

Notice of Agency Rule-making Proposal

ADVERTISE: January 18, 2017

AGENCY: 09-137 Inland Fisheries and Wildlife

CHAPTER NUMBER AND TITLE: Chapter 8 – Endangered Species

PROPOSED RULE NUMBER *(leave blank; to be assigned by Secretary of State)*:

BRIEF SUMMARY: In accordance with Title 12 MRS, Sections 12804(3) and 12808-A, the Department is proposing to amend Chapter 8 rules to provide protection guidelines and exemptions for certain activities as they relate to bat species protected under the Maine Endangered Species Act (MESA). A complete copy of the proposed rule is available from the Agency Rulemaking Contact Person listed below.

PUBLIC HEARING: February 6, 2017 @ 6:00 p.m. – Augusta Armory, Room 209B, 179 Western Avenue, Augusta

COMMENT DEADLINE: February 16, 2017

CONTACT PERSON FOR THIS FILING: Becky Orff, Inland Fisheries and Wildlife, 284 State Street 41 SHS, Augusta, ME 04333; phone: 207-287-5202; fax: 207-287-6395; e-mail: Becky.Orff@maine.gov

CONTACT PERSON FOR SMALL BUSINESS IMPACT STATEMENT *(if different)*:

FINANCIAL IMPACT ON MUNICIPALITIES OR COUNTIES *(if any)*: No fiscal impact anticipated.

STATUTORY AUTHORITY FOR THIS RULE: 12 MRS 12808-A & 12804

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED *(if different)*:

AGENCY WEBSITE: www.maine.gov/ifw

E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: Becky.Orff@maine.gov

* Check one of the following two boxes.

The summary provided above is for publication in both the newspaper and website notices.

The summary provided above is for the newspaper notice only. Title 5 §8053, sub-§5 & sub-§7, ¶D. A more detailed summary is attached for inclusion in the rule-making notice posted on the Secretary of State's website. Title 5 §8053, sub-§3, ¶D & sub-§6.

Please approve bottom portion of this form and assign appropriate AdvantageME number.

APPROVED FOR PAYMENT _____ DATE: _____
(authorized signature)

FUND	AGENCY	ORG	APP	JOB	OBJT	AMOUNT
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Rule-Making Fact Sheet

(5 MRSA §8057-A)

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NAME, ADDRESS, PHONE NUMBER, E-MAIL OF AGENCY CONTACT PERSON:

Becky Orff, Inland Fisheries and Wildlife, 284 State Street 41 SHS, Augusta, ME 04333; phone: 207-287-5202; fax: 207-287-6395; e-mail: Becky.Orff@maine.gov

CHAPTER NUMBER AND RULE TITLE: Chapter 8 – Endangered Species

STATUTORY AUTHORITY: 12 MRS 12808-A & 12804

DATE, TIME AND PLACE OF PUBLIC HEARING: February 6, 2017 @ 6:00 p.m. – Augusta Armory, Room 209B, 179 Western Avenue, Augusta

COMMENT DEADLINE: February 16, 2017

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: The little brown bat, northern long-eared bat, and eastern small-footed bat were added to the Maine Endangered and Threatened Species list in 2015 due to widespread population declines as a result of White-Nose Syndrome. The Maine Endangered Species Act (MESA) prohibits the ‘taking’ of a Threatened or Endangered Species, except as specifically authorized through an Incidental Take Plan or a Broad Activity Exemption (12 M.R.S. §12808-A(4)). Because these bats are widely distributed and their presence is hard to detect, questions have arisen for ongoing activities that could potentially result in the “take” of listed bats. These activities include 1) routine tree removals, 2) disturbance of winter hibernacula, 3) removal and exclusion of bats from buildings, and 4) mortality of bats at wind energy facilities. The proposed rule is required in order to establish protection guidelines to minimize the take of listed bat species, and to provide an exemption for certain activities that may result in the occasional take of listed bats.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? ___ YES X NO

ANALYSIS AND EXPECTED OPERATION OF THE RULE: Protection Guidelines: The proposed rule prohibits tree removal within ¼ mile of documented subsurface winter bat hibernacula (caves and underground mines) and within 150 feet of documented maternity roost trees during the pup-rearing season (June 1 to July 31) without prior approval by the Commissioner. The rule also prohibits human entry into documented winter hibernacula from October 1 to April 30th. The rule also specifies that accidental mortality of listed bats that results from their removal or exclusion from unoccupied buildings will be addressed with a Widespread Activity Incidental Take Plan developed by the Department. Accidental mortality of little brown bats and eastern-small footed bats that results from the operation of wind turbines will be addressed by Specific Activity Incidental Take Plans customized to the unique circumstances at each facility.

Broad Activity Exemptions: The proposed rule identifies several activities that are exempt from potential liability related to the unintentional take of listed bats, including the removal of hazardous trees, tree removals outside the buffers surrounding known maternity roost trees and winter hibernacula, and the removal and exclusion of bats from occupied buildings. The proposed rule also provides an exemption for accidental mortality of northern long-eared bats that result from the operation of wind turbines.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE:

This proposed rule results from extensive consultation with a wide variety of stakeholders including the Maine Forest Products Council, Small Woodland Owners of Maine, Professional Logging Contractors of Maine, Maine Renewable Energy Association, Maine Audubon Society, and The Nature Conservancy. The rule was developed in a manner that conforms to the federal Endangered Species Act 4d rule for northern long-eared bats. Finally, the Department considered wind energy monitoring data which periodically samples bat mortalities at facilities operating under state permits.

ESTIMATED FISCAL IMPACT OF THE RULE: No fiscal impact anticipated

AMEND CHAPTER 8 RULES AS FOLLOWS:

NOTE TO SECRETARY OF STATE: Previous sections of this rule remain unchanged. Please add Section 8.06.

8.06 Protection Guidelines and Broad Activity Exemptions for Bats

A. Definitions

When used in this section, the following words and terms shall have the following meaning:

1. **Maternity roost trees** - trees that have been used as roosts by female bats listed under 12 M.R.S. §12803, or their pups, between June 1 and July 31, as documented by the Department;
2. **Subsurface winter hibernacula** - natural caves or subterranean mines that are accessible for human entry and have been used by overwintering populations of bats listed under 12 M.R.S. §12803, as documented by the Department;
3. **Tree removal** - includes, but is not limited to, all forest management activities (harvesting and constructing roadways) by landowners or their agents, cutting or pruning of trees, and maintenance or expansion of existing rights-of-way for transportation or utility corridors; and
4. **Unoccupied building** - any building not currently used as a living space, work space, or as a place to congregate by people.

B. Protection Guidelines

Pursuant to 12 M.R.S. §12804 (3), the following Protection Guidelines are established:

1. Tree removal is prohibited within 0.25 miles (0.4 km) of subsurface winter hibernacula without prior written approval by the Commissioner;
2. Tree removal is prohibited within 150 feet (45 m) of maternity roost trees during the period from June 1 -to July 31 without prior written approval by the Commissioner;
3. All entry into subsurface winter hibernacula is prohibited during the period from October 1 to April 30 without prior written approval by the Commissioner;
4. Installation of materials to exclude bats listed under 12 M.R.S. §12803 from unoccupied buildings is prohibited during the period from June 1 to July 31 without prior written approval by the Commissioner;
5. Accidental mortality of bats listed under 12 M.R.S. §12803 that results from their removal from unoccupied buildings or the demolition of unoccupied buildings will be addressed with a “Widespread Activity Incidental Take Plan” (12 M.R.S. §12808-A (3)) developed by the Commissioner; and

6. Accidental mortality of little brown bats and eastern small-footed bats that results from the operation of wind turbines is best addressed by “Specific Activity Incidental Take Plans” (12 M.R.S. §12808-A (2)) customized to the unique circumstances at each facility and approved by the Commissioner.

C. Broad Activity Exemptions

Pursuant to 12 M.R.S. §12808-A (4), the following activities are exempt:

1. The removal, including lethal removal, and exclusion of bats listed under 12 M.R.S. §12803 from occupied buildings. Examples of best practices to remove and/or exclude bats from buildings are available from the Department;
2. The removal of hazard trees for the protection of human life and property;:-
3. Any cutting of trees that is compliant with the protection guidelines in 8.06(B); and
4. Accidental mortality of northern long-eared bats that results from the operation of wind turbines.