



February 1, 2021

Comments regarding:

December 2, 2020 Proposed Rule to List the Whitebark Pine as a Threatened Species with a Section 4(d) Rule under the Endangered Species Act

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comment Processing
Attn: Docket No. FWS-R6-ES-2019-0054
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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”) December 2, 2020 Proposed Rule to List the Whitebark Pine (*Pinus albicaulis*) as a Threatened Species (“Proposed Listing Rule”) and Adopt a Section 4(d) Rule (“Proposed 4(d) Rule”) under the Endangered Species Act (“ESA”).²

In this letter, EWAC does not provide comments concerning whether whitebark pine meets the listing criteria established by section 4 of the ESA or its implementing regulations. Rather, EWAC’s comments focus on the Service’s Proposed 4(d) Rule for the species and the effect of a Proposed Listing Rule on existing authorizations of utility rights-of-way (“ROW”) and other facilities. EWAC recognizes that section 512 of the Federal Lands Protection and Management Act (“FLPMA”) and U.S. Forest Service (“USFS”) vegetative management regulations play a substantial role in ensuring reliability and safety of electric transmission and distribution infrastructure on federal lands. However, where FLPMA activities intersect with ESA-listed species or their habitats, compliance with the ESA is required. With that in mind, it is EWAC’s position that the Proposed 4(d) Rule could be modified to provide clarity to USFS and Service field office personnel responsible for making decisions relating to potential interaction of electric transmission and distribution facilities with whitebark pine. Further, EWAC believes its suggested modifications to the Proposed 4(d) Rule would also allow the Service to focus its efforts on activities that have the greatest potential to recover the species. Below, EWAC sets forth its specific suggestions for revision of the Proposed 4(d) Rule.

I. Background

As the Service is aware, section 9 of the ESA does not prohibit “take” of endangered plant species. Rather, with respect to endangered plant species, ESA section 9 prohibits a number of activities, including: (1) removing and reducing to possession such species from areas under federal jurisdiction; (2) maliciously damaging or destroying such species on areas under federal jurisdiction; (3) removing, cutting, digging up, damaging or destroying any such species in knowing violation of state law or in the course of committing trespass under state law; and (4) violating any Section 4(d) rule applicable to threatened plant species.³ Section 4(d) of the ESA (“Section 4(d)”) requires the Service to issue “such regulations as [it] deems necessary and advisable to provide for the conservation” of threatened species.⁴

In the Proposed Listing Rule, the Service identifies the following as the primary threats to the whitebark pine: white pine blister rust infection and associated mortality; synergistic and cumulative interactions between white pine blister rust and other stressors, and the resulting loss

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. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² 85 Fed. Reg. 77,408 (December 2, 2020).

³ 16 U.S.C. 1538(a)(2).

⁴ *Id.* at 1533(d).

of seed source.⁵ The Service then states that the Proposed 4(d) Rule would promote conservation of the species by “encouraging management of the landscape in ways that meet land management considerations while meeting the conservation needs of the whitebark pine.”⁶

EWAC believes the Proposed 4(d) Rule, as written, has the potential to impede vegetation management for electric infrastructure – including power lines and renewable energy infrastructure – within or adjacent to federal ROWs and other lands and to potentially place an onerous procedural burden on the regulated community and the Service with respect to existing and approved infrastructure on such lands. These concerns and potential solutions thereto are described in greater detail below.

II. Any final 4(d) rule should exempt vegetation management activities for electric infrastructure in federal rights-of-way

EWAC recommends that the Service exempt vegetation management activities (e.g., trimming, cutting, herbicide treatments, and removal) conducted in connection with existing electric infrastructure, including power lines and renewable energy infrastructure, within or adjacent to ROWs on federal lands from the prohibitions of any final rule. Additionally, EWAC recommends the Service extend this exemption to electric transmission and distribution infrastructure and renewable energy infrastructure that has been approved by the relevant federal agency but not yet constructed on federal lands as of the effective date of any final 4(d) rule.

For purposes of the exemption proposed herein, “approved” infrastructure should include those projects that have received the necessary federal permits, licenses, or approvals to construct the project on federal lands or which could be constructed, operated, and maintained pursuant to an existing easement or other mechanism on federal lands. Whether or not a project has obtained a state or local approval or secured funding by the effective date of any final 4(d) rule should not prevent a project from falling within the exemption.

Such an exemption would help ensure continued provision of reliable and cost-effective electricity generation, transmission, and distribution throughout the range of the whitebark pine, and would help ensure that electric providers can swiftly respond to dangerous conditions or other emergencies that may require tree trimming, removal, or other management without violating the ESA. Electric utility companies are subject to mandatory federal reliability standards related to clearance distances between conductors and vegetation on certain transmission lines. Further, for power lines not subject to federal reliability standards, utilities must trim or remove vegetation that could contact or has grown too close to power lines in order to avoid outages and to reduce wildfire risk. The requested exemption and modified 4(d) rule should avoid hindering or restricting this type of necessary work, which might periodically involve whitebark pine. EWAC expects that this exemption should have minimal impact on the long-term survival of whitebark pine. Overlap between this species and power lines should be rare since the species and its habitat generally are found at higher elevations. As USFWS considers EWAC’s request, it may be worthwhile to coordinate closely with USFS, which is familiar with the vegetation management needs of electric utilities operating power lines on National Forest System lands and is likely to have lands under

⁵ *Id.* at 77,419.

⁶ *Id.* at 77,419.

management where whitebark pine occur. Exempting these activities would promote conservation of the whitebark pine because such activities have not been identified as contributing to the decline of the species and would reduce the regulatory burden on the Service, so that the agency can focus its resources on actions that will contribute to the recovery of the species.

III. The Proposed 4(d) Rule should clarify that consultation need not be re-initiated for existing projects on federal lands

EWAC also recommends that the Service clarify in the preamble to any final listing rule for the whitebark pine that, in most circumstances, reinitiation of consultation will not be required for vegetation management activities occurring within ROW for electric transmission and distribution or renewable energy projects that exist on federal lands as of the date of any final 4(d) rule.

Service regulations codified at 50 C.F.R. 402.16(a)(1)-(4) require the Service to reinitiate consultation where, among other things, a new species is listed that may be affected by a federal action. EWAC recognizes the regulatory requirements associated with reinitiation of ESA section 7 consultation; however, EWAC notes that vegetation management activities in previously cleared ROWs, whether on or off federal lands, are unlikely to affect the whitebark pine. Vegetation management activities should, instead, be considered by the Service as part of the baseline conditions for the species upon listing.

In the Proposed Listing Rule, the Service focused its listing analysis on altered fire regimes due to fire exclusion policies and impacts from white pine blister rust, the predatory mountain pine beetle, and climate change.⁷ Vegetation management activities were not enumerated by the Service as one of the primary stressors to the species necessitating listing. While it theoretically may be possible that the whitebark pine could experience some level of effect as a result of vegetation management activities within existing ROWs, it is unlikely that any such effect would more than de minimis.

This clarification would result in regulatory certainty for electric utilities and, in particular, for providers of critical transmission infrastructure, and would limit the circumstances in which the Service must engage in reinitiation of ESA section 7 consultation. Reducing the number of consultations would, in turn, preserve agency resources, so that the Service may focus its efforts at recovering the species and engaging with project proponents whose actions have the potential for significant effects to the species.

⁷ *Id.* at 77,412.-77,413.

IV. Conclusion

EWAC thanks the Service for its consideration of these comments as it works to finalize this rule.

Should you have any questions, please feel free to contact the following EWAC representatives:

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