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**Comments regarding the May 3, 2019
Notice of a Proposed Rule Reclassifying
the American Burying Beetle from Endangered
to Threatened on the Federal List of Endangered
and Threatened Wildlife with a 4(d) Rule**

Submitted by:

Energy and Wildlife Action Coalition

Filed Electronically to the attention of:

Public Comments Processing
Attn: Docket No. FWS-R2-ES-2018-0029
U.S. Fish and Wildlife Service
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The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) May 3, 2019 Notice (“Notice”) of a Proposed Rule Reclassifying the American Burying Beetle from Endangered to Threatened on the Federal List of Endangered and Threatened Wildlife with a 4(d) Rule (“Proposed Rule”).² EWAC supports the Service’s proposed reclassification of the American burying beetle (“ABB”) from endangered to threatened in light of the best available scientific information regarding the status of the species, and generally supports the use of an Endangered Species Act (“ESA”) section 4(d) special rule to describe what types of activities will be subject to the “take” prohibition of ESA section 9. Below, EWAC provides comments it believes that, if addressed, would strengthen the final rule.

I. Support use of 4(d) rule generally

As we previously have indicated to the Service,³ EWAC supports the Agency’s use of species-specific 4(d) rules to identify what activities would be subject to the “take” prohibition of ESA section 9. EWAC believes that use of species-specific 4(d) rules for threatened species better reflects the distinction Congress made when it enacted the ESA and applied the section 9 prohibitions on take only to species listed as endangered. Further, EWAC notes that use of species-specific 4(d) rules conserves the limited resources of the Service and the public by reducing the instances in which project proponents are obligated to seek take authorization and, therefore, reduces the Service’s workload. Reducing the Service’s workload, in turn, allows the agency to focus its attention and resources on other important matters, such as species of higher conservation need, completing Service review and processing of incidental take permit applications and formal and informal consultations under ESA section 7, completing species status reviews, and responding to petitions to list and delist species, and to designate or remove critical habitat.

Additionally, EWAC generally supports the promulgation of a species-specific 4(d) rule for the ABB, provided the suggestions for strengthening and clarifying certain aspects of the Proposed Rule are addressed, as set forth herein.

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, and related trade associations. 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.

² 84 Fed. Reg. 19,013 (May 3, 2019).

³ See EWAC Comments regarding the Revision of Regulations for Prohibitions to Threatened Wildlife and Plants, Docket No. FWS-HQ-ES-2018-0007.

II. The Service should clarify that soil disturbance in the Northern Plains analysis area would not cause take unless death or injury to the ABB is reasonably certain to occur

As described in greater detail below, EWAC is somewhat concerned that Service personnel or third parties may interpret the Proposed Rule's take provisions that are applicable to the Northern Plains analysis broadly, in contravention of existing Service regulations, guidance, and caselaw.

According to the Proposed Rule, incidental take of ABB in the Northern Plains analysis area would be prohibited where such take occurs as a result of soil disturbance.⁴ The preamble to the Proposed Rule explains further that incidental take is prohibited where soil disturbance occurs in areas of "suitable habitat."⁵ The Service then indicates that the term "suitable habitat" will be defined consistent with the definition of that term set forth in the *Species Status Assessment Report for the American Burying Beetle* ("SSA").⁶ The SSA, in turn, defines suitable habitat as:

areas where suitable soils contain the appropriate abiotic elements...that are favorable for excavation and formation of brood chambers and where appropriate carrion for reproduction is available. This suitable habitat accounts for breeding, feeding, overwintering, and dispersal needs.⁷

As the Service is aware, ESA section 9 prohibits "take" of listed species, including take caused by "harm."⁸ The Service has defined harm to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering."⁹ The United States Supreme Court has upheld the Service's definition of "harm,"¹⁰ and recent Service guidance explains that harm via habitat modification, "in and of itself, does not necessarily constitute take."¹¹ Rather, in order to constitute take, harm via habitat modification must give rise to actual death or injury to a member of a listed species.¹²

⁴ 84 Fed. Reg. at 19,028.

⁵ *Id.* at 19,025.

⁶ Species Status Assessment Report for the American Burying Beetle (February 2019); found at: https://www.fws.gov/southwest/es/oklahoma/Documents/ABB/Listing/ABBSSA_Final_V1.0_Feb2019.pdf.

⁷ 84 Fed. Reg. at 19,025.

⁸ 16 U.S.C. §§ 1532, 1538.

⁹ 50 C.F.R. § 17.3

¹⁰ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

¹¹ Memorandum to Service Regional Directors, *Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified* (April 26, 2018) ("ITP Guidance").

¹² See, e.g., *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999) (plaintiffs had burden to prove by a preponderance of evidence that habitat modification would harm an endangered owl by death or injury); *Arizona Cattle Grower's Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001) (mere potential for harm is insufficient to constitute take).

While the Proposed Rule indicates that incidental take of the ABB is prohibited where such take is a result of “soil disturbance,”¹³ mere soil disturbance likely will not rise to the level of take in all circumstances. EWAC requests the Service provide additional clarity in the text of any final rule as to the circumstances in which take would, in fact, occur. Specifically, EWAC requests the Service explain in any final rule that soil disturbance within potential (or suitable) ABB habitat will not rise to the level of take unless the following three criteria are met, as established in the Service’s *Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified* (“ITP Guidance”):

- The modification of ABB habitat is significant;
- Such modification also significantly impairs an essential behavioral pattern of the ABB; and
- The significant modification of habitat, along with the significant impairment of an essential behavioral pattern, is likely to result in the actual killing or injury to the ABB.¹⁴

According to the ITP Guidance, all three components of the definition of “harm” are necessary, and the phrase “actual killing or injury of wildlife” is the “most significant component.”¹⁵

In sum, the mere presence of “suitable habitat” for the ABB does not necessarily mean that the ABB will be present in such habitat or that the ABB will be taken unlawfully by a given instance of soil disturbance. Given the life history of the ABB and the broad area in which it is found, EWAC believes this additional clarity is beneficial, and even necessary, for both regulators and the regulated community.

III. USFWS unnecessarily singles out wind energy development

EWAC is confused by the Service’s focus on the effects of the construction and operation of wind energy facilities on the ABB and appreciates the opportunity to provide information related thereto. While the Service briefly mentions a variety of activities that could contribute to impacts to the ABB throughout its range, the Service appears to focus unnecessarily on potential impacts to the ABB that may result from construction and operation of wind energy facilities. The Proposed Rule points to the SSA as providing support for the Service’s position that construction and operation of wind energy facilities may adversely impact the ABB; however, EWAC notes that the statements contained in the SSA relating to wind energy impacts are speculative. For example, the SSA states: “Wind energy development has increased in recent years and may become a much larger risk in the future. Wind turbines and associated roads and powerlines have direct and indirect adverse effects that have not been assessed.”¹⁶ The SSA also states that wind

¹³ 84 Fed. Reg. at 19,028.

¹⁴ ITP Guidance at 4.

¹⁵ *Id.*

¹⁶ SSA at 64.

energy generation and agricultural activities, among others, are frequent sources of ABB habitat fragmentation in the Northern Plains analysis area, but then states that the Service does not have land cover data “adequate for measuring the current habitat suitability and effects of fragmentation related to these [sic] types of land uses.”¹⁷

While EWAC recognizes that certain soil disturbance activities such as grading may, if ABB are present, impact the species, EWAC does not understand why the Service elected to focus so heavily on wind energy generation in the Proposed Rule to the exclusion of the numerous other activities that cause soil disturbance in the relevant analysis areas, such as oil and gas exploration and production, transportation, and silviculture. Given that wind energy facilities require minimal disturbance of soil during construction (and none during operations), particularly when compared to other activities included in the take exemption provided in the Proposed Rule, it is unclear why the Service singles out wind energy development several times throughout the preamble to the Proposed Rule. Soil disturbance from construction of a wind energy facility includes access roads, connector lines, and turbine pads. While a wind energy developer may lease thousands to tens of thousands of acres as part of its project area, the actual disturbance to soil is a very small fraction of the project area. Wind energy development should not be treated any differently than other types of soil disturbing activities, and if anything, should be pointed to as an example of an activity that requires minimal soil disturbance.

Further, the Proposed Rule mentions, without citation, that “[t]he operation of wind turbines also has potential for direct take through [ABB] collisions with the blades.”¹⁸ EWAC is unaware of any reported collision of an ABB with a wind energy turbine. Nothing in the Proposed Rule or the SSA suggests that the ABB would be flying at heights where collisions with wind turbines would be any more likely than any other structure throughout the ABB range. Without any citation, the SSA also posits that collision of birds and bats with blades could increase carrion around the wind turbine, which would attract the ABB to the turbines, and subsequently increase the risk of the ABB colliding with the blades.¹⁹ EWAC is aware of no data supporting this theory. In fact, some of the Service’s own literature notes that the ABB does not fly during high wind speeds: “ABBs are nocturnal and have shown limited capabilities to fly during heavy rains, and high winds.”²⁰ EWAC requests that the Proposed Rule be revised to remove statements that rely on unsupported theories and positions set forth in the SSA. We do not believe it is appropriate to draw these types of conclusions within the Proposed Rule.

Finally, the Service makes several statements about anticipated wind energy development, concluding that wind energy development is expected to be much higher in the Northern Plains analysis area than the Southern Plains analysis area.²¹ The only

¹⁷ *Id.* at 67.

¹⁸ 84 Fed. Reg. at 19,020.

¹⁹ SSA at 123.

²⁰ U.S. Fish and Wildlife Service, “American Burying Beetle” (June 4, 2014) at 6, available at <https://www.fws.gov/southwest/es/oklahoma/Documents/ABB/American%20Burying%20Beetle%20Biology.pdf>.

²¹ 84 Fed. Reg. at 19,020.

support the Service provides for this conclusion is that wind speeds are higher in the Northern Plains analysis area,²² which is inappropriate as a single conclusive factor because wind energy siting relies on a variety of factors beyond wind speeds. With respect to the Northern Plains analysis area, the Service indicates that it “do[es] not know what areas, or what percentage of suitable [ABB] habitat...may be affected by wind projects in future years,” and states that it will be evaluating potential effects of wind energy generation on the ABB and seeks comment on the same.²³ Confusingly, the Service also concludes that:

future land use effects related to wind power were not factored into land use scenarios because we did not have estimates of future development or total areas that may be affected by wind projects, and there are no studies available to evaluate the actual effects of wind projects on American burying beetles.²⁴

EWAC is not sure how to reconcile this quotation with the Service’s other conclusory statements about wind energy development. EWAC recommends that the Service remove unsupported and misleading references to impacts on the ABB from wind energy facilities in its final rule. Wind energy development should be treated no differently than the other activities included in the take exemption described in the Proposed Rule.

IV. Conclusion

EWAC thanks the Service for the opportunity to provide these comments. Should the Service have any questions with respect to either wind energy development or electric transmission and distribution, EWAC encourages the Service to contact us.

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²² *Id.*

²³ *Id.*

²⁴ *Id.*