

November 21, 2016

**Comments regarding the September 22, 2016
Proposed Listing of the Rusty Patched Bumble Bee**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
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The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service's ("Service") proposed rule to list the rusty patched bumble bee ("RPBB") as endangered under section 4 of the Endangered Species Act ("ESA") (the "Proposed Rule").¹

EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

The current range of the RPBB encompasses all or portions of 12 states, although the historic range of the species is thought to have spanned across 28 states. Given the varied nature of the RPBB's preferred habitats, as well as the variety of activities that potentially could affect the species, listing of the RPBB as endangered could significantly impact EWAC members. EWAC also recognizes that this is the first of many pollinator species that will be considered for listing pursuant to the Service's Listing Workplan,² and therefore it is particularly important that the Service consider ways to recognize and incentivize best practices. EWAC members have extensive experience with Integrated Vegetation Management (described in greater detail below) that includes consideration of pollinator species. EWAC appreciates the opportunity to draw upon that experience and has some suggestions relative to the Proposed Rule.³

EWAC requests that the Service clarify and expand upon certain aspects of the Proposed Rule in any final rulemaking so that the final rule will provide definitive and functional guidance addressing herbicide use specifically, as distinct from pesticide use or insecticide use. EWAC appreciates that the Service included guidance as to what may constitute "take" in the Proposed Rule.⁴ This is consistent with Service policy stating that the Service, to the maximum extent practicable at the time a species is listed, identify those activities that would or would not constitute a violation of section 9 of the Act.⁵ In accordance with this guidance, the Proposed Rule states:

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act; this list is not comprehensive:

...

(2) The unauthorized release of biological control agents that attack any life stage of the rusty patched bumble bee, including the unauthorized use of herbicides,

¹ 81 Fed. Reg. 65324 (September 22, 2016).

² National Listing Workplan, 7-Year Workplan (September 2016 Version), U.S. Fish and Wildlife Service, *available at* https://www.fws.gov/endangered/improving_esa/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf.

³ EWAC's comment letter addresses the content of the Proposed Rule and it is not to be inferred that EWAC supports the listing of the RPBB.

⁴ 81 Fed. Reg. at 65333.

⁵ *Id.* at 65333(citing 59 Fed. Reg. 34272 (July 1, 1994)).

pesticides, or other chemicals in habitats in which the rusty patched bumble bee is known to occur.⁶

EWAC recommends that the Service (1) clarify its guidance statements and (2) add additional language noting what activities are **not** expected to result in take of the RPBB. First, the inclusion of the term “unauthorized” in the above quoted language is vague and could be confusing, as it seems to allude to pesticide registration under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) by the Environmental Protection Agency (“EPA”). EWAC asks that the Service revise this language to clarify that “unauthorized” use or release simply means use or release that is not in accordance with the EPA-approved label restrictions of a pesticide that has previously been identified by the EPA as a pesticide of concern to bees and is registered under FIFRA.⁷

Second, guidance regarding what activities are **not** expected to result in “take” is invaluable to those undertaking proposed or ongoing activities within the range of a newly-listed species, particularly the RPBB due to its presence across 12 states. The Proposed Rule’s discussion of pesticides (quoted above) includes herbicides, but does not cite to supportive research as to herbicides for its broad statement that, “[a]lthough the overall toxicity of pesticides to rusty patched or other bumblebees is unknown, pesticides have been documented to have both lethal and sublethal effects.”⁸ The Proposed Rule then focuses only on insecticides, specifically neonicotinoids, which the cited research suggests may constitute a threat to the RPBB. The Service did not provide much support for the Proposed Rule’s inclusion of herbicides or pesticides generally, especially as compared to the more thorough discussion of neonicotinoids. We believe application of herbicides, applied in accordance with label requirements and seasonal recommendations, should be expressly excluded from the list of activities that may result in “take,” and should instead be included in a guidance statement outlining what activities will **not** result in “take.” The Xerces Society petition to list the RPBB focuses specifically on non-herbicide pesticides as the threat posed to the species by pesticides.⁹ Accordingly, Service assessments of the best scientific and commercial information in assessing threats to the RPBB and determining whether listing is warranted should address herbicides separately from insecticides.

Herbicides are used throughout the U.S. to maintain electric utility line rights-of-way (“ROW”) as a widely-accepted practice in both the public and private sectors. The maintenance and management of vegetation on transmission and distribution electric line ROW is vitally important to the reliable delivery of electricity to customers. In fact, electric utilities are required

⁶ *Id.* at 65333 (emphasis added).

⁷ In 2015, EPA identified a discrete list of pesticides of concern for bees, and any label restrictions applicable to EPA-approved and FIFRA-registered pesticides so identified must be followed by the applicator. See Proposal to Mitigate Exposure to Bees From Acutely Toxic Pesticide Products, 80 Fed. Reg. 30644 (May 29, 2015). Such application would then constitute an “authorized use.” Please note that specific to this request, EWAC is seeking clarification of its guidance, not for any additional federal action related to pesticides.

⁸ *Id.* at 65328.

⁹ While the Xerces Society RPBB petition does discuss herbicides, herbicides are discussed distinct from insecticides and are only identified as a concern with relation to potential habitat loss. See Xerces Society for Invertebrate Conservation, Petition to List the Rusty Patched Bumble Bee as an Endangered Species 20–22, <http://www.xerces.org/wp-content/uploads/2013/01/Bombus-affinis-petition.pdf>. However, as pointed out later in these comments, right-of-way management activities that utilize herbicides in accordance with best practices can enhance habitat.

by the North American Electric Reliability Council (“NERC”)¹⁰ and the Federal Energy Regulatory Commission to conduct vegetation management to certain standards.¹¹

Electric utilities typically employ Integrated Vegetation Management (“IVM”) or similar practices to maintain these ROW in accordance with NERC and FERC standards.¹² These IVM practices are developed in accordance with the American National Standards Institute (“ANSI”) A300 (Part 7) standards developed by the Tree Care Industry Association, Inc.,¹³ as well as IVM best management practices developed by the International Society of Arboriculture as a companion manual to the ANSI A300 standard.¹⁴ IVM includes the use of approved, registered herbicides that typically target woody plant species that can grow to heights that jeopardize electric line reliability and impede ROW access for maintenance or repair. In fact, the use of herbicides in IVM to control large maturing woody plant species typically promotes the growth of broad-leaf, flowering forbs and grasses that provide vital habitat to RPBB and other pollinator species.¹⁵ Scientific studies demonstrate that ROW provide benefits to pollinators, including use as movement corridors, varied foraging and nesting habitat, breaks in monoculture woodlands, and more. Further, targeted herbicide use in the ROW context often mimics natural processes, like fire, that suppress invasive species and improve the health and distribution of pollinator-attracting species when used judiciously or in combination with other habitat management techniques.¹⁶

¹⁰ FAC-003-3 (2006).

¹¹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211, 119 Stat. 594 (2005).

¹² IVM is undertaken in accordance with a 2016 Memorandum of Understanding on Vegetation Management for Powerline Rights-Of-Way. Signatories include the Edison Electric Institute, Utility Arborist Association, U.S. Department of the Interior, U.S. Department of Agriculture, and U.S. Environmental Protection Agency. *Available at* https://www.epa.gov/sites/production/files/2016-11/documents/signed_2016_vegetation_mou_between_industry_and_federal_land_management_agencies.pdf.

¹³ American National Standards for Tree Care Operations – Tree, Shrub, and Other Woody Plant Management – Standard Practices (Integrated Vegetation Management a. Utility Rights-of-way), *available at* http://tcia.org/TCIA/BUSINESS/ANSI_A300_Standards_/TCIA/BUSINESS/A300_Standards/A300_Standards.aspx?hkey=202ff566-4364-4686-b7c1-2a365af59669.

¹⁴ International Society of Arboriculture, Best Management Practices – Integrated Vegetation Management, *available at* <http://www.isa-arbor.com/store/product.aspx?ProductID=101&vid=151>.

¹⁵ The Proposed Rule states that “herbicide use occurs rangewide and can reduce available floral resources (Factor A).” 81 Fed. Reg. at 65330. However, this statement in the Service’s proposed determination does not appear to take into account current scientific research reflecting the beneficial effects of herbicide use and ROW maintenance for pollinator species and their requisite habitat resources. *See, e.g.,* Bramble, W. & W. Byrnes. 1983. Thirty years of research on development of plant cover on an electric transmission right-of-way; Moisset, B., and S. Buchmann. 2011. Bee basics: An introduction to our native bees. U.S. Department of Agriculture Forest Service, FS-960, Washington, D.C.; Wagner, D.L., J.S. Ascher, and N.K. Bricker. 2014. A Transmission Right-of-Way as Habitat for Wild Bees (Hymenoptera: Apoidea: Anthophila) in Connecticut. *Annals of the Entomological Society of America* 107: 1110-1120 (underscoring the importance of transmission line corridors as managed early successional habitat for wild bees, including rare species, in largely forested landscapes); Wojcik, V.A., and S. Buchman. 2012. Pollinator conservation and management on electric transmission and roadside rights-of-way: A review. *Journal of Pollination Ecology* 7: 16-26; EPRI. 2004. Ecological and wildlife risk assessment of chemical use in vegetation management on electric utility rights-of-way. Palo Alto, CA: 1009445 (providing a summary of the behavior of each chemical in the environment as it relates to environmental and wildlife risk); EPRI. 2013. Use of Transmission Line Easements for the Benefit of Native Bees. Palo Alto, CA: 3002001125 (concluding that transmission line easements can provide quality habitat for native pollinators, particularly when these areas are managed in a way that promotes the growth of native shrubs and flowering perennials).

¹⁶ *See also* Brandt, J., K. Henderson, and J. Uthe. 2011. Integrated Roadside Vegetation Management Technical Manual, *available at* http://www.tallgrassprairiecenter.org/sites/default/files/irvm-technical-manual-2015-2_0_0.pdf;

Many EWAC members are actively engaged with herbicide manufacturers, environmental non-governmental organizations, and other stakeholders to further electric utilities' incorporation of specific IVM or similar practices that promote pollinator habitat on powerline ROW. Such strategic and collaboratively-developed vegetation management practices are widely recognized as providing pollinator benefits and ecological benefits in addition to fulfilling electric utilities' safety obligations and reliability standards. The beneficial outcomes of electric utilities' use of these practices should be reflected in any final listing rule for the RPBB.

While EWAC's primary concern relative to the Proposed Rule is ROW maintenance for electric transmission and distribution lines, it should be noted that some of EWAC's wind energy members have already been affected by the Proposed Rule. Some have been asked to conduct extensive and costly surveys for RPBB irrespective of the suitability of habitat for the RPBB. EWAC requests that the Service consider including wind energy development in "no take guidance." In particular, EWAC requests that (1) the no take guidance acknowledge that where similar IVM practices are applied in the course of wind energy development (collector lines, etc.), no take of the RPBB is likely to occur; and (2) survey efforts are appropriately limited to those areas containing potentially suitable habitat within the anticipated impacted acres that are not already covered by (1).

EWAC suggests that, should the RPBB be listed as endangered, the Service clearly state in the final listing decision that the use of herbicides to maintain powerline ROW, applied in accordance with label requirements and seasonal recommendations, is not expected to result in "take" of the RPBB. EWAC also seeks acknowledgement in the preamble of any final rule that such herbicide use to maintain powerline ROW is likely to benefit, rather than harm, pollinator insect species, including the RPBB. In the event that the Service lists the RPBB as a threatened species and accompanies such listing with a proposed 4(d) rule, the use of herbicides to maintain powerline ROW and certain aspects of wind energy development as described above should be specifically included as exempt activities under such 4(d) rule.

Thank you for the opportunity to comment on the Proposed Rule. EWAC looks forward to continuing to work with the Service in its efforts to continually improve implementation of the ESA.

Please feel free to contact the following EWAC representatives:

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Russell, K. N., H. Ikerd, and S. Droege. 2005. The potential conservation value of unmowed powerline strips for native bees. *Biological Conservation* 124:133-148.; Forrester, J. A., D. J. Leopold, and S. D. Hafner. 2005. Maintaining critical habitat in a heavily managed landscape: effects of power line corridor management on Karner blue butterfly (*Lycia melissa samuelis*) habitat. *Restoration Ecology* 13(3):488-498.; Grundel, R., R.P. Jean, K.J. Frohnapple, G.A. Glowacki, P.E. Scott, and N.B. Pavlovic 2010. Floral and nesting resources, habitat structure, and fire influence bee distribution across an open-forest gradient. *Ecological Applications* 20:1678-169; U.S. Department of Transportation, *Roadside Best Management Practices that Benefit Pollinators* (2016); U.S. Department of Agriculture and U.S. Department of the Interior, *Draft Pollinator-Friendly Best Management Practices on Federal Lands* (May 11, 2015); The Xerces Society for Invertebrate Conservation, *Literature Review: Pollinator Habitat Enhancement and Best Management Practices in Highway Rights-of-Way* (May 2015).