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 Director of the U.S. Fish and Wildlife Service; UNITED STATES DEPARTMENT OF THE INTERIOR,

Federal Defendants.

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

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 4

I. The Service's failure to designate critical habitat for the rusty patched bumble bee violates the ESA, APA, and the 2016 Regulation 4

A. The Service's argument that Section 7 consultation on critical habitat is unnecessary—in both occupied and unoccupied areas—contravenes the plain language of the ESA 6

1. For *occupied* critical habitat, consultation to insure against the destruction or adverse modification of habitat has legal effect independent of consultation to insure no jeopardy to a species 8

2. The ESA requires the Service to designate *unoccupied* habitat deemed essential for the bee's conservation—even though the bee is not currently "using" those areas 12

3. The Service's non-binding "priority maps" cannot replace the ESA's mandatory safeguards for critical habitat 16

B. The Service's attempt to minimize the threat of habitat loss and degradation fails to establish that critical habitat would not benefit the bee 18

1. Even if habitat loss and degradation are not the primary threat to the species, the Service fails to explain why designating critical habitat would not benefit the bee 19

2. The record contradicts the Service's novel assertion that habitat loss and degradation pose no threat to the bee 22

C. The Service's assertion that availability of habitat does not limit the bee's conservation lacks support in the record 25

1. The Service fails to support its finding that the rusty patched bumble bee is a "habitat generalist" 26

2. The Service fails to support its finding that the bee has such "ample suitable habitat" that habitat protections would be worthless 29

II. Plaintiffs have standing to challenge the Service's Not-Prudent Decision 33

A. Plaintiffs' challenge involves a procedural injury 33

B. Under either a "procedural" or "substantive" standing analysis, Plaintiffs have established injuries-in-fact, traceability, and redressability 35

CONCLUSION 45

TABLE OF AUTHORITIES

Cases

Air All. Houston v. EPA,
906 F.3d 1049 (D.C. Cir. 2018) 37

Am. Fuel & Petrochemical Mfrs. v. EPA,
937 F.3d 559 (D.C. Cir. 2019) 34

Am. Wildlands v. Norton,
193 F. Supp. 2d 244 (D.D.C. 2002) 35

Buffalo Field Campaign v. Williams,
No. 20-cv-798, 2022 WL 111246 (D.D.C. Jan. 12, 2022) 35

Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior,
731 F. Supp. 2d 15 (D.D.C. 2010) 20, 21, 34

Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 34

Carpenters Indus. Council v. Zinke,
854 F.3d 1 (D.C. Cir. 2017) 35

Conservation L. Found. v. Ross,
422 F. Supp. 3d 12 (D.D.C. 2019) 37, 42

Ctr. for Biological Diversity v. EPA,
861 F.3d 174 (D.C. Cir. 2017) 34, 36

Ecological Rights Found. v. EPA,
No. 19-cv-980, 2021 WL 535725 (D.D.C. Feb. 13, 2021) 41

Fla. Audubon Soc'y v. Bentsen,
94 F.3d 658 (D.C. Cir. 2017) 37

Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.,
769 F.3d 1127 (D.C. Cir. 2014) 33

Fox v. Clinton,
684 F.3d 67 (D.C. Cir. 2012) 6

Friends of Animals v. Ross,
396 F. Supp. 3d 1 (D.D.C. 2019) 37

Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.,
378 F.3d 1059 (9th Cir. 2004) 10, 11

Greenpeace v. Nat'l Marine Fisheries Serv.,
55 F. Supp. 2d 1248 (W.D. Wash. 1999) 9

**Growth Energy v. EPA*,
5 F.4th 1 (D.C. Cir. 2021) 33, 34, 35, 36, 42, 44

In re Idaho Conservation League,
811 F.3d 502 (D.C. Cir. 2016) 39, 45

In re Pub. Emps. for Env't Resp.,
957 F.3d 267 (D.C. Cir. 2020) 35, 44, 45

Loughrin v. United States,
573 U.S. 351 (2014) 9

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 44

Middle Rio Grande Conservancy Dist. v. Babbitt,
206 F. Supp. 2d 1156 (D.N.M. 2000) 12, 17

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 16

Narragansett Indian Tribal Hist. Pres. Off. v. FERC,
949 F.3d 8 (D.C. Cir. 2020) 44

Nat. Res. Def. Council v. Rauch,
244 F. Supp. 3d 66 (D.D.C. 2017) 37

**Nat. Res. Def. Council v. U.S. Dep't of the Interior*,
113 F.3d 1121 (9th Cir. 1997) 5, 12, 17, 20, 21

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
524 F.3d 917 (9th Cir. 2008) 10

NetworkIP, LLC v. F.C.C.,
548 F.3d 116 (D.C. Cir. 2008) 9

New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.,
248 F.3d 1277 (10th Cir. 2001) 9

Orleans Audubon Soc'y v. Babbitt,
No. 94-3510, 1997 LEXIS 23909 (E.D. La. Oct. 28, 1997) 5, 20

Pub. Emps. for Env't Resp. v. Bernhardt,
No. 18-cv-1547, 2020 WL 601783 (D.D.C. Feb. 7, 2020) 42, 43

Pub. Emps. Ret. Sys. of Ohio v. Betts,
492 U.S. 158 (1989) 6

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 9

Sierra Club v. EPA,
292 F.3d 895 (D.C. Cir. 2002) 42

Sierra Club v. FERC,
827 F.3d 59 (D.C. Cir. 2016) 35

**Sierra Club v. U.S. Fish & Wildlife Serv.*,
245 F.3d 434 (5th Cir. 2001) 10, 11

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 40

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978) 3, 14

U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.,
141 S. Ct. 777 (2021) 17

U.S. Postal Serv. v. Postal Regul. Comm'n,
886 F.3d 1261 (D.C. Cir. 2018) 5

United States v. Woods,
571 U.S. 31 (2013) 9

W. Coal Traffic League v. Surface Transp. Bd.,
998 F.3d 945 (D.C. Cir. 2021) 34

W. Watersheds Project v. Bernhardt,
468 F. Supp. 3d 29 (D.D.C. 2020) 34

Statutes

5 U.S.C. § 706(2)(A) 18

7 U.S.C. § 136a(g) 41

16 U.S.C. § 1531(b) 3

16 U.S.C. § 1532(2) 3, 14

16 U.S.C. § 1532(3) 3, 10

16 U.S.C. § 1532(5)(A)(i) 1, 12

*16 U.S.C. § 1532(5)(A)(ii) 1, 2, 7, 12, 13, 38

16 U.S.C. § 1533(b)(2) 20

*16 U.S.C. § 1533(b)(6)(C)(ii) 1, 4, 5, 20

*16 U.S.C. § 1536(a)(2) 1, 3, 7, 8, 22, 35, 36, 38, 42

16 U.S.C. § 1536(b)(3)(A) 17

16 U.S.C. § 1536(c)(1) 15, 38

16 U.S.C. § 1536(b)(4) 17

16 U.S.C. § 1536(g) 17

16 U.S.C. § 1538(a) 17

Rules and Regulations

50 C.F.R. § 402.02 9-10,15

50 C.F.R. § 402.02 (1986) 11

*50 C.F.R. § 424.12(a) (2016) 19

*50 C.F.R. § 424.12(a)(1) (2016) 4, 19

*50 C.F.R. § 424.12(a)(1)(i) (2016) 20

*50 C.F.R. § 424.12(a)(1)(ii) (2016) 5

79 Fed. Reg. 69,312 (Nov. 20, 2014)..... 13

81 Fed. Reg. 7214 (Feb. 11, 2016) 11

81 Fed. Reg. 7414 (Feb. 11, 2016) 4

Legislative History

*H.R. Rep. No. 95-1625, 1978 WL 8486 ..... 5, 18

INTRODUCTION

Defendants U.S. Fish and Wildlife Service et al. (the Service) maintain that designating critical habitat for the endangered rusty patched bumble bee would be "not prudent" because it would purportedly provide *no benefit whatsoever* for the species—notwithstanding the Service's own findings that habitat loss and degradation have been a primary cause of the bee's decline and that habitat protection and restoration are necessary for its recovery.

To defend its counterintuitive position, the Service repeatedly resorts to arguments that contravene the plain text of the Endangered Species Act (ESA). The ESA defines "critical habitat" to include both certain habitat that is currently occupied by a species and habitat that is currently unoccupied by a species but deemed essential to its conservation. *See* 16 U.S.C. § 1532(5)(A)(i)-(ii). With respect to habitat that is currently *occupied*, the Service argues that designating critical habitat would offer no legal protections beyond the consultation requirements already triggered by listing a species as endangered or threatened. The Service is mistaken. Section 7 of the ESA sets forth two distinct types of interagency consultation: consultation to protect against "jeopard[y]" to the species (which applies to all listed species) and consultation to protect against "destruction or adverse modification of [critical] habitat" (which applies only when critical habitat has been designated). *Id.* § 1536(a)(2). In conflating the two, the Service entirely ignores the additional protections of adverse-modification consultation within occupied habitat, and thus fails to explain rationally why designating occupied critical habitat would not benefit the bee.

The Service then compounds its error with another misreading of the statute, this time as to habitat that is currently *unoccupied*. The ESA directs the Service to designate critical habitat to the maximum extent prudent, *id.* § 1533(b)(6)(C)(ii), and the statute specifically includes

unoccupied areas within the definition of critical habitat: "specific areas *outside* the geographical area occupied by the species" that are deemed "essential for the conservation of the species," *id.* § 1532(5)(A)(ii) (emphasis added). The Service contends that consultation within unoccupied areas is unnecessary precisely *because* they are unoccupied. But if that were true, consultation in unoccupied areas would never be necessary. The Service's argument would significantly expand the "not prudent" exemption in violation of the ESA. Indeed, the bee has suffered "an 87 percent loss of spatial extent within [its] historical range since 2000," Not-Prudent Decision, RPBB0003, and the Service itself concludes that the bee must expand into currently unoccupied areas to achieve recovery, *see* Draft Recovery Plan, RPBB0046 (explaining that the bee's "recovery needs to resemble its natural . . . distribution to ensure long-term persistence"). Especially against this backdrop, the Service has failed rationally to explain why designating prime areas of presently unoccupied habitat would yield no benefit at all.

In addition, the Service contends that designating critical habitat would not benefit the bee because habitat modification and degradation are "not *the primary* threat to the species." Defs.' Cross-Mot. for Summ. J. 16, ECF No. 21 [hereinafter Defs.' MSJ] (emphasis added) (quoting Not-Prudent Decision, RPBB0004). Instead, the Service avers, disease and pesticide exposure are likely the primary drivers of the bee's recent decline. *Id.* at 17. There is no basis in the statute for this "primary threat" rationale. Nor does this rationale accord with common sense. As the Service itself acknowledges, designation of critical habitat would be beneficial (and therefore required by the statute) if it would provide *some* advantage for the bee. Even assuming the bee faces a "primary threat" other than habitat loss and degradation, the Service has failed to explain rationally why designating critical habitat would not benefit the bee in *some* way.

The Service's defense of its Not-Prudent Decision also flies in the face of extensive record evidence showing that habitat loss and degradation have contributed to the bee's precipitous decline and that habitat protection and management are crucial to the bee's conservation. Discounting this evidence, the Service vaguely asserts that it "had almost *four years* of further data collection and analysis between the time of the Listing Rule and the [Not-Prudent Decision]." *Id.* at 18 n.9. But the Service identifies *no new information* in the record supporting its claim that the bee has so much suitable habitat available that critical-habitat protections would be superfluous.

The Service's arguments reflect a radical misreading of the statutory and regulatory scheme. Accepting them would not just deny meaningful protections for this critically imperiled bee, but also gut the ESA's safeguards for critical habitat—one of the statute's key mechanisms for conserving listed species and "the ecosystems upon which [they] depend," 16 U.S.C. § 1531(b). This would stymie the ESA's goal of "bring[ing] any endangered species . . . to the point at which the measures provided pursuant to [the statute] are no longer necessary." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (emphasis omitted) (quoting 16 U.S.C. § 1532(2)[1]).

Finally, the Service's challenge to Plaintiffs' standing also lacks merit. That challenge hinges, once more, on the Service's indefensible assertion that designating critical habitat would offer no benefits beyond those already conferred by the bee's listing as an endangered species—overlooking the ESA's distinct requirement for interagency consultation to safeguard against the destruction or adverse modification of critical habitat. *See* 16 U.S.C. § 1536(a)(2). The Service's

[1] The ESA has since been revised, and the quoted language is now found at 16 U.S.C. § 1532(3).

failure to designate critical habitat to "the maximum extent prudent," *id.* § 1533(b)(6)(C)(ii), causes injuries to Plaintiffs' members that are both imminent and redressable.

ARGUMENT

I. The Service's failure to designate critical habitat for the rusty patched bumble bee violates the ESA, APA, and the 2016 Regulation

In its brief, the Service concedes that the 2016 Regulation—not the 2019 Regulation—governs its decision not to designate critical habitat for the bee. *See* Defs.' MSJ 7 n.2, 13 & n.5. Accordingly, the Service has now abandoned its Catch-All Determination under the 2019 Regulation. Its Not-Prudent Decision can be upheld, if at all, only based on its No-Benefit Determination under the 2016 Regulation. *See generally* Pls.' Mot. for Summ. J. 19-21, ECF No. 19 [hereinafter Pls.' MSJ] (explaining the Service's two alternative determinations).

The Service's No-Benefit Determination is flatly inconsistent with the statute and unsupported by the record, and the arguments proffered in the Service's brief cannot salvage it. The ESA commands that the Service "shall" designate critical habitat "to the maximum extent prudent," based on "such data as may be available at that time." 16 U.S.C. § 1533(b)(6)(C)(ii). Congress thereby mandated a precautionary approach to critical habitat, even in the face of scientific uncertainty. *See* Pls.' MSJ 26-27 (discussing statutory text, dictionary definitions, and legislative history). The 2016 Regulation, in turn, explains that designating critical habitat is "not prudent" only when such designation (i) "can be expected to increase the degree of . . . threat [of human activity] to the species" or (ii) "would not be beneficial to the species." 50 C.F.R. § 424.12(a)(1) (2016); *see* 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016).

Yet the Service's brief repeatedly rephrases the regulatory standard in a way that flips the ESA's precautionary approach on its head. In the Service's retelling, it must designate critical habitat only when "designating critical habitat *would be* 'beneficial' to the rusty patched bumble

bee"—thereby subtly framing inaction as the default, and implying that imperfect information about benefits may excuse the Service from designating any critical habitat at all. Defs.' MSJ 13 (emphasis added) (selectively quoting 50 C.F.R. § 424.12(a)(1)(ii) (2016))[2]; *see also id.* at 17 (suggesting that the Service need not designate critical habitat unless doing so "would," by itself, "reverse the species' decline"). The Service even argues that the ordinary meaning of "prudent"—the term Congress chose—is "not relevant" here, directing the Court's attention away from the statute and toward the Service's preferred regulatory gloss instead. *Id.* at 13. But an agency "cannot use its own regulations to expand its statutory authority." *U.S. Postal Serv. v. Postal Regul. Comm'n*, 886 F.3d 1261, 1271 (D.C. Cir. 2018). The Service may not "rewrit[e]" its regulatory no-benefit test to "expand[] the narrow statutory exception for imprudent designations into a broad exemption for imperfect designations." *Nat. Res. Def. Council v. U.S. Dep't of the Interior (NRDC v. DOI)*, 113 F.3d 1121, 1126 (9th Cir. 1997). The Service must designate critical habitat to the "maximum extent prudent." 16 U.S.C. § 1533(b)(6)(C)(ii). And here, it designated none at all—despite acknowledging that habitat protection and restoration are necessary to the bee's conservation, *see* Draft Recovery Plan, RPBB0042, 49-50.

The Service rightly concedes that "'not prudent' findings are intended to be rare." Defs.' MSJ 14 n.8; *see* H.R. Rep. No. 95-1625, at 17, 1978 WL 8486 (explaining that the "not prudent" exception is reserved for "rare circumstances where the specification of critical habitat . . . would

[2] The Service repeats this selective paraphrase of the regulatory language in multiple places in its brief. *See* Defs.' MSJ 13 n.6, 14, 18. Although the Service claims that "[c]ourts" have endorsed its reading, it cites only one case: an unpublished, out-of-circuit district court decision from 1997. *Id.* at 14 (quoting *Orleans Audubon Soc'y v. Babbitt*, 1997 LEXIS 23909, at *28-29 (E.D. La. Oct. 28, 1997)). And even that decision confirms that a "not prudent" determination is "the only available statutory exception to the otherwise mandatory designation process," and that, pursuant to the 2016 Regulation, a "not prudent" determination is warranted only when critical-habitat designation "would be actively detrimental" or "would not be beneficial" to a species. *Orleans Audubon Soc'y*, 1997 LEXIS, at *3, *24.

not be beneficial to the species"). Yet it avers that "the rusty patched bumble bee is one of those 'rare circumstances,'" Defs.' MSJ 15 n.8, and advances three justifications for why designating critical habitat would supposedly not "benefit" the bee, *see* Pls.' MSJ 20-21 (summarizing the Service's three justifications). Each one fails. Accepting the Service's justifications would, in effect, ensure that "not prudent" determinations become the rule, rather than the exception. Though the Service seeks deference to its "scientific expertise," no deference is due where, as here, an agency misinterprets the plain language of its governing statute. *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989), *superseded on other grounds by* Pub. L. No. 101-433, § 102, 104 Stat. 978 (1990). Nor is any deference "owed to an agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence." *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (internal quotation marks omitted). Each of the Service's three justifications fails the test of reasoned decision-making.

A. The Service's argument that Section 7 consultation on critical habitat is unnecessary—in both occupied and unoccupied areas—contravenes the plain language of the ESA

The Service relies heavily on a patently incorrect assertion to support its No-Benefit Determination: that critical habitat would provide no benefit because any resulting consultation would be duplicative of existing protections, and because the "other benefits" of designation have been accomplished by alternative means. *See* Defs.' MSJ 10-11, 20-22, 25-28. This flawed argument consists of three parts.

First, the Service contends that designating habitat that is *occupied* by the bee is unnecessary because that habitat "already benefits from the consultation obligations triggered by the bee's status as an 'endangered species' under the ESA." *Id.* at 28. To be sure, there are *some* consultation obligations that come along with the bee's listing. But designating critical habitat would provide distinct, additional consultation benefits. The Service overlooks those benefits by

conflating the ESA's requirement for consultation regarding whether an action is likely to "jeopardize the continued existence of any endangered species" (which is required for all listed species), with the statute's distinct requirement for consultation regarding whether an action is likely to "result in the destruction or adverse modification of [critical] habitat of such species" (which is required only when critical habitat is designated). 16 U.S.C.§ 1536(a)(2). *See infra* Argument I.A.1. In effect, the Service reads adverse-modification consultation for occupied habitat right out of the statute.

Second, the Service contends that designation of habitat that is *unoccupied* by the bee is unnecessary "because it is unlikely that the species is using those areas." Defs.' MSJ 26 (quoting Not-Prudent Decision, RPBB0003). However, the ESA expressly defines critical habitat to include areas that are not presently "occupied" by a species but are, nevertheless, deemed "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). If, as the Service contends, consultation within these areas is unnecessary *because* they are unoccupied, the once-narrow not-prudent exception would now eviscerate this half of the ESA's "critical-habitat" definition; adverse-modification consultation would never be beneficial in unoccupied areas. The Service's argument plainly contravenes the statute. *See infra* Argument I.A.2.

Third, the Service claims it has "achieved" the "other benefits" of designation through its "priority maps." Defs.' MSJ 26-27. By "other benefits," the Service means benefits other than interagency consultation. *See* Not-Prudent Decision, RPBB0004. But regardless of whether those "other benefits" have already been "achieved"—a proposition for which the Service offers no support—the priority maps impose no mandatory duties and are no substitute for the interagency consultation that would be required if the Service were to designate critical habitat. *See infra* Argument I.A.3.

Together, the Service's three arguments write protections for critical habitat entirely out of the ESA.

1. For *occupied* critical habitat, consultation to insure against the destruction or adverse modification of habitat has legal effect independent of consultation to insure no jeopardy to a species

The Service contends that it need not designate *occupied* critical habitat because, it says, "the bee's occupied habitat already benefits from the consultation obligations triggered by the bee's status as an 'endangered species' under the ESA." Defs.' MSJ 28; *see id.* at 10-11, 20-22. This argument ignores the distinct, mandatory consultation benefits that designating critical habitat would confer.

Section 7 sets forth procedures for interagency consultation that include two distinct requirements, one of which explicitly addresses federal agency actions that may affect critical habitat. Initially, once a species is listed as endangered or threatened, federal agencies must engage in consultation to "insure" that their actions are "not likely to jeopardize the continued existence" of the species. 16 U.S.C. § 1536(a)(2). This requirement is known as "jeopardy consultation," and it applies regardless of whether a listed species has designated critical habitat. But for species with designated critical habitat, Section 7 separately provides that federal agencies must engage in consultation to "insure" that their actions are not likely to "result in the destruction or adverse modification" of that critical habitat. *Id.* This requirement is known as "adverse-modification consultation." These two requirements are meaningfully different, as the ESA's plain text makes clear. The ESA requires that agencies consult to insure that any action "is not likely to jeopardize the continued existence of any endangered species or threatened species *or* result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2) (emphasis added). If these two types of consultation were the same, then everything after the "or" would be surplusage. That is, of course, not how courts read statutes.

See NetworkIP, LLC v. F.C.C., 548 F.3d 116, 121 n.3 (D.C. Cir. 2008) ("In construing a statute [courts] are obliged to give effect, if possible, to every word Congress used." (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))); *see also Loughrin v. United States*, 573 U.S. 351, 357 (2014) (explaining that the "ordinary use" of the word "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings" (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013))).

Consistent with the statutory text, courts have recognized that an agency's duty to insure against "jeopardy" to a species is distinct from its duty to insure against "destruction or adverse modification" of any critical habitat for that species. "Jeopardy relates to the overall continued existence of a species, and examines the effects of an action on the species. Adverse modification, in contrast, concerns the effects of an action on the species' critical habitat." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1265 (W.D. Wash. 1999) [3]; *see also New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1282-83 (10th Cir. 2001) ("Once critical habitat is designated, . . . agency action that is prohibited is both (1) action that is likely to jeopardize the existence of a listed species and (2) action that is likely to result in the adverse modification of [critical habitat].").

The Service's own definitions relating to jeopardy and adverse-modification consultation make clear that these requirements are distinct in another respect. To "[j]eopardize the continued existence" of a species means to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both* the survival *and* recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50

[3] Though the *Greenpeace* court acknowledged that there can be "considerable overlap" between the two standards, 55 F. Supp. 2d at 1265, the ESA does not permit the Service to treat them as categorically equivalent, as it did here.

C.F.R. § 402.02 (emphasis added); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (interpreting "jeopardize" to mean taking action that "will tip a species from a state of precarious survival into a state of likely extinction" or that "deepens the jeopardy [of an already jeopardized species] by causing additional harm"). In contrast, the adverse-modification standard is concerned with a broader range of harms, even ones that do not threaten a species' survival. "Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the *conservation* of a listed species." 50 C.F.R. § 402.02 (emphasis added).

In other words, as indicated by the breadth of the term "conservation," the adverse-modification standard is concerned with actions that degrade a species' habitat "so as to threaten a species' *recovery* even if there remains sufficient critical habitat for the species' *survival*." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (emphases added), *amended by* 387 F.3d 968 (9th Cir. 2004); *accord Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) ("'Conservation' is a much broader concept than mere survival. The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species."); *see also* 16 U.S.C. § 1532(3) (defining "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). Accordingly, in *Sierra Club*, the Fifth Circuit invalidated the Service's previous, unduly narrow interpretation that adverse-modification consultation was concerned only with actions that "affect[] the value of critical habitat to *both* the recovery *and* survival of a

species," holding that this interpretation "imposes a higher threshold than the statutory language permits." 245 F.3d at 442 (first emphasis added).[4]

The Service, in effect, makes the same mistake here as in *Sierra Club* when it contends that adverse-modification consultation offers no more protection for occupied critical habitat than jeopardy consultation does. By collapsing Section 7's two distinct consultation standards, the Service unlawfully reads the requirement for adverse-modification consultation on occupied critical habitat out of the statute. Accepting the Service's argument that jeopardy consultation is sufficient to protect against destruction or adverse modification of occupied habitat would mean that adverse-modification consultation regarding effects on occupied habitat would *never* benefit a listed species. Had Congress intended this result, it would not have directed the Service to engage in adverse-modification consultation regarding occupied areas of critical habitat. The Service's reading renders this protection meaningless.

The Service cannot salvage its unlawful conflation of Section 7's two distinct consultation standards by contending that the procedures for jeopardy consultation prescribed in its Section 7 Voluntary Implementation Guidance are sufficient to insure against destruction or adverse modification of the bee's occupied habitat. *See* Defs.' MSJ 25-26; RPBB0053-79 [hereinafter Section 7 Guidance]. Even assuming that adherence to the Service's Section 7 Guidance would effectively prevent such harm to a species' occupied habitat—and that is far

[4] In both *Sierra Club*, 245 F.3d at 439-42, and *Gifford Pinchot*, 378 F.3d at 1069-71, the courts held that the Service's previous regulatory definition of "destruction or adverse modification" was invalid because it encompassed only actions that threatened "*both* the survival and recovery of species," 50 C.F.R. § 402.02 (1986) (emphasis added), thereby eliding the statutory distinction between the jeopardy standard and the adverse-modification standard. The Service subsequently promulgated a new definition of the adverse-modification standard, making clear that the standard could be met if agency action reduced the value of habitat for the "conservation" of a species, even if it did not threaten the species' survival. *See* Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214, 7215-16 (Feb. 11, 2016).

from certain[5]—that *voluntary* guidance cannot substitute for the ESA's *requirement* that federal agencies engage in consultation to protect critical habitat. The Service may not read the mandatory safeguards for occupied critical habitat out of the ESA simply because the Service has issued nonbinding guidance that would purportedly achieve the same results. *See NRDC v. DOI*, 113 F.3d at 1126-27 (explaining that voluntary protections for habitat "cannot be viewed as a functional substitute for critical habitat designation," which "triggers mandatory consultation requirements for federal agency actions involving critical habitat"); *cf. Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000) ("The [ESA] compels the designation [of critical habitat] despite other methods of protecting the species the Secretary might consider more beneficial.").

2. The ESA requires the Service to designate *unoccupied* habitat deemed essential for the bee's conservation—even though the bee is not currently "using" those areas

The Service's argument that there would be no benefit from consulting on impacts to *unoccupied* critical habitat "because it is unlikely that the species is using those areas" also contravenes the plain language of the ESA. Defs.' MSJ 26 (quoting Not-Prudent Decision, RPBB0003). Congress defined "critical habitat" to include both occupied *and unoccupied* habitat. 16 U.S.C. § 1532(5)(A)(i)-(ii). Unoccupied critical habitat means "specific areas *outside* the geographical area occupied by the species" that are nevertheless deemed "essential for the

[5] For example, the Section 7 Guidance excuses an agency from engaging in jeopardy consultation—including in areas where the Service's maps indicate the bee "may be present," Defs.' MSJ 21 n.10 (quoting Rusty Patched Bumble Bee Map, RPBB0006)—if that agency completes a survey for the bee and does not find the species to be present at the time. *See* Section 7 Guidance, RPBB0058-63. Under that circumstance, the guidance's procedures for jeopardy consultation would do nothing to protect the bee's occupied habitat. *See, e.g.*, *infra* note 18. In contrast, if the Service were to designate critical habitat for the bee, then an action agency would have to engage in consultation to avoid destruction or adverse modification of that habitat—regardless of whether a species survey indicated that the bee was present.

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Unoccupied critical habitat might be essential to a species' conservation if, for example, the species needs to expand its range to recover. *See, e.g.*, 79 Fed. Reg. 69,312, 69,316 (Nov. 20, 2014) (explaining that designation of unoccupied critical habitat was "essential for conservation of [a] species" where evidence "suggest[ed] that currently occupied habitat alone may not be sufficient to maintain long-term viability for at least three and possibly five of the six populations [at issue]"). That is precisely the case here. *See, e.g.*, Draft Recovery Plan, RPBB0046 (observing that "[t]he natural history of [the] rusty patched bumble bee entails being abundant and widely distributed" and that the species' "recovery needs to resemble its natural abundance and distribution to ensure long-term persistence"); *see also* Pls.' MSJ 37 (explaining the importance of currently unoccupied habitat to the bee's conservation).

Despite the statutory definition, the Service opines that "'consultation . . . in unoccupied habitat[] is not necessary because it is unlikely the bee is *using* those areas.'" Defs.' MSJ 26 (quoting Not-Prudent Decision, RPBB003; emphasis added). By the Service's circular logic, consultation regarding unoccupied critical habitat would *never* be beneficial; nothing in the Service's decision or its brief suggests that a species might be "using" an area without "occupying" it. Though the Service may disagree about the utility of designating areas that a species does not presently occupy, it may not substitute its policy judgment for Congress's by simply ignoring the statutory requirement to engage in adverse-modification consultation for this entire category of critical habitat.

Indeed, the record here illustrates why Congress's design makes sense, and why critical habitat is not limited to currently occupied areas. The rusty patched bumble bee has suffered from "a marked decrease in [its] range and distribution . . . in recent times, with an 87 percent

loss of spatial extent within the historical range since 2000." Not-Prudent Decision, RPBB0003. Given the bee's precarious situation, protecting only the areas it *currently* occupies would be woefully inadequate to achieve the ESA's goal of bringing species "to the point at which the measures provided pursuant to [the ESA] are no longer necessary." *Tenn. Valley Auth.*, 437 U.S. at 180 (emphasis omitted) (quoting 16 U.S.C. § 1532(2)). The bee must expand into suitable, currently unoccupied areas if it is to have any hope of recovery, as the Service itself has acknowledged. *See* Draft Recovery Plan, RPBB0046; Pls.' MSJ 37. Yet the Service ignores the value of protecting those areas for the bee's conservation, and in effect argues that adverse-modification consultation concerning *any* habitat—whether occupied, *see supra* Argument I.A.1, or unoccupied—would *never* benefit *any* species. In other words, the Service has read the requirement for adverse-modification consultation out of the statute altogether.

The Service's focus on pesticide exposure, far from supporting its argument, only highlights the Service's basic error. Although the parties disagree about the precise relationship between threats to the bee from pesticide use and habitat loss and degradation, all agree that pesticides present a major threat. *See* Not-Prudent Decision, RPBB0003; Pls.' MSJ 12; Defs.' MSJ 26 (acknowledging that pesticides have a causal role in the bee's absence from currently unoccupied habitat). In addition, that pesticides are "widely used in agricultural, urban, and even natural environments" suggests that there are limited areas free of this threat. Status Assessment, RPBB0207. If the Service designated as critical habitat key areas of unoccupied habitat—such as dispersal corridors or high-quality habitat adjacent to currently occupied areas—the U.S. Environmental Protection Agency (EPA) would have to consult with the Service before

approving (or re-approving) pesticides for use in those areas.[6] EPA would, moreover, have good reason to find that use of certain pesticides "appreciably diminishes" the value of those areas for conservation of the bee under the ESA's adverse-modification standard. 50 C.F.R. § 402.02 (defining "destruction or adverse modification"); *see* Pls.' MSJ 12-14 (explaining how pesticides degrade the bee's habitat). Adverse-modification consultation may very well result in pesticide restrictions or even bans in those areas, greatly increasing the bee's chances of expanding into this advantageously located, high-quality habitat. But because the Service assumes that there is categorically no benefit to engaging in adverse-modification consultation for areas that the bee does not currently occupy, it ignores these significant potential benefits entirely.

To bolster its argument that designating unoccupied habitat would have no value, the Service now offers an expanded rationale in its brief: "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[7]) and, should the bee's numbers rebound, there is 'abundant suitable habitat for [the bee] to occupy.'" Defs.' MSJ 26 (quoting Not-Prudent Decision, RPBB0003-04) (emphasis added). But this additional explanation, if the Court considers it, also fails to show that designating critical habitat would not

[6] The Service protests that EPA is already required to consult on pesticide approvals and other agency actions in areas where "the Service finds that the species 'may be present.'" Defs.' MSJ 20-21 (quoting 16 U.S.C. § 1536(c)(1)). But it does not dispute that, without a critical-habitat designation, EPA will not be required to consult with the Service on whether pesticide approvals and other actions are likely to *destroy or adversely modify habitat* (as opposed to whether they are likely to *jeopardize a species*)—a requirement that provides distinct additional protections for habitat. *See supra* Argument I.A.1.

[7] Notably, while the Service maintains that pesticide use is "unrelated" to habitat *loss*, it does not assert that pesticide use is "unrelated" to habitat *degradation*, much less explain how that could be so. Defs.' MSJ 26 (focusing narrowly on "habitat loss"); *see* Pls.' MSJ 12-14 (summarizing record evidence on pesticide use and its role in habitat degradation).

benefit the bee. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). In particular, the Service offers no support for its blanket assertion that the bee's disappearance from much of its historical range is "due to threats unrelated to habitat loss." Defs.' MSJ 26; *see infra* Argument I.B (explaining that habitat loss and degradation have contributed to the bee's decline). And the Service's assertion that there is abundant suitable habitat for the bee to occupy, should its numbers recover, is also unsupported by the record. *See infra* Argument I.C.2. In any case, designating an area that is unoccupied because of threats unrelated to habitat loss or degradation could lead to management decisions that abate those other threats, thereby increasing the bee's chances of recolonizing that area in the future. For example, even assuming arguendo that pesticide use is a threat distinct from habitat loss and degradation, *but see infra* pp. 21-22 & n.8, designation of unoccupied critical habitat could result in restrictions on pesticide use in that habitat, and would thus offer *some* benefit to the bee. The Service irrationally ignores the benefits of consultation within unoccupied areas.

3. The Service's non-binding "priority maps" cannot replace the ESA's mandatory safeguards for critical habitat

The Service's assertion that it "achieved, through development of the priority maps, the other benefits of critical habitat that [it] had identified in the final listing rule" is entirely beside the point. Not-Prudent Decision, RPBB0004. The Service's online priority maps and associated voluntary guidance do not confer any mandatory protections on the bee's habitat. *See* Pls.' MSJ 32. The Service misses the point again when it argues that the "other benefits are not mandatory even when critical habitat is designated." Defs.' MSJ 27 (emphasis omitted). The point is that once critical habitat is designated, federal agencies must engage in *mandatory consultation* to insure their actions do not destroy or adversely modify that area. The Service is correct that

critical-habitat designation does not—in and of itself—"establish a refuge, wilderness, reserve, preserve, or other conservation area . . . [or] require implementation of restoration, recovery, or enhancement measures." Defs.' MSJ 3 (internal quotation marks omitted). But if consultation indicates that a proposed federal agency action is likely to destroy or adversely modify critical habitat, then "the Secretary *shall* suggest . . . reasonable and prudent alternatives" to avoid such a result. 16 U.S.C. § 1536(b)(3)(A) (emphasis added). The action agency, in turn, "*must* either implement the reasonable and prudent alternatives, terminate the action altogether, or seek an exemption from the Endangered Species Committee." *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc*., 141 S. Ct. 777, 784 (2021) (emphasis added) (citing 16 U.S.C. §§ 1536(b)(4), (g), 1538(a)). The voluntary measures on which the Service fixates cannot substitute for Section 7's mandatory safeguards, regardless of whether they confer "other benefits" on the bee. *See NRDC v. DOI*, 113 F.3d at 1126-27 (reasoning that alternative, voluntary protections for habitat "cannot be viewed as a functional substitute for critical habitat designation," which "triggers mandatory consultation requirements for federal agency actions involving critical habitat"); *cf. Middle Rio Grande Conservancy Dist.*, 206 F. Supp. 2d at 1169 ("The [ESA] compels the designation [of critical habitat] despite other methods of protecting the species the Secretary might consider more beneficial.").

Furthermore, even if it were legally relevant, the Service provides no evidence whatsoever that its provision of non-binding, informational "priority maps" has "achieved" *any* benefit for the bee. *See* Not-Prudent Decision, RPBB0004. It cites no evidence that *any* suitable habitat has been conserved, or that *any* bee populations have recovered, between issuance of the Service's maps in April 2019 and publication of the Not-Prudent Determination in September 2020. Here again, the Service inverts the standard for "not prudent" determinations. *See supra*

pp. 4-5. It assumes that critical habitat will not provide the presumptive benefits intended by Congress, putting the burden on Plaintiffs to show that critical habitat *will* benefit the bee, while simultaneously assuming without evidence that its non-binding priority maps facilitate the bee's conservation. That is "arbitrary," "capricious," and "not in accordance with" the ESA. 5 U.S.C. § 706(2)(A); *see also* Pls.' MSJ 26-27 (discussing the ESA's text, purpose, and legislative history).

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If accepted, the Service's arguments would vastly expand the "not prudent" exception beyond statutory bounds and ensure that designation of critical habitat becomes a rarity rather than the rule. According to the Service, jeopardy consultation provides all the benefits of adverse-modification consultation within occupied habitat, Defs.' MSJ 28; and within unoccupied habitat, consultation is not beneficial simply *because* that habitat is unoccupied, *id.* at 26; Not-Prudent Decision, RPBB0003. All remaining benefits of consultation, the Service says, are accomplished by the Service's nonbinding "priority maps." Not-Prudent Decision, RPBB0004. By the Service's logic, designating critical habitat would virtually never benefit listed species—and therefore rarely, if ever, be prudent. *But see* H.R. Rep. No. 95-1625, at 17, 1978 WL 8486 (explaining that the "not prudent" exception is reserved for "rare circumstances where the specification of critical habitat . . . would not be beneficial to the species"). Congress did not create critical-habitat protections only to have the Service cast them aside.

B. The Service's attempt to minimize the threat of habitat loss and degradation fails to establish that critical habitat would not benefit the bee

In its Not-Prudent Decision, the Service concluded that designation of critical habitat would not benefit the bee because "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." RPBB0004 (emphasis added). As Plaintiffs explained, this justification is inadequate on its face to explain why designating critical habitat would not benefit the bee, *see* Pls.' MSJ 29-30; it is, moreover, unsupported by the record, *see id.* 33-34. If the Service now means to assert that habitat loss and degradation do not even pose *a threat* to the bee—as its brief sometimes suggests, *see* Defs.' MSJ 16-18—that assertion is all the more at odds with the record.

1. Even if habitat loss and degradation are not the primary threat to the species, the Service fails to explain why designating critical habitat would not benefit the bee

To the extent the Service stands behind its rationale that designating critical habitat would not benefit the bee because habitat loss and degradation are not "the primary threat" to the species, Not-Prudent Decision, RPBB0003; *see* Defs.' MSJ 16-21, that justification fails. The Service does not explain why mitigating *a* threat to the bee by designating critical habitat—even if it is not *the primary* threat, and even if other bee species "may" be more severely affected, Defs.' MSJ 18—would not benefit the bee in any way. *See* Pls.' MSJ 29-30. The Service is correct that "[w]hether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species" is *one factor* the Service can consider in "determining whether a designation would not be beneficial," 50 C.F.R. § 424.12(a) (2016); *see* Defs.' MSJ 14. But this does not change the ultimate *standard*: whether designation would provide *no benefit* to the bee, and thus whether it would be "not prudent" to designate critical habitat. *See* 50 C.F.R. § 424.12(a)(1) (2016) (stating that the designation of critical habitat would be "not prudent" if it "would not be beneficial to the species").

The Service's argument suggests, at most, that designating critical habitat might be less beneficial than other potential measures for protecting the bee. Even if true, however, that would be legally irrelevant. As the Service acknowledges, "[i]t is meaningless to speak of 'more beneficial' or 'less beneficial,'" because as long as there is *something* "to be gained over and

above the status quo," then there is a benefit. Defs.' MSJ 14 (emphasis omitted) (quoting *Orleans Audubon Soc'y v. Babbitt*, No. 94-3510, 1997 LEXIS 23909, at *29 (E.D. La. Oct. 28, 1997)); *see Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior*, 731 F. Supp. 2d 15, 28 (D.D.C. 2010) ("[I]t is settled that the ESA does not authorize 'nondesignation of habitat when designation would be merely less beneficial to the species than another type of protection.'" (quoting *NRDC v. DOI*, 113 F.3d at 1127)). And the Service is authorized to find critical-habitat designation "not prudent" only when the best available science shows that designation would yield *no* benefit whatsoever (or would actually "be expected to increase the degree of . . . threat [of human activity] to the species," which is not applicable here). 50 C.F.R. § 424.12(a)(1)(i) (2016); *see* 16 U.S.C. § 1533(b)(2), (6)(C)(ii).

It is similarly irrelevant when the Service asserts, in its brief, that "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." Defs.' MSJ 17 (emphasis added). Designation of critical habitat would not have to "reverse" the bee's decline to provide a benefit; it could help the bee by stemming or slowing further losses, or supporting future recovery. As the Service itself recognizes, something is beneficial as long as it "confers *an* advantage, *something* additional, on the recipient." *Id.* at 14 (emphases added) (quoting *Orleans Audubon Soc'y*, 1997 LEXIS 23909, at *29); *see also* Pls.' MSJ 26 (collecting dictionary definitions of "prudent").

The Service's attempt to distinguish *NRDC v. U.S. Department of the Interior*, 113 F.3d 1121, also misses the point. *See* Defs.' MSJ 15-16. There, the court held that the Service's "rewriting [of] its 'beneficial to the species' test for prudence into a 'beneficial to *most* of the species' requirement" violated the ESA by "expand[ing] the narrow statutory exception for imprudent designations into a broad exemption for imperfect designations." *NRDC v. DOI*, 113

F.3d at 1126. Here, similarly, the Service's position that designation is "not prudent" simply because habitat loss and degradation are not "the primary threat" to the bee, Not-Prudent Decision, RPBB0003, constitutes an "expansive construction of the 'no benefit' prong to the imprudence exception [that] is inconsistent with clear congressional intent," *NRDC v. DOI*, 113 F.3d at 1126. That construction, if accepted, would gut the ESA's critical-habitat requirement for certain species facing stressors in addition to habitat loss or degradation—perversely leaving some severely imperiled species with the fewest statutory protections. The ESA does not permit this. As long as designation would provide *some* benefit, the Service may not decline to designate critical habitat because such designation might be "imperfect." *Id*.; *see Cape Hatteras Access Pres. All.*, 731 F. Supp. 2d at 28. Indeed, the Service acknowledged as much in its Listing Decision, when it stated that "[b]ecause designation of critical habitat . . . may provide some measure of benefit, designation of critical habitat may be prudent for the [bee]." RPBB00145.

Finally, the Service is also wrong that critical-habitat designation could not ameliorate the purportedly "primary threat" (or, alternatively, "the likely cause") of the bee's decline, which involves pesticide exposure.[8] Defs.' MSJ 17; *see id.* at 20-21. The Service describes as "misleading" Plaintiffs' "suggestion that the designation of critical habitat would provide the benefit of requiring [EPA] to consult with the Service" on the approval of pesticides. *Id.* at 20. According to the Service, EPA's independent duty to engage in jeopardy consultation already "minimiz[es] the impacts of pesticides" on the bee's habitat, such that critical-habitat designation "would not provide any added benefit." *Id*. at 21. But the Service's claim, once again, is based on

[8] *But see* Pls.' MSJ 33 (explaining that pesticide exposure occurs via habitat degradation). The Service continues to argue that pesticide exposure somehow threatens the bee in a way that does not involve habitat degradation, but it never explains how.

its unlawful conflation of Section 7's distinct requirements for jeopardy consultation and adverse-modification consultation. *See supra* Argument I.A.1.

The Service concedes that EPA is "required to consult with the Service" regarding "pesticide approvals." Defs.' MSJ 20. But, unless and until the Service designates critical habitat, that consultation will occur only where the Service has found the bee "may be present," and then it will focus narrowly on jeopardy to the species, not on harm to its habitat. In contrast, if the Service designated areas as critical habitat, EPA would be required to analyze whether pesticide approvals are likely to destroy or adversely modify that habitat. *See* 16 U.S.C. § 1536(a)(2). This would be true whether or not the bee "may be present," Defs.' MSJ 21, and whether or not the approval would *also* jeopardize the species' survival. Notably, the Service itself states that many unoccupied areas may be unoccupied in part *because of pesticide exposure*. *See id*. at 26 ("[T]here are no bees likely to be in [unoccupied] areas due to threats unrelated to habitat loss (i.e., pathogens and pesticides)."). By designating suitable unoccupied areas as critical habitat, the Service would require EPA to consider pesticide-related habitat degradation before approving the very pesticides that the Service characterizes as part of the "primary threat" to the bee. Because of its refusal to acknowledge the distinct importance of adverse-modification consultation, the Service fails to recognize this benefit.

2. The record contradicts the Service's novel assertion that habitat loss and degradation pose no threat to the bee

To the extent the Service newly asserts in its brief that habitat loss and degradation are not a threat to the bee *at all*—or that habitat loss and degradation did not contribute, or are not currently contributing, to the bee's decline—those assertions are contradicted by the record. *See* Defs.' MSJ 17 (asserting that habitat loss "is not *the threat* believed to be *the cause* of the bee's decline" (emphases added)); *id.* at 16 (asserting that "habitat loss and degradation are not

believed to be causing the bee's decline"); *id*. at 17-18 (asserting that it is "unlikely" that habitat loss is "still contributing to declines" for the bee).

To begin, the Service listed the bee as endangered *because of* "[t]he present or threatened destruction, modification, or curtailment of [its] habitat or range," among other factors. Listing Decision, RPBB0143; *see id.* at RPBB0143-44. The Listing Decision recognized that "habitat changes are, at the least, a contributing factor to the current precarious status of this species" and that "none" of the bumble bee experts consulted by the Service "stated that habitat loss and/or degradation played no role in the decline" of the bee. *Id*. at RPBB0136; *see also id.* at RPBB0125 (identifying "habitat loss and degradation" as one of the "primary causes" of the bee's decline). The Service also explicitly found that the bee "continue[s] to be affected by high-severity stressors, including . . . habitat loss and degradation," *id*. at RPBB0144, and even posited that "habitat losses may have become more of a factor as the colonies have been compromised by other, seemingly new, exposures to specific insecticides and pathogens," *id.* at RPBB0136; Not-Prudent Decision, RPBB0003 (acknowledging that "[t]he final listing rule for rusty patched bumble bee . . . identified . . . habitat loss and degradation" as a threat to the bee).

The Service now attempts to repudiate these findings, protesting that "statements made in the Listing Rule should [not] predetermine the outcome of the Service's critical habitat analysis." Defs.' MSJ 18 n.9. But despite the Service's vague assertion that it "had almost *four years* of further data collection and analysis between the time of the Listing Rule and the [Not-Prudent Decision]," *id.*, the Service does not point to *any new information* that justifies a departure from its previous findings.

Nor does the "the surrounding context" in the Listing Decision, *id*., cast these findings in a different light. Instead, the passage that the Service quotes from the Listing Decision states

only that "the rusty patched bumble bee *may* not be *as severely* affected by habitat loss [as compared to other bee species]." *Id*. at 18 (quoting RPBB0129 (emphases added)); *accord id.* at 5-6. This additional "context" does not alter the Service's finding that habitat loss and degradation has been, and continues to be, a primary cause of the bee's decline. *See* Listing Decision, RPBB0125, 129. On the contrary, it confirms that the bee has been—and is—"affected by habitat loss," *id*. at RPBB0129, at least to some extent, and renders even more inexplicable the Service's subsequent backtracking from its conclusion in the Listing Decision that designation of critical habitat "may be prudent," *id.* at RPBB0145.

The passages that the Service cites from the Not-Prudent Decision similarly confirm that habitat loss and degradation have contributed to the bee's decline. *See* Defs.' MSJ 17. The Service claims that "many bumble bee experts conclude [that habitat loss] . . . is unlikely to be a *main* driver of the recent, widespread North American bee declines," *id.* (quoting Not-Prudent Decision, RPBB0003 (emphasis added)),[9] and reiterates that "[a]lthough habitat loss has

[9] The record does not, in fact, support this statement. The Service cites three studies for this proposition. *See* Not-Prudent Decision, RPBB0003 (citing "Szabo et al. 2012, p. 236; Colla and Packer 2008, p. 1388; Cameron et al. 2011, p. 665"). Colla and Packer did not identify any "main driver" of North American bee declines; instead, the authors discussed "multiple stressors" and stated that "[h]abitat loss due to intensive agriculture and urbanization provides another significant threat to native pollinator populations." RPBB0484. Cameron et al. similarly did not compare the relative contributions of habitat loss and degradation versus other stressors; rather, they observed that there seem to be "[a]dditional causes" of recent North American bumble bee declines beyond "narrow climatic niche breadth combined with reductions in food and nesting resources," and that "[f]uture research on the complex interactions of habitat fragmentation, loss of floral and nesting resources, disease, and climate is needed to identify the major factors that lead to decline in bumble bee biodiversity." RPBB0392-93; *see also id.* at RPBB0392 (observing that further studies are needed to understand whether declining bumble bee species are more susceptible to the pathogen *N. bombi* or whether the pathogen "is simply more common in declining species for other reasons"). Szabo et al. alone opine that habitat loss is unlikely to be a main cause of recent bumble bee declines, but they also—contrary to the Service's conclusion, *see* Defs.' MSJ 1, 17—disclaim pesticide use and pathogen spillover as the primary drivers of the bee's recent decline. *See* RPBB0381, RPBB0385. The Service never explains why it selectively endorses one of Szabo et al.'s findings but not the others.

established negative effects on bumble bees, . . . the rusty patched bumble bee *may* not be *as severely* affected by habitat loss [as compared to other bee species]," *id*. (quoting Not-Prudent Decision, RPBB0003 (emphases added)). But again, these equivocal statements simply reinforce the Service's finding that habitat loss and degradation remain *a* threat to the bee—regardless of whether *other*, greater threats exist, or whether *other* bee species "may" be even more severely affected. The Service has not explained its about-face from the Listing Decision.

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In sum, the Service's explanation that habitat loss and degradation are not "the primary" threat to the bee is neither supported by the record nor determinative of the ultimate question: whether designating critical habitat would provide *no benefit whatsoever* for the bee. The Service's argument that designating critical habitat could not reduce the effects of pesticide exposure on the bee similarly fails. And to the extent the Service now argues that habitat loss and degradation do not pose a threat to the bee at all, that assertion is contradicted by the record, including the Service's own prior statements. For each of these reasons, the Service's justification is arbitrary and capricious and contrary to the statute.

C. The Service's assertion that availability of habitat does not limit the bee's conservation lacks support in the record

The Service next argues that designation of critical habitat would yield no benefit for the bee because "the availability of habitat is not a limiting factor on its conservation." Defs.' MSJ 21; *see id.* at 25. This argument is based on two related premises: First, the Service posits that the bee is a "habitat generalist," implying that any of a broad range of habitats could satisfy the bee's needs. *E.g.*, *id.* at 1. Second, because so many different habitat types could purportedly meet the

bee's needs, the Service further posits that there is "abundant suitable habitat" for the species. *E.g.*, *id.* at 7. Neither of these premises is supported by the record.[10]

1. The Service fails to support its finding that the rusty patched bumble bee is a "habitat generalist"

The Service's brief relies heavily on its characterization of the bee as a "habitat generalist" to suggest that virtually any habitat would be adequate to support the bee's conservation. *See* Defs.' MSJ 1, 17, 21, 23, 25. The record contradicts this characterization. Consistent with the Service's prior finding that the bee is endangered partly due to habitat loss, Listing Decision, RPBB0143-44, the record shows that the bee's survival and recovery are constrained by specific habitat needs and that a variety of habitats are needed to meet these needs over the course of the bee's life cycle.

The bee needs particular types of habitat for foraging, nesting, and overwintering. *See* Pls.' MSJ 9-11. In the Listing Decision, the Service described bumble bees as "generalist *foragers*, meaning they gather pollen and nectar from a wide variety of flowering plants." RPBB0126 (emphasis added); *see id.* at RPBB0137. But foraging describes only one life function during one stage of the bee's life cycle. Even assuming that the bee can forage in many

[10] The Service also relies on its statement in the Not-Prudent Decision that it "cannot predict which specific areas rusty patched bumble bees may occupy at a landscape level across its historic range." Defs.' MSJ 22-23 (quoting RPBB0004). But that statement, whatever it means, cannot rehabilitate the Service's No-Benefit Determination. First, the Service provided this justification *only* for its Catch-All Determination applying the 2019 Regulation. *See* Not-Prudent Decision, RPBB0004. Having abandoned its alternative Catch-All Determination, the Service may not now use that finding to rationalize its No-Benefit Determination applying the 2016 Regulation. *See supra* p. 4. Second, this justification is wholly irrelevant to whether designating critical habitat would be prudent, for the reasons explained in Plaintiffs' opening brief. *See* Pls.' MSJ 40-41.

different types of habitat,[11] the record indicates that the bee tends to use specific types of habitat for nesting and overwintering. *See, e.g.*, Conservation Management Guidelines, RPBB0083 ("Nest locations are likely to be in open areas or near open areas where it is not heavily forested and not too wet (*i.e.*, not marsh, shrub wetlands, or wetland forest.")); Section 7 Guidance, RPBB0064 (assuming "that the bee winters exclusively in upland forest and woodland"); *see also* Pls.' MSJ 9-11 (summarizing record evidence of the bee's specific habitat needs); Habitat Connectivity Model, RPBB1090 (noting that bumble bee species "typically exhibit foraging distances of less than 0.6 mile (1 km) from their nesting sites).

The Service now suggests, however, that the bee can use almost *any* habitat for not only foraging, but also nesting and overwintering. *See* Not-Prudent Decision, RPBB0003 (asserting that the bee "can use a variety of habitats for nesting and overwintering"); *id*. at RPBB0004 (asserting that "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"). What changed between the Listing Decision and the Not-Prudent Decision? The Service claims that it acquired "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." Defs.' MSJ 7. The Not-Prudent Decision cites only two studies that post-date the

[11] Notably, the bee's ability to use *varied* foraging habitats does not necessarily mean that an adequate *amount* of foraging habitat is available and accessible to the bee. For example, the Service's own guidance documents include improvement of "floral resources" as a strategy for furthering the bee's conservation—which indicates that lack of adequate flowers for foraging is, in fact, limiting the bee's conservation. *See* Not-Prudent Decision, RPBB0003 (discussing the Service's Conservation Management Guidelines and Draft Recovery Plan for the bee); *see also* Status Assessment, RPBB0180 ("The species is one of the first to emerge early in the spring and the last to go into hibernation, so to meet its nutritional needs, *B. affinis* requires a constant and diverse supply of flowers that bloom throughout the colony's long life cycle.").

Listing Decision, however, and neither supports the proposition that the bee can use any type of habitat to nest or overwinter. *See* Not-Prudent Decision, RPBB0002-03. In fact, Lanterman et al. (2019) found that, for purposes of nesting, other bumble bee species "favored transitional zones between wooded and open habitats over open habitats, with most queens investigating areas with dense leaf litter, fallen logs, and other features of woody habitats." *Id.* This simply reinforces preexisting record evidence that the bee has particularized habitat needs for nesting. *See* Pls.' MSJ 9-11.

The analysis by Liczner and Colla (2019) similarly does not show that the bee is a "habitat generalist" that lacks specific habitat preferences for nesting and overwintering.[12] With respect to nesting, the study authors reported that distinct species within the bee's subgenus *collectively* have been found nesting in a broad range of habitats. *See* RPBB0356 (reporting that seven species in the subgenus *Bombus* sensu stricto were collectively found to nest in seven types of habitat); *id.* at RPBB0351 (listing the rusty patched bumble bee, *bombus affinis*, as one of the species within the subgenus *Bombus* sensu stricto). This is not the same as a determination that *any one of those species* lacks specific preferences for nesting habitat. Without additional information, the Service's conclusion is like surveying five people about their favorite foods, getting five different answers, and concluding that people do not have favorite foods because the group, collectively, reported five different favorites. And with respect to overwintering habitat, Liczner and Colla concluded that bumble bees *do* appear to have specific habitat preferences. *See* Not-Prudent Decision, RPBB0003 ("Overwintering bumble bee queens have been found mostly in shaded areas, usually near trees and in banks without dense vegetation); Liczner and Colla,

[12] This information is also not new. Of the 59 studies analyzed in Liczner and Colla's meta-analysis, none were published after the Listing Decision; publication years ranged from 1912 to 2015. *See* RPBB0355.

RPBB0354-56. This corroborates preexisting record evidence that the bee has specific habitat needs for overwintering. *See* Pls.' MSJ 10-11.

Furthermore, that the bee "has been observed and collected in a variety of habitats," Defs.' MSJ 23 (quoting Listing Decision, RPBB0126), does not mean that those habitats are of uniform utility to the bee. *See* Pls.' MSJ 35; *e.g.*, Liczner and Colla, RPBB0354 ("[T]he presence of a bumble bee nest or overwintering queens does not necessarily mean that the surrounding areas are high quality or preferred habitat."). The Service cites two studies for its proposition that the bee "occupies a variety of habitats." Not-Prudent Decision, RPBB0002 (citing "Colla and Packer 2008, p. 1381; Colla and Dumesh 2010, p. 46"). But both studies were published prior to (and cited in) the Listing Decision, *see* RPBB0129, and neither suggests that any of the individual habitat types where the bee has been found can support the species during all phases of its life cycle, or that the various habitat types are of uniform utility to the bee. *See* Colla and Dumesh, RPBB0401-02; Colla and Packer, RPBB0477.

The record instead shows that the bee uses particular, different habitat types as its life cycle progresses, *see* Pls.' MSJ 9-11, 35, and that even within a particular habitat type, high-quality areas of habitat are particularly rare and valuable, *see id.* at 36-37; *e.g.*, Listing Decision, RPBB0133 (noting that although the bee has "been observed in agricultural landscapes, . . . such observances are declining with the decrease in diversity of floral resources in such areas"). Just because the bee *can* use both a pesticide-contaminated area and an area free from pesticides, this does not mean that there is no value in protecting the second area from pesticide contamination. Nothing in the record suggests that simply because a bee has been found in a variety of habitats, designating and protecting specific, high-value areas would not benefit the bee.

2. The Service fails to support its finding that the bee has such "ample suitable habitat" that habitat protections would be worthless

Even assuming the record supported the Service's finding that the bee is a "habitat generalist" throughout its life cycle, the Service has not established that suitable, accessible habitat is so abundant that it needs no protection. The record instead shows that habitat loss and degradation have contributed to the bee's decline and continue to threaten the bee. This record evidence cannot be reconciled with the Service's conclusion that availability of suitable habitat is not limiting, and each of the Service's attempts to argue otherwise fail.

The Service explained in the Listing Decision that habitat loss and degradation have contributed to the bee's decline and continue to present a threat:

> Although empirical data are currently unavailable regarding the level of habitat loss and degradation affecting the rusty patched bumble bee, we do know that habitat impacts have caused decline of other *Bombus* species. This, in conjunction with the declines in distribution and relative abundance since the 1990s lead us to infer that *habitat changes are, at the least, a contributing factor to the current precarious status of this species.* Recognizing the uncertainty regarding the effects of habitat loss, we consulted with bumble bee experts with regard to the likely contribution of habitat impacts to the decline of this species. *Although their conclusions varied, none of these experts stated that habitat loss and/or degradation played no role in the decline.*
>
> We agree that habitat impacts are not likely the sole cause of the rusty patched bumble bee declines; rather, as explained, *we find there are a multitude of stressors acting on the species*. We acknowledge, however, that *habitat losses may have become more of a factor* as the colonies have been compromised by other, seemingly new, exposures to specific insecticides and pathogens.

RPBB0136 (emphases added) (citations omitted). The Draft Recovery Plan further confirms that the availability of habitat continues to affect the bee's prospects; it concludes that habitat protection and restoration are "necessary" components of the bee's recovery. RPBB0042, 49-50. Both conclusions—that habitat loss and degradation have contributed to the bee's decline, and

that habitat management and protection are key to its recovery—are fundamentally inconsistent with the Service's new assertion that the availability of habitat does not "limit" the bee's conservation. Not-Prudent Decision, RPBB0004.

The Service does not explain how its prior statements in the Listing Decision are consistent with its conclusion in the Not-Prudent Decision that availability of habitat is not limiting. Nor does the Not-Prudent Decision specifically repudiate those prior findings based on new evidence. As for the Draft Recovery Plan, the Service attempts to dismiss it on the basis that it "does *not* include designating critical habitat in its list of suggested measures" for "management and protection" of habitat. Defs.' MSJ 19. This argument misses the point. The Service's Not-Prudent Decision broadly asserts that *no* habitat restoration or management is needed for the bee's conservation. *See* RPBB0004 ("[H]abitat for the rusty patched bumble bee is not limiting" and "the availability of habitat does not limit the conservation of the rusty patched bumble bee now, nor will it in the future."); *accord* Defs.' MSJ 21. But as the Service acknowledges, the Draft Recovery Plan "identifies management and protection of habitat as 'necessary to achieve the recovery vision for the rusty patched bumble bee.'" Defs.' MSJ at 24 (quoting Draft Recovery Plan, RPBB0049-50). Whether or not critical-habitat protections are expressly mentioned in the plan, the Recovery Plan indicates that habitat management and protection, in general, are crucial for the bee's recovery. This is flatly inconsistent with the Service's assertion that the availability of suitable habitat is "not limiting" the bee's recovery.

The Service's uncontroverted finding that the bee "does not have the adaptive capacity in its current state to withstand physical and biological changes in the environment presently or into the future," Listing Decision, RPBB0144, similarly undermines the agency's contention that habitat for the bee is not limiting. *See* Pls.' MSJ 34. If current populations cannot withstand

further destruction or adverse modification of its environment, it cannot also be true that the bee has "abundant suitable habitat," the availability of which is not limiting. Again, the Service does not even attempt to reconcile these two conclusions. *See* Defs.' MSJ 24. On the contrary, the Service recognized in its Not-Prudent Decision that habitat management and protection can benefit the bee "because even slight improvements in resource availability could increase development and productivity at existing colonies and improve the bees' resilience to other stressors, such as pesticides and pathogens." RPBB0004. The Service provides no support for its bare assertion that "designation of critical habitat does not itself accomplish these goals." Defs.' MSJ 24. For a species on the brink of extinction, every protection counts, including designating critical habitat.

The record also demonstrates that because of the bee's limited dispersal abilities, suitable, *accessible* habitat is quite limited. *See* Pls.' MSJ 31 (explaining that much of the bee's historic habitat "may not be accessible to *current* populations of the bee owing to distance or geographic barriers," and citing record evidence). It is therefore irrelevant that "suitable habitat is abundant *across the species' historical range*." Defs.' MSJ 25 (emphasis added). In other words, if the remaining populations of the bee were all in Wisconsin, it would be irrelevant that the bee has plenty of suitable habitat in New Jersey; the bee has no way of getting there. *Cf.* Habitat Connectivity Model, RPBB1091 (explaining that the bee's maximum dispersal distance is likely between 0.6 and 6 miles). The Service purports to respond to this argument, stating that designation of critical habitat would not "make [inaccessible] habitat somehow accessible." Defs.' MSJ 25. This misses the point of Plaintiffs' argument, which is that designating *existing* dispersal corridors and accessible habitat adjacent to currently occupied areas would be beneficial because those areas *are* limited. The Service has no relevant response.

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In sum, the Service has failed to establish that designating critical habitat would provide no benefit whatsoever for the bee's survival or recovery. In its attempt to make such a showing, the Service contravenes the plain language of the ESA, relies on conclusions not supported by the record, and crafts rationales that are irrelevant to whether designating critical habitat would benefit the bee. In addition, the Service concedes that its three justifications are intertwined. Defs.' MSJ 16 (protesting that Plaintiffs' arguments "pull [the Service's three justifications] . . . apart from one another"). Therefore, if the Court finds any one of the Service's three justifications to be unlawful—and as shown above, each one of them is—the Not-Prudent Decision must be set aside in its entirety. *See* Pls.' MSJ 38-39; *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) ("Where the agency has not afforded individual weight to the alternative grounds [for its decision] . . . , the court may uphold the decision only as long as one [ground] is valid and the agency would clearly have acted on that ground even if the other were unavailable." (internal quotation marks omitted)).

II. Plaintiffs have standing to challenge the Service's Not-Prudent Decision

Notwithstanding the Service's arguments, Defs.' MSJ 8-13, Plaintiffs have associational standing to challenge the Not-Prudent Decision. *See Growth Energy v. EPA*, 5 F.4th 1, 26-27 (D.C. Cir. 2021); Pls.' MSJ 42-45.[13] The Service does not deny that Plaintiffs' challenge is germane to Plaintiffs' organizational purposes. Nor does the Service argue that the participation of individual members is necessary. The only dispute is whether at least one of Plaintiffs' members would have standing to sue in their own right. Plaintiffs have made that showing.

[13] To be clear, Plaintiffs assert representational or "associational" standing on behalf of their members, not "organizational" standing. *Contra* Defs.' MSJ 9.

A. Plaintiffs' challenge involves a procedural injury

Plaintiffs have standing regardless of whether the Court applies a "procedural injury" or a "substantive injury" analysis. Defendants contend that procedural injury is "not at issue here," Defs.' MSJ 12 n.4, though they cite no authority for that assertion. To be sure, "the distinction between substan[tive] and procedur[al]" injuries can be difficult to define, *W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 954 (D.C. Cir. 2021), and Plaintiffs are not aware of any case in this Circuit expressly deciding whether an agency's decision not to designate critical habitat gives rise to a "procedural" or "substantive" injury.[14] The D.C. Circuit has, however, held that agency failures to comply with the ESA's Section 7 consultation requirements are "archetypal procedural injur[ies]." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017) (internal quotation marks omitted); *accord Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019) (per curiam). For "substantially the [same] reasons," the D.C. Circuit in *Growth Energy* held that an agency's "flawed effects determination"—that is, its allegedly erroneous conclusion that a proposed rule would have no effect on listed species or their critical habitat "and therefore it need not consult with the Services"—gave rise to a "procedural" injury claim, too. 5 F.4th at 27-28, 30 (internal quotation marks omitted); *see also W. Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29, 42 (D.D.C. 2020) (holding that failure to "insure" that project would not jeopardize ESA-listed species was "classic procedural injury").[15]

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[14] In *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), the court found plaintiffs had standing to challenge a critical-habitat designation without specifying whether it was applying a "procedural" or "substantive" analysis. *See id.* at 118; *accord Cape Hatteras Access Pres. All.*, 731 F. Supp. 2d at 20.

[15] Similarly, other courts in this District have held that allegedly deficient decisions not to list species as endangered or threatened in the first place—which necessarily means agencies will

Here, just as in *Growth Energy*, the Service's "flawed" Not-Prudent Decision ensures that the Service and other federal agencies will "fail[] to engage in consultation" about the destruction or adverse modification of the bee's habitat. *Growth Energy*, 5 F.4th at 27; *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 3 (D.C. Cir. 2017) (summarizing the effect of designating critical habitat as "trigger[ing] . . . consulting requirements under Section 7 of the Act"). In essence, the Service's determination that it would be "not prudent" to designate *any* critical habitat means that federal agencies will *never* have to engage in Section 7 consultation to "insure" against the "destruction or adverse modification" of the bee's habitat, as the ESA requires. *See* 16 U.S.C. § 1536(a)(2); *supra* Argument I.A.

To be sure, the Service disagrees that such consultation is warranted for the bee, but that is a merits argument—and when evaluating standing, courts assume plaintiffs will "prevail[] on the merits." *Sierra Club v. FERC*, 827 F.3d 59, 67 (D.C. Cir. 2016); *accord In re Pub. Emps. for Env't Resp.*, 957 F.3d 267, 272 (D.C. Cir. 2020). The procedural injury framework is therefore appropriate here.

In any event, the distinction between procedural and substantive injury is not outcome-determinative in this case. While "the issues of imminence and redressability" are "relaxed" in the procedural injury context, the rest of the standing inquiry is the same. *Growth Energy*, 5 F.4th at 27-28 (internal quotation marks omitted).[16] Under either rubric, Plaintiffs have standing.

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not consult about harm to those species—also give rise to procedural injury claims. *See Buffalo Field Campaign v. Williams*, No. 20-cv-798, 2022 WL 111246, at *6 (D.D.C. Jan. 12, 2022); *Am. Wildlands v. Norton*, 193 F. Supp. 2d 244, 250 (D.D.C. 2002). The Service's failure to list a species is, like its failure to designate critical habitat, governed by Section 4 of the ESA and constitutes a decision about whether the statute's consultation safeguards under Section 7 should apply at all.

[16] The Service's cursory attempt to distinguish *Growth Energy* is unavailing. *See* Defs.' MSJ 12 n.4. Not only is *Growth Energy* squarely on point with respect to procedural injury, but much of

B. Under either a "procedural" or "substantive" standing analysis, Plaintiffs have established injuries-in-fact, traceability, and redressability

The Service's failure to designate critical habitat injures Plaintiffs' members because it "demonstrably increase[s]" the "specific risk of environmental harms that imperil the[ir] members' particularized interests" in viewing the bee in its habitat. *Growth Energy*, 5 F.4th at 27 (internal quotation marks omitted). True, Plaintiffs themselves are not regulated parties, Defs.' MSJ 9, but this is not a case where the threat of harm depends on the actions of unpredictable private "third part[ies]," *contra id*. at 12. The relevant actors here are the Service itself and other federal agencies that are required to consult with the Service whenever undertaking action that might destroy or adversely modify designated critical habitat. Plaintiffs' claim is that, without a lawful determination of critical habitat, the Service and other federal agencies will have no obligation to consult and insure that their actions do not destroy or adversely modify the bee's habitat. *See* Pls.' MSJ 43-44; 16 U.S.C. § 1536(a)(2). This failure to consult presents a substantial risk of harm to Plaintiffs' members' concrete professional, recreational, and aesthetic interests in viewing and interacting with the bee. *See* Pls.' MSJ 43 (citing declarations).

This is precisely the sort of injury that the D.C. Circuit has repeatedly found to be sufficiently concrete, particularized, and imminent for standing. *See Growth Energy*, 5 F.4th at 29-30 (holding that agency decision not to engage in Section 7 consultation gave rise to a "substantial probability" of "degradation of critical habitat for whooping cranes and Gulf sturgeon in the geographic areas where [their members] view those species" (internal quotation marks omitted)); *Ctr. for Biological Diversity*, 861 F.3d at 183 (explaining that agency failure to

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its standing analysis is based on general principles applicable to both procedural and substantive injuries. And, as to redressability, the D.C. Circuit expressly considered *both* the relaxed redressability standard for procedural injuries *and* "the ordinary standards" for substantive injuries, and concluded that the plaintiffs satisfied both. 5 F.4th at 29.

make an effects determination or engage in consultation created a "'demonstrable risk' to the Valley Elderberry Longhorn Beetle in California and the Mitchell's satyr butterfly in Michigan," where members intended to view them (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 2017))); *see also Conservation L. Found. v. Ross*, 422 F. Supp. 3d 12, 18-27 (D.D.C. 2019) (concluding plaintiffs had standing to challenge agency failure to consult regarding harm to North Atlantic right whale).[17] The result would be the same under a substantive-injury analysis. *See, e.g.*, *Air All. Houston v. EPA*, 906 F.3d 1049, 1058 (D.C. Cir. 2018) (applying a substantive-injury analysis and explaining that, "[w]hen challenging [a] failure to regulate, a [plaintiff] need demonstrate only a substantial probability that local conditions will be adversely affected, and thus will harm members of the [plaintiff] organization" who use those areas (internal quotation marks omitted)).

The Service is simply wrong when it argues that "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." Defs.' MSJ 10. Plaintiffs have, in fact, identified multiple imminent and specific federal actions that, because of the Not-Prudent Decision, present a substantially greater risk of destroying or adversely modifying the bee's habitat.

[17] *See also Friends of Animals v. Ross*, 396 F. Supp. 3d 1, 8-9 (D.D.C. 2019) (holding that plaintiff had standing to challenge failure to list queen conch); *NRDC v. Rauch*, 244 F. Supp. 3d 66, 85 n.22 (D.D.C. 2017) (concluding that plaintiffs had standing to challenge failure to list blueback herring). Contrary to the Service's suggestion, Defs.' MSJ 12 n.4, it is irrelevant that the government chose not to contest standing in those cases. What matters is whether the *courts* addressed standing in their decisions—and they did. *See Friends of Animals*, 396 F. Supp. 3d at 8 ("Though the government does not contest standing, the Court still must assess it."); *Rauch*, 244 F. Supp. 3d at 85 n.22 (evaluating standing).

First, NRDC member Clay Bolt's declaration shows that the proposed expansion of the Chicago Rockford International Airport imminently threatens to destroy prime habitat for the bee in Bell Bowl Prairie, where he has plans to look for and photograph the bee. *See* Pls.' MSJ 44; Bolt Decl. ¶ 14. The Service concedes that "the bee has been sighted in the Bell Bowl Prairie area in recent years," but it contends that the bee's observed presence "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.'" Defs.' MSJ 10 (emphasis added) (quoting 16 U.S.C. § 1536(a)(2), (c)(1)). But the Service misses the point: as discussed above, jeopardy consultation is no substitute for adverse-modification consultation, in either occupied or unoccupied areas. *See supra* Argument I.A.[18] Further, jeopardy consultation will not insure that the airport expansion has no adverse effects on adjacent, currently unoccupied areas that are "essential" to the recovery of Bell Bowl's remaining bees. 16 U.S.C. § 1532(5)(A)(ii); *see supra* Argument I.A.2; *see also* Suppl. Bolt Decl. ¶ 4 (discussing desire to search for the bee in areas surrounding Bell Bowl); Vandal Decl. ¶ 10 & Ex. F (discussing overlap between High Potential Zones, Low Potential Zones, and Chicago Rockford International Airport); RPBB1089 (explaining High Potential Zones and Low Potential Zones). The Service may consider these additional missing

[18] In addition, the Service's Voluntary Implementation Guidance shows that jeopardy consultation might not even occur: Even though the bee "may be present" at Bell Bowl, the Department of Transportation could choose to conduct a survey for the bee to determine whether formal consultation with the Service is necessary. *See supra* n.5. But a survey could very well fail to locate bees that are present. For example, there is an especially great risk that a survey could fail to find the bee during winter, when there may be a single queen overwintering *underground*. *See* Status Assessment, RPBB0179-80; *see also* Liczner and Colla, RPBB0349 (noting "the difficulty in locating" bumble bee nesting and overwintering sites). If the Service designated Bell Bowl Prairie as critical habitat, in contrast, the agencies' obligation to consider whether the action might destroy or adversely modify habitat would not depend on whether the bee happens to be found at the time of a pre-construction survey.

protections to be less important than jeopardy consultation, but they are undeniably *different* and *additional* protections that the Service's Not-Prudent Decision has eliminated. The "existence of alternative protective conditions does not negate [Plaintiffs'] standing to enforce statutorily mandated regulations." *In re Idaho Conservation League*, 811 F.3d 502, 511 (D.C. Cir. 2016) (internal quotation marks omitted).

Second, FMSNA member Thomas Casey, a Minnesota resident, attests that he "plan[s] to continue going on . . . daily walks and hikes and will always be on the lookout" for the bee, including in the Minnesota Valley National Wildlife Refuge (Refuge), where he "often visit[s]." Casey Decl. ¶¶ 4, 10, 11. The Refuge encompasses areas identified as "High Potential Zones" and "Low Potential Zones" for the bee, *id.* ¶ 11; *see id.* ¶ 12; *accord* Vandal Decl. ¶ 8 & Exs. C, D. Although the Service asserts that these "priority areas are not appropriate for designation as critical habitat because they do not map directly to suitable habitat," Not-Prudent Decision, RPBB0003, it acknowledges that "suitable habitat" is present in High Potential Zones and that Low Potential Zones are "important for conservation actions," Key to Rusty Patched Bumble Bee Map, RPBB1089. In addition, Mr. Casey has observed a variety of flowering plants, as well as a mixture of woods and leaf litter within the Refuge, Suppl. Casey Decl. ¶ 5; and the Service has identified these habitat features as ones that support the bee, *see, e.g.*, Not-Prudent Decision, RPBB0002 ("[T]he species requires a constant and diverse supply of blooming flowers to meet its nutritional needs."); *id*. at RPBB0002-3 (describing evidence that bumble bee queens prefer "areas with dense leaf litter, fallen logs, and other features of woody habitats" for nesting). But, because of the Service's Not-Prudent Decision, none of these areas will be protected as either occupied or unoccupied critical habitat.

The Service claims that Mr. Casey has no injury-in-fact because (it says) his injury is predicated on "unidentified and hypothetical future agency actions." Defs.' MSJ 12. Not so. Mr. Casey's declaration names specific, ongoing management actions that are substantially likely to impact the bee's habitat within the Refuge, including "chemical control of invasive plants, construction of housing and trails, and periodic controlled burns." Casey Decl. ¶ 12; *see also* Suppl. Casey Decl. ¶ 6 & Ex. A. In addition, the Service's management plan for the entire Refuge is now due to be revised, Casey Decl. ¶¶ 11-12 & Ex. A—and that forthcoming revision is another agency action that is "imminent." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (explaining that a future injury may be imminent if "there is a 'substantial risk' that the harm will occur" (internal citation omitted)). The current plan makes "no mention of the rusty patched bumble bee or its habitat at all," Casey Decl. ¶ 12, and it is substantially likely that the revised plan will also omit consideration of destruction or adverse modification of the bee's habitat so long as the Not-Prudent Decision stands.

As set forth in their supplemental declarations, Plaintiffs' members' interests in viewing the bee are also threatened by the Service's Not-Prudent Decision because of the resulting likelihood that EPA's approval of neonicotinoid insecticides ("neonics") will harm the bee and its habitat. Mr. Bolt is aware of extensive corn, soybean, and wheat fields, as well as residential areas with lawns, surrounding the areas where he plans to look for the bee. Suppl. Bolt Decl. ¶¶ 3, 6. Neonics are approved for use on corn, soybean, wheat, and lawns within Wisconsin. *E.g.*, Rhoads Decl. Ex. A, at 4[19] (corn, soybean, and wheat); *id.* Ex. D, at 26, 30 (corn and soybean); *id.* Ex. E, at 5 (soybean); *id.* Ex. B, at 4 (lawns); *id*. Ex. C, at 1 (lawns); *id*. Ex. F, at 8 (lawns);

[19] Where an exhibit has native page numbers, this brief uses those native page numbers for any pinpoint citations; but where an exhibit does not have native page numbers, this brief uses the PDF page numbers for any pinpoint citations.

see id. Ex. L (list of products approved in Wisconsin). Mr. Casey has similarly seen extensive agriculture (including alfalfa), an airport, and residential lawns in and around the areas where he plans to look for the bee. Suppl. Casey Decl. ¶ 8. Neonics are approved for use in those areas in Minnesota. *E.g.*, Rhoads Decl. Ex. A, at 4 (corn, soybean, and wheat); *id.* Ex. D, at 26, 30 (corn and soybean); *id.* Ex. E, at 5 (soybean); *id.* Ex. G, at 1 (alfalfa); *id.* Ex. B, at 4 (lawns, ornamental plants, airports); *id.* Ex. C, at 1 (same); *id.* Ex. F, at 8 (same); *see id.* Ex. K (list of products approved in Minnesota). Jason Taylor also knows that corn and soybean surround many of the properties where he plans to look for the bee, Suppl. Taylor Decl. ¶¶ 6-7, and neonics are approved for use on those areas in Iowa, *e.g.*, Rhoads Decl. Ex. D, at 26, 30 (corn and soybean); *id.* Ex. E, at 5 (soybean); *id.* Ex. H, at 3, 6 (corn and soybean); *see id.* Ex. M (list of products approved in Iowa).

The Service has identified pesticide use as a primary threat to the species, Not-Prudent Decision, RPBB0004, and described at length the serious risks that neonics pose to the bee, Status Assessment, RPBB0208-13. EPA is currently reviewing the registrations for neonics through the registration-review process under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136a(g), and must engage in Section 7 consultation as part of the registration-review process. *See Ecological Rights Found. v. EPA*, No. 19-cv-980, 2021 WL 535725, at *13 (D.D.C. Feb. 13, 2021) (referring to "the statutorily required interagency consultation for [a chemical's] registration review"), *vacated in part on other grounds*, 541 F. Supp. 3d 34 (D.D.C. 2021); Rhoads Decl. Ex. N (showing EPA's schedule for review of neonic registrations). The Agency can and does limit pesticide use to protect listed species and their critical habitat. *See, e.g.*, Rhoads Decl. Ex. I, at 6-9 (describing required mitigation measures, such as county-level prohibitions). Without any designation of critical habitat, however, EPA

will not have to consider whether its pending re-approval of neonics will likely destroy or adversely modify the bee's habitat. *See* 16 U.S.C. § 1536(a)(2). The lack of adverse-modification consultation "demonstrably increas[es]" the "specific risk" that EPA will re-approve the use of neonics to the detriment of the bee and its habitat. *Growth Energy*, 5 F.4th at 27.

The Service protests that Plaintiffs "'have not provided the [C]ourt with any evidence whatsoever demonstrating that [the Not-Prudent Decision] will lead *inexorably* to fewer [members of the species] or make it harder to observe [the species] in the wild.'" Defs.' MSJ 11 (quoting *Pub. Emps. for Env't Resp. v. Bernhardt*, No. 18-cv-1547, 2020 WL 601783, at *4 (D.D.C. Feb. 7, 2020) (emphasis added)). But inexorability is not a requirement for standing, and to the extent the Service relies on the unpublished decision in *Bernhardt* to suggest otherwise, it is plainly mistaken. Plaintiffs "need not prove . . . that localized harm has in fact resulted" or will certainly result from the Service's action; it is enough that "there is a substantial probability that local conditions will be adversely affected and thereby injure a member['s]" interests. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (internal quotation marks omitted); *see also Conservation L. Found.*, 422 F. Supp. 3d at 18, 25 (holding that likelihood of injury was traceable to agency decision not to consult because "gillnet fishing creates a serious *risk* of entanglement for North Atlantic right whales," that "entanglements cause death, shortened lifespans, and lower reproductivity in North Atlantic right whales—in short, they result in fewer whales in the water," and that "[f]ewer whales in the water means a lower *chance* of CLF's members seeing the whales" (emphases added)).

In any event, the unsuccessful standing argument advanced in *Bernhardt* is a far cry from the facts here. In that case, plaintiffs asserted that the Service's decision to remove the Louisiana black bear from the list of threatened species would "make it more difficult to observe and study

the [bear] and its habitat." 2020 WL 601783, at *4 (internal quotation marks omitted). But critically, the Service's de-listing decision noted that "the main [bear] subpopulations are stable or increasing, and that the probability of long-term persistence is 99.6%." *Id.* (internal quotation marks omitted). The plaintiffs, who filed suit two years after the bear was de-listed, offered no contrary evidence that de-listing had any dampening effect on the bear's population or that de-listing would otherwise have "self-evident" negative effects on bear populations. *Id.*

Here, by contrast, the record demonstrates unequivocally that the bee is sliding toward extinction. *See, e.g.*, Listing Decision, RPBB0127 ("[T]he resiliency, representation, and redundancy of the rusty patched bumble bee have all declined since the late 1990s and are projected to continue to decline over the next several decades."); Species Status Assessment, RPBB0168 ("The abundance of *B. affinis* is forecasted to decline over time under all three risk scenarios evaluated, with extinction predicted in all but one ecoregion within 5 years; Ecoregion 220 is forecasted to be extinct by Year 30.")[20]; Defs.' MSJ 5 (conceding that the Service has observed "an 88% decline from the number of populations documented prior to 2000"). The record also demonstrates that habitat loss and degradation have contributed and will likely continue contributing to the bee's decline. *See supra* Argument I.B.2. It is, therefore, substantially likely that withholding the ESA's principal protection for habitat will contribute to the bee's continued decline and threaten Plaintiffs' members' interests in seeing the bee.

Finally, the Service's arguments about redressability miss the mark. *See* Defs.' MSJ 11-13. In general, under a substantive injury framework, Article III requires that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

[20] Ecoregion 220 covers portions of Minnesota, Wisconsin, and Illinois—states in which Plaintiffs' members have searched and plan to search for the bee. *See* Suppl. Bolt Decl. ¶¶ 5, 7; Suppl. Casey Decl. ¶ 4.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). Plaintiffs "need not show that relief is *certain*," but "only that it is substantial[ly] like[ly]." *In re Pub. Emps. for Env't Resp.*, 957 F.3d at 272 (internal quotation marks omitted). Under the procedural injury framework, redressability is further "relaxed." *Narragansett Indian Tribal Hist. Pres. Off. v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020). In such cases, "instead of needing to establish that compelling the agency to follow the correct procedure *would* lead to a substantive result that favors the [plaintiff's] concrete interests, the [plaintiff] need only show that its concrete interests *could* be better protected." *Id.*; *see also Growth Energy*, 5 F.4th at 28 ("[I]t suffices to show that EPA *could* reach a different conclusion if ordered to revisit its procedural error." (internal quotation marks omitted)).

Under either standard, Plaintiffs' injuries here are redressable because it is substantially likely—and certainly possible—that vacating the Service's Not-Prudent Decision would result in designation and protection of critical habitat in areas where Plaintiffs' members seek out the bee, thus helping to safeguard Plaintiffs' members' interests. *See Growth Energy*, 5 F.4th at 28; Suppl. Bolt Decl. ¶12; Suppl. Taylor Decl. ¶ 5; Suppl. Casey Decl. ¶ 6; Vandal Decl. ¶¶ 6-10.

Plaintiffs do not ask the Court to "direct an agency to make particular substantive findings as the result of its rulemaking process" on remand. *Contra* Defs.' MSJ 11 n.3. Plaintiffs simply seek vacatur of the Not-Prudent Decision, and an order "direct[ing] the Service both to propose and finalize a designation of critical habitat for the bee, based on the best available information and to the maximum extent prudent, within one year of the entry of judgment, consistent with section 4 of the ESA." Pls.' MSJ 45. For redressability purposes, Plaintiffs need not prove that the Service certainly *will* designate particular areas as critical habitat, or that its action on remand will entirely eliminate the threats to their members' interests. All Plaintiffs

need to show is "a substantial probability" (under the substantive-injury rubric) or a "possibility" (under the procedural-injury rubric) that such relief may "reduce the injuries" to their members' interests. *In re Idaho Conservation League*, 811 F.3d at 512-13; *see also In re Pub. Emps. for Env't Resp.*, 957 F.3d at 272 (finding redressability where agencies, on remand, "may prohibit air tours altogether or establish certain conditions, including noise mitigation," which were "substantially likely to mitigate the noise impact"). Plaintiffs have made that showing.

CONCLUSION

The Service's decision not to protect critical habitat for the rusty patched bumble bee founders against basic principles of ESA protection and reasoned agency decision-making. Plaintiffs respectfully ask that the Court grant their motion for summary judgment, declare unlawful and set aside the Service's decision, and direct the Service to propose and finalize a designation of critical habitat for the rusty patched bumble bee, to the maximum extent prudent, within one year of the entry of judgment.

Dated: April 22, 2022

Respectfully Submitted,

/s/ Lucas J. Rhoads

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2022, I caused Plaintiffs' Combined Reply in Support of Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment; supplemental declarations of Clay Bolt, Jason Taylor, and Thomas E. Casey; declarations of Lucas Rhoads and Nicole Vandal; and Proposed Order to be filed and served upon counsel of record via the Court's CM/ECF filing system.

Dated: April 22, 2022 */s/ Lucas J. Rhoads*