



Siting Insights

Looking Back and Looking Ahead at
Key Environmental Developments
Affecting the Wind Industry

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UT CLE Renewable Energy Law | Austin, TX
Feb 1, 2017

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Overview

Key Species Actions

- Lesser Prairie Chicken
- Northern Long-Eared Bat
- Black-Capped Vireo
- Bald and Golden Eagles
- Rusty Patched Bumblebee
- American Burying Beetle

Policy Developments

- Critical Habitat Rule Revisions
- HCP Handbook Revision
- USFWS Mitigation Policy
- FWS MBTA Policy Statement
- Midwest Wind Energy MSHCP

The Big Picture

- Recent FWS regulatory strategy
- Impact of Trump Administration on strategy, policy

Lesser Prairie Chicken

New Listing Threatened



- Listed as “threatened” in April 2014 with 4(d) rule based on WAFWA Range Wide Plan
- Federal court vacated listing in September 2015 (*Permian Basin Petroleum Assoc’n et al., v. U.S. Dep’t. of Interior*, No. 7:14-cv-00050-RAJ (W.D. Tex. Sept. 1, 2015))
- Court denied Service motion to remand without vacatur in February 2016
- Final rule de-listing LEPC published July 20, 2016
- September 2016 – eNGOs petitioned USFWS to list three LEPC population segments as endangered, with emergency listing for two of those (sand sage and shinnery oak prairie populations)
- November 2016 – USFWS issued 90-day finding on LEPC status
 - “Based on our review of the petition and sources cited in the petition, we find that the petition presents substantial scientific or commercial information indicating that listing the lesser prairie-chicken may be warranted...”
 - Finding assumes validity of all information presented – similar to surviving motion for summary judgment

Lesser Prairie Chicken

New Listing Threatened



Looking Ahead

- 90-day finding kicks off status review leading to 12-month finding on whether LEPC again warrants threatened or endangered listing – due September 2017
 - Also underway – FWS species assessment, expected to be complete in summer 2017
 - 12-month finding due September 2017
 - FWS seeking comment on range of issues relating to biology and listing factors
- Could a new listing be in the offing?
 - Population numbers were strong in 2016 – may be a challenge to support biologically
 - Even if FWS inclined to re-list, due to effect on oil and gas development and questions surrounding RWP, would seem that Trump admin would not favor
 - Could re-list but give favorable treatment to oil and gas such as CCAA and private HCPs
 - New 4(d) rule could be problematic given problems with mitigation under RWP

Northern Long-Eared Bats

Beware the Long-Ear of the Law



- Listed as “threatened” in April 2015. Final 4(d) rule published 1/14/16
- 4(d) rule exempts NLEB from ESA § 9 take prohibition:
 - Designates “WNS Zone” – all counties with known WNS plus 150-mile buffer
 - Outside WNS Zone – blanket incidental take authorization, no surveys or consultation required
 - Within WNS Zone – incidental take authorized except:
 - Activities occurring within a NLEB hibernaculum, or that could alter the entrance to or environmental conditions in a hibernaculum even when the bats are not present
 - Activities involving tree removal, if they:
 - occur within a 0.25 mile radius of a known NLEB hibernaculum;
 - cut or destroy known occupied maternity roost trees, or any trees within a 150 foot radius of a known maternity roost tree, during the pup season (June 1 through July 31); or
 - involve the removal of trees for the protection of human life or property

Northern Long-Eared Bats

Beware the Long-Ear of the Law



- Center for Biological Diversity and Defenders of Wildlife separately filed challenges to 4(d) rule in May 2016
 - Argue for endangered vs. threatened, challenge sufficiency of BiOp, § 7 and NEPA processes
 - AWEA filed motion for leave to file amicus brief in December

Looking Ahead

- If challenge is successful, 4(d) rule could be vacated or rendered moot
- Status review in 2020 – could result in uplisting

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First appeared as part of the conference materials for the
2017 Renewable Energy Law session

"Siting Insights: Looking Back and Looking Ahead at Key Environmental Developments"