Via Overnight and Certified Mail
Return Receipt Requested

January 14, 2021

Aurelia Skipwith, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

David Bernhardt, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Dear Director Skipwith and Secretary Bernhardt,

We write on behalf of the Natural Resources Defense Council, the Center for Biological Diversity, and the Friends of Minnesota Scientific and Natural Areas (collectively, Conservation Organizations) to notify you of our intent to file a lawsuit against the U.S. Fish and Wildlife Service, U.S. Department of Interior, and agency officials acting in their official capacity (collectively, "the Service") under the Endangered Species Act, 16 U.S.C. § 1540(g)(1). Conservation Organizations intend to challenge the Service's unlawful determination that protection of critical habitat for the rusty patched bumble bee is "not prudent" under the ESA, *id.* § 1533(b)(6)(C)(ii). This letter provides written notice pursuant to the 60-day notice requirement of the ESA's citizen suit provision. *See id.* § 1540(g)(2).

I. Factual Background

In response to a petition filed by the Xerces Society for Invertebrate Conservation, the Service listed the rusty patched bumble bee as an endangered species in January of 2017. Endangered Species Status for the Rusty Patched Bumble Bee, Proposed Rule, 81 Fed. Reg. 65,324, 65,325 (Sep. 22, 2016); Final Rule, 82 Fed. Reg. 3,186 (Jan. 11, 2017). The bee, which was once common throughout the Midwest and Northeast, has disappeared from 87% of its range since the mid-90s, Rusty Patched Bumble Bee (*Bombus affinis*) Species Status Assessment at 98 (June 2016),[1] and was the first bee in the continental U.S. to be listed under the Act.

On September 1, 2020, the Service announced its decision that designation of critical habitat for the bee is not prudent. Determination That Designation of Critical Habitat is Not Prudent for the Rusty Patched Bumble Bee, 85 Fed. Reg. 54,281 (Sep. 1, 2020) ("Decision"). The Service provided justifications for this Decision under both the current

[1] *Available at* https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/SSAReportRPBBwAdd.pdf.

and prior versions of 50 C.F.R. § 424.12 ("Regulation"), both of which interpret the phrase "not prudent" in Section 4 of the ESA. *See id.* at 54,281, 54,284.

Under its current Regulation, the Service provided three justifications for its conclusion. First, it finds that present or threatened destruction of habitat is not "the primary" threat to the bee, and that pesticides and pathogens are instead the primary threats. *Id.* at 54,281, 54,284. Second, it claims that availability of habitat does not, and will not, limit the bee's survival and recovery. *Id.* Third, the Service reasons that a "not prudent" determination is warranted because it "cannot predict which specific areas" the bee "may occupy at a landscape level across its historical range." *Id.* at 54,284.

Under its old Regulation, the Service similarly provides three justifications for its conclusion. First, habitat destruction is not the primary threat to the bee. *Id.* at 54,284. Second, availability of habitat does not limit the bee's conservation. *Id*. Third, "[S]ection 7 consultation in unoccupied areas is not necessary," and the Service's "priority maps" have achieved the "other benefits" of critical habitat that the Service identified in its final listing rule. *Id.* These "other benefits" include "focusing conservation activities on the most essential areas to prevent further loss of colonies, providing educational benefits by creating greater public awareness of rusty patched bumble bee and its conservation, and preventing inadvertent harm to the species." *Id.*

II. Legal Issues

Protection of habitat is central to species conservation under the ESA. For all endangered or threatened species, Section 4 directs the Service to designate "critical habitat," 16 U.S.C. § 1533(a)(3), meaning areas that species require to survive or recover, such that their protection under the Act is no longer required. *Id*. § 1532(3), (5)(A). Critical habitat can include not only areas that are currently occupied by a species, but also areas that the species does not presently occupy. *See id.*

The Service must always designate critical habitat for a listed species at the time the species is listed, subject to two narrow exceptions. *Id.* § 1533(a)(3)(A). The first is when critical habitat is not "determinable," meaning the Service does not have enough information to identify suitable areas at the time of listing. *Id.*; *see* 50 C.F.R. § 424.12(a)(2). This finding gives the Service one additional year to make its determination, at which point the Service must make a designation based on available data, unless the second exception applies. 16 U.S.C. § 1533(b)(6)(C). The second exception is when designating critical habitat is not "prudent." *Id.* § 1533(a)(3)(A).

Here, after invoking the first exception and taking another year to make its determination, the Service unlawfully invoked the second, "not prudent" exemption when deciding not to designate critical habitat for the rusty patched bumble bee.

A. The Service's application of its current Regulation is arbitrary, capricious, and not in accordance with law.

i. The ESA and the Service's current Regulation authorize application of the "not prudent" exemption only in narrow circumstances where designation of critical habitat would not benefit a species.

Congress intended the "not prudent" exemption to be narrow, reserved only for instances in which protecting critical habitat would not benefit the species. The plain language of the ESA tightly cabins the "not prudent" exemption. Section 4 directs the Service to designate critical habitat "to the *maximum extent* prudent," 16 U.S.C. § 1533(a)(3)(A), expressly indicating that the exception is intended to be as narrow as the definition of "prudent" allows. "Prudent" is defined as "careful and avoiding risks," Cambridge Dictionary (online ed. 2020); "acting with or showing forethought; . . . . circumspect, discreet, cautious; [and] far-sighted." Oxford English Dictionary (online ed. 2020). The plain meaning of "prudent" accords with the ESA's "institutionalized caution" in favor of species. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Read alongside the ESA's express purposes of "conserv[ing] . . . endangered species" and providing "a means whereby the ecosystems upon which endangered species . . . depend may be conserved," 16 U.S.C. § 1531(b), Section 4 leaves no room for the Service to forgo designating critical habitat based on the "not prudent" exception when protection would contribute to a species' survival or recovery.

The legislative history confirms this reading; Congress explained that the "not prudent" exemption was reserved for "rare circumstances where the specification of critical habitat . . . would not be beneficial to the species." *See* H.R. Rep. No. 95-1625 at 17. In other words, it is to be applied where designation "would not be in the best interests of the species." *Id.* at 16-17; *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (rejecting interpretation of statute that expanded narrow "not prudent" exception); *NRDC v. DOI*, 113 F.3d 1121 (9th Cir. 1997) (same); *accord Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) ("The legislative history does indicate that the Secretary may only fail to designate a critical habitat under rare circumstances."), *abrogated on other grounds by Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989). Thus, an interpretation that expands the "not prudent" exception—allowing it to be applied for any reason other than lack of benefit to a species—is contrary to the ESA.

The Service's own Regulation independently compels such a cabined construction of the "not prudent" exception. The current Regulation lays out four specific instances in which designation of critical habitat may not be prudent, as well as a fifth provision that allows the Service to "otherwise determine[]" that designation is not prudent. *Id.* § 424.12(a)(1)(i)-(v). Despite the general language of this catch-all provision, the regulatory structure compels a narrow reading. The first four specifically enumerated instances that justify a "not prudent" finding all involve situations in which designation would not benefit a species. *See id.* § 424.12(a)(1)(i)-(iv). Accordingly, well-established canons of construction indicate that the catch-all, *id.* § 424.12(a)(1)(v), must similarly be cabined to circumstances

where designation would provide no benefit. *See, e.g.*, *Rizo v. Yovino*, 950 F.3d 1217, 1225 (9th Cir. 2020) (explaining canons that "words grouped together should be given similar or related meaning to avoid giving unintended breadth to the Acts of Congress" and that where a "more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (internal quotation marks omitted)).

This interpretation accords with the final rule establishing the current Regulation, in which the National Marine Fisheries Service and Service explained: "[T]he Services anticipate that not prudent findings will remain rare and would be limited to situations in which designating critical habitat would not further the conservation of the species." Final Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020, 45,040-41 (Sept. 26, 2019). The Service therefore may not apply the catch-all provision of its current Regulation—which the Service relies on here, *see* 85 Fed. Reg. at 58,284—where designation of habitat would benefit a species.

In the alternative, to the extent the Service construes the current Regulation to authorize a determination "that designation of critical habitat would not be prudent," 50 C.F.R. § 424.12(a)(1)(v), on any basis other than lack of benefit to a species, then the current Regulation itself violates the ESA. *See, e.g.*, *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) ("[A]n agency cannot by regulation contradict a statute . . . .").

In sum, Section 4 permits the Service to make a "not prudent" finding only where designating critical habitat would have no benefit for the species. Applying the "not prudent" exemption in any other circumstance, therefore, would violate the ESA. It would also violate the Service's current Regulation, which independently limits a "not prudent" finding to circumstances where designating critical habitat would not benefit a species. In the alternative, insofar as the current Regulation is properly read to authorize a "not prudent" finding notwithstanding benefit to a species, the current Regulation itself violates the ESA.

ii. The Service fails to provide a reasonable explanation for why designation of critical habitat would be "not prudent" given the significant benefits of such designation

The Service fails to explain why designation of critical habitat would not benefit the bee—the only relevant consideration for invoking the "not prudent" exception under the ESA and the Service's own Regulation. And even assuming the Service may lawfully make a "not prudent" finding for reasons other than lack of benefit to the bee, the Service still fails to articulate why it would not be careful, circumspect, and cautious—i.e., prudent—to designate critical habitat.

This fundamental flaw is especially glaring in light of ample record evidence that designating critical habitat would, in fact, substantially benefit conservation of the bee. Notably, the Service describes habitat loss as one of the "primary causes" of the bee's

decline. 82 Fed. Reg. at 3186; *see also* 85 Fed. Reg. at 54,283 ("habitat loss has established negative effects on bumble bees"). And the Draft Recovery Plan describes habitat protection as one of the "necessary" actions to provide for the bee's recovery. U.S. Fish and Wildlife Service, Draft Recovery Plan for the Rusty Patched Bumble Bee at 7-8.[2] The record also describes habitat restoration in areas around current populations as a way to reduce pesticide exposure, another primary threat to the species. *See, e.g.*, *id.* at 8. Ignoring such evidence, the Service has failed to explain why designation of critical habitat would not be beneficial or otherwise prudent. Instead, the Service offers three irrelevant justifications.

First, the Service asserts that habitat destruction is not the *primary* threat to the bee. 85 Fed. Reg. at 54,284. But even if there were more pressing threats to the bee—a premise that is itself questionable—this does not mean that habitat destruction is not a threat at all. And so long as habitat loss remains a threat, the Service fails to explain why alleviating that threat would not be beneficial or otherwise prudent.

The Service's first justification fails also because the current Regulation precludes the Service from applying its catch-all provision on the basis that habitat destruction is not the primary threat to a species. As discussed, the Regulation specifically enumerates four circumstances under which designation may be "not prudent." The second of these includes when "[t]he present or threatened destruction, modification, or curtailment of a species' habitat or range is not *a threat* to the species." 50 C.F.R. § 424.14(a)(1)(ii) (emphasis added). It would render this provision superfluous if the Service could refuse to designate critical habitat not only when habitat loss is not a threat *at all*, but also when habitat loss is anything other than the *primary* threat to a species.

Second, the Service claims that ample acceptable habitat exists across the bee's historical range, and that habitat is therefore not "limiting." 85 Fed. Reg. at 54,284. The Service, however, ignores record evidence that protecting *specific, uniquely important* areas of habitat would benefit the bee notwithstanding the purported *general* availability of suitable habitat. For example, destruction of currently occupied habitat—which comprises only about 10% of the bee's historical range—would be devastating for the bee. Even if the bee could find and move to new habitat, relocation would have significant costs to the bee, compromising its ability to survive and recover. In addition, preservation of habitat adjacent to occupied areas is essential to connecting isolated populations and helping the species expand. High-quality habitat areas, including pesticide-free areas, are also extremely limited, and protection of prime habitat would facilitate the bee's conservation even if lower-quality habitat *could* support the bee to some lesser degree. The Service fails to explain why designating such important habitat areas would not benefit the bee or otherwise be prudent.

Third, the Service claims that it cannot identify what habitat the bee will use, and therefore cannot designate critical habitat. *See* 85 Fed. Reg. at 54,284. But even if information gaps make it difficult to identify critical habitat, the ESA requires the

[2] *Available at* https://ecos.fws.gov/docs/recovery_plan/RPBB%20Draft%20Recovery%20Plan%2009302019.pdf.

Service—which has exhausted its one-year extension—to designate critical habitat based on the best information available. *See* 16 U.S.C. § 1533(b)(6)(C)(ii).

iii. The record contradicts the Service's justifications.

The Service's justifications are also arbitrary and capricious because they are contradicted by the record. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

First, the Service claims that pesticides and disease, and not "destruction, modification, or curtailment of habitat," are the "primary" threats to the bee. *See* 85 Fed. Reg. at 54,284. But this false dichotomy between habitat modification and exposure to pesticides is not supported by the record. The Service identifies availability of floral resources as a key component of rusty patched bumble bee habitat*, id.* at 54,282, and pesticides influence the availability of suitable foraging habitat in at least two ways. First, "herbicides reduce available floral resources." Species Status Assessment at 43. Second, "[b]umble bees are exposed to pesticides when they consume contaminated nectar or gather contaminated pollen" from floral resources. *Id.* In other words, pesticide contamination is a central component of habitat degradation that threatens the bee. The record does not support the Service's arbitrary distinction between these threats.

The Service's second justification—that habitat availability is not limiting because there is "abundant suitable habitat" across the bee's historic range, 85 Fed. Reg. at 54,283—is also contradicted by the record. 99.9% of the bee's native grassland habitat is gone. Status Assessment at 49. And notwithstanding the bee's ability to use other habitat types to some degree, numerous agency documents point to habitat destruction as a significant factor in the bee's decline and identify habitat restoration in and around currently occupied areas as key to the bee's recovery. If habitat restoration and enhancement are crucial to the bee's recovery, it cannot logically be that habitat availability does not limit its recovery.

Third, the record contradicts the Service's contention that it cannot predict areas the bee may occupy. In fact, the Service has *mapped* areas for the bee's conservation, including "high priority zones" where the bee likely exists and lower-priority "dispersal zones" around areas where the bee is likely to exist. 85 Fed. Reg. at 54,283. Moreover, the Service has identified numerous habitat features that the bee needs to survive. *E.g.*, *id.* at 54,582 (nesting habitat, overwintering habitat, and "a constant supply of blooming flowers" from early spring to late fall); Section 7 Guidance at 9 (upland grasslands and shrublands that contain forage during the summer). Particularly because the ESA requires only that critical habitat designations be made based on the best scientific data *available*, *see* 16 U.S.C. § 1533(b)(2), this information suffices to identify specific areas that the bee may use.

B. The Service's application of its old Regulation is also arbitrary, capricious, and not in accordance with law.

The Service argues that even if its old Regulation applies, designating critical habitat is not prudent because doing so would not benefit the species. 85 Fed. Reg. at 54,284. The Service's first two justifications are identical to those offered to support the Service's determination under the current Regulation. They are unlawful because, as explained in Part II.A, they fail to show that designating habitat would not benefit the bee; they thus fail to satisfy the relevant criterion for making a "not prudent" finding under the ESA or the relevant subsection of the Service's old Regulation. *See* 50 C.F.R. § 424.12(a)(1)(ii) (2016) (providing that designation of critical habitat is not prudent when it "would not beneficial to the species"). Moreover, these two justifications are contrary to clear record evidence that critical habitat protections are beneficial and therefore prudent. *See supra* Part II.A.

The third justification, that consultation is not necessary in *unoccupied* critical habitat areas, is also meritless. Section 7 of the ESA requires federal agencies to consult with the Service to ensure that a proposed federal 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 habitat of such species*." 16 U.S.C. § 1536(a)(2) (emphasis added). The Service fails to explain why designation of critical habitat would not benefit the bee by requiring Section 7 consultation to avoid destroying or adversely modifying *either* occupied *or* unoccupied habitat for the bee.

With respect to Section 7 consultation for *occupied* habitat, the Service says nothing at all. *See* 85 Fed. Reg. at 54,284. To the extent the Service assumes that consultation to avoid "jeopardiz[ing] the continued existence," *id.*, of the bee will *also* prevent "destruction or adverse modification," *id.*, of any habitat that the bee actually occupies, this assumption is contrary to law. This is because Section 7 *separately* prohibits jeopardizing listed species, and destroying or adversely modifying their critical habitat. *See* 15 U.S.C. § 1536(a)(2); *see also Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000) ("The designation of critical habitat therefore serves as the principle means for conserving an endangered species, by protecting not simply the species, but also the ecosystem upon which the species depends.").

Nor does the Service explain its conclusion that Section 7 consultation for *unoccupied* habitat would not benefit the bee. The ESA provides for protection of unoccupied critical habitat because species frequently need to expand into new habitat areas as they recover. The Service's Draft Recovery Plan emphasizes that "improving the . . . quantity of habitat" available to the bee would facilitate its recovery. Draft Recovery Plan at 3. The Service fails to reconcile its conclusion with record evidence that protecting unoccupied habitat—including high-quality habitat and habitat adjacent to the bee's current range, *see supra* Part II.A.i—would benefit the bee.

Instead of acknowledging the important consultation benefits of designating critical habitat, the Service focuses narrowly on "other benefits" of designation, arguing that the

Service has already achieved the same benefits through "priority maps" it developed to protect the bee. *See* 85 Fed. Reg. at 54,284. Regardless of whether the priority maps provide the "other," ancillary benefits that the Service claims, those benefits cannot substitute for the mandatory protections conferred by the Section 7 consultation process.

III. Conclusion

For the foregoing reasons, the Service's Decision not to designate critical habitat for the rusty patched bumble bee is unlawful. We would welcome an opportunity to discuss the Service's obligations under the ESA with your staff.

Sincerely,

Lucas Rhoads
1152 15th Street NW, Suite 300
Washington, DC 20005
lrhoads@nrdc.org

Margaret Hsieh
40 West 20th Street, 11th Floor
New York, NY 10011
mhsieh@nrdc.org

Rebecca Riley
20 North Wacker Drive
Suite 1600
Chicago, IL 60606
rriley@nrdc.org

Natural Resources Defense Council

Ryan Adair Shannon
P.O. Box 11374
Portland, OR 97211
rshannon@biologicaldiversity.org

Center for Biological Diversity

Thomas E. Casey, Board Chair
2854 Cambridge Lane
Mound, MN 55364
Tel: (952) 472-1099

Friends of Minnesota Scientific and Natural Areas