



**October 7, 2024**

Comments regarding:

**August 6, 2024 Proposed Rule to List the Eastern Regal Fritillary as an Endangered Species and the Western Regal Fritillary as a Threatened Species With a Section 4(d) Rule Under the Endangered Species Act**

Submitted by:

**Energy and Wildlife Action Coalition**

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Docket No. FWS-R6-ES-2023-0182

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the United States Fish and Wildlife Service’s (“Service”) August 6, 2024 Notice of Proposed Rulemaking<sup>2</sup> to list the eastern regal fritillary (*Argynnis idalia idalia*) as endangered and the western regal fritillary (*A. i. occidentalis*) as threatened with a section 4(d) rule (“Proposed 4(d) Rule”) under the Endangered Species Act (“ESA”). EWAC provides these comments on the Proposed 4(d) Rule based on the knowledge and experience of its membership.

EWAC supports the Service’s use of species-specific 4(d) rules to identify what activities are and are not subject to the “take” prohibition of ESA section 9 relative to threatened species. Species-specific 4(d) rules better reflect the distinction Congress made when it enacted the ESA and applied the ESA section 9 take prohibition only to species listed as endangered. The Service’s use of species-specific 4(d) rules that tailor protections to the key threats faced by threatened species also conserves Service resources by reducing the instances in which project proponents must obtain take authorization from the Service, and thus, allows the Service to devote its time and resources to addressing species of higher conservation need, engaging in ESA section 7 consultation, processing incidental take permit applications, and responding to petitions.

As developers and operators of renewable energy facilities and electric transmission and distribution infrastructure, EWAC applauds the Biden-Harris Administration’s (“Administration”) clean energy goals and initiatives,<sup>3</sup> as well as the Administration’s prioritization to achieve a nationwide energy transition toward a carbon pollution-free electricity sector.<sup>4</sup> Achieving these goals will necessitate not only the deployment of new renewable energy facilities and associated transmission and distribution nationwide, but also the maintenance and operation of existing infrastructure in order to ensure our electric grid is operated safely, reliably, and affordably. The use of species-specific 4(d) rules allows for more efficient operation, maintenance, and deployment of renewable energy and electric transmission and distribution

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<sup>1</sup> EWAC is a trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related industry 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.

<sup>2</sup> 89 Fed. Reg. 63,888 (August 6, 2024) (“Proposed Rule”).

<sup>3</sup> See Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021). Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies; available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies>.

<sup>4</sup> Executive Order 14057: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,943 (Dec. 13, 2021).

resources by helping to streamline the ESA compliance process while providing for the conservation of threatened species.

EWAC's members develop and maintain renewable energy facilities and transmission and distribution infrastructure throughout the United States, including a substantial number of assets within the range of the western regal fritillary. Should the Service determine that listing the western regal fritillary as threatened is supported by the best available scientific and commercial information, EWAC agrees that use of a 4(d) rule for the western regal fritillary would be biologically and legally appropriate and would provide for the conservation of the species. Further, a tailored 4(d) rule would support the Administration's goals to reduce greenhouse gas emissions and bolster resilience to the impacts of climate change,<sup>5</sup> and deliver much needed improvement of this nation's electric and communications infrastructure,<sup>6</sup> including to historically underserved communities.<sup>7</sup>

The purposes of this letter are to: (1) provide support for the exception of activities that promote and maintain grassland habitat from the take prohibitions that otherwise would be established by the Proposed 4(d) Rule prohibitions; (2) offer suggestions for additional, tailored exceptions from the take prohibitions to prevent overbroad application of the Proposed 4(d) Rule to activities that are unlikely to impact the western regal fritillary; and (3) offer recommendations on how the Proposed 4(d) Rule could be revised and clarified to focus on identified threats to the western regal fritillary in order to avoid unnecessarily hindering the development and deployment of clean energy, operation and maintenance of the electric grid, and achieving the Administration's climate and infrastructure goals.

#### **I. Support for exceptions for activities that promote and maintain grassland habitat.**

As set forth in the Proposed 4(d) Rule, take of western regal fritillary would be prohibited unless an exception applies.<sup>8</sup> As currently contemplated, the 4(d) Rule would except from the take prohibition activities that promote and maintain grassland habitat, including: (1) noxious weed control; (2) haying and mowing; (3) prescribed fire; (4) brush control; and (5) mowing section line rights-of-way ("ROW") and recreational trails.<sup>9</sup> Given the wide range of the western regal fritillary, EWAC supports these exceptions, particularly when they are conducted in the course of ROW and vegetation management in connection with transmission and distribution infrastructure and renewable energy facilities. EWAC notes a recent Washington

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<sup>5</sup> See Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021) ("Executive Order 13990").

<sup>6</sup> Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies; available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies>.

<sup>7</sup> EWAC notes the Biden-Harris Administration's focus on advancing environmental justice when addressing the climate crisis. See Executive Order 13990.

<sup>8</sup> Proposed Rule at 63,904.

<sup>9</sup> *Id.* at 63,906-63,907.

State University study confirmed that human intervention in managing the habitats of at-risk butterfly species promotes the survival of such species,<sup>10</sup> and, specifically, that activities such as prescribed fire, mowing, and weeding support butterfly conservation.<sup>11</sup> As such, EWAC encourages the Service to retain the aforementioned exceptions in any final rule.

**II. Vegetation maintenance for electric transmission and distribution lines and renewable energy facilities should be excepted from the “take” prohibition.**

In addition to the exceptions provided in the Proposed 4(d) Rule for haying and mowing, prescribed fire, brush control, and mowing section line ROWs and recreational trails,<sup>12</sup> EWAC urges the Service to ensure that any final 4(d) rule include an exception to the take prohibition specifically for vegetation maintenance associated with transmission and distribution lines and renewable energy facilities. Any exception for vegetation maintenance should clearly specify that manual, mechanical, and chemical methods, as well as the use of grazing as a method of vegetation management, are included in the exception.

The exceptions set forth in the Proposed 4(d) Rule for noxious weed control, brush control, livestock grazing, and mowing section line ROWs are very similar to the practices required for vegetation maintenance associated with transmission and distribution lines and renewable energy facilities, and would have a similarly limited impact on, and provide benefit to, the western regal fritillary. Vegetation maintenance activities for transmission and distribution lines tends to occur on a periodic cycle, often once every three to seven years. These activities are typically constrained to narrow ROWs or other discrete areas rather than an entire grassland habitat. Moreover, existing requirements for owners and operators of transmission and distribution facilities to control woody vegetation in ROWs to meet national reliability standards results in maintenance of early successional habitat that is necessary for the western regal fritillary. As a result, any impacts to the western regal fritillary as a result of these activities would be periodic and limited in scale but would result in maintaining or improving western regal fritillary habitat over time. Similar to owners and operators of transmission and distribution facilities, owners and operators of renewable energy facilities also engage in vegetation maintenance to ensure the safe and efficient generation of electricity. For example, solar generation facilities engage in vegetation maintenance to avoid shading of solar panels and prevent a reduction in the generation capacity of such facilities.<sup>13</sup>

With the foregoing in mind, EWAC believes including an exception for vegetation maintenance activities specifically associated with transmission and distribution lines and renewable energy facilities would benefit the species and ensure that any final rule does not disrupt the safe and reliable operation of electric transmission and distribution, reduce the

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<sup>10</sup> See Collin B. Edwards et al, Phenological constancy and management interventions predict population trends in at-risk butterflies in the United States, *Journal of Applied Ecology* (2024). DOI: [10.1111/1365-2664.14735](https://doi.org/10.1111/1365-2664.14735).

<sup>11</sup> *Id.*

<sup>12</sup> Proposed Rule at 63,906-63,907.

<sup>13</sup> In general, vegetation height at solar generation facilities must be kept to no more than 18-24 inches.

generation capabilities of renewable energy facilities, or increase the cost of providing the services necessary for the Administration to achieve its clean energy goals and initiatives.

**III. The Proposed 4(d) Rule’s exceptions related to brush control would benefit from further changes to ensure any final 4(d) rule facilitates Administration goals and initiatives.**

EWAC appreciates the inclusion of brush control related to activities that promote and maintain grassland habitat among the exceptions from the take prohibition, and urges the Service to expand this exception to include brush control specifically associated with vegetation maintenance for electric transmission and distribution ROWs. Controlling brush in electric transmission and distribution line ROWs is crucial for preventing fires,<sup>14</sup> which the Proposed 4(d) Rule cites as a primary threat to the western regal fritillary.<sup>15</sup> Furthermore, brush control promotes propagation of violets (*Viola spp.*), on which the regal fritillary exclusively relies for a host plant when in larvae form.<sup>16</sup> Because violets require warm-season grasses for cover,<sup>17</sup> brush control activities that create habitat with violets interspersed with wet meadow patches or swales are beneficial for the species. An exception for brush control associated with vegetation maintenance for electric transmission and distribution ROWs will promote violet species by allowing electric transmission and distribution operators to manage incompatible woody or tall growing brush species that could shade out violets and, in turn, facilitate the creation and maintenance of violet habitat and ultimately support the conservation of the western regal fritillary.

In the event the Service elects not to create a specific exception for vegetation maintenance and inspection of utility ROWs, EWAC believes that the language of the Proposed 4(d) Rule regarding the brush control exception would benefit from the adjustments described below, which would continue to conserve the western regal fritillary while also ensuring safe and reliable transmission and distribution of electricity.

*Blade height associated with mechanical clearing*

The Proposed 4(d) Rule would except from the take prohibition brush control methods that “include mechanical means, burning, grazing, or spot use of herbicides.”<sup>18</sup> If mechanical means are used, the Proposed 4(d) Rule indicates “the blade must be set to 20 cm (8 in) or

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<sup>14</sup> Vegetation Management Requirements for Electricity Assets on Federal Lands: Hearing Before the U.S. Senate Committee on Energy and Natural Resources, 115 Cong. (2017) (Statement of John Ruhs, Acting Deputy Director for Operation, Bureau of Land Management).

<sup>15</sup> Proposed Rule at 63,895.

<sup>16</sup> *Id.* at 63,891; U.S. Department of Agriculture and U.S. Fish and Wildlife Service, Regal Fritillary (*Speyeria Idalia*) Landowner Guide (May 2020).

<sup>17</sup> U.S. Department of Agriculture and U.S. Fish and Wildlife Service, Regal Fritillary (*Speyeria Idalia*) Landowner Guide (May 2020).

<sup>18</sup> Proposed Rule at 63,906.

higher above the ground.”<sup>19</sup> The requirement that blades be set at 8-inches or higher above the ground is problematic within utility ROWs, and could negatively impact ROW safety, vehicle access, and spill prevention. For example, utility vehicles need to travel periodically on ROWs for inspections and repairs, including under inclement weather conditions. Typically, utility practitioners cut or mow stems close to ground level, while avoiding grubbing or ground disturbance, to facilitate safe vehicle access, avoid potential impacts to fuel lines and tanks on vehicle undercarriages, and prevent tripping hazards for maintenance staff. EWAC notes that the exceptions related to mowing section line ROWs, noxious weed control, and haying and mowing are not subject to the same 8-inch requirement.<sup>20</sup> For this reason, EWAC requests the Service remove the blade height requirement in any final 4(d) rule. Should the Service decline to remove the blade height requirement altogether, EWAC suggests revising the blade height requirement to 3 inches similar to the approach taken by the Wisconsin Department of Natural Resources in its Broad Incidental Take Permit/Authorization for the regal fritillary issued pursuant to the State of Wisconsin’s wildlife protection statute.<sup>21</sup> Making these changes will better ensure that entities that must undertake frequent brush control activities will not be unduly hindered by any 4(d) rule.

#### *Spot use of herbicides*

Under the brush control exception from the take prohibition, the Proposed 4(d) Rule would allow the “spot use of herbicides,” so long as the “appropriate systemic herbicide” is “directly applied to cut stems.”<sup>22</sup> EWAC is concerned the requirement that herbicides be applied directly to cut stems is unnecessarily limiting considering the Proposed 4(d) Rule’s exception for noxious weed control allows for flexibility with regard to spray application methods. The requirement that herbicides be applied directly to cut stems is also impractical given the vast linear mileage of transmission and distribution line ROWs throughout the species’ range. Instead, EWAC encourages the Service to provide for “spot spray” in the context of brush control. Spot spray, which the Proposed 4(d) Rule currently allows in its exception for noxious weed control,<sup>23</sup> would allow transmission and distribution line infrastructure and renewable energy facility maintenance workers to select the application method that is most efficient and effective in each location, while still achieving the goal of targeting woody species. If the Service does not include an exception specifically for utility ROW maintenance and inspection in the Final Rule, expanding the brush control exception to allow for use of spot spray will help ensure the rule does not overly burden the electric power sector.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 63,905 – 63,906.

<sup>21</sup> Wisconsin Department of Natural Resources, Broad Incidental Take Permit/Authorization (November 2019), available at <https://dnr.wisconsin.gov/topic/erreview/itgrasslands.html>; see also Wis. Stats. At 29.604.

<sup>22</sup> Proposed Rule at 63,906.

<sup>23</sup> *Id.* at 63,905.

**IV. The Proposed Rule’s exception related to livestock grazing should clarify whether the exception applies to public utilities.**

The Proposed 4(d) Rule exempts incidental take of the western regal fritillary that may result from livestock grazing on “private, State, or Tribal land” and notes the positive impact grazing may have on western regal fritillary habitat.<sup>24</sup> EWAC members, many of whom are public utilities, employ livestock grazing to control vegetation along and near their facilities. The Proposed 4(d) Rule would benefit from language specifying that livestock grazing occurring on lands owned or controlled (e.g., via an easement or other legal mechanism) by public utilities falls within the livestock grazing exception.

**V. Conclusion**

EWAC appreciates the Service’s proposal to promulgate a 4(d) rule for the western regal fritillary. EWAC believes a carefully tailored 4(d) rule can conserve the western regal fritillary while supporting development and maintenance of electric transmission and distribution infrastructure and renewable energy facilities that are helping the Administration achieve its clean energy goals and initiatives. EWAC welcomes the opportunity to discuss its comments in greater detail with the Service.

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<sup>24</sup> *Id.*