are active -- and that WNS is what is causing the decline, not loss of habitat by

cutting trees.

FWS issued a final rule in January that becomes effective on February 16, 2016. It relaxes the restrictions on development. The final rule establishes a [WNS Zone](#) over all or portions of 32 states, and the restrictions apply only within this zone. (All of Virginia, most of North Carolina, and a portion of South Carolina are within the WNS Zone.) Tree removal is permitted within the WNS Zone *unless*: (i) the activity will occur within ¼ mile of a “known, occupied” hibernacula (a cave or abandoned mine), or (ii) *during the bat pup season (June-July)*, the activity cuts or destroys a “known, occupied maternity roost tree” or any tree within a 150 foot radius of it. Bat surveys are not required to determine the presence of hibernaculas and roost trees, but developers are required to use due diligence in making that determination. The rule is not explicit on what this must entail, but consulting databases maintained by state wildlife agencies may be sufficient.

How this rule will be addressed in permits issued by federal agencies, such as the Corps of Engineers, is not yet clear. Time of year restrictions will certainly be imposed, but the extent to which additional conditions will be added to permits remains to be seen. Also, developers are cautioned that even if their project is not within the WNS Zone now, that could change. WNS is spreading rapidly, and all it takes is one case to extend the WNS Zone to 150 miles around it. The WNS Zone map is updated monthly by FWS.

[81 Fed. Reg. 1900 \(Jan. 16, 2016\)](#)

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