



PUBLIC NOTICE

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WIRELESS FACILITY CONSTRUCTION GUIDANCE WITHIN THE AMERICAN BURYING BEETLE'S RANGE

With this *Public Notice*, the Wireless Telecommunications Bureau (Bureau) provides guidance for applicants proposing to build facilities that will use Federal Communications Commission (Commission)-licensed spectrum to comply with the latest programmatic biological opinion issued by the U.S. Fish and Wildlife Service (Service) for the American burying beetle (*Nicrophorus americanus*) species.¹

Background. The American burying beetle (ABB) is a large orange and black, nocturnal beetle that requires a diversity of vegetation types including native grasslands, grazed pastures, riparian zones, and forests.² In 1989, the Service listed the American burying beetle as endangered under the Endangered Species Act (ESA) and devised a recovery plan in 1991.³

On January 2, 2020, while the ABB was classified as an endangered species, the Service approved a programmatic biological opinion that addressed authorizations by the Commission of construction and operation of telecommunications facilities and their potential effects on the ABB in Oklahoma only.⁴

¹ See Memorandum from Elizabeth Forbus, Division Chief, Environmental Review, Ecological Services, Interior Region 6, to Assistant Regional Director, Ecological Services Interior Region 6, Albuquerque, New Mexico, Attention: Marty Tuegel, Branch Chief Environmental Review (Oct. 15, 2020), [https://www.fws.gov/southwest/es/Oklahoma/Documents/ABB/Listing/BP035713%2020201008_BO_ABB4\(d\)%20For%20Signature.pdf](https://www.fws.gov/southwest/es/Oklahoma/Documents/ABB/Listing/BP035713%2020201008_BO_ABB4(d)%20For%20Signature.pdf) (Opinion) (evaluating activities that the Service excepted from incidental take prohibitions under the final 4(d) rule also issued by the Service on October 15, 2020). A programmatic biological opinion is the Service's opinion on whether multiple, related projects are likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. See 16 U.S.C. § 1536(b)-(c).

² See generally Service, *American Burying Beetle* (Apr. 2014), https://www.fws.gov/southwest/es/oklahoma/documents/te_species/species%20profiles/american%20burying%20beetle%20fact%20sheet%202014.pdf.

³ *Id.*

⁴ Service, *Programmatic Biological Opinion on the Proposed Construction of Telecommunications Facilities within the Oklahoma Range of the American Burying Beetle* (*Nicrophorus americanus*) 2020-2024 (Jan. 2, 2020), https://www.fws.gov/southwest/es/Oklahoma/Documents/TE_Species/FinalSigned%20ABB%20FCC%20Programmatic%20BO%20Jan2020_corr.pdf (January 2020 PBO) (requiring owners of certain telecommunications facilities for the use of Commission-licensed spectrum to use a formula to determine effects to the ABB and detailing mitigation measures).

On October 15, 2020, the Service downlisted the ABB from an endangered species to a threatened species and issued both a rule pursuant to section 4(d) of the ESA⁵ and the Opinion,⁶ which provides for streamlined treatment in several states under certain circumstances.⁷ On February 3, 2021, the Service authorized the Commission to use the Opinion for all ongoing and future actions that may affect the ABB.⁸

Discussion. The construction and operation of communications facilities for use of Commission-licensed services are federal activities that trigger environmental obligations, including with respect to endangered and threatened species.⁹ Under the Commission's rules, applicants proposing new wireless facilities or proposing modifications to existing facilities that will involve ground disturbance in the ABB's range must consider potential effects to the ABB as part of their required environmental review before commencing ground-disturbing activities.¹⁰ To fulfill this obligation, we notify all applicants with proposed wireless facilities within the ABB's range that they must follow the Opinion, which supersedes the Service's January 2020 PBO.

In particular, applicants must complete the automated determination key for the ABB through the Service's Information for Planning and Consultation (IPaC) system¹¹ and must follow the Service's process for federal actions.¹² The key asks a series of detailed questions related to the project to help applicants determine the probable impact the proposed project will have on the ABB, recommend steps to

⁵ Service, Endangered and Threatened Wildlife and Plants; Reclassification of the American Burying Beetle from Endangered to Threatened with a Section 4(d) Rule, 85 Fed. Reg. 65241 (Oct. 15, 2020); 50 CFR §§ 17.11(h), 17.47(d). 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.

⁶ See generally Opinion.

⁷ See Opinion at 3-4 (stating, for example, that “[i]n this 4(d) rule, within the Southern Plains analysis areas, incidental take is only prohibited on certain conservation land: in Arkansas, Fort Chaffe; and in Oklahoma McAlester Army Ammunition Plant and Camp Gruber/Cherokee Wildlife Management Area” and that “[w]ithin the New England and Northern Plains analysis areas, the 4(d) rule only prohibits incidental take if it occurs in suitable habitat and is the result of soil disturbance, which includes converting habitat from an existing land use to a different land use.”); see also *id.* at 3 and Fig. 1 (defining the analysis areas).

⁸ Email from Daniel Fenner, Supervisory Fish and Wildlife Biologist, Oklahoma Ecological Services Field Office, U.S. Fish and Wildlife Service, to Erica Rosenberg, Assistant Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Feb. 3, 2021, 8:39 EDT).

⁹ See 47 CFR § 1.1301 *et seq.*; see also FCC, Tower and Antenna Siting, <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting> (last visited Dec. 2, 2021).

¹⁰ See 47 CFR § 1.1307(a); 50 CFR §§ 17.11(h), 17.47(d). The ABB occurs in portions of Arkansas, Kansas, Oklahoma, Nebraska, South Dakota, and Texas, on Block Island off the coast of Rhode Island, and in reintroduced populations on Nantucket Island, Massachusetts and southwest Missouri, where a nonessential experimental population was established in 2012 under section 10(j) of the ESA. Service, *Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of American Burying Beetle in Southwestern Missouri*, 77 Fed. Reg. 16712 (Mar. 22, 2012).

¹¹ Service, *IPaC Information for Planning and Consultation*, <https://ecos.fws.gov/ipac/> (last visited Dec. 2, 2021). IPaC helps to determine if a project qualifies for a programmatic consultation. By answering questions about the proposed project, a non-federal user can determine if a project is covered by a programmatic consultation and generate a consistency letter. *Id.*

¹² Service, *American Burying Beetle: Additional Information*, https://www.fws.gov/southwest/es/oklahoma/abb_add_info.htm (last visited Dec. 2, 2021).

minimize the impact of the project, and determine whether the project will result in incidental takes of the species, and, if so, whether those incidental takes are excepted under the applicable 4(d) rule.¹³

After completing the automated determination key, an applicant will receive a letter from the Service, which will either be a: (i) “consistency” letter informing the applicant that it has satisfied and concluded its responsibilities under ESA section 7(a)(2) with respect to the project and that any activities resulting in incidental take are excepted from take prohibitions; or (ii) “formal consultation” letter informing the applicant that project-specific ESA section 7 formal consultation is necessary.

If an applicant receives a consistency letter and the applicant is submitting a related Antenna Structure Registration (ASR) or Universal Licensing System (ULS) application, the applicant must attach the consistency letter to its Commission application. If the applicant is not otherwise required to submit an application to the Commission, it must retain a copy of the consistency letter in its records and be prepared to produce a copy to the Commission if and when the Commission requests it.

If an applicant receives a formal consultation letter, it must notify the Bureau and concurrently submit a Biological Assessment (BA) completed by a qualified biologist at the following email address: towercomments@fcc.gov.¹⁴ The Bureau will enter formal consultation with the Service upon receiving the BA. The Service will provide a Biological Opinion (BO) to the Bureau once the formal consultation process is completed. The Bureau will in turn provide the BO to the applicant. The applicant must incorporate the BO’s recommendations and file an environmental assessment along with its application either in ASR or ULS. No additional reporting is required with respect to the ABB if the proposed facility will not be constructed in the ABB’s range.

We note that the Opinion imposes additional obligations with which applicants must comply. For example, if an applicant finds a dead, injured, or sick ABB, it must promptly notify the appropriate Service Field Office.¹⁵ Applicants must also promptly report and describe any departures from activities they described in documents submitted to the Service to the appropriate Service Field Office.¹⁶ Finally, applicants should rely exclusively on the Opinion in place of the January 2020 PBO.

For further information, contact Deborah Spring, Biologist, Wireless Telecommunications Bureau, Competition and Infrastructure Policy Division, Deborah.Spring@fcc.gov.

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¹³ “Take” is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19). “Incidental taking” is a take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 50 CFR § 17.3. We note that intentional takes remain prohibited.

¹⁴ See 50 CFR § 402.08; see also *id.* at § 402.12(b)(1) (“The procedures of this section are required for Federal actions that are ‘major construction activities’”).

¹⁵ Opinion at 1.

¹⁶ *Id.* at 5.