

WSSI 2023 Regulatory Updates
April 12, 2023

Legal and Regulatory Updates

Justin W. Curtis

AQUALAW

An aerial photograph of a forest with a stream. The forest is dense and green, with a stream flowing through it. The stream is a light brown color, and the surrounding forest is a deep green. The text is overlaid on the center of the image.

1. Northern Long Eared Bat Uplisting

Why Uplist NLEB Now?

💧 Listed as Threatened

~ April 2, 2015

💧 NLEB 4(d) Rule Issued

~ January 14, 2016

💧 Litigation

- ~ Several eNGOs challenged listing
- ~ U.S. District Court in DC found listing to be “arbitrary and capricious,” ordered FWS to make new listing decision by December 2022



So Long 4(d) Rule

◆ Endangered Species Act Section 4(d)

- ~ Sec 4(d) authorizes promulgation of “necessary and advisable” regulations to conserve **threatened** species
- ~ FWS issues species-specific 4(d) rules for **threatened** species

◆ NLEB 4(d) Rule

- ~ Prohibited “purposeful take” of NLEB (with limited exceptions)
- ~ Allowed “incidental take” under certain conditions
 - ~ E.g, tree removal if (1) $>.25$ mile from known hibernaculum or (2) >150 feet from a known maternity roost tree between June 1 and July 31

Effect of Uplisting

◆ Endangered Species Act Section 9

- ~ Prohibits “take” of endangered species
- ~ Endangered species not eligible for 4(d) Rule

◆ What is “Take”?

- ~ “Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”
- ~ “Incidental take” is taking that is incidental to a lawful activity



NLEB Enforcement

- ◆ **By US Fish & Wildlife Service**
 - ~ Civil penalties for unintentional but foreseeable take of NLEB
- ◆ **By US Attorney's Office**
 - ~ “Knowing” take of NLEB is criminal offense
- ◆ **By Citizens**
 - ~ Civil suit for any alleged violation (after 60-day notice)
- ◆ **By Federal Permitting Agency**
 - ~ Civil or criminal enforcement for violations of permit conditions regarding NLEB



Living with Uplisting: Non-Federal Activities

- No Safe Harbor for (Unpermitted) Incidental Take!
- Evaluate Potential to Affect NLEB
 - ~ Range-Wide Determination Key (IPaC)
 - ~ Interim Wind Guidance
 - ~ Interim Forestry Modification Guidance
 - ~ Contact local FWS field office
- If Necessary: Apply for Incidental Take Permit



Living with Uplisting: Federally Permitted Activities

- ◆ **Activities that Will Require a Federal Permit**
 - ~ Section 7 consultation triggered if activity may affect NLEB
 - ~ Responsibility applies to federal permitting agency
 - ~ Guided by “Interim Consultation Framework” if activity complies with conditions and requirements of expired 4(d) Rule and effects will occur before April 1, 2024
- ◆ **Activities Under a Previously Issued Federal Permit**
 - ~ Permitting agency may need to reinitiate consultation if (1) it retains discretionary authority and (2) permitted activity may affect NLEB
 - ~ Permittee potentially liable for incidental take **even if** agency declines to reinitiate consultation
 - ~ Expect permit modifications with NLEB special condition

Looking Forward



💧 Interim Consultation Framework

- ~ Only covers permitted activities through [April 1, 2024](#)

💧 Permitted Activities After April 1, 2024

- ~ Permitting agency may need to reinitiate consultation if (1) it retains discretionary authority and (2) permitted activity may affect NLEB
- ~ If agency does not reinitiate, any Incidental Take Statement protection may be lost
- ~ Expect additional guidance from FWS

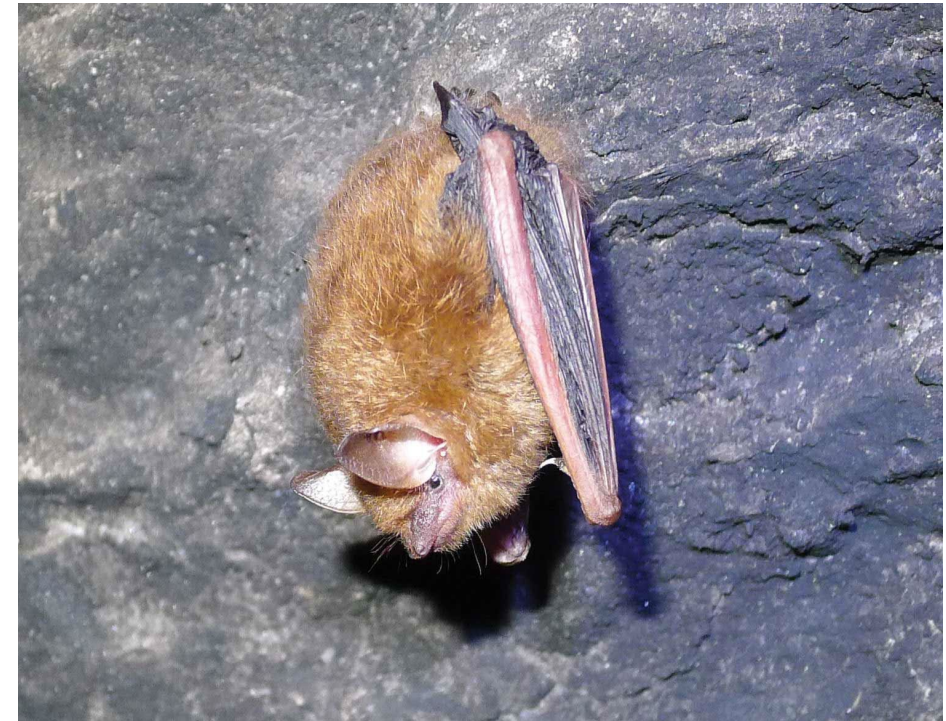
Up Next: Tricolored Bat


💧 Listing Status

- ~ Proposed endangered listing throughout range (39 states) in September 2022
- ~ No critical habitat designation proposed
- ~ Rule to be finalized later this year

💧 Implications

- ~ Take prohibition does not apply until listing finalized
- ~ Permit agency must “confer” with FWS if application “likely to jeopardize the continued existence” (40 CFR 402.10(a))





Justin W. Curtis
Justin@AquaLaw.com
804.716.9021

AQUALAW

www.AquaLaw.com