



November 21, 2016

Public Comments Processing
Attn: FWS-R3-ES-2015-0112
U.S. Fish and Wildlife Service Headquarters, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Submitted Electronically via eRulemaking Portal to FWS-R3-ES-2015-0112

Re: NRECA Comments on the U.S. Fish and Wildlife Service's Proposed Rule to List the Rusty Patched Bumble Bee as an Endangered Species; 81 *Fed. Reg.* 65324 (September 22, 2016),
Docket No. FWS-R3-ES-2015-0112

The National Rural Electric Cooperative Association (NRECA) respectfully submits the following comments in response to the above-referenced notice and request for comment from the U.S. Fish and Wildlife Service (USFWS) on the proposed rule to list the rusty patched bumble bee (RPBB) as an endangered species under the Endangered Species Act of 1973, as amended (ESA).

NRECA is the national service organization dedicated to representing the interests of rural electric utilities and the consumers they serve. NRECA represents more than 900 rural electric cooperatives that provide electricity to over 42 million people in 47 states or nearly 13 percent of the nation's electric customers. Electric cooperatives are private, independent, not-for-profit electric utility businesses that are owned by the customers they serve. NRECA's members include approximately 65 generation and transmission (G&T) cooperatives, which generate and transmit power to 668 of the 838 distribution cooperatives. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. The typical distribution cooperative is a small business entity, according to the Small Business Administration, that serves 13,000 member-consumers. Collectively, electric cooperatives own and maintain 2.5 million miles or 42 percent of the nation's electric distribution lines, covering 75 percent of the U.S. landmass. Both distribution and G&T cooperatives were formed to provide reliable electric service to their member-owners at the lowest reasonable cost.

The RPBB historically had an expansive range across areas of 28 states, but since 2000 has only been documented in all or portions of 12 states. NRECA understands the USFWS's concerns for the continued existence for the RPBB given the drastic population declines that have occurred in recent years. While we agree that there are compelling reasons for listing the RPBB, NRECA has concerns that its listing may conflict with the electric cooperatives' obligations to provide safe, reliable power to rural America.

Since RPBBs have been observed in a variety of habitats across its range and are generalist foragers, there could be significant impacts to NRECA members. NRECA believes this listing could impact as

many as 207 distribution cooperatives and G&Ts within the RPBB's current range. We also recognize that ESA listing decisions will be made for several other pollinators over the next seven years, per the USFWS's National Listing Workplan.¹ If listed, the RPBB would be the first pollinator in the contiguous U.S. to gain ESA protections and there could be sweeping implications for future pollinator listing decisions. Therefore, the USFWS should carefully consider the comments provided below in any final listing decision. The importance of this issue and extent of potential impact require a national solution for electric cooperatives to ensure that electric cooperative obligations can be met, while providing benefits to the RPBB.

NRECA appreciates the opportunity to comment on the proposed listing. In addition, we are a member of the Energy and Wildlife Action Coalition (EWAC) and support its comments on the RPBB. Before making a listing determination for the RPBB, please consider the following suggestions and recommendations.

The USFWS should address herbicides separately from other pesticides.

The proposed listing identifies pesticide use as a primary stressor for the RPBB. Then, broadly states that "the pesticides with greatest effects on bumble bees are insecticides and herbicides" and "although the overall toxicity of pesticides to rusty patched or other bumble bees is unknown, pesticides have been documented to have both lethal and sublethal effects on bumble bees."² The word pesticide is used as a general term to describe insecticides, fungicides, and herbicides. However, the primary analysis and supporting scientific studies provided in the proposed listing are specific to the effects of neonicotinoids, a distinct class of insecticides. NRECA believes the USFWS did not provide enough discussion or justification for including herbicides, or pesticides in general, as a primary stressor for the RPBB. NRECA recommends that the USFWS analyzes the potential effects of herbicides separately from insecticides and fungicides.

The USFWS should clarify what constitutes "unauthorized use" of biological control agents.

"The unauthorized release of biological control agents that attack any life stage of the rusty patched bumble bee, including the unauthorized use of herbicides, pesticides, or other chemicals in habitats in which the rusty patched bumble bee is known to occur" is listed in the proposed rule as an activity that may result in a violation of section 9 of the ESA.³ While NRECA appreciates the USFWS's attempts to identify activities that may potentially cause "take" of the RPBB, it is unclear what the USFWS considers as an "unauthorized use." As described, the "unauthorized use" of pesticides, including herbicides, can be interpreted to mean many different things. Does this mean using or releasing a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)-registered pesticide in a manner inconsistent with its Environmental Protection Agency (EPA)-approved labeling instructions? Does this mean improperly using or releasing pesticides that have EPA-approved labeling restrictions that protect bees? More specifically, is this referring to using or releasing one or more of the registered active ingredients that are listed in EPA's proposal to protect managed bees under contract pollination services from acutely

¹ https://www.fws.gov/endangered/improving_esa/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf

² *Id.* at 65328.

³ *Id.* at 65333.

toxic pesticides?⁴ NRECA is not asking these questions to advocate for additional pesticide regulations, but instead is simply asking that the USFWS provides clear and specific guidance, relevant to RPBBs, on what is considered “unauthorized use.” Furthermore, NRECA suggests that the USFWS excludes the use of herbicides, when applied in accordance with labeling instructions, from the list of activities that may result in “take” due to the lack of current scientific support. The USFWS should also include in any final rule and preamble that herbicide use will not result in “take” of the RPBB.

The USFWS should carefully consider how listing the RPBB may conflict with utility ROW maintenance requirements.

The USFWS should carefully consider how listing the RPBB may conflict with other Federal mandates. Specifically, our concerns center on the electric cooperatives obligations to public safety, maintaining electric reliability, and legal requirements under the Energy Policy Act of 2005 and the North American Electric Reliability Corporation Transmission Vegetation Management standards (FAC-003-3).⁵ Electric cooperatives are required to manage vegetation located on power line rights-of-way (ROW) and minimize encroachments from vegetation located adjacent to the ROW to prevent the risk of vegetation-related outages that could lead to major outages and operational problems.

Herbicide application is a common ROW vegetation management method that both the public and private sectors widely accept. Generally, herbicides are selectively used within transmission and distribution ROW to target woody vegetation and herbaceous weeds to prevent vegetation encroachment that, if left unmanaged, would violate reliability standards or jeopardize the safety of electric cooperative employees and the public. These are FIFRA-registered, EPA-approved herbicides that are applied per manufacturers’ labels by trained electric cooperative personnel or hired third-party contractors. Maintaining ROW vegetation is critical to ensuring safe and reliable delivery of electricity. If the USFWS lists the RPBB, NRECA has concerns that using herbicides within the RPBB range could trigger “take,” thus pitting electric cooperatives’ public and legal obligation to maintain ROW against compliance with the ESA.

Furthermore, the USFWS identifies the “unauthorized modification, removal, or destruction of the habitat (including vegetation and soils) in which the rusty patched bumble bee is known to occur” as an activity that may result in “take” violation.⁶ As mentioned above in regards to herbicides, the USFWS should clarify and provide guidance on what is considered “unauthorized” modification, removal, or destruction of RPBB habitat. In addition, NRECA shares similar concerns with how the USFWS may view mechanical mowing of utility ROW in regards to “take” of the RPBB, should the species become listed. Mechanical mowing is another widely-accepted vegetation management technique that is commonly used within the ROW to meet public and legal obligations for providing safe and reliable delivery of electricity. If listed, routine herbicide application and mowing of ROW might result in accidental, illegal take of the RPBB, which could result in criminal enforcement, civil administrative penalties, and civil judicial action for injunctive relief.

⁴ See Docket No. EPA-HQ-OPP-2014-0818-0003 (May 29, 2015).

⁵ <http://www.nerc.com/files/fac-003-3.pdf>

⁶ *Id.* at 65333.

The USFWS should not prohibit utility infrastructure construction or ROW maintenance practices.

Since the RPBB is a mobile species with a wide range of habitat use, NRECA urges the USFWS to consider that the potential impact of utility work does not threaten the survival of the RPBB or the conservation of its habitat. Where impacts may occur, the electric cooperatives work closely with the natural resource, forestry, and fish and wildlife agencies in their respective states to ensure that vegetation management do not harm wildlife.

If ESA protections are extended to the RPBB, a double jeopardy issue appears to be immediately triggered with one regulatory agency requiring a utility to maintain vegetation (North American Electric Reliability Corporation [NERC]) and another regulatory agency preventing a utility from do so (USFWS). Because of what we see as a potential conflict between two legal requirements – the requirement to maintain reliable power by managing vegetation that threatens transmission and distribution lines and the requirement to protect listed species and their habitat – NRECA recommends that USFWS works with electric cooperatives to identify a means by which cooperatives will be able to meet both of these legal obligations simultaneously.

If the USFWS were to decide that listing the RPBB as an endangered species is warranted, NRECA recommends that the USFWS clearly states in the final rule that utility ROW maintenance, including the use of herbicides and mechanical mowing, does not result in “take” of the RPBB. If the USFWS determine a threatened status for the RPBB, NRECA suggests that a 4(d) rule is proposed that would take into account that utility line maintenance need not be prohibited in order to provide for the conservation of the RPBB. NRECA encourages the USFWS to include in the preamble of any final rule that essential utility ROW activities, including maintenance, can continue without compromising the RPBB. In addition, the USFWS should include a statement that utility ROW maintenance can likely benefit, rather than harm, pollinators, including the RPBB, as outlined below.

While NRECA has primarily expressed concerns that listing the RPBB may conflict with the electric cooperatives’ obligations to maintain ROW, we are also concerned about potential impacts to new utility line construction. Most new utility installations occur in existing ROW, which are often co-located with highways, roads, and other existing corridors. However, there are circumstances when new ROW are required. This need arises primarily with respect to rural connectivity, tribal development, reliability, and safety considerations. Electric cooperatives are already motivated by cost, efficiency, and other considerations to co-locate new linear projects within existing corridors when it is safe and possible to do so. However, it is not always safe or possible. NRECA believes it is critical to ensure that the reach of utility infrastructure does not become limited by the RPBB listing decision, so that new member-consumers in rural areas can receive utility services and additional infrastructure needed to preserve utility reliability can be sited and constructed. Should the RPBB become listed, it will be unworkable for electric cooperatives to encounter seasonal delays or delays due to ESA Section 7 or Section 10 processes. In addition to not prohibiting utility ROW maintenance, NRECA recommends that the USFWS clearly states in the final rule that new transmission and distribution line construction will not be prohibited.

The USFWS does not recognize the benefits of herbicide use and mowing for creating and maintaining pollinator habitat.

Judicious mowing, herbicide use, and other vegetation management practices are recognized as strategies that benefit pollinators, which include the RPBB. For example, herbicide use can suppress invasive species, promote flowering plant growth for increased foraging opportunities, and expose soils to provide nesting habitat for ground nesting bees.⁷ The proposed listing does not take into account the benefits of these vegetation management practices. In addition, there are many scientific studies that demonstrate that ROW have the potential to provide travel, foraging, and nesting habitat for pollinators, including the RPBB, that do not appear to be considered in the proposed listing.⁸ NRECA encourages the USFWS to recognize the potential benefits of ROW for pollinators, including the RPBB, and consider ways to incentive best practices. In addition, the USFWS should include a statement in the final rule that herbicides used per the manufacturers label and mechanical mowing are best practices that would “avoid and minimize” adverse impacts to the RPBB.

Thank you for considering our comments. NRECA is committed to working with the USFWS and other immediate stakeholders to develop effective conservation measures that will protect the RPBB and other pollinators while allowing electric cooperatives to continue to deliver safe, affordable, and reliable electric power. Please do not hesitate to contact me by phone at (703) 907-5790 or email at janelle.lemen@nreca.coop should you have any questions regarding our comments.

Respectfully,



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⁷ http://www.xerces.org/wp-content/uploads/2016/08/BMPs_pollinators_landscapes.pdf

⁸ See e.g., 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.