

# FWS proposes rule to protect bats ravaged by white-nose syndrome

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The Fish and Wildlife Service announced today it will develop a special rule under the Endangered Species Act to protect the northern long-eared bat while easing the regulatory burden on forest management activities, an indication the service may list the bat as a threatened species and not endangered as originally proposed.

FWS Director Dan Ashe said in an interview that the bat species found in 39 states and the District of Columbia needs some level of federal protection because it is being wiped out across large swaths of its core range by the rapid spread of the bat-killing white-nose syndrome.

Fish and Wildlife will decide in April whether to make the northern long-eared bat the first species to be granted ESA protection due to the devastating impacts of white-nose syndrome -- a deadly fungal disease that has killed nearly 7 million bats across the eastern half of the country since it was discovered in New York in late 2006.

Listing the bat as threatened -- and not endangered, as the service proposed in 2013 -- would allow the agency to develop the special rule under Section 4(d) of the ESA that would provide regulatory flexibility for forest managers and landowners by allowing for the incidental killing or harming of long-eared bats during the course of forest management activities, such as cutting down hazardous trees that house nesting bats or disturbing hibernation sites.

In exchange, forest managers and landowners would need to comply with some best management practices to protect the bats, such as agreeing not to conduct clear-cutting within a quarter-mile of a known nesting tree, or undertaking forest management activities within a quarter-mile of a site that contains hibernating bats, Ashe said.

But in states such as North and South Dakota, eastern Montana, and portions of Wyoming, Kansas and Nebraska, where northern long-eared bats reside but where white-nose syndrome has not been detected, only "restrictions on direct, intentional take" would apply, he said.

"The bats are being devastated by white-nose syndrome, so it's appropriate to be thinking about what we can do to protect them," he said.

The proposed rule will be formally published tomorrow in the *Federal Register*, kicking off a 60-day public comment and review period ending March 17.

Ashe said the service has not made any final decision whether to list the bat as threatened or endangered, though it has committed to making a final ESA listing decision on the bat by April

2. The service is proposing the 4(d) rule now because it wants to finalize the rule by the time it announces a final ESA listing decision in April.

"That's our goal," Ashe said. "It's an ambitious goal."

In doing so, Ashe said, the service is exploring the special rule as a way to "tailor the restrictions of the [ESA] law so that they protect the bat but touch activities and people as lightly as possible to ensure that we're providing adequate protection but also recognizing that many of these activities are not the proximate cause of the species' decline."

## **A contentious debate**

But the proposed rule is sure to spark controversy, in large part because Fish and Wildlife in October 2013 proposed listing the bat as endangered under ESA, noting the impact of white-nose syndrome. The service estimates that, as a result of the disease, the bat's numbers have declined by 99 percent in the Northeast -- the core of its range.

More than 80 scientists last month sent a [letter](#) to Ashe and Interior Secretary Sally Jewell urging Interior to take quick action and designate the bat as endangered ([E&ENews PM](#), Dec. 8, 2014).

But Fish and Wildlife has been heavily lobbied against doing so by the timber and forest products industry, as well as congressional leaders and the affected states. And the service's willingness to develop the special rule easing regulatory burdens will likely be seen as a victory for state government and forestry officials across the bat's vast range, which extends from Maine south to North Carolina, as far west as Oklahoma and north through the Dakotas.

At a House Natural Resources Committee field hearing on the issue last fall, former committee Chairman Doc Hastings (R-Wash.) warned that the impact of an endangered listing of the bat would be akin to that of the northern spotted owl in the Pacific Northwest, which he said has resulted in problems for the forestry industry ([E&E Daily](#), Sept. 9, 2014).

A bipartisan coalition of 13 U.S. senators from Maine to Arkansas this week sent a [letter](#) to Ashe requesting that the service -- if it decides to list the bat as threatened -- develop a concurrent 4(d) rule "in order to allow normal forest management practices and minimize economic impacts in our states."

But Fish and Wildlife began informing states in its Midwest region of the pending 4(d) rule proposal earlier this week, and "the decision to publish this rule strongly implies that they will go with a threatened, not endangered, listing," Bill Imbergamo, executive director of the Federal Forest Resource Coalition, wrote in an email sent yesterday to the coalition's board of directors.

The Federal Forest Resource Coalition, a nonprofit that represents forest harvest and wood products companies and trade associations, has been one of the leading voices against an endangered listing for the northern long-eared bat, fearing it would have negative consequences for the industry.

Ashe said that if the proposed 4(d) rule is implemented, it will eliminate those concerns, while at the same time stabilizing bat populations and buying more time while researchers work to find a cure for white-nose syndrome.

"If we can encourage best management practices that would avoid the take of maternity trees and protect hibernacula, then I think that our hope would be we'd be able to continue to work with our state partners, with forest product companies, with private landowners and others, to sustain these bat populations while we look for solutions to the really challenging problem of white-nose syndrome," he said. "We need to ensure we're doing everything possible to protect these creatures while we look for a solution to white-nose syndrome, which may be years or even decades away."

## **Trouble ahead?**

Environmental groups have strongly opposed use of the 4(d) rule in recent listing decisions and will likely do so if the proposed rule is ultimately adopted.

Fish and Wildlife has proposed adopting a 4(d) rule in two recent high-profile listing decisions.

The service proposed a special rule in its final decision in March to list the lesser prairie chicken as threatened and not endangered, prompting an angry response from some environmental groups. The service also proposed a 4(d) rule when it decided in November to list the Gunnison sage grouse as threatened.

Environmental groups filed a federal lawsuit over the lesser prairie chicken decision last summer and have notified Interior they also plan to sue over the Gunnison sage grouse decision, arguing in both cases that the best available science points to the need for an endangered listing.

Similar lawsuits are likely if the long-eared bat is listed as threatened and the 4(d) rule is adopted, critics say.

Mollie Matteson, a senior scientist and bat specialist at the Center for Biological Diversity who wrote the original 2010 petition to FWS to list the northern long-eared bat for ESA protection, said the service's decision to propose a special rule for the bat is unacceptable.

Matteson said it indicates the service is caving to elected leaders and industry lobbyists.

"This proposal by the Fish and Wildlife Service is the result of political pressure. Period," she said today in an email. "You'd have to be a lot blinder than a bat to not see how the agency has allowed fear-mongering and an anti-endangered species agenda that is a lot bigger than the fate of one bat species to hijack its own process in what is supposed to be a science-based decision."

FWS officials said science, not politics, will be the basis for any listing decision it makes for the northern long-eared bat.

Though Fish and Wildlife originally proposed listing the bat as endangered in 2013, the "ongoing scientific review of threats to the species" could point the way toward a threatened listing instead, Tom Melius, the service's Midwest regional director in Bloomington, Minn., said today in a statement.

And Ashe denied that political pressure has anything to do with the decision to develop a 4(d) rule.

"Our listing determinations are based upon science as the law requires," he said, adding that the service must also consider relevant public comment.

"What we're saying with the publication of this 4(d) rule, through public comment from competent public officials, not politicians ... is that we are trying to respond to those comments," Ashe said.

"Ultimately, if we do determine that the bat is imminently threatened with extinction, we will list it as endangered. If we believe that it is not, but that it is threatened with extinction in the foreseeable future, then we will make a threatened determination," he added. "And if we make a threatened determination, then a 4(d) rule is allowed by the law, and in fact is a very important expression of the law's flexibility."

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