IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL, INC.; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF MINNESOTA SCIENTIFIC AND NATURAL AREAS,

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director of the U.S. Fish and Wildlife Service; UNITED STATES DEPARTMENT OF THE INTERIOR,

Federal Defendants.

Civ. No. 1:21-cv-00770-ABJ

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), Federal Defendants cross-move for summary judgment in the above-captioned action. This Cross-Motion is based on the accompanying Memorandum, the administrative record, and all argument or evidence that may be presented to, or at, any hearing on this Cross-Motion. For the reasons provided in the accompanying Memorandum, Federal Defendants respectfully request that the Court grant their cross-motion for summary judgment, deny Plaintiffs' motion for summary judgment, and dismiss Plaintiffs' Complaint with prejudice.

Dated: February 11, 2022

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs challenge a determination made by the United States Fish and Wildlife Service ("Service") under the Endangered Species Act ("ESA"), 16 U.S.C. § 1533, that designating critical habitat for the rusty patched bumble bee is not prudent because such a designation would not be beneficial to conservation of the species ("Critical Habitat Determination"). Plaintiffs' claims, which are asserted on the basis of organizational standing, must be dismissed because Plaintiffs fail to identify any action that, in the absence of a critical habitat designation, has actually injured or will imminently cause a concrete injury to any of their individual members.

Even if Plaintiffs had standing to challenge the Service's Critical Habitat Determination, their claims are without merit. In 2017, when the Service listed the rusty patched bumble bee as endangered under the ESA, there was insufficient information for the Service to determine if a critical habitat designation would be prudent. After years of further data collection and analysis, the Service ultimately determined that the biological characteristics and unique circumstances of the rusty patched bumble bee's decline make the designation of critical habitat "not prudent" for the species. The best scientific data available indicates that the present or threatened destruction or modification of the bee's habitat is not the primary threat responsible for its decline, as the bee's decline has been attributed to a synergistic reaction between a pathogen and a particular class of insecticides. Additionally, because the bee is a habitat generalist and there is abundant suitable habitat available across its historic range, the Service determined that the availability of habitat is not a limiting factor on the species' conservation and that the designation of critical habitat would not provide a benefit beyond the ESA consultation requirements already triggered by the bee's status as an "endangered species."

The Service's Critical Habitat Determination is supported by the administrative record and was made in accordance with the ESA and its implementing regulations. Because Plaintiffs fail to show any clear error in agency judgment, the Court should afford deference to the Service's well-reasoned analysis and expertise, and uphold the Critical Habitat Determination.

LEGAL BACKGROUND

I. The Endangered Species Act

Congress enacted the ESA in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). If the Service determines that a species is threatened or endangered based on the best scientific and commercial data available, the species is added to the list of threatened and endangered species and subject to a variety of protections under the ESA. *Id.* § 1533(a)(1), (b)(1)(A).[1] The ESA also requires the Service to designate, "to the maximum extent prudent and determinable," specific geographical areas as "critical habitat" for each listed species. *Id.* § 1533(a)(3)(A). Critical habitat is defined under the ESA as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

[1] The Secretaries of the Interior and Commerce are responsible for implementing the ESA, and they have delegated their respective responsibilities to the Service and the National Marine Fisheries Service. The Service has responsibility for terrestrial and freshwater species, including the rusty patched bumble bee. *See* 50 C.F.R. § 402.01(b).

16 U.S.C. § 1532(5)(A).

When a species is listed as threatened or endangered, it receives protection under Section 7 of the ESA through the requirement that federal agencies consult with the Service to ensure that any actions they authorize, fund, or carry out are not likely "to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

Similarly, when an area is designated as critical habitat, it receives protection under Section 7 through the requirement that federal agencies consult with the Service to ensure that such actions are not likely to "result in the destruction or adverse modification of [critical] habitat of such species." *Id.* However, the designation of critical habitat "does not . . . establish a refuge, wilderness, reserve, preserve, or other conservation area . . . nor does it require implementation of restoration, recovery, or enhancement measures." 82 Fed. Reg. 3186, 3206 (Jan. 11, 2017).

II. Implementing Regulations on Criteria for Designating Critical Habitat

A. The 2016 Regulations

Under the version of the ESA regulations that were in effect at the time of the Listing Rule ("2016 Regulations"), a "designation of critical habitat is not prudent," as is relevant here, when the "following situation[]" exists:

> Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat."

81 Fed. Reg. 7414, 7439 (Feb. 11, 2016).

B. The 2019 Regulations

A revised version of the 2016 Regulations was issued in 2019. Under the revised version, which was in effect at the time of the Service's Critical Habitat Determination ("2019 Regulations"), the Service "may, but is not required to, determine that a designation would not be prudent" in the following relevant circumstances:

> (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;
>
> * * *
>
> (v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

84 Fed. Reg. 45020, 45053 (Aug. 27, 2019). The 2019 Regulations apply "only to relevant rulemakings for which the proposed rule is published after [September 26, 2019]. Thus, the prior [2016 Regulations] will continue to apply to any rulemakings for which a proposed rule was published before [September 26, 2019]." *Id.* at 45020.

FACTUAL BACKGROUND

I. The Rusty Patched Bumble Bee

The rusty patched bumble bee (*Bombus affinis*) is a eusocial (highly social) organism forming colonies consisting of a single queen, female workers, and males. 82 Fed. Reg. at 3187. The species has "been observed and collected in a variety of habitats, including prairies, woodlands, marshes, agricultural landscapes, and residential parks and gardens." *Id.* Like other species of bumble bees, the rusty patched bumble bee is a generalist forager, meaning it "gather[s] pollen and nectar from a wide variety of flowering plants." *Id.*

Prior to the mid- to late-1990s, the rusty patched bumble bee was widely distributed across the upper Midwest and Eastern United States, but since then it has experienced a significant decline. *Id.* at 3188. Historically, up to 926 populations of the bee had been documented, but since 1999 the species has been observed at 103 populations (representing an 88% decline from the number of populations documented prior to 2000). *Id.*

The precipitous decline of the rusty patched bumble bee from the mid-1990s to the present was contemporaneous with the collapse of the commercially bred western bumble bee population, which was attributed to a pathogen called *Nosema bombi* (a fungus). *Id.* at 3189. Based on the temporal congruence and speed of these declines (and the decline of several other bumble bee species), scientists believe that the rusty patched bumble bee decline was, at least in part, caused by a transmission or ''spillover'' of *Nosema bombi* from the commercial colonies to wild populations through shared foraging resources. *Id.* Additionally, the use of neonicotinoids (a class of insecticides used to target pests of agricultural crops) has been "been strongly implicated as the cause of the decline of bees in general . . . and specifically for rusty patched bumble bees, due to the contemporaneous introduction of neonicotinoid use and the precipitous decline of the species." *Id.* at 3190 (scientific literature citations omitted). Habitat loss and degradation are also considered a threat to the rusty patched bumble bee because much of its historic habitat was lost or fragmented by the European settlement of North America, and "the past effects of habitat loss . . . may continue to have impacts on bumble bees that are stressed by other factors." *Id.* However, scientists believe that habitat loss is "unlikely to be a main driver of the recent, widespread North American bee declines." *Id.* This is especially true of the rusty patched bumble bee because, while scientists believe that it is possible that habitat loss "may continue to contribute to current declines, at least for some species" that are "habitat specialists," the rusty patched bumble bee, by contrast, is less

likely to be "severely affected by habitat loss . . . because it is not dependent on specific plant species, but can use a variety of floral resources." *Id.*

II. Relevant Rulemaking History

A. The Listing Rule

On September 22, 2016, the Service issued a proposed rule, proposing to list the rusty patched bumble bee as an "endangered species" under the ESA. 81 Fed. Reg. 65324 (Sept. 22, 2016) ("Proposed Listing Rule"). Based on the best available science at the time and in need of further analysis, the Service found that critical habitat was "not determinable" at the time of the Proposed Listing Rule. *Id.* at 65332. In connection with its further analysis of the listing status of the species, the Service sought comments and information from the public concerning "reasons why any habitat should or should not be determined to be critical habitat for the rusty patched bumble bee as provided by [the ESA]." *Id.* at 65325.

On January 11, 2017, the Service issued a final rule listing the rusty patched bumble bee as an "endangered species" under the ESA. 82 Fed. Reg. 3186 (Jan. 11, 2017) ("Listing Rule"). With respect to critical habitat, the Service was still in the process of collecting data expected to provide important knowledge on the topic and concluded that, based on the best available science, critical habitat was still "not determinable" at the time of the Listing Rule. *Id.* at 3207

B. The Critical Habitat Determination

Subsequent to further analysis and data collection leading to the creation of multiple conservation materials—including, for example, a map of priority areas for habitat improvement and surveys, *see* RPBB0080; a Draft Recovery Plan for the species, *see* RPBB0041-52; Conservation Management Guidelines, *see* RPBB0081-98; and ESA Section 7 Implementation Guidance, *see* RPBB0053-79 —the Service issued a determination that the designation of critical

habitat is "not prudent" for the rusty patched bumble bee. 85 Fed. Reg. 54281 (Sept. 1, 2020). The Service based its determination on an enhanced understanding of the bee's life-history needs developed from the best available science, including more complete data and new information that became available after issuance of the Listing Rule. *Id.* at 54282. Among other things, the Service found that "given the primary stressors of pesticides and pathogens, the species' dispersal abilities, and the variety of habitats it can use for foraging, overwintering, and nesting," as well as the availability of "abundant suitable habitat" across its historical range, designating critical habitat would not be beneficial to the species. *Id.* at 54283-84.[2]

STANDARD OF REVIEW

Judicial review of agency determinations under the ESA is governed by the "arbitrary or capricious" standard set forth in the Administrative Procedure Act ("APA"), which requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under this standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing

[2] In light of some ambiguity as to whether the 2016 or 2019 Regulations applied, the Service took the most comprehensive approach to the Critical Habitat Determination by analyzing whether habitat should be designated under both versions of the regulations. *See* 85 Fed. Reg. at 54284-85. As a result of each analysis, the Service concluded that the designation of critical habitat is "not prudent" for the rusty patched bumble bee. *Id.* Notwithstanding the practical insignificance of which version applies, it is Federal Defendants' position that the Proposed Listing Rule (issued in 2016) constitutes a proposed rule with respect to the Critical Habitat Determination because it included an analysis addressing the potential prudency of designating critical habitat, 81 Fed. Reg. at 65331-32, and sought comments and information from the public concerning "reasons why any habitat should or should not be determined to be critical habitat for the rusty patched bumble bee as provided by [the ESA]," *id.* at 65325. Thus, the parties agree that the 2019 Regulations do not apply to the Critical Habitat Determination because it constitutes a "rulemaking[] for which a proposed rule was published before the [September 2019] effective date of [the 2019 Regulations]." 84 Fed. Reg. at 45020.

court's only role in applying this standard is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (citations omitted).

A reviewing court "will give an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise.'" *Hüls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir 1996) (citation omitted); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of facts, a reviewing court must generally be at its most deferential."). "[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1980).

The court's review is limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Although summary judgment usually means that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), in APA cases, the agency decides factual issues, *N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007), and the "district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson,* 269 F.3d 1077, 1083 (D.C. Cir. 2001). Courts implement summary judgment as a means of ascertaining whether the record supports the agency's action. *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 60 (D.D.C. 2014) (citation omitted).

ARGUMENT

I. Plaintiffs lack standing because they fail to demonstrate any injury in fact that is traceable to the challenged decision and would be redressed by judicial relief.

Plaintiffs' complaint must be dismissed for lack of jurisdiction because they have failed to establish standing to raise their claims. Plaintiffs claim that they have organizational standing "on behalf of their members," because their "interests in the rusty patched bumble bee are [purportedly] harmed by the Service's [Critical Habitat Determination]." ECF No. 19 ("Pls.' Br.") 42. To establish organizational standing, a party must show that "[1] its members would otherwise have standing to sue in their own right, [2] the interests it seeks to protect are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members." *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013) (citation omitted). To establish the first prong in this test, i.e., show that one of its members has Article III standing to sue in his or her own right, an organization must demonstrate that "the member has incurred '[1] an actual or imminent injury in fact, [2] fairly traceable to the challenged agency action, [3] that will likely be redressed by a favorable decision.'" *Id.* (citation omitted). The Supreme Court has recognized that "standing is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). Here, Plaintiffs fail to establish standing because they fail to point to anything in the administrative record or in the declarations submitted with their motion for summary judgment which demonstrates that any member of their organizations has suffered an "injury in fact" traceable to the Critical Habitat Determination which can be redressed by a favorable ruling from this Court.

Plaintiffs argue that, "[w]ithout designated critical habitat in place, federal actions will continue destroying and degrading the bee's remaining habitat without triggering mandatory

safeguards that would apply to critical habitat under section 7 [of the ESA]." Pls.' Br. 43-44. But Plaintiffs fail to point to a single instance in which the Service's Critical Habitat Determination has either caused or will imminently cause federal destruction or degradation of the bee's habitat. Neither of the purported examples that Plaintiffs provide of alleged "injury in fact" fill this void.

As their primary example, Plaintiffs claim that "the proposed expansion of the Chicago Rockford International Airport, which entails federal action by the Department of Transportation, threatens to destroy Bell Bowl Prairie," where "the species was seen [] as recently as August 2021." Pls.' Br. 44 (citation omitted). They allege that, "[a]bsent critical-habitat designation for this area, it is substantially more likely that the expansion will destroy habitat for the bee and thus prevent [Plaintiff Natural Resources Defense Council] member Clay Bolt from following through with his plans to search for and photograph the bee there." *Id.* (citation omitted). This alleged "injury" fails to establish standing.

Any federal action taking place in the Bell Bowl Prairie area is already subject to ESA Section 7 consultation due to the bee's status as an "endangered species," *see* 16 U.S.C. § 1536(a)(2), and Plaintiffs fail to even attempt to provide an explanation (nor could they provide a reasonable one) as to how the already-existing consultation obligations are somehow insufficient to safeguard Mr. Bolt's interest in viewing and photographing the bee in that area. Because the bee has been sighted in the Bell Bowl Prairie area in recent years, the Service recognizes it as an area where the bee "may be present." *See* RPBB0006. This classification triggers a requirement for federal agencies, including the Department of Transportation, to consult with the Service on any projects overlapping the area to ensure that their proposed action is "not likely to jeopardize the continued existence" of the species. 16 U.S.C. §§ 1536(a)(2), (c)(1). The proposed expansion of the Chicago Rockford International Airport thus already triggers consultation requirements which

provide protections for the bee and its habitat under ESA Section 7. Plaintiffs' broad and conclusory allegations that "[a]bsent critical-habitat designation . . . it is substantially more likely that the [airport] expansion will destroy habitat for the bee" and "prevent" Mr. Bolt from observing and photographing the bee are therefore without merit. Pls.' Br. 44. Plaintiffs also fail to demonstrate that vacatur of the Critical Habitat Determination (or a designation of critical habitat) would redress Mr. Bolt's alleged injury, because there is no evidence indicating that such a result would lead to any added protections for the bee and its habitat in the Bell Bowl Prairie area beyond those that already exist.[3] *See, e.g., Pub. Emps. for Env't Resp. v. Bernhardt*, No. CV 18-1547 (JDB), 2020 WL 601783, at *4 (D.D.C. Feb. 7, 2020) (holding that plaintiff environmental organizations did not have standing to challenge an agency decision to delist a species, finding that, "while plaintiffs' aesthetic interest in the [species] could conceivably support an injury in fact, plaintiffs have not provided the [c]ourt with any evidence whatsoever demonstrating that delisting will lead inexorably to fewer [members of the species] or make it harder to observe [the species] in the wild").

Plaintiffs' second purported example also does not constitute an "injury in fact." For this example, Plaintiffs state that "[Plaintiff Natural Resources Defense Council] member Thomas

[3] While Plaintiffs suggest that the Court can enter an order "directing the Service to designate habitat," *see* Pls.' Br. 44, it is important to note that a court cannot direct an agency to make particular substantive findings as the result of its rulemaking process. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.") (citations omitted). Rather, in cases where an agency's determination is found to be arbitrary and capricious, the appropriate remedy is to remand the determination to the agency for any issues to be addressed in the context of the rulemaking process. *Id.*; *see also Nat'l Tank Truck Carriers v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take . . . . It may even be that the [agency] will choose some other solution altogether. In any event, that choice is the agency's and not ours.") (citations omitted).

Casey is concerned that the Service's failure to designate critical habitat will likely result in federal management decisions that impair his interests in seeing the bee at the Minnesota Valley National Wildlife Refuge, where he regularly seeks out the bee." Pls.' Br. 44. But Mr. Casey's "concern" over unidentified and hypothetical future agency actions that may impact his interests is hardly sufficient to establish "injury in fact" for the purposes of Article III standing. *See Lujan*, 504 U.S. at 562 (When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"— here, federal agencies—"it becomes the burden of the plaintiff to adduce facts showing that those [agencies'] choices have been or will be made in such manner as to produce causation and permit redressability of injury."). Here, Plaintiffs have failed to identify any agency or other third party action that, in the absence of a critical habitat designation, has or will imminently cause a concrete harm to any of Plaintiffs' members.[4] Nor have Plaintiffs established any way in which the Court's remand of the Critical Habitat Determination (or even an ultimate designation of critical habitat) would redress their members'

[4] The cases cited by Plaintiffs also fail to support their argument that the alleged "injury-in-fact [of their members] is traceable to the Service's [Critical Habitat Determination]" or that it can be redressed by a favorable ruling. Pls.' Br. 43. *See Growth Energy v. EPA*, 5 F.4th 1, 27 (D.C. Cir. 2021) (involving a "procedural injury"—something not at issue here—where the agency omitted a required step in its rulemaking process and noting that courts will "relax" their evaluation of "imminence and redressability" when applying "standing requirements for procedural injuries" (citations omitted)); *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 85 n.22 (D.D.C. 2017) (noting in a footnote that standing was not contested by the government and finding that plaintiffs' standing declarations were sufficient where the agency had issued a decision not to list a species as endangered or threatened under the ESA, thereby affording the species *no* consultation or any other protections (citations omitted)); *Friends of Animals v. Ross*, 396 F. Supp. 3d 1, 8 (D.D.C. 2019) (also involving a decision in which the agency declined to list a species as endangered or threatened, thus affording it *no* consultation or any other protections, and in which the government did not contest standing).

alleged injuries in some way that the ESA consultation obligations already required by the bee's "endangered" status do not.

II. The Service's Critical Habitat Determination is reasonable and supported by the record.

A. The Service applied the correct standard for a "not prudent" determination.

Under the applicable 2016 Regulations, there are certain situations under which the ESA's "not prudent" exception applies and critical habitat should not be designated, including when a designation "would not be beneficial to the species." 50 C.F.R. § 424.12(a)(1) (2016).[5] Plaintiffs' suggestion that the Service has applied an "expansive interpretation" of the "not prudent" exception is baseless. Pls.' Br. 26. As an initial matter, because the 2016 Regulations enumerate specific instances under which designating critical habitat is "not prudent" under the ESA (the relevant one here being when it "would not be beneficial to the species"), Plaintiffs' citation to various dictionary definitions of the broader term "prudent" is not relevant. *Id.*; 50 C.F.R. § 424.12(a)(1). Nor are Plaintiffs' broad statements about the general intent of the ESA statute. Pls.' Br. 26-27. Rather, the appropriate, specific standard relevant to the Service's Critical Habitat Determination is whether designating critical habitat would be "beneficial" to the rusty patched bumble bee. 50 C.F.R. § 424.12(a)(1)(ii) (2016).[6]

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[5] Because the parties do not contest the application of the 2016 Regulations to the Service's Critical Habitat Determination, *see supra* n.2, Federal Defendants do not address Plaintiffs' alternative argument regarding the Service's analysis under the 2019 Regulations (i.e., Pls.' Br. 39-42, Section III.). *See* Pls.' Br. 24 ("If the Court agrees [that the 2016 Regulations apply], then it need only consider the Service's . . . [application of] the 2016 Regulation in deciding whether the [Critical Habitat Determination] is lawful.").

[6] Plaintiffs do not challenge the Service's interpretation of prudency in the 2016 Regulations, which provide that one basis for determining prudency is evaluating whether the designation of critical habitat would be "beneficial to the species." *Id.* Even if Plaintiffs did assert such a challenge, the interpretation should be upheld as reasonable because the Court need only determine that the Service's interpretation of the meaning of "prudent" is permissible − not whether there is

The regulation provides two factors that the Service "may" consider in determining whether critical habitat would be "beneficial" to the species and clearly states that the Service's consideration is "not limited to" those factors. *Id.*[7] Courts evaluating this standard have found:

> **The regulation simply, and sufficiently, states that [critical habitat] designation must be "beneficial."** The dictionary definition of "beneficial" is to confer benefits, contribute to a good end, or be helpful or advantageous; tending to the benefit of a person, or yielding a profit, advantage or benefit. . . . It is meaningless to speak of "more beneficial" or "less beneficial." **By definition, a benefit confers an advantage, something additional, on the recipient. If there is nothing to be gained over and above the status quo, then there is no benefit.**

Orleans Audubon Soc'y v. Babbitt, 1997 LEXIS 23909, at *28-29 (E.D. La. Oct. 28, 1997) (emphasis added). Contrary to Plaintiffs' misleading suggestions that designation of critical habitat can only be deemed "not beneficial" if it would "increase threats to the species" or if the species was listed due to threats "other than . . . to its habitat or range," *see* Pls.' Br. 28-29, the regulations are clear that they provide a "non-exclusive list of factors the Service[] may consider in evaluating whether designating critical habitat is not beneficial." 81 Fed. Reg. at 7425 (clarifying that the regulation "allows for the consideration of alternative fact patterns where a determination that critical habitat is not beneficial would be appropriate," and that the "but not limited to" language in the regulation is intended to "expressly reflect [a] regulatory flexibility").[8]

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some other reasonable interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The Court should also defer to the Service's reasonable interpretation of the meaning "beneficial" under the regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019).

[7] Here, the Service did not rely on either provided example, but rather found that the designation of critical habitat would not be beneficial to the rusty patched bumble bee for other reasons, discussed below in Section II. B.

[8] Plaintiffs also rely heavily on the ESA's legislative history for the proposition that the ESA's "'not prudent' exception is strictly limited to rare circumstances." Pls.' Br. 27. But Federal Defendants do not dispute that "not prudent" findings are intended to be rare, and *are* indeed rare.

In a similarly misleading argument, Plaintiffs cite a string of irrelevant cases for their contention that the ESA "strictly limit[s]" application of the "not prudent" exception and that courts have rejected its application on the basis that it is reserved for "rare circumstances." Pls.' Br. 27-28. Indeed, most of the cases that Plaintiffs rely on do not even address the "not prudent" exception. *See Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (upholding a decision not to designate critical habitat based on insufficient information, holding that the ESA "does not mandate a [critical habitat] determination based on inadequate information"); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 626-27 (W.D. Wash. 1991) (addressing the *timing* of when critical habitat must be designated, holding that the Service could not make "a finding that critical habitat is not presently 'determinable'" when "no effort [had even] been made to secure the information necessary to make the designation"); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-43 (5th Cir. 2001) (addressing the regulatory definition of "the destruction/adverse modification" of critical habitat, holding that the definition was invalid). And the other cases Plaintiffs cite have no bearing on or commonalities with the Critical Habitat Determination. *See Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280, 1283-84 (D. Haw. 1998) (finding that the Service did not provide sufficient evidence constituting a "rational basis" to support its claim that designating habitat would "increase the likelihood that individuals would . . . vandalize the [species]"); *Nat. Res. Def. Council v. U.S. Dep't of the Interior ("NRDC v. DOI")*, 113 F.3d 1121, 1125-26 (9th Cir. 1997) (finding that the Service could not determine that critical habitat would not be "beneficial to the species" on the basis that "most" of the species is "found on private lands," as

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See, e.g., 81 Fed. Reg. at 7417 ("Based on our experiences with designating critical habitat, a determination that critical habitat is not prudent is rare."). Here, the rusty patched bumble bee is one of those "rare circumstances in which designating critical habitat does not contribute to conserving the species." *Id.* at 7425.

this effectively rewrote the "'beneficial to the species' test . . . into a 'beneficial to *most* of the species'" test).

Here, in reaching its determination that critical habitat should not be designated for the rusty patched bumble bee, the Service applied the standard set forth in the statute and applicable regulation and, for the reasons discussed below, reasonably concluded that "designation of critical habitat would not be beneficial to the species." 50 C.F.R. § 424.12(a)(1)(ii) (2016); *see also* 81 Fed. Reg. at 7425 (the regulation provides a "non-exclusive list of factors the Service[] may consider in evaluating whether designating critical habitat is not beneficial,").

B. The conclusions in the Critical Habitat Determination are adequately explained and supported by the record.

In an attempt to undermine the Critical Habitat Determination, Plaintiffs select three bases provided by the Service for its conclusion that critical habitat would not be beneficial for the bee, pull them out of context and apart from one another, and ignore the Service's well-reasoned analysis and record support for each. Plaintiffs' effort fails and the Court should uphold the Critical Habitat Determination, as the Service's analysis and expertise are entitled to substantial deference. *Hüls Am. Inc.*, 83 F.3d at 452 (an agency is afforded "an extreme degree of deference . . . when it 'is evaluating scientific data within its technical expertise.'") (citation omitted).

1. Designating critical habitat would not benefit the species because habitat loss and degradation are not believed to be causing the bee's decline.

First, Plaintiffs claim to take issue with the Service's finding that "[t]he best scientific data available indicate[s] that the present or threatened destruction, modification, or curtailment of the rusty patched bumble bee's habitat or range is not the primary threat to the species." 85 Fed. Reg. at 54284; *see* Pls.' Br. 29-30, 33-34. Specifically, Plaintiffs contend that, even if "habitat loss and degradation are not 'the' primary threat to the bee," that does "not mean that designating critical

habitat would not benefit the bee." Pls.' Br. 29. But as set forth in the analysis provided in the Service's Critical Habitat Determination, the reason it matters that habitat loss is not the "primary threat" to the species is because it is not the threat believed to be the *cause of the bee's decline*. *See* RPBB0003 (finding that the "evidence suggests a synergistic interaction between an introduced pathogen and exposure to pesticides" and that the interaction between those two threats is the likely cause of the decline leading to the bee's endangered status). Indeed, the Service specifically found that:

> Although habitat loss has established negative effects on bumble bees, many bumble bee experts conclude it is **unlikely to be a main driver of the recent, widespread North American bee declines**. Further, the rusty patched bumble bee may not be as severely affected by habitat loss [as compared to other bee species] because **it is not dependent on specific plant species for floral resources and can use a variety of habitats for nesting and overwintering**.

Id. (scientific literature citations omitted) (emphasis added). Thus, the ways in which elimination of a negative condition can sometimes benefit a species would not serve to benefit the bee by designating critical habitat. For example, the designation of critical habitat would not reverse the species' decline because this would only happen if habitat loss or degradation was the primary driver of the decline. Nor would it foster positive conditions that would allow the species to recover from its decline because the fact that the species is a habitat generalist already gives it the positive conditions needed for recovering once the primary threat is ameliorated.

Plaintiffs further contend that the fact that the Listing Rule characterizes habitat loss and degradation as "a" cause of the bee's decline means that it "especially" cannot be the case that the designation of critical habitat would not benefit the species. Pls.' Br. 29. But, again, this argument ignores all context surrounding the Service's finding. In its analysis of the five "primary stressors" identified in the Listing Rule, the Service found that while "habitat loss and degradation" may

have *historically* contributed to declines, and may still be contributing to declines for *some* bee species, this is unlikely for the rusty patched bumble bee:

> The rusty patched bumble bee historically occupied native grasslands of the Northeast and upper Midwest . . . . Estimates of native grassland losses since European settlement of North America are as high as 99.9 percent. Habitat loss is commonly cited as a long-term contributor to bee declines through the 20th century, and **may continue to contribute to current declines, at least for *some* species**. **However, the rusty patched bumble bee may not be as severely affected by habitat loss** . . . because it is not dependent on specific plant species, but can use a variety of floral resources.

RPBB0129 (scientific literature citations omitted) (emphasis added). The Service further found that, while the "past effects of habitat loss . . . may continue to have impacts on [] bees that are stressed by other factors," researchers believe that it is "unlikely to be a main driver of the recent, widespread North American bee declines." *Id.* The Court should therefore uphold the Service's Critical Habitat Determination, as "[c]ertainly it is within the [Service]'s expertise and mission to evaluate the status of the [bee], including . . . current threats, to determine whether critical habitat designation would be beneficial." *Orleans Audubon*, 1997 LEXIS at *29.[9]

Plaintiffs similarly cite cherry-picked language from the Recovery Plan in purported support of their challenge to the Service's finding that critical habitat designation would not be beneficial to the bee. Pls.' Br. 29 (citing the Recovery Plan for their broad allegation that the Service "has previously acknowledged . . . that habitat protection is a 'necessary' component of

[9] Even if the finding in the Listing Rule that habitat loss is "a" primary cause of the bee's decline were viewed in isolation without its relevant context (which it should not be), that finding does not somehow render the Service's "not prudent" finding arbitrary and capricious. Indeed, the Service had almost *four years* of further data collection and analysis between the time of the Listing Rule and the Critical Habitat Determination; to suggest that statements made in the Listing Rule should predetermine the outcome of the Service's critical habitat analysis simply does not make sense. Nevertheless, Plaintiffs continuously cite this language from the Listing Rule throughout their brief in purported support (and in many cases as the only support) for their arguments and, each time, decline to include the surrounding context. *See, e.g.,* Pls.' Br. 2-3, 7 n.5, 12, 18, 19, 29, 34, 43.

the species' recovery"). But the Recovery Plan merely lists and describes six "broad categories of [] actions necessary to achieve the recovery vision for the rusty patched bumble bee," and includes "management and protection [of habitat]" as one of those categories. RPBB0049-50. And the description of that category does *not* include designating critical habitat in its list of suggested measures. RPBB0050. Instead, it lists various other habitat "management and protection measures" which do not require a critical habitat designation and, many of which, as discussed in Section II. B. 3. below, are being achieved through other measures:

> Successful management and protection measures may include: maintaining, improving, and restoring overwintering, foraging, and nesting habitat; restoring connectivity for dispersal; developing and implementing habitat management plans; creating habitat management incentive programs; conducting research; and providing education and outreach to the public and land managers; and securing permanent protection of habitat through land acquisition and/or conservation easements by land management agencies and nongovernmental organizations.

Id. Thus, Plaintiffs' reliance on select segments of the Listing Rule and Recovery Plan to demonstrate the Service's previous acknowledgement that habitat loss and degradation are one of the threats acting on the bee fails to undermine the Service's conclusion that designating critical habitat would not be beneficial to conservation of the species.

Plaintiffs' reliance on *NRDC v. DOI*, 113 F.3d 1121, is similarly unavailing. Pls.' Br. 30. Plaintiffs argue that the court in *NRDC v. DOI* rejected a purportedly "analogous rationale" relied on for a "not prudent" determination. *Id.* However, the agency's rationale in that case—that critical habitat would not be beneficial to the California gnatcatcher because 80%, or "most," of the species would not benefit from it—is not analogous to the Service's analysis here. *NRDC v. DOI*, 113 F.3d at 1125-26, 1128. Here, the Service has not based its analysis on the anticipated benefit or lack of benefit to only a portion of the species' population, but rather has found that the loss and

degradation of habitat is not a primary threat with respect to the entire species. *See* RPBB0004 ("The best scientific data available indicate[s] that the present or threatened destruction, modification, or curtailment of the rusty patched bumble bee's habitat or range *is not the primary threat to the species*.") (emphasis added).

Further, the sole basis for Plaintiffs' contention that there is no "support in the record" for the Service's finding that habitat loss is not the primary threat to the species is that "the record [purportedly] establishes that pesticides often harm the bee . . . by destroying or degrading the bee's habitat." Pls.' Br. 33-34. But this argument is based on a flawed assumption that the designation of critical habitat would be beneficial to counteracting the threat of pesticides. While pesticides may impact "floral resources, thus indirectly affecting bumble bees," *see* RPBB0128, designating critical habitat does not ameliorate that threat. Indeed, the Recovery Plan lists multiple actions that would effectively "[m]inimize exposure to harmful pesticides," and designating critical habitat is not contemplated as one of those measures:

> Successful minimization [of pesticide exposure] measures may include: creating pesticide registry programs, executing pollinator-safe labeling on nursery plants, establishing buffers around populations (for example, habitat restoration or land acquisition), implementing integrated pest management, conducting research, and providing education and outreach to the public and agricultural community.

RPBB0050. Moreover, Plaintiffs' suggestion that the designation of critical habitat would provide the benefit of requiring the Environmental Protection Agency ("EPA") to consult with the Service to ensure that pesticide approvals do not harm the bee is misleading. Pls.' Br. 33-34. Because the bee is listed as an "endangered species," the EPA is required to consult with the Service to ensure that any agency action (including pesticide approvals) is "not likely to jeopardize the continued existence" of the species. 16 U.S.C. § 1536(a)(2). To carry out this obligation, the EPA (and any

other federal agency) is required to request information from the Service regarding "whether any species . . . listed [as threatened or endangered under the ESA] . . . may be present in the area" before carrying out its proposed action. *Id.* § 1536(c)(1). If the Service finds that the species "may be present," further analysis and consultation requirements are triggered under ESA Section 7. *Id.*[10] This means that, with or without any designation of critical habitat, the EPA is required to consult with the Service over proposed agency actions (such as pesticide approvals) that are expected to impact areas in which the bee may be present. *Id.* § 1536(a)(2), (c)(1). Thus, while the same consultation requirements apply to agency actions that may "result in the destruction or adverse modification of [critical] habitat," the designation of critical habitat would not provide any added benefit to the bee in terms of minimizing the impacts of pesticides. *Id.* § 1536(a)(2).

Because the record supports the Service's conclusion that habitat loss and degradation are not the primary threat causing the bee's decline and that designating critical habitat would not benefit the bee's conservation, the Court should defer to the agency's reasoned judgment in the Critical Habitat Determination.

2. Because the bee is a habitat generalist and there is abundant suitable habitat across its range, designating critical habitat would not provide a benefit to the species.

Plaintiffs also take issue with the Service's finding that, because there is "abundant suitable habitat" for the bee across its historical range and because the bee is "flexible with regard to its habitat use for foraging, nesting, and overwintering," the availability of habitat is not a limiting factor on its conservation and the designation of critical habitat would not provide a benefit. RPBB0003-04; *see* Pls.' Br. 31, 34-37. Plaintiffs argue that the abundance of available habitat and the bee's generalist approach to habitat selection does "not mean that designating and protecting

[10] For this purpose, the Service maintains and publishes an updated map identifying areas in which the bee "may be present." *See* RPBB0006.

specific, important areas of habitat would not benefit remaining populations of the bee." Pls.' Br. 31. But Plaintiffs fail to point to anything in the record demonstrating that the designation of critical habitat would afford some benefit to the species.[11] Therefore, their argument essentially boils down to a contention of "it wouldn't hurt." This runs afoul of the standard for the "not prudent" exception, under which an agency must determine whether a critical habitat designation would be "beneficial" to the species. 50 C.F.R. § 424.12(a)(1).

Here, the record supports a multitude of reasons why designating critical habitat would not provide a benefit to the bee. With respect to occupied habitat, as discussed above at pp. 20-21, ESA Section 7 requires federal agencies to analyze potential impacts to the bee anytime that the bee "may be present" in a proposed action area, to ensure that the action is "not likely to jeopardize the continued existence" of the species. 16 U.S.C. § 1536(a)(2), (c)(1). Thus, any "benefit" provided by the consultation obligations accompanying the designation of critical habitat would be duplicative of benefits already afforded to occupied habitat under the ESA. *Id.*; *see also* RPBB0053-79 (ESA Section 7 Implementation Guidance published by the Service to assist agencies in fulfilling their consultation obligations).

With respect to unoccupied habitat, the Critical Habitat Determination explains that there would also be no benefit provided by attempting to designate critical habitat:

> Because habitat for the rusty patched bumble bee is not limiting, and because the bee is considered to be flexible with regard to its habitat use for foraging, nesting, and overwintering, the availability of habitat does not limit the conservation of the rusty patched bumble bee now, nor will it in the future. **Given the primary stressors of pesticides and pathogens, the species' dispersal abilities, and the**

[11] The only purported support from the record that Plaintiffs proffer (and heavily rely on) for this argument are cherry-picked statements from the Listing Rule about how the Service previously recognized habitat loss and degradation as "a" threat to the bee. Pls.' Br. 34. But such a finding does not contradict the Service's Critical Habitat Determination, and for all the reasons discussed above at pp. 17-18, n.9 this repeated argument fails here as well.

> **variety of habitats it can use for foraging, overwintering, and nesting, we cannot predict which specific areas rusty patched bumble bees may occupy at a landscape level across its historic range**. Therefore, pursuant to 50 CFR 424.12(a)(1)(v), the best scientific data available indicate that designation of critical habitat is not prudent.

RPBB0004 (emphasis added). In sum, because there is abundant suitable unoccupied habitat available and the bee can occupy a broad range of habitats ("including prairies, woodlands, marshes, agricultural landscapes, and residential parks and gardens," and "gather[s] pollen and nectar from a wide variety of flowering plants"), the Service has determined that predicting areas that the bee may inhabit in the future and designating them as critical habitat would not provide a benefit to the species. RPBB0126; *id.*[12] *See Hüls Am. Inc.*, 83 F.3d at 452 (courts provide "an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise'") (citation omitted).

Plaintiffs' contention that the record "contradicts" the Service's purportedly "novel" finding that "the bee is a 'habitat generalist' that 'is considered to be flexible with regard to its habitat use for foraging, nesting, and overwintering'" is plainly inaccurate. Pls.' Br. 35. Indeed, the record reveals that this is not a novel finding at all and amply supports the Service's conclusion. In the Listing Rule, which Plaintiffs selectively quote from, the Service recognized that "[b]umble bees are generalist foragers, meaning they gather pollen and nectar from a wide variety of flowering plants," and that the "rusty patched bumble bee has been observed and collected in a variety of habitats, including prairies, woodlands, marshes, agricultural landscapes, and residential

[12] Contrary to Plaintiffs' contentions, the Service's finding here is significantly different from a "not determinable" finding, which is rendered when the Service does not have sufficient information to designate critical habitat. Pls.' Br. 40; *see* 50 C.F.R. § 424.12(a)(2). Here, the Service found that, based on the best available science, designating unoccupied critical habitat would not be beneficial to the species. RPBB0004.

parks and gardens." RPBB0126 (scientific literature citations omitted); *see also* RPBB0179-80 (same findings in the 2016 Species Status Report).

There is also no "mismatch" between the Recovery Plan, which identifies management and protection of habitat as "necessary to achieve the recovery vision for the rusty patched bumble bee," RPBB0049-50, and the Critical Habitat Determination, in which the Service found that "the availability of habitat does not limit the conservation of the [] bee," RPBB0004. Pls.' Br. 36. As mentioned above, the "management and protection measures" contemplated by the Recovery Plan do not include the designation of critical habitat, but rather measures such as "developing and implementing habitat management plans; creating habitat management incentive programs; conducting research; and providing education and outreach to the public and land managers." RPBB0050. As indicated in the Critical Habitat Determination, these are the types of habitat-restoration and -enhancement activities that could be expected to help improve "development and productivity at existing colonies and improve the bees' resilience to other stressors, such as pesticides and pathogens." RPBB0004. The designation of critical habitat does not itself accomplish these goals, and many of them are addressed in the Service's Conservation Management Guidelines, which are intended to "to help [the Service], other federal agencies, state agencies, private landowners and land managers manage their land to benefit the rusty patched bumble bee." RPBB0083.

Additionally, Plaintiffs' suggestion that designating critical habitat would be beneficial because "any further destruction or degradation of the bee's habitat could drive the species to extinction" is a red herring. Pls.' Br. 34. There is nothing in the record to support a conclusion that destruction or degradation of the bee's habitat is driving the decline of the species or that the designation of critical habitat would have any positive impact on a population that is declining due

to other causes. Indeed, the Service reasonably concluded that having more available habitat would not address the primary threats that are believed to be causing the species' decline—pesticides and pathogens. RPBB0003-04. Plaintiffs' separate contention that designating critical habitat would be beneficial because some of the bee's available suitable habitat "may not be accessible to current populations of the bee owing to distance or geographic barriers" similarly fails. Pls.' Br. 31. This contention is another red herring because, if suitable habitat is available but "distance or geographic barriers" are preventing the bee from distributing to it, the designation of critical habitat is not going to make that habitat somehow accessible to the bee.

The Service's conclusion that designating critical habitat would not be beneficial to the bee's conservation because suitable habitat is abundant across the species' historical range and because the bee is known to be a habitat generalist is both adequately explained and supported by the record. Accordingly, the agency's analysis and expertise should be afforded deference.

3. Designating critical habitat would not benefit the species because Section 7 consultation is unnecessary in unoccupied areas and the other potential benefits of critical habitat designation have been accomplished through other means.

Plaintiffs additionally challenge the Service's finding that the designation of critical habitat would not benefit the species because "triggering [S]ection 7 consultation in unoccupied areas is not necessary" and "the other benefits of critical habitat" have been achieved through other measures. RPBB0004; Pls.' Br. 31-32, 37-38. Plaintiffs contend that "the Service offers no explanation whatsoever" for its finding that consultation in unoccupied areas is unnecessary, Pls.' Br. 37, but their contention is belied by a simple reading of the Critical Habitat Decision, which provides:

> [W]e have developed section 7 consultation guidance, which focuses on avoiding direct impacts to rusty patched bumble bees and their occupied habitat (Service 2019b, entire). The consultation guidance directs Federal agencies to assess potential effects to rusty

> patched bumble bee from activities occurring in suitable habitat within [High Potential Zones, where the bee is likely present]. **We have determined that consultation outside of these zones, in unoccupied habitat, is not necessary because it is unlikely that the species is using those areas**. . . .

RPBB0003 (emphasis added). Plaintiffs also remove this finding from the important context of the other related findings discussed above. In other words, based on its analysis of the best available science, the Service found that Section 7 consultation in unoccupied areas would not benefit the conservation of the species because there are no bees likely to be in those areas due to threats unrelated to habitat loss (i.e., pathogens and pesticides) and, should the bee's numbers rebound, there is "abundant suitable habitat for [the bee] to occupy." RPBB0003-04.

With respect to the other non-consultation benefits that typically accompany a critical habitat designation, the Service found that those benefits have been achieved through other, more-direct measures, which make critical habitat designation unnecessary and not beneficial for the bee:

> [W]e have achieved, through development of the priority maps, the other benefits of critical habitat . . . *i.e.*, focusing conservation activities on the most essential areas to prevent further loss of colonies, providing educational benefits by creating greater public awareness of rusty patched bumble bee and its conservation, and preventing inadvertent harm to the species. **Because these maps are updated regularly as we receive new information, they provide better, more focused attention to the needs of rusty patched bumble bee than a static critical habitat designation would.** For these reasons, we find that designating critical habitat would not be beneficial for the species.

RPBB0004 (emphasis added); *see also* RPBB0081-98 (Conservation Management Guidelines directing federal and state agencies, private landowners, and land managers to use the Service's priority maps in implementing conservation measures, and providing other education on the bee); RPBB0053-79 (ESA Section 7 Implementation Guidance, providing the same in the context of

agencies conducting mandatory consultation). However, Plaintiffs argue that the Service's priority maps and conservation guidance are not sufficient because they "do not confer any *mandatory* safeguards for the bee's habitat; rather, they provide *voluntary* guidance that may inform conservation efforts by private actors and federal agencies." Pls.' Br. 32. But this argument fails because it disregards the fact that these other benefits are not mandatory *even when critical habitat is designated*. 16 U.S.C. § 1536(a)(2). When critical habitat is designated, it is mandatory for federal agencies to consult with the Service to ensure that proposed agency actions are not likely to "result in the destruction or adverse modification of [critical] habitat of such species," but the other benefits—i.e., focusing conservation activities on the most essential areas, providing educational benefits to government and private entities, and preventing people from causing inadvertent harm to the species—are incidental. *Id.* Indeed, the Service's Conservation Management Guidelines and priority maps for the rusty patched bumble bee are likely *more effective* at conferring these non-mandatory benefits than critical habitat because the maps "are updated regularly as [the Service] receive[s] new information, [and] provide better, more focused attention to the needs of [the] bee than a static critical habitat designation would." RPBB0004. Thus, contrary to Plaintiffs' contentions, the court's finding in *NRDC v. DOI* that the agency could not rely on a "state-run 'comprehensive habitat management program'" as a substitute for the "mandatory consultation requirements" associated with critical habitat is irrelevant. *NRDC v. DOI*, 113 F.3d at 1126-27. *See also Orleans Audubon*, 1997 LEXIS 23909, at *29-30 (where agency found that "critical habitat designation would not benefit the [species] [based] on the existence of protective measures provided by other sources such as state laws[] [and] habitat restoration projects," the court held that it was within the agency's "expertise and mission" to evaluate those

measures, and that the agency could "permissibly find that [critical habitat] designation . . . would not be beneficial because it would add nothing to the protections already in place").

Additionally, Plaintiffs contend that the Service's "focus on the purported lack of benefit from consultation regarding *unoccupied* habitat completely ignores the likelihood that consultation regarding *occupied* habitat would benefit the bee." Pls.' Br. 37 (citation omitted). But it is Plaintiffs who ignore the fact that the bee's occupied habitat already benefits from the consultation obligations triggered by the bee's status as an "endangered species" under the ESA. *See* 16 U.S.C. § 1536(a)(2). Indeed, at the moment a species is listed as endangered, it is provided the full protection of the ESA, including a mandate for federal agencies to consult with the Service to ensure that any proposed action is not likely to "jeopardize the continued existence" of the species. *Id.* Because the term "jeopardize the continued existence" is defined to encompass any action that would "directly or indirectly" reduce "the likelihood of [] the survival and recovery of a listed species," 50 C.F.R. § 402.02, the Service has confirmed that "habitat destruction can be the basis for a jeopardy opinion." 51 Fed. Reg. 19926, 19935 (June 3, 1986). Thus, habitat that is occupied by the bee is already afforded the benefit of Section 7 consultation obligations that attach without the designation of critical habitat. Given that availability of suitable habitat is not a concern for the bee, it was therefore reasonable for the Service to conclude that the designation of critical habitat (whether occupied or unoccupied) would not provide any additional benefit to the species' conservation.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant their cross-motion for summary judgment, deny Plaintiffs' motion for summary judgment, and dismiss Plaintiffs' Complaint with prejudice.

Dated: February 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system, which will serve a copy of the same on the counsel of record.

Dated: February 11, 2022

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