



**EWAC**<sup>®</sup>

Energy and Wildlife  
Action Coalition

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**January 27, 2025**

Comments regarding:

**November 26, 2024 Proposed Designation of Critical Habitat for the Rusty Patched Bumble Bee**

Submitted by:

**Energy and Wildlife Action Coalition**

Submitted electronically to:

Public Comments Processing  
Attn: FWS-R3-ES-2024-0132  
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The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) November 26, 2024 proposed designation of critical habitat (“Proposed Rule”) for the rusty patched bumble bee (“RPBB”).<sup>2</sup> EWAC provides these comments based on the knowledge and experience of its membership.

EWAC appreciates the Service’s work to protect endangered, threatened, and at-risk species, and recognizes the role of regulated industries in environmental stewardship and aiding species conservation. In accordance with its mission, EWAC submitted comments to the Service’s February 1, 2024 request for input to inform the economic impact analysis associated with the agency’s consideration of a critical habitat designation for the RPBB (“Economic Impact Comments”).<sup>3</sup> In its Economic Impact Comments, EWAC encouraged the Service not to broadly designate RPBB critical habitat coextensively within all areas identified as High Potential Zone (“HPZ”) by the Service’s High Potential Zone Model for the Rusty Patched Bumble Bee (*Bombus affinis*) (“HPZ Model”).<sup>4</sup> Instead, EWAC urged the Service to consider the direct costs to federal agencies associated with the section 7 consultation process under the Endangered Species Act (“ESA”) and the costs and delays to non-federal entities responsible for producing, delivering, and distributing electricity that would arise from any critical habitat designation that was coextensive with HPZ areas.

In the Proposed Rule, the Service identifies three types of areas within the species’ historical range that would constitute critical habitat: (1) areas within a continuous HPZ with 50 or more positive RPBB observations since 2007; (2) areas that include any known genetically distinct populations; and (3) areas that are at least 0.6 miles away from large-scale agriculture that use pesticides, managed bees, or both.<sup>5</sup> Applying these criteria, the agency then proposes designation of more than 1.6 million acres of land within 17 distinct units as critical habitat. As an initial matter, EWAC notes that because RBPP are habitat and foraging generalists, the Service should consider whether designation of critical habitat is prudent in this circumstance and whether it will result in the intended conservation effects. Moreover, given the impacts critical habitat designation would have on its members, EWAC encourages the Service to reconsider the breadth of the proposal. Projects planned within or near areas designated as critical habitat that have one more federal nexi will experience delay and increased costs associated with an ESA section 7 consultation, even where, for example, surveys demonstrate RPBB absence from the project area. Even with the added qualifier requiring 50 or more positive RPBB observations since 2007, designation of critical habitat where RPBB are not currently present and have not recently been sighted is unlikely to provide meaningful, additional conservation for the species.

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<sup>1</sup> 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.

<sup>2</sup> 89 Fed. Reg. 93245 (Nov. 26, 2024).

<sup>3</sup> See EWAC, Comments on February 1, 2024 Request for Input Regarding Economic Impact Analysis Associated with U.S. Fish and Wildlife Service Consideration of Critical Habitat for the Rusty Patched Bumble Bee (Mar. 1, 2024).

<sup>4</sup> High Potential Zone Model for the Rusty Patched Bumble Bee (*Bombus affinis*), U.S. Fish and Wildlife Service Minnesota-Wisconsin Field Office (October 4, 2022).

<sup>5</sup> 89 Fed. Reg. at 93251.

As the Service is aware, multiple industries are pursuing formalized and other efforts to conserve pollinator species, including the renewable energy and electric transmission and distribution sectors. Among the initiatives in which EWAC has specific involvement is the Nationwide Conservation Benefit Agreement for Bumble Bees on Energy and Transportation Lands (“Bumble Bee CBA”). The Bumble Bee CBA is a collaborative effort among the Service, University of Illinois Chicago, the Wisconsin Department of Natural Resources, and dozens of representatives from the energy and transportation sectors, including EWAC and some of its individual members. In January 2023, the Service announced that it would provide nearly \$800,000 toward development of the Bumble Bee CBA, pursuant to section 6 of the ESA. The RPBB is among the thirteen species of bumble bee to initially be covered by the Bumble Bee CBA. Pursuant to Service regulations, the goal of the Bumble Bee CBA is to provide a net conservation benefit to the RPBB. As of the date of this letter, the Service has had the draft CBA under review for quite some time, but has not yet published the draft for public review and comment. Particularly in light of the Service’s publication of the Proposed Rule, EWAC urges the agency to publish the draft CBA in the Federal Register as expeditiously as possible so that the conservation measures for the RPBB set forth in the CBA can be considered alongside the proposed designation of critical habitat.

EWAC also urges the Service to exclude from the final RPBB critical habitat designation any areas that are enrolled in the anticipated Bumble Bee CBA at the time a final RPBB critical habitat rule takes effect. Service regulations give the agency authority to exclude areas from critical habitat designation that are covered by Service-approved conservation plans.<sup>6</sup> The Bumble Bee CBA will provide meaningful and long-term resources towards conservation of the RPBB and other pollinators that go beyond what the Service could require through formal ESA section 7 consultation, such that critical habitat designation in areas covered by the agreement will be duplicative and create unnecessary administrative burdens to regulated entities.

In addition to formalized, programmatic efforts to conserve pollinators, owners and operators of electric generation and transmission and distribution projects frequently employ a number of integrated vegetation management (“IVM”) practices aimed at limiting impacts or actively conserving pollinator species, including the RPBB. These IVM practices include, but are not limited to manual brush cutting, targeted herbicide application, and re-seeding with native vegetation to encourage pollinator use. Additionally, solar energy projects are also taking advantage of the Bee and Butterfly Habitat Fund’s Solar Synergy Program, which provides support to utility-scale solar developers seeking to cultivate high-quality pollinator habitat at their projects. This support includes, but is not limited to, provision of next generation seed mixture, pollinator and habitat monitoring, carbon sequestration monitoring, and providing education and technical assistance to participating projects.

EWAC believes the designation of 1.6 million acres of critical habitat—particularly for a species that is a habitat and foraging generalist—will increase delays and costs to electric generation, and transmission and distribution projects, despite the ongoing efforts of such entities to proactively engage in RPBB conservation efforts. Designation of critical habitat adds an additional regulatory hurdle for EWAC

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<sup>6</sup> See Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226 (Feb. 11, 2016); see also Final Rule Revising Portions of U.S. Fish and Wildlife Service and National Marine Fisheries Service (“Services”) Regulations Implementing ESA section 4, “The ESA allows for consideration of the potential impacts on conservation efforts when designating critical habitat, and as described in the Services’ section 4(b)(2) policy...we will consider areas covered by conservation agreements or plans when assessing the benefits of including and excluding particular areas from a designation. In particular, the Services consider whether such conservation plans are already providing on-the-ground conservation that would reduce the benefit of designating the same area as critical habitat.” 89 Fed. Reg. 24,300, 24,324 (April 5, 2024).

members that in some cases could render development projects infeasible, would create new barriers, and may dampen industry efforts to employ proactive, creative solutions to addressing complex conservation and electric reliability issues. Additionally, the designation of critical habitat, where such designation overlaps with existing electric infrastructure, will likely increase facility management costs for system operators who are working under constrained, often fixed budgets. The cumulative effect of these factors is the likely increase in electricity costs to customers at a time when consumers are already facing financial hardships.

EWAC also urges the Service to reconsider its approach to analyzing the economic impacts associated with designating critical habitat both with respect to the RPBB and in general. Too often, the Service looks only at the administrative costs to the agency of undertaking an adverse modification analysis in the context of ESA section 7 consultations. This approach ignores the actual costs to the public that include increased instances where consultations are undertaken and requirements for mitigation, as well as costs associated with delays in projects that result from the heightened consultation and mitigation requirements. This is particularly relevant where designated critical habitat extends beyond habitat that is presently occupied by a species. For example, where a project proponent conducts presence/absence surveys that demonstrate absence of relevant species and no critical habitat has been designated, the project proponent or federal action agency may conclude that the action is not likely to affect a listed species and thus consultation is not required. On the other hand, if that same area is designated as critical habitat, the federal agency may determine that the action may affect critical habitat—even though that area does not contain listed species. That same area would have had a no effect determination without critical habitat designation. Federal courts have recognized that the Service’s designation of critical habitat also impacts the underlying economic value of lands affected by the designation.<sup>7</sup> Service consideration only of the costs to the agency associated with designating critical habitat omits consideration of significant sources of economic burden on the regulated community.

For the reasons set forth above, EWAC urges the Service to reconsider the agency’s conclusion regarding the economic impact of the Proposed Rule and whether some or all of the areas proposed for designation as critical habitat should, in fact, be excluded pursuant to ESA section 4(b)(2). EWAC recommends that the Service narrow the proposed critical habitat designation and, instead, focus any final designation on areas that are truly “essential to the conservation” of the RPBB and “require special management considerations or protection.”<sup>8</sup>

EWAC appreciates the Service’s consideration of these comments in connection with the Proposed Rule, and encourages the agency to consider the degree to which designation of critical habitat will create unnecessary barriers and costs to electric generation, transmission and distribution infrastructure deployment and increased cost for the operations of existing infrastructure. EWAC welcomes the opportunity to discuss these comments in greater detail and explore with the Service how to implement the ESA in a way that provides for the conservation of the RPBB without hindering the development of critical electric infrastructure.

Please feel free to contact the following EWAC representatives:

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<sup>7</sup> See *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 17 (2018).

<sup>8</sup> See 16 U.S.C. § 1532.