

# Tower Construction/Reclassification of the Northern Long-Eared Bat as Endangered: Federal Communications Commission Issues Updated Guidance



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The Wireless Telecommunications Bureau (“Bureau”) of the Federal Communications Commission (“FCC”) issued a January 24th public notice that it is providing updated instructions (i.e., “Guidance”) in regards to tower construction. See DA 23-63.

The reason for the updated Guidance is the United States Fish and Wildlife Service (“Service”) announcement in 2022 of 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.

The FCC had previously issued Guidance to the tower industry on the recommended steps for considering the potential effects that proposed facilities could have on the northern long-eared bat’s range as part of an applicant’s environmental review. See Revised Tower Construction Guidance for Protection of Northern Long-Eared Bat under the Endangered Species Act, Public Notice, DA 21-1501.

The northern long-eared bat had been initially listed as threatened in 2015. However, the Service determined that the species warranted reclassification as endangered. A number of activities in addition to the tower industry may be affected such as wind energy facilities, infrastructure, and forestry activities.

The Bureau had previously in 2016 released a public notice setting forth guidance to applicants for using the Service’s final 4(d) rule and programmatic biological opinion related to protective measures for the northern long-eared bat. The Service’s biological opinion provided an optional framework to applicants to streamline northern long-eared bat section 7 consultation (denominated “Streamlined Framework”) pursuant to the Endangered Species Act under certain circumstances.

The Bureau had indicated that if the Streamlined Framework applied to a proposed facility, a tower owner was not required to submit additional documentation to the FCC. Further guidance was issued by the Bureau in 2021 on using the Streamlined Framework. However, the January 24, 2023, FCC notice notifies applicants that the 4(d) rule and Streamlined Framework are null and void once the Service’s reclassification of the northern long-eared bat takes effect on January 30th.

As a result, the FCC notes that a tower applicant must re-initiate Service consultation for any project that is proposed or is in pre-construction status as of January 30th and that relied on the 4(d) and Streamlined Framework. The FCC notes that the Service has announced that it is “developing other streamlining tools to assist” applicants with consultations for the northern long-eared bat. This is stated to include a “rangewide northern long-eared bat determination key.” Further, the FCC states that the Service had

indicated that a “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.”

A copy of the Guidance can be found [here](#).