



## Proposed “Endangered” Listing for Rusty Patched Bumble Bee Creates a Buzz in the Energy Industry

By: M. Benjamin Cowan and Andrew Davitt

On September 22, 2016 the U.S. Fish and Wildlife Service (Service) published a proposed rule to list the rusty patched bumble bee (*Bombus affinis*) as “endangered” under the federal Endangered Species Act (the ESA). If enacted, the proposed rule would make the rusty patched bumble bee the first bee species listed as federally endangered in the United States. The listing could have significant implications for developers of both energy and real estate projects as well as those in other industries. The Service’s proposal opens a 60-day public comment period to allow interested parties to comment and provide the Service with new information. The public comment period is open through November 21, 2016.

### Numerous Causes for Decline

Once broadly distributed across a geographic range that included 28 states along the eastern U.S. and upper Midwest, according to a 2016 Species Status Assessment the rusty patched bumble bee’s abundance and distribution has declined by about 91% since the mid to late 1990s. Since 2000, the bee has only been reported in 12 states: Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and Wisconsin. While the exact cause of the rusty patched bumble bee’s population decline is uncertain, the Service attributes it to a collection of factors including pathogens, pesticides, habitat loss and degradation, and the dynamics of small populations. The Service acknowledged in the proposed rule that the relative contribution of each of these factors to the species’ decline is unknown, but concluded that the data indicate these threats are acting “synergistically and additively,” and the combination of multiple stressors on the species is likely more harmful than any single stressor.

### Implications of a Listing

If listed as endangered, “take” of the rusty patched bumble bee without a permit would be prohibited. “Take” is defined under the ESA to include harassing, harming, hunting, capturing or killing any member of the species. When listing a species, the ESA also requires the Service to designate critical habitat for the species “to the maximum extent prudent and determinable.” The Service indicated in the proposed rule that the biological needs of the rusty patched bumble bee are not sufficiently well known to permit identification of critical habitat at this time. However, that does not mean that rusty patched bumble bee habitat would not receive some protection under the ESA. By rule, the Service interprets the term “harm” in the ESA’s definition of “take” to include “significant habitat modification or degradation [not limited to critical habitat] where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”

The rusty patched bumble bee occurs in a variety of habitats including prairies, woodlands, marshes, and agricultural landscapes. As the Service highlighted in the proposed rule, unauthorized modification, removal, or destruction of such habitat where the rusty patched bumble bee is known to occur, including both the vegetation in which it feeds and pollinates and the soils in which it nests and overwinters, could result in a violation of the ESA. Violations could also result from the discharge of chemicals or fill material into wetlands in which the rusty patched bumble bee occurs, or the release into occupied habitat of biological agents such as herbicides, pesticides, or other chemicals that attack any life stage of the bee.



Accordingly, even though development and habitat loss are not identified as the principal reason for the declining status of the rusty patched bumble bee, if the listing is finalized many activities associated with the development, operation and maintenance of energy, industrial and real estate projects could be at risk of causing a take and violating the ESA if those activities take place in or near occupied rusty patched bumble bee habitat. Even though its range has been drastically reduced over the last 20 years, because the rusty patched bumble bee is known to occur in 12 states, a decision by the Service to list the species would have significant implications for a broad range of industries. Industries as diverse as timber harvesting, wind energy development, and oil and gas exploration (including fracking), and linear energy and infrastructure projects such as pipelines, transmission lines and highways, are all likely to be impacted.

### Avoiding the Sting of a Listing

If the proposed listing is finalized, developers and operators of these and other projects would be required to avoid all unauthorized take of rusty patched bumble bees to comply with the ESA. The first step would be to determine whether a particular project is located in or would impact known rusty patched bumble bee habitat. That would involve consultation with the Service, but also could involve costly surveys which might be subject to seasonal timing requirements, potentially delaying the start of construction. If the bee or its habitat are present, avoidance may be difficult or impossible depending upon the nature of the activity and the location of the habitat. That could result in a need to obtain take authorization, most likely through a Section 7 consultation and incidental take statement, in the case of projects with a federal nexus, or a Section 10 incidental take permit for purely private projects. The take authorization process is typically extremely lengthy and costly, particularly for newly listed species, and often requires restrictions on development and operations that drive up the cost of a project and/or complicate operation or maintenance. It also requires identification and implementation of mitigation projects, typically requiring preservation or restoration of habitat, to offset the impact of the take. These projects further add to the cost of compliance and can be a source of additional delay if suitable mitigation strategies or opportunities cannot be identified.

In addition to the effect of a federal listing, many states have their own endangered species statutes that prohibit the unauthorized take of state-listed species, and many of those state statutes have provisions providing for the automatic listing of any species that is federally listed. Therefore, if the Service finalizes its proposal to list the rusty patched bumble bee as endangered under the ESA, it could trigger additional obligations for projects at the state level under relevant state laws.

For these reasons, companies that may be impacted by a listing should strongly consider filing public comments on the proposed rule before the November 21 deadline to get their concerns on the record. Looking ahead, if the rusty patched bumble bee is listed as endangered, careful consideration must be given to project development and operations within the bee's range. Companies planning operations in or near rusty patched bumble bee habitat will need to develop appropriate strategies to ensure compliance with the ESA. Locke Lord's energy and environmental attorneys have the relevant expertise to provide strategic advice and insight on these issues, as well as assist with the preparation of public comments on the proposed rule.

**M. Benjamin Cowan** | 713-226-1339 | [bcowan@lockelord.com](mailto:bcowan@lockelord.com)

**Andrew Davitt** | 713-226-1461 | [adavitt@lockelord.com](mailto:adavitt@lockelord.com)

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