

Fish And Wildlife Service Lists Northern Long-eared Bat As Threatened Its Potential Impact On Eastern US Caving Activities

By Randy Hurst

On April 2, 2015, the USFWS published in the Federal Register a Notice of Final Rulemaking listing the Northern Long-eared bat as a Threatened species under the Endangered Species Act (ESA). This listing (codified at 50 CFR § 17.40) may affect cavers for the reasons stated below.

The habitat of the Northern Long-eared bat encompasses the entire United States east of the Rocky Mountains except for some portions of Florida and Georgia. Of particular interest is the provision in the listing that distinguishes activities prohibited within and outside the “WNS buffer zone.” The WNS buffer zone is defined as any area within 150 miles from any county where WNS has been identified. This encompasses nearly all of the traditional caving areas frequented by MAR cavers, as well as NRO, VAR, SERO and TAG.

The Notice states that these bats hibernate in caves and mines, but generally use tree roosts in summer, including nursing females. The bats swarm entrances to hibernacula in the fall prior to hibernating. Hence, cavers are most likely to encounter these bats at their most vulnerable stage: during winter hibernation.

The primary threat to the northern long-eared bat is identified (unsurprisingly) as white nose syndrome. However, disturbance during hibernation by recreational caving is identified as a secondary threat, although caving in and of itself does not appear to be a cause of population decline. Nevertheless, recreational caving is identified as an additional stressor to a population that is in serious decline due to WNS. The discussion accompanying the FWS’s Notice of Final Rulemaking includes about ½ page describing what we already know: how even “non-tactile” disturbances such as changes in light and sound can detrimentally affect hibernating bats. Hence, recreational caving is identified in the rulemaking as a potential source of harm to the species.

Listing of a species as “threatened” invokes the protections of the Endangered Species Act, which generally prohibits “takings.” The statute defines “taking” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” The courts have interpreted the term to include such ancillary activities as habitat modification or destruction and other activities that cause “indirect” injuries. (See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, U.S. Supreme Court 1995.) Thus, even otherwise innocuous activities that result in harm to individual animals (such as caving during hibernation, as discussed above) are prohibited unless specifically exempted by the regulations.

As noted above, the new rules are slightly different within and outside the WNS buffer zone. Outside the zone, the general prohibitions on taking are tempered by the following Exception: “Any incidental (non-purposeful) take of northern long-eared bats resulting from otherwise lawful activities.” (50 CFR § 17.40(o)(1)(ii)(B).) Noting that recreational caving is recognized as a secondary threat by the FWS, it would appear that recreational caving would fall under this exception and be allowed as long as cavers take reasonable care not to disturb hibernating bats (something that should be practiced anyway).

Inside the buffer zone, however (*i.e.*, throughout the MAR, VAR, NRO, and TAG caving areas), the exceptions are more limited: the only activities that are excepted from the general prohibition on taking are those related to forest management (lumbering) activities, routine right-of-way maintenance, and removal of hazardous trees for protection of human life and property (there is also an exception for deliberate removal of bats from houses if done properly according to state regulations). Note that all of these exempted activities affect summer habitat, which is less stressful since the bats are active and can relocate and therefore are not as much at risk. There are no exceptions inside the buffer zone for “incidental takes” involving hibernacula. In particular, **inside the WNS buffer zone there is no exception for an “incidental (non-purposeful) take resulting from otherwise lawful activities”** as there is outside the buffer zone.

Consequently, caving in the MAR (and other Eastern areas) in any cave known or suspected to harbor hibernating Northern Long-eared bats could be a violation of the ESA and subject to penalties. Penalties under the ESA include civil fines of up to \$25,000 and federal criminal charges equivalent to a misdemeanor (\$50,000 fine and up to one year imprisonment for “knowing” violations). There is also a “citizen suit” provision allowing concerned citizens to initiate suit if the responsible agency (FWS or a state Environmental agency) does not take action. Hence, there is a risk that concerned conservation groups that become aware of winter caving activities could bring a federal civil action against either the individuals or group (Grotto) involved.

Of more importance than potential penalties, however, is the concept that cavers should be concerned about preserving ALL bat species in this time of severe stresses on their populations. Winter caving in known hibernacula for any species—threatened or not—is simply not responsible. Since the threat does not exist in summer, there appears to be no prohibition on caving at any other time of year. Please plan your caving trips accordingly, and let those you meet know about this important new law.