



# PUBLIC NOTICE

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## UPDATED TOWER CONSTRUCTION GUIDANCE FOLLOWING THE RECLASSIFICATION OF THE NORTHERN LONG-EARED BAT AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT

On December 2, 2021, the Wireless Telecommunications Bureau (Bureau) of the Federal Communications Commission (Commission) issued guidance to the tower industry on the recommended steps for considering the potential effects that proposed facilities could have in the northern long-eared bat's (*Myotis septentrionalis*) range as part of an applicant's environmental review.<sup>1</sup> On November 29, 2022, U.S. Fish and Wildlife Service (Service) announced a final rule to reclassify the northern long-eared bat from being listed as threatened to being listed as an endangered species under the Endangered Species Act (ESA).<sup>2</sup> The final rule takes effect on January 30, 2023. With this guidance, the Commission provides updated instructions for the industry following the effective date of the final rule.

*Background.* On April 2, 2015, the northern long-eared bat was listed as threatened under the ESA due to the continued spread of white-nose syndrome.<sup>3</sup> In January 2016, the Service released a final 4(d) rule<sup>4</sup> and programmatic biological opinion<sup>5</sup> requiring protective measures related to the northern long-eared bat. Among other things, the Opinion provided an optional framework to applicants to streamline northern long-eared bat section 7 consultation (Streamlined Framework), pursuant to the ESA under certain circumstances.<sup>6</sup>

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<sup>1</sup> *Revised Tower Construction Guidance for Protection of Northern Long-Eared Bat under the Endangered Species Act*, Public Notice, DA 21-1501 (WTB 2021) (2021 Public Notice).

<sup>2</sup> U.S. Fish and Wildlife Service, News Release, *U.S. Fish and Wildlife Service Reclassifies Northern Long-eared Bat as Endangered under the Endangered Species Act* (Nov. 29, 2022), [https://www.fws.gov/sites/default/files/documents/FINAL.FWS\\_NEWS%20RELEASE.NLEB%20final%20rule.11252022.pdf](https://www.fws.gov/sites/default/files/documents/FINAL.FWS_NEWS%20RELEASE.NLEB%20final%20rule.11252022.pdf).

<sup>3</sup> Service, Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 17973 (Apr. 2, 2015); 50 CFR § 17.11(h).

<sup>4</sup> Service, Endangered and Threatened Wildlife and Plants; 4(d) Rule for the Northern Long-Eared Bat, 81 Fed. Reg. 1900 (Jan. 14, 2016); 50 CFR § 17.40(o). A 4(d) rule framework is a streamlined consultation with the Service to determine the extent of the potential effects of a project on listed species and/or their critical habitat and whether further consultation is required.

<sup>5</sup> Service, Programmatic Biological Opinion on Final 4(d) Rule for the Northern Long-Eared Bat and Activities Exempted from Take Prohibitions (2016), <https://www.fws.gov/sites/default/files/documents/BOtlebFinal4d.pdf> (Opinion).

<sup>6</sup> Opinion at 4-6.

In 2016, the Bureau released a Public Notice setting forth guidance to applicants for using the Streamlined Framework for facilities that may affect the northern long-eared bat.<sup>7</sup> The Bureau indicated that if the Streamlined Framework applied to a proposed facility, the tower owner was not required to submit additional documentation to the Commission.<sup>8</sup>

In 2021, the Bureau issued further guidance on using the Streamlined Framework.<sup>9</sup> The Bureau directed applicants using the Streamlined Framework to complete the automated determination key for the northern long-eared bat through the Service's Information for Planning and Consultation (IPaC) system and follow the Service's process for federal actions.<sup>10</sup>

On January 30, 2023, the Service's final rule reclassifying the northern long-eared bat as endangered under the ESA will take effect.<sup>11</sup> Among other actions, the final rule removes the northern long-eared bat's species-specific rule issued under section 4(d) of the Act.<sup>12</sup>

*Discussion.* With this *Public Notice*, we notify applicants that the 4(d) rule and Streamlined Framework are null and void once the final rule takes effect on January 30, 2023. Accordingly, an applicant must re-initiate Service consultation for any project that is proposed or is in pre-construction status as of January 30, 2023 and that relied on the 4(d) and Streamlined Framework. The Service has announced that it is "developing other streamlining tools to assist" applicants with consultations for the northern long-eared bat, including a "rangewide northern long-eared bat determination key" available through the IPaC, and an Interim Consultation Framework to help "ensure that projects in compliance with the 4(d) rule are not delayed."<sup>13</sup> The Service states that the "new formal consultation framework will facilitate the transition from the 4(d) rule to typical Section 7 consultation procedures for federally endangered animals, until spring 2024."<sup>14</sup>

We therefore direct applicants to consult with the Service's resources<sup>15</sup> and the applicant's respective field Service office<sup>16</sup> to determine how to proceed with the consultation process for any project affected by the Service's final rule and ensure continued ESA compliance.

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<sup>7</sup> *Tower Construction Guidance for Protection of Northern Long-Eared Bat under the Endangered Species Act*, Public Notice, 31 FCC Rcd 3960 (WTB 2016).

<sup>8</sup> *Id.* at 3961 ("If no action is required with respect to the NLEB, or if the [Streamlined] Framework applies, the FCC does not require additional reporting.").

<sup>9</sup> *2021 Public Notice*.

<sup>10</sup> *Id.*

<sup>11</sup> Service, *Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat*, 87 Fed. Reg. 73488 (Nov. 30, 2022) (*Final Rule*).

<sup>12</sup> *Id.*

<sup>13</sup> Service, *Final rule to reclassify the northern long-eared bat as endangered under the Endangered Species Act Questions and Answers*, [https://www.fws.gov/sites/default/files/documents/FINAL.FWS\\_FAQs\\_NLEB%20final%20rule%20FAQs.11222022%20%281%29.pdf](https://www.fws.gov/sites/default/files/documents/FINAL.FWS_FAQs_NLEB%20final%20rule%20FAQs.11222022%20%281%29.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> See Service, *Northern Long-eared Bat*, <https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis> (last visited Jan. 18, 2023) (providing resources on the transition, including a Frequently Asked Questions and webinar slides).

<sup>16</sup> See *Final Rule*, 87 Fed. Reg. at 73494 ("If any private entity is concerned that they may be engaging in an activity that will result in take of a northern long-eared bat, they should coordinate with their respective Service field office.").

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