

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE XERCES SOCIETY FOR
INVERTEBRATE CONSERVATION
628 NE Broadway Street, Suite 200
Portland, OR 97232

and

NATURAL RESOURCES DEFENSE COUNCIL
40 West 20th Street, 11th Floor
New York, NY 10011-4231

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as the
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

UNITED STATES DEPARTMENT OF THE
INTERIOR
1849 C Street, NW
Washington, DC 20240

DANIEL M. ASHE, in his official capacity as the
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

and

UNITED STATES FISH AND WILDLIFE
SERVICE,
1849 C Street NW
Washington, DC 20240

Defendants.

Civil Action No.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. The Secretary of the Interior, the United States Department of the Interior, the United States Fish and Wildlife Service, and the Director of the United States Fish and Wildlife Service (collectively “Defendants”) had a non-discretionary duty to issue a ninety-day finding on the Xerces Society for Invertebrate Conservation’s (“Xerces Society”) petition to list the rusty patched bumble bee (*Bombus affinis*) as an endangered species pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.* More than a year has elapsed since Xerces Society filed its January 31, 2013, petition for listing (the “Petition”), and Defendants have not yet issued a ninety-day finding. Defendants’ inaction thwarts a collective commitment—manifest in the ESA itself—to our country’s most imperiled species and risks the irretrievable loss of the rusty patched bumble bee from the wild forever.

2. The rusty patched bumble bee is named for a small rust-colored patch on its abdomen. The bee is found predominately in the upper Midwest, where it is an important pollinator of a variety of wild flowering plants and common crops. It also has the ability to “buzz pollinate” certain plants—such as tomatoes and blueberries—whose flowers depend on the special vibration (or “buzz”) of the bee’s flight muscles to dislodge their pollen and facilitate fertilization.

3. The rusty patched bumble bee faces a barrage of threats to its survival that have already reduced the bee’s range by over 70 percent. The Midwestern prairie—historic rusty patched bumble bee habitat—has all but disappeared, and, at the same time, the use of deadly pesticides and exposure to pathogen-carrying commercial bees has increased. Without swift intervention and the benefit of our most rigorous legal protections, the rusty patched bumble bee is in danger of disappearing permanently.

4. Defendants must now, at last, determine whether the Petition presents substantial information indicating that listing the rusty patched bumble bee as endangered may be warranted (i.e. the “ninety-day finding”). 16 U.S.C. § 1533(b)(3)(A). If Defendants make a positive ninety-day finding on the Petition, they must then determine whether listing is warranted within twelve months of receiving the Petition. 16 U.S.C. § 1533(b)(3)(B).

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g) (action arising under ESA citizen suit provision), 5 U.S.C. § 702 (judicial review of agency action), and 28 U.S.C. § 1331 (federal question jurisdiction).

6. The relief requested may be granted under 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief), 16 U.S.C. § 1540(g) (ESA), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act or “APA”).

7. Pursuant to Section 11(g)(2)(C) of the ESA, 16 U.S.C. § 1540(g)(2)(C), Xerces Society and Natural Resources Defense Council (“NRDC”) (collectively “Plaintiffs”) provided the Secretary of the Interior and all named defendants with written notice of Plaintiffs’ intent to file this suit more than sixty days prior to the commencement of this action.

8. Defendants have not corrected their violations of the law in response to Plaintiffs’ written notice.

9. Venue is proper in the United States District Court for the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(2) because a substantial part of the events giving rise to Plaintiffs’ claims occurred in this district. Specifically, the United States Fish and Wildlife Service is headquartered in Washington, D.C., and the officials

responsible for responding to the petition are located there. Plaintiff NRDC also has an office in Washington, D.C.

PARTIES

10. Plaintiff Xerces Society is a nonprofit membership organization founded in 1971. Currently, Xerces Society has more than 7,000 members, which include scientists, students, bee enthusiasts, university professors, backyard gardeners, conservationists, land managers, researchers, families, activists, high school teachers, outdoor enthusiasts, landscape designers, and others. Xerces Society's members value invertebrates for many reasons, from their beneficial role in agriculture to their integral place in a healthy ecosystem to their incredible, natural beauty. Xerces Society is a national and international leader in the protection of wildlife through the conservation of invertebrates and their habitat. Its core programs focus on endangered species, native pollinators, and watershed health. Xerces Society uses advocacy, education, and applied research to defend invertebrates, and Xerces Society has been active for over four decades in producing ground-breaking publications on insect conservation, training farmers and land managers to protect and manage habitat, and raising awareness about the invertebrates of forests, prairies, deserts, and oceans. In particular, Xerces Society has a long-standing and serious commitment to protection of the rusty patched bumble bee.

11. Xerces Society members regularly observe, visit, study, work to protect, eat and enjoy plants pollinated by, and delight in the rusty patched bumble bee in the wild, and intend to continue doing so in the future. Xerces Society members derive scientific, educational, recreational, conservation, aesthetic, nutritional, and other benefits from the existence of rusty patched bumble bees in the wild. These interests have been, are, and will be directly, adversely, and irreparably affected by Defendants' violation of the law. Xerces Society members will

continue to be prejudiced by Defendants' unlawful actions until and unless this Court provides the relief prayed for in this Complaint.

12. Plaintiff NRDC is a not-for-profit membership corporation founded in 1970 and organized under the laws of the State of New York. NRDC maintains offices in New York, New York; Washington, D.C.; San Francisco and Santa Monica, California; Chicago, Illinois; Bozeman, Montana; and Beijing, China. NRDC has more than 330,850 members nationwide. NRDC's purposes include the preservation, protection, and defense of our nation's biodiversity and environment. NRDC has long been active in efforts to protect endangered species generally and bees specifically.

13. NRDC members regularly observe, visit, study, work to protect, eat and enjoy plants pollinated by the rusty patched bumble bee, and delight in the bee's presence in the wild. NRDC members intend to continue doing so in the future. NRDC members derive scientific, educational, recreational, conservation, aesthetic, nutritional, and other benefits from the existence of rusty patched bumble bees in the wild. These interests have been, are, and will be directly, adversely, and irreparably affected by Defendants' violation of the law. NRDC members will continue to be prejudiced by Defendants' unlawful actions until and unless this Court provides the relief prayed for in this Complaint.

14. Defendant Sally Jewell is sued in her official capacity as the Secretary of the Interior. The Secretary of the Interior ("Secretary") is the federal official responsible for complying with the statutory requirements of the ESA for terrestrial and some aquatic species, including listing decisions for species such as the rusty patched bumble bee.

15. Defendant Daniel M. Ashe is sued in his official capacity as Director of the United States Fish and Wildlife Service. As Director, and through delegation of authority from

the Secretary, Mr. Ashe is the United States Fish and Wildlife Service official responsible for complying with and implementing the ESA, including listing decisions for species such as the rusty patched bumble bee.

16. Defendant United States Department of the Interior is an agency of the United States Government and includes Defendant United States Fish and Wildlife Service. Among other functions, the Department of the Interior is responsible for the administration of the ESA and is legally responsible for listing decisions for species such as the rusty patched bumble bee.

17. Defendant United States Fish and Wildlife Service is an agency of the United States government, within and under the jurisdiction of the Department of the Interior. Through delegation of authority from the Secretary, the United States Fish and Wildlife Service administers and implements the ESA and is legally responsible for listing decisions for species such as the rusty patched bumble bee.

LEGAL BACKGROUND

18. The ESA is a federal statute enacted to conserve species in danger of extinction and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. As the Court found, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

19. One of the purposes of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to

provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b). To this end, Section 4 of the ESA requires that the Secretary protect such species by listing them as either “threatened” or “endangered.” An endangered species is a species “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is a species “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

20. A species receives mandatory substantive protections under the ESA only when it is listed as endangered or threatened.

21. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

22. Upon receipt of a petition to list a species, Defendants have ninety days, to the maximum extent practicable, to make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1).

23. If Defendants make a positive ninety-day finding, they must promptly publish it in the Federal Register and commence a “status review” of the species. 16 U.S.C. § 1533(b)(3)(A).

24. After issuing a positive ninety-day finding, Defendants have twelve months from the date that they received the petition to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by work on other pending proposals for listing species of higher priority. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3).

25. If Defendants find that listing the species is warranted, they must publish a proposed rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

26. Within one year of the publication of a proposed rule to list a species, Defendants must make a final decision on the proposal. 16 U.S.C. § 1533(b)(6)(A).

FACTUAL BACKGROUND

27. The rusty patched bumble bee is a native pollinator that lives in the northern Midwest and eastern United States. The rusty patched bumble bee is an important species that facilitates the existence of other species, boosting biodiversity by regulating and stabilizing fundamental ecosystem processes. Rusty patched bumble bees not only pollinate numerous wild flowers and play a critical role in the healthy functioning of our environment, they assist in the production of many food crops including cranberries, plums, apples, alfalfa, and onions.

28. Historically, the rusty patched bumble bee was broadly distributed across the eastern United States (from Maine to Georgia) and upper Midwest (from Pennsylvania to North Dakota). In recent years, the species has undergone a dramatic contraction in range. Two recent nationwide studies have independently estimated that the rusty patched bumble bee has been lost from more than 70 percent of its historic range. Although the reason for this decline is not entirely known, scientists have identified several threats to the species' survival.

29. The evidence to date suggests that parasites and pathogens pose a serious threat to wild rusty patched bumble bees. The multiform effects of these various parasites and pathogens include interference with learning among bumble bee foragers; reduction in colony fitness, individual reproduction rates, and life span; inhibition of ovary development and rapid death of queen bees; deformed wings; and lethargic behavior, including reduced foraging. The

rapid rise in the use of commercial bumble bees—often shipped around the country and historically shipped to the United States from overseas—is hypothesized to be one of the causes for the recent spread of pathogens in and concomitant disappearance of rusty patched bumble bees and related species from the wild. The evidence gathered to date supports that hypothesis.

30. Agricultural conversion, fire suppression, grazing, and urban development have fragmented or destroyed the rusty patched bumble bee's historic habitat. The loss, fragmentation, and alteration of historic habitat interfere with the bee's primary habitat requirements. For example, the disappearance of the prairie has resulted in (a) declines in native wildflowers and decreased access to nectar and pollen; (b) fewer nesting sites, such as underground abandoned rodent cavities or above ground in clumps of grasses; and, (c) limited overwintering sites for hibernating queens that are free from the risk of being destroyed by farm machinery or trampled by livestock.

31. Small bumble bee populations and fragmented habitat can affect bumble bee genetic diversity. Bees existing in isolated patches of habitat tend to inbreed, and when this happens, overall population fitness can rapidly become reduced. Inbreeding can also result in the production of sterile male bees. As a result of their unusual genetic factors and life history, small populations of bumble bees are especially vulnerable to extinction.

32. Pesticides, insecticides, and herbicides are used widely in agricultural, urban, and even natural areas and can exert lethal and sublethal toxic effects on rusty patched bumble bees. Foraging bees can be poisoned by pesticides when they absorb toxins through their exoskeleton, drink contaminated nectar, or gather contaminated pollen. Neonicotinoid pesticides, for example, are among the most commonly employed insecticides worldwide. When used on

plants, neonicotinoids are absorbed and transferred through the vascular system, making the plant itself—and its pollen and nectar—toxic to bees.

33. Climate change is an evolving threat to the rusty patched bumble bee and its effects may lead to increased pathogen pressure, reduced nectar quality, and decreased resource availability. Climate change may also result in asynchrony between the bees and the plants they feed on. Bee life cycle events are influenced by variations in light and temperature, and as certain regions experience warmer winters, bees may emerge earlier from hibernation. If their emergence is no longer in synch with the flowering plants they feed on, the bees may suffer, even starve. When key ecological interactions such as that between a plant and its pollinator are disrupted, the resultant detrimental effects can ramify through multiple trophic levels and cascade through the ecosystem.

34. On January 31, 2013, Plaintiff Xerces Society submitted the Petition to list the rusty patched bumble bee as an endangered species pursuant to the ESA to the Secretary of the Interior and United States Department of the Interior. The Petition outlined the threats to the species, including those threats described above.

35. As of the date of this filing, Defendants have not issued a ninety-day finding or made any final decision on the Petition.

36. On February 14, 2014, Plaintiffs sent Defendants a sixty-day notice indicating their intent to file suit if Defendants failed to make a ninety-day finding on the Petition to list the rusty patched bumble bee as an endangered species within the next sixty days.

37. Defendants have not remedied the legal violations described in the notice letter.

CLAIM FOR RELIEF

(Violation of ESA and/or APA)

38. Each and every allegation set forth in the preceding paragraphs is incorporated herein by reference.

39. Defendants' failure to make a ninety-day finding on the Petition to list the rusty patched bumble bee as an endangered species is a violation of the ESA and its implementing regulations. 16 U.S.C. §§ 1533(b)(3). Defendants' failure to perform this mandatory, non-discretionary duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1). Additionally, and/or in the alternative, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment providing for the following relief:

1. Declare that Defendants violated the ESA and the APA by failing to comply with the non-discretionary duty under ESA Section 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A), to make and publish in the Federal Register a ninety-day finding regarding the Petition to list the rusty patched bumble bee as an endangered species;
2. Order Defendants to make and publish in the Federal Register a ninety-day finding on the Petition to list the rusty patched bumble bee as an endangered species by a date certain;

3. Grant Plaintiffs fees, costs, expenses and disbursements, including reasonable attorneys' fees; and

4. Grant Plaintiffs such additional and further relief as the Court deems just and proper.

Respectfully submitted this 13 day of May, 2014.

By: /s/ Sharon Buccino
Sharon Buccino (DC Bar No. 432073)
1152 15th Street NW, Suite 300
Washington, DC 20005
202-289-2397
sbuccino@nrdc.org

Giulia C.S. Good Stefani (CA Bar No. 262228), *pro hac
vice pending*
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
310-434-2300
ggoodstefani@nrdc.org

Rebecca J. Riley (IL Bar No. 6284356), *pro hac vice
pending*
Natural Resources Defense Council
20 N Wacker Drive, Suite 1600
Chicago, IL 60606
312-651-7913
rriley@nrdc.org