Via Email and Certified Mail/Return Receipt Requested

August 5, 2020

City of Minnetonka
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Geralyn Barone, City Manager, gbarone@minnetonkamn.gov
14600 Minnetonka Blvd.
Minnetonka, MN 55345

Re: Illegal Incidental Take of Rusty Patched Bumble Bee in Minnetonka: Notice of Intent to Sue for Violations of the Endangered Species Act

To Whom It May Concern at the City of Minnetonka:

On behalf of the Center for Biological Diversity and Friends of Lone Lake Park, I hereby provide notice that the Center intends to bring a lawsuit against you (in your official capacity) and the City of Minnetonka (collectively, "the City") for violating the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Specifically, the City has authorized a mountain bike course that has caused and will continue to cause unlawful "take" of the endangered rusty patched bumble bee (*Bombus affinis*), an animal protected under the ESA, without a permit from the U.S. Fish and Wildlife Service ("FWS").

To prevent further harm to bee and comply with the law, the City must immediately develop a "habitat conservation plan" and apply for an "incidental take permit." If you do not do so within the next 60 days, you would be subject to a lawsuit in the United States District Court to enjoin construction of the mountain bike course. We provide this letter pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2).

BACKGROUND

I. The Endangered Species Act Prohibits Unpermitted "Take" of the Rusty Patched Bumble Bee

Under Section 9 of the ESA, it is unlawful for any person to "take" an endangered species. 16 U.S.C. § 1538(a)(1)(B). To "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19). "Take" includes direct as well as indirect harm and need not be purposeful. *See* 50 C.F.R. § 17.3 (definitions of "harass" and "harm"); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 (1995). In fact, a take may even be the result of an accident. *See Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994). "Take is defined in the broadest possible manner to include every conceivable way in which a person can

'take' or attempt to 'take' any fish or wildlife." *Defs. of Wildlife v. Adm'r, EPA,* 882 F.3d 1294, 1300 (8th Cir. 1989).

This is true even if that take is committed by a municipality. It is unlawful for any person to "cause [an ESA violation] to be committed." 16 U.S.C. § 1538(g). The term "person" includes "any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State…[or] any State, municipality, or political subdivision of a State . . . ." 16 U.S.C. § 1532(13). As a leading case explains, a "governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA." *Strahan v. Coxe,* 127 F.3d 155, 163 (1st Cir. 1997) (holding that by issuing licenses and permits authorizing gillnet and lobster pot fishing, activities known to incidentally injury Northern right whales, Massachusetts officials had exacted a taking).[1]

The ESA has a broad citizen suit provision that reaches cities: "any person may commence a civil suit on his own behalf to enjoin any person, including [any] governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA]." 16 U.S.C. § 1540(g); *see Ex parte Young,* 209 U.S. 123, 159-60 (1908) (authorizing lawsuits for prospective relief against state officials acting in violation of federal law). A plaintiff can seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in take. *See Burlington N. R.R.,* 23 F.3d at 1511.

The taking of an endangered species that is "incidental" to the purpose of otherwise lawful activity may be allowed if permitted under Section 10 of the ESA. 16 U.S.C. § 1539(a)(1)(B). As a prerequisite to receiving an incidental take permit ("ITP") from FWS, the applicant must submit a habitat conservation plan that specifies "(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." *Id*. § 1539(a)(2)(A).

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[1] *See also Defs. of Wildlife v. Adm'r, EPA,* 688 F. Supp. 1334 (D. Minn. 1988), *aff'd by Defs. of Wildlife v. Adm'r, EPA,* 882 F.3d 1294 (8th Cir. 1989) (holding the U.S. Environmental Protection Agency liable for take associated with the registration of strychnine, which was known to poison endangered species, even though third parties used the pesticides); *Loggerhead Turtle v. Cty. Council of Volusia Cty.,* 148 F.3d 1231 (11th Cir. 1998), *cert. denied,* 526 U.S. 1081 (1999) (holding that plaintiff had standing to proceed against Volusia County for take of threatened and endangered sea turtles, which were harmed by the private, artificial light sources permitted by the County's regulations); *Sierra Club v. Lyng,* 694 F.Supp. 1260 (E.D. Tex. 1988), *aff'd by Sierra Club v. Yeutter,* 926 F.2d 429 (5th Cir. 1991) (holding the U.S. Forest Service liable for take because its even-aged management plan allowed private companies to harvest timber in a way that degraded the habitat of the endangered red-cockaded woodpecker); *Unites States v. Town of Plymouth, Mass.,* 6 F. Supp. 2d 81 (D. Mass. 1998) (holding the Town of Plymouth liable for the take of endangered piping plovers that had either been run over or isolated from their food source by off-road vehicles, which were allowed on the beach under the Town's policies); *Pac. Rivers Council v. Brown*, No. 02-243, 2002 U.S. Dist. LEXIS 28121 (D. Or. Dec. 23, 2002) (finding that state forester's authorization of private logging operations that are likely to result in a take is itself a cause of a take); *Seattle Audubon Soc'y. v. Sutherland*, No. 06-1608, 2007 U.S. Dist. LEXIS 31880 (W.D. Wash. May 2, 2007) (by regulating logging on private lands, the State has injected itself into a position in which it may be the proximate cause of an ESA take).

Thereafter, FWS must find, with respect to the permit application and the habitat conservation plan, that the applicant will "minimize and mitigate" the impacts of take "to the maximum extent practicable," that the applicant has adequate funding to carry out the plan, and that the incidental take will not appreciably reduce the likelihood of survival of the species. 16 U.S.C. § 1539(a)(2)(B).

A project proponent cannot rely on FWS's failure to "require" an ITP, as FWS policy – released on April 26, 2018 by the Trump administration – bars staff from telling a project proponent that an ITP is required.[2]

II. Natural History and Status of the Rusty Patched Bumble Bee

FWS listed the rusty patched bumble bee (*Bombus affinis*) as endangered on March 21, 2017. 82 Fed. Reg. 3186 (Jan. 11, 2017). Once widely found in the upper Midwest and Northeastern United States, FWS explained that the bee is "so imperiled that every remaining population is important for the continued existence of the species . . . ."[3]

The rusty patched bumble bee has declined by 87% in the last 20 years and is estimated to be present in only 0.1% of its former range.[4] Most of its grassland and prairie habitat has been lost, degraded, or fragmented by conversion to development. Other threats to the bumble bee include exposure to pesticides, effects of climate change, effects of extremely small populations, disease, and a combination of these factors.[5]

Rusty patched bumble bees are pollinators that contribute to the healthy functioning of our ecosystems and our food security. Bumble bees are keystone species necessary for native wildflower reproduction and for creating seeds and fruits that feed wildlife, including songbirds. Bumble bees are also important pollinators of crops such as apples.

The rusty patched bumble bee has been observed in a variety of habitats, including prairies, woodlands, marshes, and urban gardens. The species lives underground throughout the year as solitary queens or in colonies that the queen initiates in the spring.

Throughout its active season – roughly from mid-March through mid-October, it is essential that the bumble bee have access to diverse and abundant floral resources to forage for nectar and pollen.[6] Key features of its habitat include the diverse and abundant flowering plants near areas that are "predominantly free from ground-disturbing activities that may function as

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[2] https://www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf
[3] U.S. Fish & Wildlife Service, Survey Protocols for the Rusty Patched Bumble Bee (*Bombus affinis*), Version 1.2 (June 6, 2017) at 1 ("FWS Survey Protocols"), *available at* https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/SurveyProtocolsRPBB28Feb2018.pdf.
[4] https://www.fws.gov/midwest/endangered/insects/rpbb/
[5] For more information on the decline of the bee and its conservation, see https://www.colorado.edu/law/sites/default/files/attached-files/franz_web_edition.pdf
[6] U.S. Fish and Wildlife Service, 2017. The Rusty Patched Bumble Bee (*Bombus affinis*), Interagency Cooperation under Section 7(a)(2) of the Endangered Species Act Voluntary Implementation Guidance, Version 1.1 at 8-9 (hereinafter "2017 FWS ESA Guidance"), *available at* https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/S7GuidanceRPBB20Mar2017.pdf.

overwintering sites for hibernating queens."[7] Other bumble bee species typically forage within 0.6 miles of their nests.[8] Overwintering habitat "may typically be in uncompacted and often sandy, moss-covered soils," often in abandoned rodent nests, downed logs, and it has been found in soft soil under a layer of leaf litter.[9]

Figure 1. Rusty patched bumble bee on culver's root in Lone Lake Park on July 24, 2020. Photo courtesy of Heather Holm.

[7] *Id.* at 9.
[8] *Id.*
[9] *Id.* at 9-10.

III. Planned Mountain Bike Course in Minnetonka's Lone Lake Park and Its Impacts on the Endangered Bee

Lone Lake Park is a 146-acre park located off Shady Oak Road in Minnetonka. In addition to expansive open space with woodlands, wetlands, and prairie, the Park includes 1.6 miles of walking and biking trails and various sports facilities.[10]

Lone Lake Park is designated as a "High Potential Zone" for the rusty patched bumble bee. In 2018, more than 30 of the endangered bees were identified at the Park, and scientists estimated that the Park's population represented 13% of the total population of the bees in Minnesota and 6% of the remaining populations in North America. In July of this year, several individual rusty patched bumble bees were again documented in Lone Lake Park – and this time a mere feet from the proposed trail corridor. See Figure 1.

On August 26, 2019, Minnetonka's City Council voted to approve the concept plan for mountain biking trails in Lone Lake Park.[11] Thereafter, at its June 8, 2020, meeting, the Minnetonka City Council approved an agreement for volunteers to work on the trail, including removal of downed logs from the trail corridor, transplanting vegetation out of the corridor and into other areas, and other construction and maintenance activities.[12]

The finished trail will be approximately 18-24 inches wide and 4.7 miles long, and trail construction is set to begin on September 1, 2020.[13] Construction will include removing vegetation from a ten-foot wide corridor for the length of the course, resulting in the initial destruction of approximately 6 acres in the course's footprint. Even prior to creating the corridor, ground disturbance has occurred and will continue to occur as staff and volunteers dig out and transplant plants from the trail footprint to other areas of the Park. After revegetation, the trail corridor will be appropriately 3 feet wide.

Construction of the nearly five-mile mountain bike course would harm rusty patched bumble bees by destroying their homes and causing other disturbances across approximately 50 acres, which is about half of the available bee habitat in Park. For example, vegetation, downed logs, and leaf litter will be lost from the trail construction footprint. Soil disturbance and compaction will be caused by trail construction equipment, hand tool work, the excavation of signposts and trail bridge footings, trail use, and trail maintenance work. That will cause direct destruction and disturbance of present and potential nesting sites and overwintering sites.

The colony life cycle can end and new queens can begin overwintering in Minnesota as early as September,[14,15] during which time they are in the ground only "a few centimeters below

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[10] https://www.minnetonkamn.gov/Home/Components/FacilityDirectory/FacilityDirectory/53/3379?npage=2
[11] https://www.minnetonkamn.gov/services/construction-projects/park-and-trail-projects/mountain-biking-trails-study; https://www.minnetonkamn.gov/Home/ShowDocument?id=5829
[12] https://www.minnetonkamn.gov/home/showdocument?id=7145
[13] https://www.minnetonkamn.gov/services/projects/park-and-trail-projects/lone-lake-park-multi-use-mountain-bike-trail; https://mtka.maps.arcgis.com/apps/webappviewer/index.html?id=5a86b7a289de4fa1af5e9e531f83e046
[14] Xerces Society for Invertebrate Conservation (2013). Petition to list the rusty patched bumble bee *Bombus affinis* (Cresson), 1863 as an endangered species under the U.S. Endangered Species Act at 26.
[15] Holm, H. (2020). Personal observation of new queens on August 18th.

the ground."[16] Surface and subsurface disturbance can be harmful to overwintering rusty patched bumble bee queens[17] and can disrupt their diapause, at least temporarily, and cause them to become active and sometimes fly away.[18] Bumble bee queens use up to 80% of their fat reserves when overwintering and experimentally-reduced diapause length has been shown to reduce colony initiation and alter reproductive output the following spring.[19,20,21]

The project will also destroy flowering plants and other foraging resources required to create and maintain healthy colonies.[22] The lack of a diverse diet can weaken a bumble bee's immune system. A weakened immune system can make it more susceptible to disease and the impacts of pesticides, and, in turn, infected bumble bees themselves require increased nutrition.[23-25] Bumble bees require between 350,000 to 18 million floral units per month per 100 ha.[26] The rusty patched bumble bee is a generalist forager that "relies on diverse and abundant flowering plant species."[27] Generalist bees will readily use non-native floral resources,[28,29,30,31,32]

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[16] U.S. Fish and Wildlife Service (2018). Conservation Management Guidelines for the Rusty Patched Bumble Bee (*Bombus affinis*), Version 1.6 at 1 (hereinafter "2018 FWS Conservation Management Guidelines"), *available at* https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/ConservationGuidanceRPBBv1_27Feb2018.pdf.
[17] *Id*. at 12.
[18] Williams, N. M., Mola, J. M., Stuligross, C., Harrison, T., Page, M. L., Brennan, R. M., ... & Rundlöf, M. (2019). Fantastic bees and where to find them: locating the cryptic overwintering queens of a western bumble bee. *Ecosphere*, *10*(11), e02949, pgs. 3-
[19] Beekman, M., and P. Van Stratum.(2000). "Does the diapause experience of bumblebee queens *Bombus terrestris* affect colony characteristics?" *Ecological Entomology* 25.1, 1-6, *available at* https://www.researchgate.net/publication/224808689_Does_the_diapause_experience_of_bumblebee_queens_Bombus_terrestris_affect_colony_characteristics.
[20] Baron, G. L., Jansen, V. A., Brown, M. J., & Raine, N. E. (2017). Pesticide reduces bumblebee colony initiation and increases probability of population extinction. *Nature Ecology & Evolution*, *1*(9), Pgs. 3-4,7, Figure 1.
[21] Amin, M. R., Kwon, Y. J., & Thet, Z. M. (2011). Effect of worker number and diapause duration on colony parameters of the bumblebee, Bombus terrestris (Hymenoptera: Apidae). *Journal of Asia-Pacific Entomology*, *14*(4), 455-458.
[22] 2018 FWS Conservation Management Guidelines at 2
[23] Brown, M.J.F., Loosli, R., Schmid-Hempel, P. (2000). Condition-dependent expression of virulence in a trypanosome infecting bumblebees. *Oikos* 91, 421–427.
[24] U.S. Fish and Wildlife Service (2018), *Franklin's bumble bee (Bombus franklini) Species Status Assessment*. Final Report, Version 1, p. 39.
[25] Goulson, D., Nicholls, E., Botías, C. & Rotheray, E.L. (2015). Bee declines driven by combined stress from parasites, pesticides, and lack of flowers. *Science,* 347, 1255957.
[26] Dicks, L. V., Baude, M., Roberts, S. P., Phillips, J., Green, M., & Carvell, C. (2015). How much flower-rich habitat is enough for wild pollinators? Answering a key policy question with incomplete knowledge. *Ecological entomology*, *40*(S1), 22-35.
[27] 2017 FWS ESA Guidance at 9.
[28] Bartomeus, I., Vila, M., & Steffan-Dewenter, I. (2010). Combined effects of *Impatiens glandulifera* invasion and landscape structure on native plant pollination. *Journal of Ecology*, *98*(2), 440-450.
[29] Bezemer, T. M., Harvey, J. A., & Cronin, J. T. (2014). Response of native insect communities to invasive plants. *Annual Review of Entomology*, *59*, 119-141.
[30] Salisbury, A., Armitage, J., Bostock, H., Perry, J., Tatchell, M., & Thompson, K. (2015). EDITOR'S CHOICE: Enhancing gardens as habitats for flower-visiting aerial insects (pollinators): should we plant native or exotic species? *Journal of Applied Ecology*, *52*(5), 1156-1164.
[31] Drossart, M., Michez, D., & Vanderplanck, M. (2017). Invasive plants as potential food resource for native pollinators: A case study with two invasive species and a generalist bumble bee. *Scientific reports*, *7*(1), 16242.
[32] Stouffer, D. B., Cirtwill, A. R., & Bascompte, J. (2014). How exotic plants integrate into pollination networks. *Journal of Ecology*, 102(6), 1442-1450.

and invasive plants can provide important early or late-season floral resources for bumble bees.[33] Indeed, the 2020 rusty patched bumble bee population at the Park has been observed actively foraging on non-native tall sweet clover.

As such, even invasive plant removal could be problematic if not properly timed and replaced with other foraging resources. Yet volunteers are currently removing non-native buckthorn in the planned trail area and actively disturbing prevalent foraging habitat around the buckthorn as well as any rusty patched bumble bee nests (or potential nest sites) at the base of the shrubs.

The City purports to be protecting the bee by following voluntary guidance from FWS. Even full compliance with that guidance, however, will not prevent take of the bee. For example, FWS relies on the idea that the bee "will avoid" or "fly away from" disturbances.[34] But flushing the bee away from essential foraging and breeding activities is unlawful harassment given the cost of flight and importance of energetics for bumble bees,[35,36,37] which are likely to be experiencing other stressors like pathogens and pesticides that further exacerbate the energetic costs.[38] Despite wooded areas being cited as potential rusty patched bumble bee nesting[39] and overall habitat,[40] FWS's guidance assumes that woodlands are not used as nesting habitat and thus recommends conducting ground disturbance in interior woodlands June through September, the bee's primary active period. It also wrongly suggests that trees in the woodlands should be cut in August and September, a time when new queens are being produced and mating prior to overwintering in the woodlands. Further, FWS states that ground disturbance of woodland edges in September through mid-October is less likely to impact the species directly, but bees could be still be using these areas for foraging and nesting. And it recommends cutting of trees in mid-October to early November along woodland edges, a time crucial to overwintering queens that could easily be disturbed or killed.

FWS's guidance also directs staff to "operate equipment slowly with at least one person walking in front of the equipment to search for RPBB activity or RPBB nests," and if a bee or

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[33] Salisbury, A., Armitage, J., Bostock, H., Perry, J., Tatchell, M., & Thompson, K. (2015). EDITOR'S CHOICE: Enhancing gardens as habitats for flower-visiting aerial insects (pollinators): should we plant native or exotic species?. *Journal of Applied Ecology*, 52(5), 1156-1164.

[34] U.S. Fish and Wildlife Service (2020). Recommendations for Mountain Bike Trail Construction within Rusty Patched Bumble Bee (RPBB) High Potential Zones: Prepared for City of Minnetonka – Lone Lake Park, May 15, 2020 Version (hereinafter "2020 FWS Lone Lake Park Guidance").

[35] Wolf, T. J., Ellington, C. P., & Begley, I. S. (1999). Foraging costs in bumblebees: field conditions cause large individual differences. *Insectes sociaux*, 46(3), 291-295.

[36] Crall, J. D., Chang, J. J., Oppenheimer, R. L., & Combes, S. A. (2017). Foraging in an unsteady world: bumblebee flight performance in field-realistic turbulence. *Interface Focus*, 7(1), 20160086.

[37] Schaffer, W. M., Jensen, D. B., Hobbs, D. E., Gurevitch, J., Todd, J. R., & Schaffer, M. V. (1979). Competition, foraging energetics, and the cost of sociality in three species of bees. *Ecology*, 60(5), 976-987.

[38] Goulson, D., Nicholls, E., Botías, C. & Rotheray, E.L. (2015). Bee declines driven by combined stress from parasites, pesticides, and lack of flowers. *Science* 347, *available at* https://science.sciencemag.org/content/347/6229/1255957.long.

[39] Xerces Society for Invertebrate Conservation (2013). Petition to list the rusty patched bumble bee *Bombus affinis* (Cresson), 1863 as an endangered species under the U.S. Endangered Species Act at 26.

[40] Colla, S. R., & Packer, L. (2008). Evidence for decline in eastern North American bumblebees (Hymenoptera: Apidae), with special focus on Bombus affinis Cresson. *Biodiversity and Conservation*, *17*(6), 1379. Pg. 1381

nest is observed, to stop equipment and contact FWS.[41] Even if staff have the expertise to identify bees or nests, which is highly unlikely, staff searching for bees or nests in front of slow-moving construction equipment cannot ensure that all nests will be discovered. Finally, FWS relies on unsupported and often contradictory statements regarding the phenology of the rusty patched bumble bee, proving that surveys must be completed before trail construction begins and continue as part of a habitat conservation plan.

Moreover, the City may not be fully complying with FWS's recommendations to protect the endangered rusty patched bumble bee. In mid-May FWS recommended that the City conduct bee surveys, but the City did not announce until June 24 that they "recently hired" a bee researcher.[42] Those surveys are ongoing and the results are vital to determine the bee's presence and use of the landscape. No construction should occur until this survey is completed and the results analyzed. Nevertheless, trail construction is slated to begin September 1, 2020 and could impact areas where bees forage, nest or overwinter. Indeed, September and October are crucial times of transition for the rusty patched bumble bee going from active foraging and nesting in open areas, woodlands, and edges to queen production, mating, and initiation of overwintering in woodlands and edges.

Despite these impacts to the Park's crucial population of the endangered bee, the City has explained that it will not pursue an ITP for this project.[43]

Figure 2. Lone Lake Mountain Bike Trail Concept Plan

[41] 2020 FWS Lone Lake Park Guidance.
[42] https://www.minnetonkamn.gov/services/projects/park-and-trail-projects/lone-lake-park-multi-use-mountain-bike-trail
[43] https://www.minnetonkamn.gov/services/projects/park-and-trail-projects/lone-lake-park-multi-use-mountain-bike-trail

LEGAL VIOLATIONS

The City has authorized activities associated with a planned mountain bike course at Lone Lake Park – including site preparation, trail construction and maintenance – that is reasonably certain to kill, harm, harass, and otherwise "take" endangered rusty patched bumble bees. But the City has failed to obtain an ITP that would legalize such take of a federally protected species.

The City has the authority to stop the incidental take of the bee by delaying or properly mitigating any further ground-disturbing activities at Lone Lake Park pending its compliance with the ESA. Until the City either ends its authorization of activities that are causing the incidental take of the bee or obtains an ITP that mitigates impacts to the maximum extent practicable, the City is in violation of the ESA. 16 U.S.C. § 1538.

In summary, despite its responsibility to act consistent with the ESA, the City has authorized site preparation, construction and maintenance of a mountain bike course, which has and will continue to result in unlawful take of the endangered rusty patched bumble bee. If the City does not act to correct the violations described in this letter, the City will be subject to suit within 60 days in U.S. District Court. The Center would seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have wish to discuss this matter or believe this notice is in error, please contact me at 651-955-3821.

Sincerely,

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